

Judicial Application of the 'realistic possibility of restoration' test in care and protection proceedings in the Children's Court of New South Wales

Meredith McLaine

A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy

Sydney Law School
University of Sydney
February 2026

Statement of Originality

The content of this thesis is my own work. The thesis has not been submitted for any other degree or purpose. All assistance received in preparing this thesis and all sources have been acknowledged.

No content generated by generative AI tools has been used in the preparation of this thesis.

Meredith McLaine

26 February 2026

Scholarship support

The research reported in this thesis was supported by an Australian Government Research Training Program (fee offset) scholarship, and by the Sydney Law School's *WA Cooke, Jane Cooke and Alfred Godfrey Postgraduate Research Scholarship* and *John O'Brien Memorial Research Scholarship*.

Ethics Approvals

Ethics approval for the use of unpublished judgments of the Children's Court was provided by the University of Sydney Human Research Ethics Committee (protocol no. 2021/839) and the Aboriginal Health & Medical Research Council of NSW (project no. 2203/23), and was subject to the approval and support of the President of the Children's Court of NSW.

Ethics approval to interview magistrates, registrars and judges was provided by the University of Sydney Human Research Ethics Committee (protocol no. 2022/190), and was subject to the approval and support of the President of the Children's Court, the Chief Magistrate of the Local Court of NSW, and the Chief Judge of the District Court of NSW.

Ethics approval to interview caseworkers and lawyers of the Department of Communities and Justice (NSW) was provided by the University of Sydney Human Research Ethics Committee (protocol no. 2023/202) and the Aboriginal Health & Medical Research Council of NSW (project no. 2203/23), and was subject to the conditions of a Research Agreement between the University of Sydney and the Department of Communities and Justice (5 June 2024).

Views and statements reported from interviews reflect the study's analysis and individual participants' perspectives, and do not represent official positions or policies of the Department of Communities and Justice or the Courts.

References in the thesis to formal policies of the Department of Communities and Justice, other policies of the New South Wales Government, and publicly available statistical data, have been accurately described to the best of the author's knowledge and intention.

Abstract

When children in New South Wales are removed from their parents by the State, and found to be in need of care and protection, the Children's Court must decide whether there is 'a realistic possibility of restoration'. The application of this statutory test has profound impact on the lives of the children and parents involved, determining whether a child returns home, or is placed in out-of-home care – often for the rest of their childhood years. The concept of a realistic possibility of restoration is therefore of immense significance to the child protection system and its ripple effects on families and society.

Under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) 'realistic possibility of restoration' is assessed with regard to the circumstances of the child, and the likelihood of the parents satisfactorily addressing the issues that led to the child's removal. These considerations are subject to the 'paramount' concern of the child's safety, welfare and wellbeing. Case law principles add the test of 'unacceptable risk', and establish that plans for restoration must be sensible, practicable, and not based on merely idealistic or fanciful hopes. There has been no prior research exploring how these abstract guidelines are applied in substance to the factual circumstances in cases before the Court. To fill this gap, this thesis analyses 98 judgments (comprising 106 decisions) in contested hearings on restoration, supplemented by the perspectives of judicial officers, caseworkers and lawyers who participated in interviews for the study.

The study found a distinct difference between the reasons for the child's initial removal by the statutory authority, which are chiefly tangible, externalised manifestations of risk factors, and the reasons for the Court's decision on restoration, which are dominated by 'intrinsic' themes of parental attitude, insight, capacity to meet the child's emotional needs, and – particularly strongly evident – the parent's state of mental health. Yet, dichotomously, the child protection legal process is often counter-productive to parents' mental wellbeing. The thesis considers the practical and policy implications of these findings, alongside interconnected contexts including children's cultural identity, their wellbeing in out-of-home care, and a relative neglect of attention to the immediate 'circumstances of the child'.

Acknowledgements

To my supervisors Professors Rita Shackel and Judy Cashmore, I could not have asked for a better supervision team. Thank you for your time, guidance, wisdom, empathy and moral support.

I thank Sydney Law School for the opportunity and an array of supports, and my colleagues at the School of Law, University of Wollongong, for patiently providing the flexibility I needed to balance my day job with this epic task.

Thank you to Dr Amy Conley Wright for enthusiastically steering me to this PhD in the first place.

I thank Dr BJ Newton for external supervision in relation to the crucial Aboriginal context of the topic, and the generous volunteers who formed my Aboriginal Reference Group: Sue Cutmore, Lyn Carriage, Caryn Nye-Carpenter, Irene Wardle, and Louise Coady of the Aboriginal Legal Service NSW/ACT. Thank you also to Kimberly Chiswell for affirming the importance of the research and challenging my thinking on some core issues.

I am immensely grateful to Judge Skinner, President of the Children's Court, and former President Judge Johnstone, for their support of the project, and to all the Magistrates and Judges who participated in interviews and provided access to unpublished judgments.

I also extend my appreciation to everyone at DCJ ('the Department') who helped in one way or another—including the many interview participants, and especially the FACSIAR Research Partnerships team for your thoughtful, efficient and consistent assistance over several years.

To everyone at the Research Centre for Children & Families—it has been wonderful to be welcomed into a world of like-minded research interests, co-authored journal articles, and convivial dinners! I am especially grateful to my newfound friends Pei Kong and Susan Collings, who were always just a phone call away during the ups and downs of this PhD journey.

Thank you to Tracey, Sharon, Wendy, Katie and Justine for asking how the PhD was going, really listening to my answers, and encouraging me to keep going.

Last but not least, to my own (grown-up) children Colbee and Susanna, thank you for your encouragement and faith in me.

Notes on Terminology

Aboriginal: As this study is situated in and specific to the State of New South Wales, the thesis uses the word Aboriginal rather than 'Indigenous' or 'Aboriginal and Torres Strait Islander', in accordance with policy guidelines of the NSW Government (eg NSW Health, *Communicating Positively: A Guide to Appropriate Aboriginal Terminology* (2019)), and the practice of the Department of Communities and Justice (*DCJ Strategic Plan 2026–2031*).

Abuse and neglect: Attempts to categorise forms of child maltreatment are beset by definitional challenges, including the fine lines between neglectful and abusive conduct. In this thesis, commentary in the judgments has been categorised as 'neglect' when the judgment literally uses this word, and/or when the adult's behaviour represents an omission to do something. The omission may or may not result in actual harm, and is distinguished from active conduct causing actual harm ('abuse').

Best interests of the child / safety, welfare and wellbeing: The paramountcy principle is expressed in the *Children and Young Persons (Care and Protection) Act 1998* (NSW) as the child's 'safety, welfare and wellbeing' rather than 'best interests'. Although acknowledging some subtle distinctions between the two, the thesis uses these terms mostly interchangeably.

Care and protection / care: The thesis uses the jurisdictional term 'care and protection' to refer to the area of law, but occasionally shortens this to the single word 'care' as is common usage among professionals in this field.

Child/ren: While the *Children and Young Persons (Care and Protection) Act 1998* (NSW) distinguishes a young person (16–17 years) from a child (under 16 years), the thesis uses 'child' or 'children' in reference to the whole under-18 age group.

The Court: Most of the analysis is concerned with the practices, procedures and decisions of the Children's Court of New South Wales; however the thesis encompasses decisions of the Supreme Court, District Court, and of Local Court magistrates. Unless otherwise specified, 'the Court' refers generically to all of these forums in which care and protection cases are heard.

Domestic violence: The thesis refers to 'domestic violence' rather than family violence, gender-based violence, intimate partner violence or the many other alternative terms. This reflects the language in the legislation, and the phrase most commonly used in the judgments. Additionally, although domestic violence can be understood as including violence directly inflicted on a child, its discussion in the thesis is generally limited to acts between parents, or between a parent and another partner. Violence perpetrated on a child is independently

categorised as ‘physical abuse’ in keeping with its typical conceptualisation in child protection discourse and law. It is important to acknowledge, however, that physical or psychological violence against a parent and a child coexist in many cases in this study.

The Department: ‘The Department’ is used as shorthand for the Department of Communities and Justice, which is the statutory authority for care and protection in New South Wales.

Judicial officer, magistrate, judge: ‘Judicial officer’ refers to both judges and magistrates as a group, while the terms ‘magistrate’ (Children’s Court and Local Court) and ‘judge’ (District and Supreme Courts) are used when specific to the context. (Note: shortly after the date of submission of the thesis, the title of Local Court and Children's Court magistrates in NSW was changed to 'Judge'. The thesis retains the pre-reform nomenclature.)

Out-of-home care / kinship care: The term ‘out-of-home care’ is used in its statutory context of a court-ordered arrangement in which a child is cared for by a person other than their parent and at a place other than their previous usual home. The thesis sometimes refers to ‘kinship care’, being a sub-category of out-of-home care in which the carer is the child’s relative or member of their Aboriginal kin.

Non-determinative strengths: This phrase is used in relation to positive aspects of a parent’s capacities or circumstances, which are recognised within the judgments but are not treated as persuasive factors in the Court’s assessment of realistic possibility of restoration.

Realistic possibility / no realistic possibility: the thesis refers to ‘realistic possibility’ judgments and ‘no realistic possibility’ judgments as shorthand to convey the relevant case outcomes.

Restoration: ‘Restoration’ is not defined in the legislation, but is understood to mean the child’s return, pursuant to a court order, to the care of the parent/s. ‘Reunification’ is the equivalent term used in many other parts of Australia and internationally.

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CHAPTER ONE

Introduction

Chapter Overview

This chapter starts by describing the initial impetus for the research, arising in my prior role as a lawyer in the field of care and protection.

Part A presents the aims of the study, including its three research questions, and Part B summarises the research methods.

Part C, ‘Need for the Research’, discusses the significance of the topic. It provides, firstly, a brief overview of statistical data and trends in contemporary out-of-home care in Australia, setting the scene of its scale and its impact on children’s lives. Next is a summary of the nature and scope of existing scholarly research in care and protection law, indicating a modest but growing interest in this field. The third section in this part identifies a gap in the Australian literature—namely qualitative analysis of judicial reasoning in restoration decisions—and discusses the need to fill this gap in knowledge.

Part D, ‘Stories of “unrealistic” possibility of restoration’ uses case studies to introduce key themes in the research findings. The chapter concludes in Part E with an overview of the structure of the thesis.

Origins of the Thesis

The seed of idea for this thesis was sown around eight years ago, when I worked as a care and protection solicitor in a Children’s Court in regional New South Wales (‘NSW’). At this time, the NSW care and protection jurisdiction was at the tail-end of a policy era of relative conservatism, in which the goal of ‘permanency’ for children in need of care usually equated to their being placed in long-term out-of-home care until the age of 18.¹ I acted for parents whose children had been removed, almost all of whom started out in the legal process asking for their children’s return home. In the face of staunch opposition from the statutory authority

¹ Shifts in the policy landscape are discussed in Chapter 2, parts D ‘The Evolution of the “realistic possibility of restoration test”’ and E ‘Recent Policy Developments’, and in Chapter 5, part B, section (iii) ‘Striking a Balance’.

(‘the Department’),² and often from the child’s independent lawyer, this natural hope on the part of the parents was rarely realistic. Despite advocating in my clients’ interests as far as possible, I often felt as if my role was akin to a cog in a machine, processing cases to a foregone conclusion of ‘no realistic possibility of restoration’. It seemed to be merely a matter of time, through a gradual whittling away of the parent’s resolve, until they accepted that their case was not winnable and consented to final orders placing their children in care.

Against this gloomy backdrop, I had four cases in close succession that were exceptions to the norm. Each went to hearing on the question of restoration, all resulting in a ‘win’ for the parent. In two of these cases the parent had an unresolved drug or alcohol problem, and there were some quite chaotic aspects to family life, but the magistrate found that the parent met the child’s needs to an acceptable standard. In the other two cases the parents had done everything asked of them and manifestly turned their lives around in a short space of time – a circumstance acknowledged and applauded by the Department, which nevertheless argued that this new-found stability might not be maintained, and therefore the children should be placed in the ‘parental responsibility of the Minister’ until the age of 18.³ The Department added the vague indication that it might support the parents to bring their cases back to Court for restoration, in a year or so.⁴ The magistrate pointed out that by logical extension the Department was admitting the existence of a realistic *possibility* of restoration, and reasoned that cautiously delaying restoration to a hypothetical future time was denying the parents the exercise of responsibility for their own journey of change. As I listened to the magistrate delivering these immediate, unwritten and unrehearsed judgments, I wondered if other magistrates around the State were reasoning in a similar way. Would similar cases heard in another court location have had the same outcome? What were the driving considerations distinguishing a realistic from an unrealistic possibility of restoration – and were these consistent?

Beyond anecdote and the impressions of professionals in the field, there was no clear and reliable source of knowledge to answer these questions. Most Children’s Court judgments are not published, and children’s matters are heard ‘in closed court’,⁵ without access to the public eye. Yet decisions on the issue of restoration fundamentally shape the lives of individual children and families, and have ripple effects on the wider child protection system, and

² Now called the Department of Communities and Justice (‘The Department’).

³ Effectively amounting to long-term out-of-home care.

⁴ Via an application for variation or rescission of the existing final orders: see Chapter 2, part C ‘The Legal Process’.

⁵ See nn 113–114 below.

ultimately on the whole community. Pondering this situation created the impetus to embark on this research study.

A. Aims of the Research

This thesis analyses decisions of the judiciary in applying the statutory ‘realistic possibility of restoration’ test⁶ in NSW care proceedings. It aims to identify thematic patterns—including dominant considerations and areas of consistency or inconsistency—in the ways the test is applied in the context of the family circumstances, child protection issues and risk factors present in the cases.

The ‘realistic possibility of restoration’ test applies to children who have been removed from their parents and found to be ‘in need of care and protection’.⁷ It determines whether the child returns home to be raised in the natural family, or is permanently placed elsewhere. The applicable section of the *Children and Young Persons (Care and Protection) Act*,⁸ section 83, is entitled ‘Preparation of permanency plan’. Under this section the Court’s final orders are contingent on an adequate plan by the Department for the child’s future needs and stability.⁹ The plan is, in turn, directed by whether there is, or is not, a realistic possibility of restoration of the child to the parents, within a ‘reasonable period’.¹⁰ The Department first makes this assessment, which the Court then decides to accept or reject.¹¹

The test for realistic possibility of restoration has two components (sometimes referred to as ‘arms’ or ‘limbs’), requiring that regard be had to:

- (a) the circumstances of the child or young person, and
- (b) the evidence, if any, that the child or young person’s parents are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care.¹²

⁶ *Children and Young Persons (Care and Protection) Act 1998 (NSW)* s 83 (*‘The Act’*).

⁷ *The Act* (n 6) s 71; see Chapter 2, part C *‘The Legal Process’*.

⁸ *The Act* (n 6).

⁹ *Ibid* ss 78A, 83(2), (3), (7).

¹⁰ *Ibid* ss 83(1)–(3A), (7). The ‘reasonable period’ must not exceed 24 months, other than in exceptional circumstances: s 83(8A).

¹¹ *Ibid* ss 83(5)–(6).

¹² *Ibid* ss 83(1), (7)(b).

Aside from these prescribed considerations, the phrase ‘realistic possibility’ is not defined in the Act. The Children’s Court and appellate courts have developed a body of principles for determining realistic possibility of restoration, with a focus on whether there is ‘an unacceptable risk’ to the child. The principles are inherently abstract, and do not, of themselves, readily reveal the way in which they apply to the varied facts of individual cases—nor to the underlying ‘bigger’ questions concerning society’s expectations for children’s wellbeing. How ‘good’ is a ‘good enough’ standard of parenting? What type or level of risk within a child’s environment is within acceptable norms? And how are risks presented by the child’s family to be weighed against the potential harms of being raised in out-of-home care?

Re-phrased as a question, the research aim of analysing the Court’s application of ‘realistic possibility of restoration’ becomes:

1. According to the factors influencing judicial determinations on whether restoration is or is not realistic, what is needed from the Court’s perspective for restoration to be achievable?

Answering question 1 is the primary aim of the thesis. However, integrated throughout the analysis of the Court’s reasoning, is a secondary, broader question:

2. What do the Court’s decisions on realistic possibility of restoration indicate about the societal or systemic problems perceived as impeding or prohibiting ‘good enough parenting’?

Additionally, although the thesis is not aiming to solve the identified problems with a law reform orientation, its concluding chapter touches on some of the policy and reform implications of the findings—as these coalesce with existing research, law reform debates and policy initiatives in the care and protection field. Hence a sub-question flowing from (i) and (ii) is:

3. How might the societal and systemic problems reflected in the Court’s decisions be better addressed by the statutory child protection system?

My purpose in addressing these questions is essentially practical. The thesis unites the doctrinal goal of deciphering a body of law internally formulated in court decisions, with the socio-legal goal of analysing the intersection of this law with the lives and circumstances of the affected children and parents.¹³ It is hoped that the findings can be put to constructive use. For parents and their lawyers, enhanced knowledge of the Court's reasoning may help predict what sort of steps should be taken and outcomes achieved to 'address' the relevant issues—and indeed to understand what those relevant issues are in the eyes of the Court. In the broader child protection setting, a clearer, informed sense of the Court's standards and expectations for restoration has potential to contribute to policies, programs and day-to-day casework, including in the context of efforts to support families to enable children to remain (or return) home.

The study assumes that children's restoration to their parents is an inherently positive and desirable objective, normally preferred above alternative options. This premise is embedded in the Act¹⁴ and in government policy.¹⁵ It reflects human rights principles concerning the integrity of the family as 'the natural and fundamental group unit of society',¹⁶ children's right to 'know and be cared for' by their parents,¹⁷ and the obligation of the State to support parents to care for their children.¹⁸ I further adopt the premise that this prioritisation of restoration must always remain subject to the paramount concern of the child's best interests,¹⁹ and to children's human rights to love, nurture, belonging, health, safety, cultural identity, expression and dignity.²⁰ In practice the goals of family reunification and upholding children's rights are frequently aligned, but this is not always so.

Other than these core understandings, the thesis does not apply an underpinning theoretical framework. It is not a study of, for example, abstract theories of judicial reasoning or broader 'decision theory'. It does not apply the lenses of critical legal studies, critical discourse analysis

¹³ See chapter 3 on Methodology.

¹⁴ *The Act* (n 6) ss 9(2)(c), 10A(3)(a).

¹⁵ See, eg, Auditor-General for New South Wales, *Oversight of the Child Protection System* (Performance Audit Report, June 2024) 45; Department of Communities and Justice (NSW), *Permanency Case Management Policy: Policy statement* (January 2020) 8. See also Chapter 2, part E 'Recent Policy Developments'.

¹⁶ *International Covenant on Civil and Political Rights*, articles 17, 23(1); see also *United Nations Convention on the Rights of the Child*, article 16.

¹⁷ *United Nations Convention on the Rights of the Child*, articles 7(1), 9(1), 18(1).

¹⁸ *International Covenant on Economic, Social and Cultural Rights*, article 10(1); *United Nations Convention on the Rights of the Child*, articles 18(2), 27(3); *The Act* (n 6) s 8(c).

¹⁹ *The Act* (n 6) s 9(1) (referring to the paramount concern as 'safety, welfare and wellbeing').

²⁰ The listed rights are among other pertinent rights of the child. See *United Nations Convention on the Rights of the Child*, Preamble, articles 19, 23, 24, 27, 29, 30, 32, 34, 35, 36, 39; *The Act* (n 6) ss 8, 9, 10, 10A(1).

or semiotics to the judgments; nor does it seek to ‘explain’ its findings under the umbrella of a particular sociological theory. While such approaches might penetrate intriguing facets of the interplay between law, language, society, power, and the institutions of child protection, they would take the project down a different path, unviably extend its length, and divert from its purpose.

The thesis does, however, touch on theories arising as incidental to the discussion, including procedural justice,²¹ therapeutic jurisprudence,²² response-based practice²³ and the ‘weaponisation of trauma’.²⁴

B. Summary of Methods

This is a socio-legal study. It is concerned with decisions made by the Children’s Court and appellate courts in implementing an important legislative provision, in an area of law both reacting *to* and impacting *on* the social circumstances of children and parents involved in the child protection system. The primary method is a thematic analysis of published and unpublished judgments in contested hearings on the issue of ‘realistic possibility of restoration’. The analysis is mainly qualitative, but has a basic quantitative approach in counting the frequency of the Court’s reliance on the various factors influencing its decisions. Social science methods for ‘content analysis’ of the judgments, enabling systematic identification of individual factors in the decisions, are merged with a doctrinal approach to analysing the overall reasoning in the cases.

The analysis of judgments is supplemented with perspectives drawn from stakeholder interviews. Interviews were conducted with magistrates and judges, and with other professionals involved in decisions about realistic possibility of restoration: children’s registrars of the Children’s Court, and caseworkers and lawyers of the Department of Communities and Justice.

²¹ See Chapter 10, part C, section (ii)(a).

²² Ibid section (ii)(b).

²³ See Chapter 8, section (ii) ‘Domestic Violence’.

²⁴ See Chapter 7, section (iii) ‘Mental Health’.

C. Need for the Research

(i) Children in Out-of-home Care: Overview

There are around 45,000 children living in out-of-home care in Australia,²⁵ of whom 12,000 are in NSW.²⁶ The majority of these children in NSW (55%) live with relatives ('kinship care'), 37% are in foster care, and 6.5% in residential care.²⁷ NSW has historically had a low rate of restoration to parents in comparison with other States and Territories,²⁸ and the rate continues to decline.²⁹ For instance, 339 children were restored to their parents from out-of-home care in NSW during 2024–25, which was a 19% decrease from the 419 restored in the previous year.³⁰

Aboriginal children are critically over-represented in out-of-home care, making up 44.5% of children in out-of-home care nationally³¹ and 47.8% in NSW.³² This latter figure – almost half of all children in care – is staggering, particularly in light of the fact that Aboriginal children comprise just 6.5% of the child population of the State.³³ The rates of over-representation are increasing, both Australia-wide³⁴ and in NSW.³⁵ Across Australia, Aboriginal children are less

²⁵ Australian Institute of Health and Welfare, *Child Protection Australia 2023–24* (Web report, Australian Government, 2025): <<https://www.aihw.gov.au/reports/child-protection/child-protection-australia-2023-24/contents/insights/supporting-children>> ('AIHW, *Child Protection Australia 2023–24*').

²⁶ Figure for 'statutory out-of-home care' in NSW, as at 30 September 2025: <<https://dcj.nsw.gov.au/about-us/families-and-communities-statistics/services-for-children-and-young-people/quarterly-statistical-report.html>>.

²⁷ AIHW, *Child Protection Australia 2023–24* (n 25) (figure 5, characteristics of children in out-of-home care, by state or territory).

²⁸ Australian Institute of Health and Welfare, *Permanency outcomes for children in out-of-home care: indicators* (Web report, March 2023); Jessica Roberts et al, 'Reunifying Children in Out-of-Home Care: Does NSW's Permanency Support Program Affect Restoration?' (2025) *Australian Social Work* (published online 10 September 2025) 1–15: 10.

²⁹ Auditor-General for New South Wales (n 15) 9; Department of Communities and Justice, *System Review into Out-of-Home Care* (Final Report, October 2024) 15 ('*System Review*').

³⁰ Department of Communities and Justice, *Annual Statistical Report 2024–25*: <<https://dcj.nsw.gov.au/about-us/families-and-communities-statistics/annual-statistical-reports/asr-landing-page/asr-cft-oohc.html>>.

³¹ Productivity Commission, *Closing the Gap: Annual Data Compilation Report* (Australian Government, July 2025) 48, citing the figure as at 2024.

³² Department of Communities and Justice, *Families and communities statistics – Services for children and young people – September 2025 quarter analysis*: <<https://dcj.nsw.gov.au/about-us/families-and-communities-statistics/services-for-children-and-young-people/quarterly-statistical-report-text-version.html>>

³³ Ombudsman New South Wales, *Protecting Children at Risk: An Assessment of Whether the Department of Communities and Justice is Meeting its Core Responsibilities* (Report, July 2024) 77 ('*Protecting Children at Risk*').

³⁴ Productivity Commission (n 31) 44–8; SNAICC – National Voice for our Children, *Family Matters Report 2025*, 19–20, 49–60.

³⁵ Ombudsman New South Wales, *Protecting Children at Risk* (n 33) 5–6, 39–40, 75–8. See also Chapter 2, part E 'Recent Policy Developments'.

likely than non-Aboriginal children to be restored,³⁶ and NSW has the lowest rates of restoration for Aboriginal children of all the States and Territories.³⁷

Children's experiences in out-of-home care are vastly diverse, and overall 'outcomes' (and their causes)³⁸ difficult to measure.³⁹ However, it is clear that many children enter the care system with complex needs connected to their early exposure to neglect or other adversity, and that out-of-home care often fails to remedy this disadvantage.⁴⁰ For some children the effects of previous maltreatment are compounded, or new harms imposed, by instability and/or neglect and abuse within out-of-home care itself.⁴¹ There is consensus that, overall, children and young people who have been in out-of-home care experience long-term disadvantage, compared with other children, in areas of life such as emotional wellbeing, physical and mental health, substance misuse, education, employment, and housing.⁴² Particularly dire is the phenomenon of 'care criminalisation' (or 'the cross-over kids'), whereby children in care are significantly over-represented in the juvenile criminal justice system, and subsequently in adult offending and incarceration.⁴³ Aboriginal children in care

³⁶ SNAICC – National Voice for our Children (n 34) 56.

³⁷ BJ Newton et al, 'Restoring Children From Out-of-Home Care: Insights from an Aboriginal-Led Community Forum' (2025) 30(3) *Child & Family Social Work* 366, 367 ('Insights from an Aboriginal-Led Community Forum'); SNAICC – National Voice for our Children (n 34) 56, 58.

³⁸ Lawrence M Berger et al, 'Estimating the "Impact" of Out-of-Home Placement on Child Well-Being: Approaching the Problem of Selection Bias' (2009) 80(6) *Child Development* 1856; Judith Cashmore and Fred Wulczyn, 'Pathways of Care: A Longitudinal Study of Children in Care in Australia: Introductory Article for Special Issue on Pathways of Care Longitudinal Study' (2024) 149 *Child Abuse & Neglect* 106586: 1–12, 2, 4–5; Kath McFarlane, 'Care-criminalisation: The Involvement of Children in Out-of-Home Care in the New South Wales Criminal Justice System' (2018) 51(3) *Australian & New Zealand Journal of Criminology* 412, 415–16; P Walsh et al, *Literature Review: Factors Influencing the Outcomes of Children and Young People in Out-of-Home Care* (NSW Department of Family and Community Services, Pathways of Care Longitudinal Study, Research Report No. 6, 2018) 16.

³⁹ Jonathan Dickens et al, 'Courts, Care Proceedings and Outcomes Uncertainty: The Challenges of Achieving and Assessing 'Good Outcomes' for Children After Care Proceedings' (2019) 24 *Child and Family Social Work* 574.

⁴⁰ Department of Communities and Justice, *System Review* (n 29) 32, 90, 102; Walsh et al (n 38) 88.

⁴¹ Advocate for Children and Young People, 'Moving Cage to Cage: Final Report of the Special Inquiry into Children and Young People in Alternative Care Arrangements' (Office of the Advocate for Children and Young People, NSW Government, August 2024) 46–7; Megan Davis, Independent Review of and Torres Strait Islander Children in Out-of-Home Care in New South Wales, *Family is Culture* (Review Report, 2019) 226–30 ('*Family is Culture Report*'); Department of Communities and Justice, *System Review* (n 29) 44, 90–94; Tommie Forslund et al, 'Attachment Goes to Court: Child Protection and Custody Issues' (2022) 24(1) *Attachment and Human Development* 1, 27; Briony Horsfall, 'Children's Participation Rights During Child Protection Hearings: Recognition, Legal Representation and Redistribution of Care in Victoria's Children's Court' (PhD Thesis, Swinburne University of Technology, 2016) 208–11; McFarlane (n 38) 419–21.

⁴² Davis, *Family is Culture Report* (n 41) 230; George Economidis, 'An Evaluation of the Implementation of Family-Based Therapy Programs to Enhance Government Responses to Child Physical Abuse and Neglect in New South Wales, Australia' (PhD Thesis, UNSW Sydney, 2023) 48; Forslund et al (n 41) 27; Walsh et al (n 38) 4, 13, 16.

⁴³ Davis, *Family is Culture Report* (n 41) 235–45; Department of Communities and Justice, *System Review* (n 29) 103–6; McFarlane (n 38).

are disproportionately at risk of poor outcomes,⁴⁴ associated and enmeshed with their removal and disconnection from culture, kin and country.⁴⁵ Approximately one-third of Aboriginal children in care in NSW are placed with their Aboriginal kin,⁴⁶ although the Department reports more broadly that 70% of Aboriginal children in care are ‘placed with an Aboriginal or non-Aboriginal relative or an Aboriginal carer’.⁴⁷

A myriad of institutional, social and political factors contribute to the rates and impact of out-of-home care, the Court playing just one part. It is however a pivotal part, situated at the critical juncture determining whether a child enters out-of-home care. Yet, despite the centrality of the Court’s role, there is relatively little research on how these important legal decisions are made. The next section provides an overview of Australian and international research literature on legal decision-making in child protection.

(ii) Existing Literature

Within Australia and internationally, care and protection research is dominated by social work and the social sciences – in which entire journal series are dedicated to the field of family welfare, incorporating child protection.⁴⁸ There is comparatively little legal scholarly work in

⁴⁴ Walsh et al (n 38).

⁴⁵ See Davis, *Family is Culture Report* (n 41) 320–42; Wendy Hermeston, ‘First Nations Children and Families and Permanency Planning Reform: The Evidence Counts’ (2023) 76(3) *Australian Social Work* 358, 359; McFarlane (n 38) 415–16; BJ Newton et al, ‘Insights from an Aboriginal-Led Community Forum’ (n 37) 367.

⁴⁶ SNAICC – National Voice for our Children (n 34) 13, 63.

⁴⁷ Department of Communities and Justice, *Families and communities statistics – Services for children and young people – September 2025 quarter analysis*: <<https://dcj.nsw.gov.au/about-us/families-and-communities-statistics/services-for-children-and-young-people/quarterly-statistical-report.html>>.

⁴⁸ For example: *Child Abuse & Neglect*; *Child & Family Social Work*; *Child Abuse Review*; *Children Australia*; *International Journal on Child Maltreatment*; *Journal of Public Child Welfare*; *Journal of Family Social Work*; *Journal of Social Welfare and Family Law*.

the area.^{49 50} When Australian Children's Courts have received research attention, this has mainly concerned juvenile criminal law rather than child protection.⁵¹ Meanwhile, studies concerning the intersection of families, parenting and the law have been mostly conducted in the federal family law jurisdiction rather than in care and protection.⁵²

A small body of Australian literature has considered aspects of care and protection law, and can be loosely categorised into two groups. First are studies that apply a particular perspective in considering the court process in its entirety. Examples are parents' experiences in the legal system following removal of their children,⁵³ and experiences or court outcomes for parents who have particular characteristics such as intellectual disability,⁵⁴ mental illness,⁵⁵ and drug

⁴⁹ The limited amount of research on care and protection law in Australia is noted in, eg, Judy Cashmore, "Best Interests" in *Care Proceedings: Law, Policy and Practice* in Elaine E Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Wellbeing* (Cambridge University Press, 2016) 326, 330; Lillian De Bortoli, Jan Coles and Mairead Dolan, 'Parental Substance Misuse and Compliance as Factors Determining Child Removal: A Sample from the Victorian Children's Court in Australia' (2013) 35 *Children and Youth Services Review* 1319, 1320; Davis, *Family is Culture* Report (n 41) 68; Elizabeth Fernandez et al, 'A Study of the Children's Court of New South Wales' (Research Report, UNSW, 2014) 16; Rosemary Sheehan, *Magistrates' Decision-Making in Child Protection Cases* (Ashgate, 2001) 1–2 ('*Magistrates' Decision-Making*'); Rosemary Sheehan, 'Introduction: Australia's Children's Courts – the Study and its Context' in Rosemary Sheehan and Alan Borowski (eds) *Australia's Children's Courts Today and Tomorrow* (Springer, 2013) 1, 4 ('*Australia's Children's Courts*'); Tamara Walsh and Heather Douglas, 'Lawyers' Views of Decision-Making in Child Protection Matters: The Tension Between Adversarialism and Collaborative Approaches' (2012) 38(2) *Monash University Law Review* 181, 190.

⁵⁰ Equivalent observations in an international context have been made by, eg, Vered Ben-David, 'Study of Termination of Parental Rights: An Analysis of Israeli Court Decisions in Favor or Against Termination of Parental Rights' (2015) 18 *Journal of Family Social Work* 225, 225–6 ('Termination of Parental Rights'); Marit Skivenes and Milfrid Tonheim, 'Improving Decision-Making in Care Order Proceedings: A Multijurisdictional Study of Court Decision-Makers' Viewpoints' (2018) 24(2) *Child & Family Social Work* 1, 173; Alicia Summers, Sophia Gatowski and Shirley Dobbin, 'Terminating Parental Rights: the Relation of Judicial Experience and Expectancy-related Factors to Risk Perceptions in Child Protection Cases' (2012) 18(1) *Psychology, Crime and Law* 95, 96. In contrast, Masson writes of a 'substantial body of research' in child protection law in the UK over the past c. 30 years, and refers to care proceedings as 'a major site for research': Judith Masson, 'Understanding Care Proceedings: Learning from Empirical Research' in Jens M Scherpe and Stephen Gilmore (eds), *Family Matters: Essays in Honour of John Eekelaar* (Intersentia, 2022) 933, at 935, 937.

⁵¹ This dominant focus on juvenile justice is noted in, eg, Fernandez et al (n 49) 16; Sheehan, '*Magistrates' Decision-Making*' (n 49) 7; Sheehan, '*Australia's Children's Courts*' (n 49) 4.

⁵² The family law focus of prior literature is noted in Clare Tilbury, 'Obtaining Expert Evidence in Child Protection Proceedings' (2019) 72(4) *Australian Social Work* 392, 394; Walsh and Douglas (n 49) 190.

⁵³ Frank Ainsworth and Patricia Hansen, 'Behind the Closed Door: A Guide and Parents' Comments on the Workings of the New South Wales Children's Court' (2013) 38(2) *Children Australia* 47; Teresa Hinton, *Rebalancing the Scales: Access to Justice for Parents in the Tasmanian Child Safety System* (Report, Anglicare Tasmania, 2020); Nicola Ross et al, 'Evidence-based law and practice with disadvantaged populations: Perspectives of parents involved in child protection proceedings' (2017) 12 *Newcastle Law Review* 23.

⁵⁴ David McConnell, Gwynnyth Llewellyn and Luisa Ferronato, *Parents with a Disability and the NSW Children's Court* (Research Report, University of Sydney, 2000); Phillip A Swain and Nadine Cameron, "'Good Enough Parenting": Parental Disability and Child Protection' (2003) 18(2) *Disability and Society* 165.

⁵⁵ McConnell, Llewellyn and Ferronato (n 54); Rosemary Sheehan and Greg Levine, 'Parents with Mental Illness: Decision-making in Australian Children's Court Cases Involving Parents with Mental Health Problems' (2005) 27(1) *Journal of Social Welfare and Family Law* 17; Swain and Cameron (n 54).

dependency.⁵⁶ Other topics include lawyers' perspectives on proceedings;⁵⁷ children's legal representation;⁵⁸ conceptualisations of domestic violence held by professional stakeholders;⁵⁹ the potential for a therapeutic jurisprudence approach to care proceedings;⁶⁰ and the over-representation of Aboriginal children in the child protection system, understood in a critical cultural, political and historical context.⁶¹

A second group of studies is concerned with particular aspects of the legislation or stages in care matters, rather than the process as a whole. This includes the socio-legal impact of specific legislative provisions in NSW, such as rescission and variation applications,⁶² contact orders,⁶³ and a reverse onus presumption (since repealed) affecting proceedings for a child whose siblings are already in out-of-home care.⁶⁴ Other research has concentrated on parenting capacity assessments;⁶⁵ children's participation in clinic assessments;⁶⁶ models of risk prediction;⁶⁷ and the implementation of special court models – such as Aboriginal Care Circles

⁵⁶ De Bortoli, Coles and Dolan (n 49).

⁵⁷ Walsh and Douglas (n 49).

⁵⁸ Briony Horsfall, 'Children's Participation Rights During Child Protection Hearings: Recognition, Legal Representation and Redistribution of Care in Victoria's Children's Court' (PhD Thesis, Swinburne University of Technology, 2016); Nicola Ross, 'Different Views? Children's Lawyers and Children's Participation in Protective Proceedings in New South Wales, Australia' (2013) 27(3) *International Journal of Law, Policy and the Family* 332.

⁵⁹ Nisha Prichard, 'Children at Risk: Domestic Violence, Child Protection and The Children's Court of New South Wales Decision-Making Process' (PhD Thesis, UNSW, 2015).

⁶⁰ Alana Thompson, 'Therapeutic Jurisprudence and the Children's Court: Creating a More Relational Approach to Protection and Care Proceedings' (PhD Thesis, University of Western Australia, 2011); Clare Tilbury, 'Child Protection Proceedings in the Children's Court of Queensland: Therapeutic Opportunities Lost' (2013) 27 *Australian Journal of Family Law* 170 ('Therapeutic Opportunities Lost').

⁶¹ See, eg, Davis, *Family is Culture Report* (n 41); BJ Newton, 'Aboriginal Parents' Experiences of Having Their Children Removed by Statutory Child Protection Services' (2020) 25 *Child and Family Social Work* 814.

⁶² Hansen, Patricia, 'Rescission or Variation of Children's Court Orders: A Study of Section 90 Applications in New South Wales' (2012) 37(2) *Children Australia* 69.

⁶³ Frank Ainsworth and Patricia Hansen, 'Understanding the Behaviour of Children in Care Before and After Parental Contact' (2017) 42(1) *Children Australia* 5; Rejani Rajan, 'Birth Family Contact for Children in the New South Wales Child Protection System' (PhD Thesis, Western Sydney University, 2019).

⁶⁴ Frank Ainsworth and Patricia Hansen, 'A Study of the Use of Section 106A of the Children and Young Persons (Care and Protection) Act 1998 in the New South Wales Children's Court' (2017) 42(3) *Children Australia* 198 ('Use of Section 106A').

⁶⁵ Sheila Gray, 'Parenting Capacity: An Analysis of Parenting Capacity Assessment in the Children's Court of New South Wales' (PhD Thesis, University of Sydney, 2014).

⁶⁶ Peiling Kong, 'Recognition of Misrecognition? The Role of Authorised Clinicians in Facilitating Child Participation in New South Wales Care and Protection Matters' (PhD Thesis, University of Sydney, 2025).

⁶⁷ Lillian De Bortoli et al, 'Preliminary Evaluation of Structured Professional Judgment to Assess Removal in Child Protection Practice' (2015) 5 *Journal of Forensic Social Work* 29 ('Structured Professional Judgment').

in NSW,⁶⁸ and the Marram-Ngala Ganbu Koori Family Hearing program⁶⁹ and Family Drug Treatment Courts,⁷⁰ both in Victoria.

Case disposition, with respect to the integral question of whether a child is restored home, is touched upon in some of these studies. However, the judicial reasoning informing the restoration decision is not their focus. Several studies in Victoria have examined the relationship between court outcomes and specific case variables (factors in the parents' circumstances) or forms of evidence (such as clinical reports), but have used statistical analysis,⁷¹ rather than delving into the substance of the magistrates' reasons for decision.

A closer focus on the reasoning underlying court outcomes has featured in only a handful of studies, two of which were conducted in the 1990s.⁷² More recently, research in NSW has considered the influence of expert and social science evidence in decisions on children's 'best interests' in care and adoption matters.⁷³ A study in the Victorian care jurisdiction examined the impact on magistrates' decisions of children's participation, as facilitated through direct legal representation.⁷⁴ Case law is integrated into a text on 'legal intervention in family life' in Australian family law and child protection, with an overarching focus on dilemmas faced by the courts in determining 'best interests'.⁷⁵ The latter three publications are distinctive in drawing from written judgments. Typical empirical methods in Australian research on care proceedings are stakeholder interviews or focus groups,⁷⁶ access to case files of the court or

⁶⁸ Sarah K Ciftci, 'Between "Two Worlds": Examining the Aboriginal Care Circle Program as a Space of Indigenous Justice in Child Protection' (PhD Thesis, University of Sydney, 2022).

⁶⁹ K Arabena, W Bunston, D Campbell, D Eccles, K Hume and S King, *Evaluation of Marram-Ngala Ganbu* (Report, prepared for the Children's Court of Victoria, 2019).

⁷⁰ Lillian De Bortoli et al, *The Family Drug Treatment Court: An Evaluation Report* (Centre for Forensic Behavioural Science, Swinburne University of Technology, November 2018).

⁷¹ De Bortoli et al, 'Structured Professional Judgment' (n 67); De Bortoli, Coles and Dolan (n 49); Aino Suomi and Jeanette A Lawrence, 'Clinical Family Assessment for the Children's Court of Victoria: Building the Evidence Base in Court Child Protection Matters' (2013) 27 *Australian Journal of Family Law* 220; Aino Suomi, 'Analyses of Parents' Problems in Clinicians' Assessments for the Children's Court of Victoria on Child Protection Matters' (PhD Thesis, University of Melbourne, 2012).

⁷² McConnell, Llewellyn and Ferronato (n 54); Sheehan, 'Magistrates' Decision-Making' (n 49).

⁷³ Cashmore (n 49).

⁷⁴ Horsfall (n 41).

⁷⁵ John Seymour, *Children, Parents and the Courts: Legal Intervention in Family Life* (Federation Press, 2016).

⁷⁶ Lynda Campbell et al, 'High Risk Infants in the Children's Court Process in Australia: Dilemmas and Directions' (2003) 25(2) *Journal of Social Welfare and Family Law* 121; Davis, *Family is Culture Report* (n 41); Hinton (n 53); Cathy Humphreys and Meredith Kiraly, 'High-Frequency Family Contact: A Road to Nowhere' (2011) 16 *Child and Family Social Work* 1; McConnell, Llewellyn and Ferronato (n 54); Prichard (n 59); Ross et al (n 53); Sheehan, 'Magistrates' Decision-Making' (n 49); Thompson (n 60); Tilbury, 'Therapeutic Opportunities Lost' (n 60); Walsh and Douglas (n 49).

statutory authority,⁷⁷ and court observation.⁷⁸ It is very unusual for written judgments to form part of the research data.

Internationally, there is a growing body of literature on court decision-making and process in child protection,⁷⁹ particularly evident in the United Kingdom,⁸⁰ USA,⁸¹ Canada⁸² and Scandinavian countries.⁸³ A universal commonality of core themes and challenges in child protection is apparent, reflected in several studies conducted across multiple jurisdictions.⁸⁴

⁷⁷ Ainsworth and Hansen ('Use of Section 106A') (n 64); Campbell et al (n 76); Davis, *Family is Culture Report* (n 41); De Bortoli et al (n 67); De Bortoli, Coles and Dolan (n 49); Hansen (n 62); Horsfall (n 41); Humphreys and Kiraly (n 76); McConnell, Llewellyn and Ferronato (n 54); M O'Donnell et al, 'Child Protection Proceedings for Infants: Analysis of Court Files to Identify Court Outcomes and Requirements for Families in Child Protection Safety Plans' (2024) 157 *Children and Youth Services Review* 1; Prichard (n 59); Sheehan, 'Magistrates' Decision-Making' (n 49); Swain and Cameron (n 54); Suomi and Lawrence (n 71).

⁷⁸ Hinton (n 53); Horsfall (n 41); McConnell, Llewellyn and Ferronato (n 54); Prichard (n 59); Sheehan, 'Magistrates' Decision-Making' (n 49); Swain and Cameron (n 54); Thompson (n 60).

⁷⁹ Cashmore (n 49) notes 'increasing interest in this to date neglected field': at 330.

⁸⁰ See, eg, Dickens et al, 'Courts, Care Proceedings and Outcomes Uncertainty: The Challenges of Achieving and Assessing 'Good Outcomes' for Children After Care Proceedings' (2019) 24 *Child and Family Social Work* 574; Judith Masson, 'What are Care Proceedings Really Like?' (2012) 36(1) *Adoption and Fostering* 5; JM Masson et al, *Child Protection in Court: Outcomes for Children: Establishing Outcomes of Care Proceedings for Children Before and After Care Proceedings Reform* (Report, University of Bristol, 2019); Mary Ryan and Rachel Cook, *Born into Care: Case Law Review* (Report, Nuffield Foundation, 2019); Yuval Saar-Heiman, Anna Gupta and Griet Roets, 'Parenting Through the Lenses of Risk and Othering: Constructions of Parenting Cannabis Use in Child Protection Court Proceedings' (2023) 28 *Child and Family Social Work* 690.

⁸¹ See, eg, Joshua Gupta-Kagan, 'Confronting Indeterminacy and Bias in Child Protection Law' (2022) 33 *Stanford Law and Policy Review* 217; Vicki Lens, 'Engaging Parents in Family Court: Lessons from an Observational Study of Child Protection Cases' (2017) 17(2) *Journal of Social Work* 129; Jennifer G May, 'Decision Making Processes of Judges in the Family Court: An Investigation of Salient Features Relating to Termination of Parental Rights' (PhD Thesis, University of South Carolina, 2015); Sophia Gatowski, 'Examining the Judge's Role in Achieving Permanency for Children in Foster Care: Judicial Best Practice-Focused Performance Measurement' (2024) 75(2) *Juvenile & Family Court Journal* 79; Alicia Summers and Jennifer Renne, 'From Ambiguity to Action: Reframing Child Safety Measurement in the Child Welfare Court System' (2024) 75 *Juvenile & Family Court Journal* 67.

⁸² Peter W Choate, 'Termination of Parental Rights: A Commentary on Ben-David' (2015) 18 *Journal of Family Social Work* 243; Ilana Dodi Luther, ' "On the Poverty of Responsibility": a Study of the History of Child Protection Law and Jurisprudence in Nova Scotia' (PhD Thesis, Dalhousie University, 2015); Munazza Tahir and Virginie Cobigo, 'Accessibility of Child Protection Investigations During Pandemic: A Qualitative Analysis of Court Proceedings' (2023) 36 *Journal of Applied Research in Intellectual Disabilities* 343.

⁸³ See, eg, Anne-Mette Magnussen and Marit Skivenes, 'The Child's Opinion and Position in Care Order Proceedings: An Analysis of Judicial Discretion in the County Boards' Decision-Making' (2015) 23(4) *International Journal of Children's Rights* 705 (Norway); Sofia Nord Levin et al, 'Attachment Goes to Court in Sweden: Perception and Application of Attachment Concepts in Child Removal Court Decisions' (2024) 26(6) *Attachment & Human Development* 521 (Sweden); Tarja Poso and Rosi Enroos, 'The Representation of Children's Views in Finnish Court Decisions Regarding Care Orders' (2017) 25 *International Journal of Children's Rights* 736 (Finland).

⁸⁴ See, eg, Jill Berrick et al, 'Are Child Protection Workers and Judges in Alignment with Citizens When Considering Interventions into a Family? A Cross-country Study of Four Jurisdictions' (2020) 108 *Children and Youth Services Review* 1; Rachel Gregory-Wilson et al, 'Infant Removal from Birth Parents: How Does Health Information Impact Court Decisions? A Scoping Review' (2022) 29(3) *Collegian* 379; Jenny Krutzinna and Marit Skivenes, 'Judging Parental Competence: a Cross Country Analysis of Judicial Decision Makers' Written Assessment of Mothers' Parenting Capacity in Newborn Removal Cases' (2021) 26 *Child and Family Social Work* 50; Skivenes and Tonheim (n 50).

The international literature represents a mix of the primarily qualitative,⁸⁵ primarily quantitative,⁸⁶ and studies which combine both approaches.⁸⁷ European scholars appear, overall, more likely to be interested in the ways that parents' and children's circumstances directly affect court decisions,⁸⁸ whereas much of the American research is concerned with how the training, experience, practices and technique of judges shape their approach to decision-making.⁸⁹ Research methods have involved judicial surveys⁹⁰ and hypothetical vignettes,⁹¹ interviews⁹² and access to case files.⁹³ Additionally, several studies have analysed published judgments (or publicly available written decisions),⁹⁴ sometimes specified as being reported cases of the appellate courts.⁹⁵ I found only one study expressly conveying that researcher access to the sample of cases required special consent from the judicial or administrative authority⁹⁶ – that is, indicating that these were unpublished decisions.

⁸⁵ Levin et al (n 83); Luther (n 82); Magnussen and Skivenes (n 83); Poso and Enroos (n 83); Ryan and Cook (n 80) 95; Saar-Heiman, Gupta and Roets (n 80); Tahir and Cobigo (n 82).

⁸⁶ Vered Ben-David, 'Does a Parent's Right to Parenting Matter in Termination of Parental Rights? An Analysis of Court Cases' (2020) 58(4) *Family Court Review* 1061 ('Right to Parenting'); Ben-David, 'Termination of Parental Rights' (n 50); Nicole Kratky and Michela Schroder-Abe, 'How are Parental Functioning and Single Parenthood Associated with Court Outcomes: An Analysis of Child Protection Cases' (2018) 84 *Child Abuse & Neglect* 95 ('Parental Functioning'); Summers, Gatowski and Dobbin (n 50).

⁸⁷ Nicole Kratky and Michela Schroder-Abe, 'A Court File Analysis of Child Protection Cases: What Do Children Say?' (2020) 25 *Child and Family Social Work* 169 ('What Do Children Say?'); Krutzinna and Skivenes (n 84); Lorie L Sifacuse et al, 'Evaluating the Child Abuse and Neglect Institute: Does Training Affect Decision-Making?' (2015) 66(1) *Juvenile and Family Court Journal* 1.

⁸⁸ See, eg, Kratky and Schroder-Abe ('Parental Functioning') (n 86); Krutzinna and Skivenes (n 84); Magnussen and Skivenes (n 83); Poso and Enroos (n 83); Ryan and Cook (n 80); Saar-Heiman, Gupta and Roets (n 80).

⁸⁹ See, eg, Melissa Carter, Cristopher Church and Vivek Sankaran, 'A Quiet Revolution: How Judicial Discipline Essentially Eliminated Foster Care and Nearly Went Unnoticed' (2022) 12(1) *Columbia Journal of Race and Law* 496; Gatowski (n 81); May (n 81); Sifacuse et al (n 87); Summers, Gatowski and Dobbin (n 50); Summers, Gatowski and Gueller (n 93).

⁹⁰ Berrick et al (n 84); Summers, Gatowski and Dobbin (n 50).

⁹¹ Berrick et al (n 84); Sifacuse et al (n 87); Summers, Gatowski and Dobbin (n 50).

⁹² Masson et al (n 80); May (n 81); Conor O'Mahony et al, 'Child Care Proceedings in Non-Specialist Courts: The Experience in Ireland' (2016) 30 *International Journal of Law, Policy and The Family* 131.

⁹³ Kratky and Schroder-Abe ('Parental Functioning') (n 86); Kratky and Schroder-Abe ('What Do Children Say?') (n 87); Judith Masson, Julia Pearce and Kay Bader, *Care Profiling Study* (Research Report, Ministry of Justice UK, 2008); Alicia Summers, Sophia I Gatowski and Melissa Gueller, 'Examining Hearing Quality in Child Abuse and Neglect Cases: The Relationship Between Breadth of Discussion and Case Outcomes' (2017) 82 *Children and Youth Services Review* 490.

⁹⁴ Ben-David, 'Right to Parenting' (n 86); Ben-David, 'Termination of Parental Rights' (n 50); Krutzinna and Skivenes (n 84); Magnussen and Skivenes (n 83); Saar-Heiman, Gupta and Roets (n 80); Luther (n 82); Tahir and Cobigo (n 82). Levin et al (n 83) (in Sweden) note that decisions from first instance courts were attached to published decisions from the appellate Court: at 8.

⁹⁵ Levin et al (n 83); Ryan and Cook (n 80).

⁹⁶ Poso and Enroos (n 83) 740, re: decisions in the Finnish administrative courts. See also Krutzinna and Skivenes (n 84): based on a multi-country study (Norway, Germany and England), in which the means of access to judgments is not explicitly stated. However the article distinguishes the sample from England as being judgments 'publicly available', and in referring to jurisdictional differences notes as a limitation of the study that the English cases are 'non-representative, as we analyse only the publicly available judgments': at 55.

(iii) Filling a Research Gap

As outlined in the section above, there has been limited Australian research qualitatively analysing care and protection case law. While there have been some quantitative studies, evidence of statistical correlations between case variables and outcomes goes only so far in enabling understanding of the courts' decisions. It leaves to supposition the judicial reasoning underlying the correlations. Knowledge of *which* child protection issues are persuasive to the courts is a valuable starting point for analysis, but does not reveal *why* these were deemed important, or *how* the courts approached the evaluative exercise of weighing different and competing considerations.⁹⁷

Qualitative exploration is needed to form an understanding of how parenting capacity is perceived and assessed in judicial decisions. Ultimately, the numerous individual factors influencing restoration decisions converge in the deciding issue of whether this person's parenting capacity is 'good enough'. Certainly there are more formal legal principles to be applied—such as 'unacceptable risk', and in NSW the paramountcy of the child's safety, welfare and wellbeing⁹⁸—but there is general acceptance in child protection discourse that the standard required of parents is not one of perfection,⁹⁹ nor of providing the child with an optimal, ideal childhood.¹⁰⁰ Rather, a child protection intervention should ensure 'good enough' parenting,¹⁰¹ being a minimum or adequate level of competence.¹⁰² The 'good enough' notion, despite its ubiquity, is inevitably complex, contested, and reliant on culture and context.¹⁰³ No single study can capture its elusive meaning; however, a thematic analysis of court decisions can help build a stronger understanding of the law's expectations for adequate parenting capacity in a particular jurisdiction.

⁹⁷ See Choate (n 82) 248, 251.

⁹⁸ Discussed in Chapter 5.

⁹⁹ Peter W Choate and Sandra Engstrom, 'The "Good Enough" Parent: Implications for Child Protection' (2014) 20(4) *Child Care in Practice* 368, 369.

¹⁰⁰ Choate (n 82); Forslund et al (n 41) 26; Luther (n 82) 363–4, citing *Children's Aid Society of Pictou County v AJG* 2009 NSFC 26; Seymour (n 75) 55.

¹⁰¹ See, eg, Gray (n 65) 64; Forslund et al (n 41) 4, 26–7; Kong (n 66) 154; McConnell, Llewellyn and Ferronato (n 54) 19; Seymour (n 75) 40; Swain and Cameron (n 54) 165.

¹⁰² Choate and Engstrom (n 99) 369; Seymour (n 75) 54.

¹⁰³ Choate and Engstrom (n 99) 369; Philippa M Eve, Mitchell K Byrne and Cinzia R Gagliardi, 'What is Good Parenting? The Perspectives of Different Professionals' (2014) 52(1) *Family Court Review* 114, 115–6; Chris Lennings, 'Risk Assessment in Care and Protection: The Case for Actuarial Approaches' (2005) 4(1) *Australian e-Journal for the Advancement of Mental Health* 1, 1–2; Tahir and Cobigo (n 82) 351; Sheehan (n 49) 3, 64.

There has been no prior research study specific to judicial application of the ‘realistic possibility of restoration’ test in NSW. The Children’s Court produces its own internal resources on care proceedings, encompassing realistic possibility of restoration, some of which are accessible to the public via the internet.¹⁰⁴ The Court’s publications are concerned for the most part with guiding principles and procedure, rather than detailed examination of their application to factual scenarios.

In the academic realm, the topic of ‘restoration’ has seen recent attention in NSW—but without a judicial reasoning angle. Several publications have analysed the experiences and perceptions of parents¹⁰⁵ and of caseworkers (in both the Department and non-government agencies),¹⁰⁶ in navigating the care and protection system in pursuit of the goal of restoration. They paint with a broader brush than a legal focus—being concerned with the lives of families, children and carers after a child has been removed, the challenges faced by these families, and the complex service systems established to both assist and monitor them. Rather than examining how the Court makes its decisions on realistic possibility of restoration, these studies note a lack of stakeholder knowledge on this question. A recurring theme in Australian care and protection literature is a sense of bewilderment and frustration on the part of parents, and in some instances, workers, regarding the legal process and its expectations.¹⁰⁷ As far back as the Wood Special Commission of Inquiry in 2008, a paucity of published care and protection judgments in NSW was ‘lamented’,¹⁰⁸ and a decade later the *Family is Culture* Review called for ‘a more transparent’¹⁰⁹ Children’s Court, recommending

¹⁰⁴ See articles and conference papers in Children’s Court of New South Wales, *Children’s Law News*: <<https://childrenscourt.nsw.gov.au/publications/children-s-law-news.html>>; see also Judicial Commission of NSW, *Children’s Court of New South Wales Resource Handbook* (2nd ed, 2023, updated November 2025): <<https://www.judcom.nsw.gov.au/bench-books-resources/bench-books-handbooks/childrens-court-nsw-resource-handbook>>.

¹⁰⁵ Davis, *Family is Culture Report* (n 41) 344–70; BJ Newton et al, ‘Restoration from Out-of-Home Care for Aboriginal Children: Evidence from the Pathways of Care Longitudinal Study and Experiences of Parents and Children’ (2024) 149 *Child Abuse & Neglect* 106058 (‘Restoration from Out-of-Home Care’); BJ Newton et al, ‘Insights from an Aboriginal-Led Community Forum’ (n 37).

¹⁰⁶ Susan Collings et al, ‘Working Towards Reunification in New South Wales: Professional Perspectives on Navigating Complex Systems’ (2024) 59 *Australian Journal of Social Issues* 752; Betty Luu et al, ‘Strengths, Compliance, or Deficits: Examining Professional Viewpoints on the “Realistic Possibility of Reunification” for Parents with Children in Care’ (2025) *Journal of Public Child Welfare* (published online 8 May 2025) 1–25; Newton et al, ‘Restoration from Out-of-Home Care’ (n 105); Newton et al, ‘Insights from an Aboriginal-Led Community Forum’ (n 37).

¹⁰⁷ Collings et al (n 106) 761–3; Davis, *Family is Culture Report* (n 41) 68, 344, 355–7, 365–7; Hinton (n 53) 39, 46, 87; Newton et al, ‘Insights from an Aboriginal-Led Community Forum’ (n 105) 372; Ross et al (n 53) 29–30; Thompson (n 60) 77.

¹⁰⁸ The Hon James Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (State of New South Wales, November 2008) 459–60 (‘Wood Inquiry’).

¹⁰⁹ Davis, *Family is Culture Report* (n 41) 131.

that *all* of its final judgments be anonymised and routinely published online.¹¹⁰ This, it is argued, would promote access to justice by enabling public understanding of care proceedings and decisions,¹¹¹ and encourage trust in ‘the independence and integrity’ of the Court.¹¹²

There are pragmatic reasons for the dearth of public information on care and protection decisions. Care proceedings are held in ‘closed’ court,¹¹³ in recognition of children’s vulnerability and their need for privacy and protection.¹¹⁴ Thus any release of case information to the public or media is strictly controlled.¹¹⁵ As a court on the lower rung of the judicial hierarchy, Children’s Court judgments are not formally ‘reported’; and, as discussed in chapter 3, scarce resources constrain the capacity for its decisions to be put in writing, let alone uniformly published. The Court’s capacity to produce statistical data is also limited.¹¹⁶ All of these circumstances make research in care and protection law somewhat difficult.¹¹⁷

Nonetheless, a select sample of published judgments does exist and can be found. This thesis refers to 69 such judgments, specific to the issue of realistic possibility of restoration. Furthermore, with some setbacks and persistence, I was able to obtain 29 unpublished judgments.¹¹⁸ In combining unpublished with published decisions in a comprehensive study of care and protection cases, this thesis covers original ground. In doing so, it not only identifies the issues persuasive to the Court, but develops a picture of how the issues interact with one another and *why* they are considered important.

¹¹⁰ Ibid 132.

¹¹¹ Ibid.

¹¹² Ibid 132–3.

¹¹³ *The Act* (n 6) s 104B.

¹¹⁴ Judge Peter Johnstone, President of the Children’s Court of NSW, Letter of Submission to New South Wales Law Reform Commission, *Open Justice Review: Court and Tribunal Information – Access, Disclosure and Publication* (9 March 2021) 1–2, 14.

¹¹⁵ *The Act* (n 6) s 105; Johnstone (n 114) 2. See also Davis, *Family is Culture Report* (n 41) 123–5.

¹¹⁶ Davis, *Family is Culture Report* (n 41) 122–3. Two decades earlier, the *Wood Inquiry* (n 108) headed a section of its report ‘[t]he Data Challenge in the Care Jurisdiction’, commenting that ‘[n]either the Children’s Court nor Attorney General’s [Department] keeps detailed or reliable statistics in relation to care proceedings’: at 459.

¹¹⁷ See Cashmore (n 49) 330; Gregory-Wilson et al (n 84) 384.

¹¹⁸ See Chapter 3, part B, section (ii).

D. Stories of ‘unrealistic’ possibility of restoration

The following stories, based on four of the judgments in the sample, typify some of the common issues found in the cases overall. They are provided here as an introduction to key themes to emerge in the thesis.

The reasons for removal:

Anna’s¹¹⁹ three daughters were removed from her care, the Department’s concerns being neglect, domestic violence, transient housing, and resistance to cooperating with caseworkers.

Leah’s¹²⁰ baby was assumed into care shortly after his birth, on the basis that Leah’s six older children were already in permanent care, and due to a history of concerns about mental health, domestic violence, substance abuse and homelessness.

Jade’s¹²¹ baby was assumed into care at birth, based on long-standing mental health and domestic violence concerns. Also instrumental was Jade’s failure to be candid with the Department and compliant with Court orders after her first child had suffered unexplained injuries, possibly at the hands of her former boyfriend.

Michael’s¹²² four children were removed due to substance abuse and domestic violence, the precipitating incident being a serious assault inflicted by Michael on the children’s mother in the presence of the children.

The parents’ efforts to address the issues that led to removal:

The magistrate criticised the Department for its imprecise and inconsistent case against Anna, and observed that Anna had done everything caseworkers asked: including a parenting course, maintaining secure housing, abstinence from drugs, living without domestic violence, and engaging in ongoing mental health therapy. Anna had achieved most of these things on her own initiative, with minimal help from caseworkers.

¹¹⁹ Based on *Re: Alison Claire, Lauren Donovan and Victoria Claire* (Children’s Court of New South Wales, 10 July 2009).

¹²⁰ Based on *DFaCS and Boyd* [2013] NSWChC 9.

¹²¹ Based on *DCJ and Alice* [2024] NSWChC 12.

¹²² Based on *FaCS v the Harris children* [2012] NSWChC 9.

In Leah's case, the Court accepted the parents' evidence of steps they had taken in the year since the baby's removal, including a parenting course, relationship counselling, and – for Leah – sexual assault counselling and a 10-week Dialectical Behaviour Therapy Course. Leah's evidence provided practical examples of things she had learned and strategies implemented, in relation to each course and form of therapy.

Jade had engaged with many therapists and domestic violence programs over the years, both before and after the baby's removal. There was evidence of her 'full and meaningful engagement' in an intensive, inpatient Domestic Violence Trauma Clinic. At the time of the hearing she had engaged in parenting education, ceased her previous drug use, was employed and in stable housing, and had support from her parents. Jade continued to engage in regular sessions with her treating psychiatrist, and was affirmed to be making therapeutic improvement.

By the time Michael's case for restoration was heard, two years had passed since his children's removal. The Magistrate 'commended' Michael for the changes he had made in that time, including a drug detoxification and rehabilitation program, two parenting programs, a 'conflict management' course, a peer-support drug and alcohol recovery group (of which he had become a facilitator), counselling with a clinical psychologist to address 'issues from his childhood', and employment as an apprentice bricklayer.

The decisions:

Caseworkers had struggled to pinpoint the nature of their concerns about Anna's parenting. During the course of the hearing, a psychologist diagnosed Anna with mental health conditions including 'dysphoria', for which a minimum of two years intensive therapy was recommended. From the magistrate's perspective this dysphoric condition – a 'deep-seated' dissociative response to stress – explained the nub of the issues. The magistrate agreed that Anna had 'made significant inroads' in seeking restoration of her children, who she loved and cared for to the best of her ability, and despite her own difficult childhood. However, her depression and dysphoria, compounded by emotional volatility, a mistrustful attitude towards caseworkers, and a lack of insight, posed unacceptable risk to the children.

The Court recognised that Leah and her partner had taken steps to address 'historical' child protection issues, that their relationship appeared harmonious, and there was no evidence of continued drug use. However, both parents were found to lack insight into Leah's borderline personality disorder. A psychologist's evidence emphasised Leah's 'chaotic' past, linked to her experience of abuse as a child. Her 10-week Dialectical Behaviour Therapy course was

held to be inadequate in the face of the psychologist's recommendation of a two year course. The potential for Leah to relapse into emotional instability posed an unacceptable risk, and the 'mere hope' that the parents would maintain their progress was 'sentimental and idealistic, based on unlikely hopes for the future'.

Jade was acknowledged to have made substantial gains in the two years since the proceedings began. However, much of her evidence had dishonest elements, consistent with other indications of 'habitual lying'. Her articulated learning from domestic violence programs had not, in the magistrate's observation, dissuaded her from continuing to enter impulsive and potentially unhealthy relationships. Jade's commitment to therapy was deemed insufficient to guarantee sustained change or overcome her personality disorder and 'maladaptive' behaviour patterns. Restoration would not be compatible with her child's safety, welfare and wellbeing.

The magistrate agreed that Michael had made positive, even 'dramatic' changes to his lifestyle, such that 'serious consideration' to his restoration application was warranted. He appeared to have taken some responsibility for his domestic violence and its impact on the children. However, he was found to have been less than candid in other parts of his evidence, undermining his overall credibility. The Court determined that Michael did not have 'true insight' into the full extent of psychological harm to the children caused by his past violence. There was no realistic possibility of restoration.

These brief summaries have simplified the details of the cases on which they are based, and various differences between them, but there are clear common threads. In each case the parents had, at an external level, taken steps to improve their parenting capacity and demonstrate commitment to restoration. The apparently genuine nature of their efforts was not disputed, and there were no glaring omissions in the sorts of activities engaged in. It might be said that each parent had 'ticked the boxes' on a metaphorical list—or perhaps an *actual* list, such as the requirements contained in a 'Summary of Proposed Plan' presented to parents and to the Court at the start of care proceedings.¹²³ But in each case, ticking the boxes, even with authentic intention and some practical benefits, was not good enough. It was the parents' more elusive, nebulous, *internalised* characteristics that were the ultimate barriers to restoration: lack of insight for all of them, insufficient candour for Michael and Jade, and, for

¹²³ See Children's Court of New South Wales, *Practice Note 5, Case Management in Care Proceedings – Standard directions*, 16.6.1 (c). See also Chapter 2, part C 'The Legal Process'.

all the women, their profound mental health conditions, and expert evidence of lengthy, sustained periods of therapy needed to overcome these conditions.

The stories are reflective of the main findings to emerge from the analysis of judgments in this thesis, including the ways in which the issues of concern appear to shift during the course of proceedings. Cooperative engagement with services is important—but, of itself, is often regarded as insufficient for sustainable change, even when reasons for the child’s removal, such as drug use, domestic violence and insecure housing, have been ‘addressed’. Instead, for many parents, mental health problems are the main barrier to restoration, and are perceived as flowing from their own past experiences of abuse, and intertwined with matters of ‘insight’. Until and unless gains from therapy are deemed to have resolved these deep-seated issues, the legal system remains unconvinced that the parent can adequately meet the child’s needs.

Further case studies are presented and developed in chapters 6 to 10, tracing the events, legal issues and eventual decisions in the cases of two mothers, ‘Sarita’ and ‘Sonya’.

E. Structure of the Thesis

The thesis has 10 chapters. This introductory chapter has described the impetus for the study, its aims and significance.

Chapter 2 sets the scene of the thesis topic—describing the jurisdictional, institutional, and legislative contexts of care and protection law in NSW, including the origins and evolution of the statutory ‘realistic possibility of restoration’ test.

Chapter 3 explains and discusses the methodology of the thesis, as a socio-legal, mixed methods study with a doctrinal element, incorporating thematic analysis of 98 care and protection judgments, and 45 stakeholder interviews.

Chapter 4 discusses aspects of the practical functioning of the care and protection legal system—including the nature and challenges of the judicial task in this field; procedural issues affecting the typical progress of a case; alignments and tensions in the respective roles of the Court and the statutory authority (‘the Department’); and the role of interdisciplinary expert evidence.

Chapter 5 discusses findings on ‘issues of law’, focusing on the Court’s approach to assessing ‘unacceptable risk’, the paramount concern of the child’s safety, welfare and wellbeing, and the legislatively prescribed considerations for ‘realistic possibility of restoration’.

Chapter 6 is the first of four chapters on ‘issues of fact’. It presents and analyses findings on the reasons for the Department’s decisions to remove children from parental care and institute court proceedings.

Chapters 7, 8 and 9 present and analyse findings on the Court’s reasons for decision on the question of ‘realistic possibility of restoration’. Chapter 7 is concerned with the ‘leading influential’ factors in the decisions, chapter 8 with the ‘substantially influential’ factors, and chapter 9 with ‘moderately’ and ‘less’ influential factors. The tables and figures in Appendix A collate the numerical incidence of the factors and their comparative prevalence.

Chapter 10 pulls together the threads and patterns emerging from the findings in chapters 4 to 9, to draw conclusions on the Court’s reasoning in deciding whether children are restored to their parents or placed in long-term out-of-home care. It then suggests and briefly discusses some of the practical, policy and law reform implications arising from the findings.

CHAPTER TWO

Setting the Scene: The Care and Protection Landscape in New South Wales

Chapter Overview

This chapter provides essential context for the subsequent analysis of restoration decisions of the Children's Court. It presents an overview of the nature and operation of the New South Wales ('NSW') care and protection legal system, and considers the influence of policy on changes to the 'realistic possibility of restoration' test and related statutory provisions.

Part A locates Australian care and protection law as a matter of State and Territory jurisdiction within the federal constitutional framework, and Part B describes the main institutions responsible for its operation in NSW. Part C summarises the legislative provisions and court procedures governing the stages of the legal process—from the time a family first comes to the attention of the statutory child protection authority until a judicial decision is made on the question of restoration. Part D traces the evolution of the 'realistic possibility of restoration' test over time, as influenced by shifting policy and statutory objectives through to the present day, while Part E outlines some of the most recent developments reflecting an ostensible policy emphasis on keeping children at home with their families.

A. Situating the Care and Protection Jurisdiction

Australian child protection law, or 'care and protection', is the jurisdictional responsibility of the States and Territories. It is distinct from the federal 'family law' jurisdiction, which is governed by the *Family Law Act* of the Commonwealth.¹ The divide is dictated by the Australian Constitution, under which the Commonwealth Parliament has—in effect—law-making power in respect of private law disputes between separated parents (and/or other family members),² while leaving to the States and Territories the public law arena of child welfare. This is a very simplified account; the relevant issues of constitutional law, history and policy are ridden with complexities which are outside the scope of this thesis.³ Suffice to note

¹ *Family Law Act* 1975 (Cth).

² *Australian Constitution* s 51(xxii).

³ See, eg, Family Law Council, *The Care, Support and Protection of Children: Interaction Between the Family Law Act and State and Territory Child and Family Services Legislation: Discussion Paper No 2 – The Best Interests of the Child? The*

there is extensive critique of the conceptual and practical difficulties of having independent, parallel jurisdictions for resolving disputes about children and parental responsibility,⁴ and particularly a perception that the ‘private–public’ distinction is artificial in the face of similar and consistent issues—such as family violence and child abuse allegations—presenting in families across both systems.⁵

Also beyond the reach of this study is an analysis of the cross-border complexities created by the co-existence of eight separate child protection regimes within Australia. Each of the six States and two Territories has its own care and protection legislation, operating in its own Children’s Court, Youth Court, or division of the Local Court. While broadly similar in overarching goals and functions, there are many specific differences between the laws of each jurisdiction, in matters such as terminology, legal tests and thresholds, procedures, children’s legal representation, and the available orders for resolution of a case.⁶ Notably, the test of ‘a realistic possibility of restoration’—including its requirement that the parents are ‘likely to be able to satisfactorily address the issues’ that led to the child’s removal—is unique to NSW. There is no equivalent test in the legislation of the other States and Territories. All the jurisdictions, NSW included, share principles to the effect that court orders for a child’s short or long-term removal must promote the child’s safety, wellbeing and best interests, and are to be made only when there is no suitable, less intrusive option available.⁷ By virtue of these parameters, which circumscribe the power of legal intrusion into the family realm, restoration to parents is the preferred outcome by default. Several jurisdictions make this explicit by

Interaction of Public and Private Law in Australia (Discussion Paper, 2000) (‘Care, Support and Protection’); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (Interim Report, June 2015) 65–76 (‘Families with Complex Needs’); Chapter 4 ‘Constitutional Powers and the Family Courts’, in Adiva Sifris et al, *Family Law in Australia* (LexisNexis, 10th ed, 2012) 166.

⁴ See, eg, Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System: Section 4 – Closing the Jurisdictional Gap* (Report No 135, March 2019); Family Law Council, *Care, Support and Protection* (n 3); Family Law Council, *Families with Complex Needs* (n 3); Felicity Bell, ‘State Child Welfare Departments and Federal Family Law Matters’ (2016) 6 *Family Law Review* 218.

⁵ Australian Law Reform Commission (n 4) 120–121, 135; Family Law Council, *Families with Complex Needs* (n 3) 3–5, 95–6; Rae Kaspiew, ‘Australia’s Family Law System: A User-Centred Perspective’ in Mavis Maclean and Rachel Treloar (eds), *Research Handbook on Family Justice Systems* (Elgar, 2023) 2, 2–5.

⁶ See Family Law Council, *Families with Complex Needs* (n 3) 7–13; Alison Silink, ‘Protecting Children from Abuse and Neglect’, in Lisa Young, Mary Anne Kenny and Geoffrey Monahan, *Children and the Law in Australia* (LexisNexis, 2nd ed, 2017) 195, 203–211.

⁷ *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 9, 9A, 69, 70, 79(3) (‘The Act’); *Children, Youth and Families Act 2005* (Vic) ss 10, 276, 287, 289, 290; *Child Protection Act 1999* (Qld) ss 5A, 5B, 5BA, 51AE, 59(1); *Children, Young Persons and Their Families Act 1997* (Tas) ss 7, 10C, 10E, 42, 44, 54; *Children and Young People (Safety) Act 2017* (SA) ss 7, 8, 11, 50, 53(1c); *Children and Community Services Act 2004* (WA) ss 7, 8, 9, 46, 58; *Care and Protection of Children Act 2007* (NT) ss 8, 10, 10A, 70(2)(d), 90, 105, 121, 129, 130(2), 137G; *Children and Young People Act 2008* (ACT) ss 8, 349, 350, 464, 465.

specifying a hierarchy of preferred placement options.⁸ Only in NSW, however, does the legislation supplement this position by prescribing a criterion to be *actively satisfied* by the parents to justify the child's return home.⁹

B. The Institutions

First established in 1905,¹⁰ the Children's Court of New South Wales in the present day is constituted under the *Children's Court Act 1987* (NSW) and comprises 'the President and such Children's Magistrates as are appointed under [the Act]'.¹¹ The President, formerly known as the Senior Children's Magistrate, has since 2009 held office as a Judge of the District Court¹² – although for practical intents and purposes sits exclusively in the Children's Court. There are currently 16 Children's Magistrates.¹³ The bulk of the Court's work is in care and protection and criminal law (juvenile justice). It also deals with compulsory schooling applications, apprehended violence orders, and breaches of parole.¹⁴ As specialists, Children's Magistrates participate in training workshops and conferences on matters such as child development, attachment theory, trauma, and cross-cultural issues.¹⁵

The Children's Court sits permanently at dedicated buildings in the Sydney urban locations of Parramatta and Surry Hills, and the regional locations Broadmeadow and Woy Woy. The Court shares premises with the Local Court in the urban/outer-urban locations of Campbelltown and Sutherland, and in the regions at Port Kembla, Nowra and Wyong. Throughout the rest of the State, Children's Court matters are heard by either Local Court Magistrates or specialist Children's Magistrates travelling 'on circuit'.¹⁶ The work of

⁸ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 10A; *Children, Youth and Families Act 2005* (Vic) s 167; *Child Protection Act 1999* (Qld) s 5BA(4).

⁹ *The Act* (n 7) ss 83(1)(b), (7)(b)(ii). The Australian Capital Territory is the only other jurisdiction to use the phrase 'realistic possibility of restoration'; however this is configured differently to NSW—as a discretionary consideration that 'may' be included by the statutory authority in a care plan for foster or kinship care (*Children and Young People Act 2008* (ACT) s 456(3)(b)(i)), but which is not expressed as a pre-requisite or explicit consideration to the making of orders by the Court: see s 464.

¹⁰ Children's Court of New South Wales, *2023 Annual Review* 8.

¹¹ *Children's Court Act 1987* (NSW) s 6.

¹² *Ibid* s 6A.

¹³ Website of the Children's Court of New South Wales, <<http://childrenscourt.nsw.gov.au/about-the-court/court-structure.html>>; Children's Court of NSW, *2024 Annual Review* 9.

¹⁴ Website of the Children's Court of New South Wales, <<http://childrenscourt.nsw.gov.au/about-the-court/cases-the-court-deals-with.html>>.

¹⁵ *Children's Court Act 1987* (NSW) s 16(1)(g); Children's Court of New South Wales, *2022 Annual Review* 4, 35.

¹⁶ Website of the Children's Court of New South Wales, <<http://childrenscourt.nsw.gov.au/about-the-court/court-structure.html>>. See also Chapter 4, part A, section (iii) for discussion of the role of Local Court magistrates in hearing care matters.

magistrates in the care and protection jurisdiction is assisted by Children's Registrars, who conduct dispute resolution conferences and quasi-judicial functions such as court list call-overs.¹⁷

The government agency principally responsible for child protection in NSW is the Department of Communities and Justice (often referred to as 'DCJ'). As government agencies are wont to do, the Department has changed in structure and name several times over the past 20 years. Previous iterations include the Department of Community Services (colloquially known as 'DOCS'), and the Department of Family and Community Services ('FACS'). In July 2019 the Department of Family and Community Services was merged with the Department of Justice, creating the current Department of Communities and Justice. Its large umbrella covers multiple agencies and Ministerial portfolios—including (among others) the areas of law reform, courts and tribunals, prisons, youth justice, domestic and family violence, social housing, disability and inclusion. The Child Protection and Permanency division deals with early intervention, family preservation, care order applications and out-of-home care.¹⁸ In legal proceedings, 'the Secretary'—being the most senior executive officer—is the denotation used in reference to the authority, decisions and submissions of the Department and its staff. Prior to 2014 the equivalent phrase appearing in court documents was 'the Director-General'. For simplicity this thesis instead refers uniformly to 'the Department'.

The Department works alongside numerous community-sector agencies in child protection, most notably via contractual arrangements in which certain aspects of day-to-day service delivery and case management are performed by accredited non-government organisations ('NGOs') under the 'Permanency Support Program'.¹⁹ This model of shared service provision was ramped up in the years following the 2008 Report of the 'Wood Inquiry', a comprehensive and highly influential inquiry into child protection in NSW.²⁰ The Inquiry found that the Department struggled, due to high workloads and competing casework priorities, to maintain an adequate level of case management to children in out-of-home care. It recommended

¹⁷ Children's Court of New South Wales, *2023 Annual Review*; Children's Court of New South Wales, *Practice Note 3: Alternative Dispute Resolution Procedures in the Children's Court* (as amended, November 2015); Children's Court of New South Wales, *Protocol for Registrars conducting Care Call Overs* (December 2014).

¹⁸ Website of the Department of Communities and Justice, <<http://dcj.nsw.gov.au/>>; Department of Communities and Justice, *2024-25 Annual Report: Volume 1—Performance and activities* (November 2025) 16, 40, 46–9.

¹⁹ See <<https://dcj.nsw.gov.au/service-providers/oohc-and-permanency-support-services/permanency-support-program-oohc/permanency-support-program/what-is-the-permanency-support-program.html#Working2>>.

²⁰ Hon. James Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (State of NSW, November 2008) ('Wood Inquiry').

devolution of out-of-home care services to the non-government sector, envisaging a higher standard of care, and enabling the Department to focus its resources to the ‘front end’ of the child protection system – that is, the immediate context of children at risk of harm and in need of care.²¹ A gradual transition followed, with approximately half of all children in care being case-managed by NGOs in 2023-24.²²

The nature of shared responsibility between the Department and NGO sector has further evolved since the time of the Wood Inquiry, with outsourced roles in out-of-home care moving beyond support to children and their carers, to a requirement to also engage in the facilitation of restoration of children to their parents.²³ This shift reflects changes in the policy landscape, with a stronger focus since 2017-18 on reducing the number of children in out-of-home care via a commitment to family preservation and the active pursuit of viable restorations for children already in care.²⁴ Hence, the Department directs NGOs that they must ‘support parents to increase their capacity to enable children to return home as quickly as possible (for new entries to care)’,²⁵ and in all cases ‘work with families and significant others of children and young people to reduce the risks that caused them to be unsafe, regardless of the Case Plan Goal’.²⁶

The expectation that NGOs provide restoration casework has, in some instances, caused tension and miscommunication in the context of legal proceedings.²⁷ The organisations have (ordinarily) no formal standing and often no direct participation in the Court process,²⁸ with

²¹ Ibid 650–66, and Recommendation 16.2.

²² Auditor-General for New South Wales, *Oversight of the Child Protection System* (Performance Audit Report, June 2024) 17; Department of Communities and Justice, *System Review into Out-of-Home Care* (Final Report, October 2024) 20 (‘System Review’). A slightly different figure, of 58% NGO: 42% DCJ, is cited in Ombudsman New South Wales, *Protecting Children at Risk: An Assessment of Whether the Department of Communities and Justice is Meeting its Core Responsibilities* (Report, July 2024) 45.

²³ Susan Collings et al, ‘Working Towards Reunification in New South Wales: Professional Perspectives on Navigating Complex Systems’ (2024) 59 *Australian Journal of Social Issues* 752, 754–5; Family & Community Services, *Permanency Support (Out-of-Home Care) Program Description: Creating Safe and Permanency Homes for Children and Young People* (NSW Government, 2017) 16 (‘Permanency Support Program Description’); Jessica Roberts et al, ‘Reunifying Children in Out-of-Home Care: Does NSW’s Permanency Support Program Affect Restorations?’ (2025) *Australian Social Work* (published online 10 September 2025) 1–15, 3.

²⁴ See, eg, Family & Community Services, *Permanency Support Program Description* (n 23) 4; Family & Community Services, *Shaping a Better Child Protection System* (Discussion Paper, NSW Government, October 2017) 11–12; Ombudsman New South Wales (n 22) 4, 45–6; Roberts et al (n 23) 2–3.

²⁵ Department of Communities and Justice, *Permanency Support Program – Service Requirements* (as updated September 2025) 3.3.1.

²⁶ Family & Community Services, *Permanency Support Program Description* (n 23) 16.

²⁷ Collings et al (n 23) 759–62, 767.

²⁸ Subject to arrangements outlined in Children’s Court of NSW, *Practice Note 17: Designated Agencies in Children’s Court care proceedings* (as amended, March 2023).

the Department holding authority for decisions about the conduct of the case, and acting as the conduit between the NGO's intimate knowledge of the family's circumstances and the evidence presented to the Court.²⁹ This has produced frustration and resentment on the part of NGO staff,³⁰ and a level of confusion and complexity noted by judicial officers.³¹

Another key entity in the care and protection legal system is the Children's Court Clinic – which, despite its name, is independent of the Court (and sits under the Government's health, rather than justice, portfolio).³² Formed in 2001, the Clinic conducts expert assessments of children and families in care matters, drawing from a panel of accredited 'authorised clinicians'.³³ Not every care matter involves a report by the Clinic; the need and utility for this evidence is assessed by the Court upon application by a party to the case.³⁴ Chapter 4 discusses the influence of Children's Court Clinic reports and other expert assessments on judicial decision-making.³⁵

C. The Legal Process

This section provides a summary of law and procedure in cases in which the Department seeks a 'care order' – defined as an order 'for or with respect to the care and protection of a child'.³⁶ A final care order cannot be made without the Court first determining whether or not there is a realistic possibility of restoration of the child to the parents; hence this overview is concerned with the process leading up to this decision. It does not delve into judicial application of the *principles* guiding the evaluation of realistic possibility of restoration, this being the focus of chapter 5.

The legal process in a care and protection case usually originates in the Department's assessment of a report that a child may be at risk of significant harm.³⁷ Such reports are

²⁹ Collings et al (n 23) 759–61.

³⁰ Ibid.

³¹ See Chapter 4, part C, section (iii) for brief discussion of the Court's observations on problems associated with the NGO role. See also part E below in relation to recent changes to the outsourcing context.

³² *Children's Court Act 1987* (NSW) s15B; Children's Court of New South Wales, *2023 Annual Review* 23; website of the Children's Court Clinic NSW: <<http://www.schn.health.nsw.gov.au/clinical-hub/childrens-court-clinic>>.

³³ Website of the Children's Court Clinic NSW: <<http://www.schn.health.nsw.gov.au/clinical-hub/childrens-court-clinic>>.

³⁴ *The Act* (n 7) div 6 'Examination and assessment orders'; Children's Court of New South Wales, *Practice Note 6: Children's Court Clinic assessment applications and attendance of Authorised Clinicians at hearings, dispute resolution conferences and external mediation conferences* (as amended, June 2017).

³⁵ See Chapter 4, part D.

³⁶ *The Act* (n 7) s 60.

³⁷ Ibid s 24.

mandatorily made by people in certain professions,³⁸ subject to ‘reasonable grounds’ for suspicion of risk,³⁹ and may also be made by any person on a voluntary basis.⁴⁰ The Department determines whether the information in the report meets the ‘risk of significant harm’ threshold,⁴¹ and what action, if any, to take in response.⁴² This threshold (one of several within the Act) is met if there are concerns for the child’s safety, welfare or wellbeing, because of the presence ‘to a significant extent’ of one or more prescribed circumstances.⁴³ The ‘circumstances’ encompass neglect of the child’s basic physical or psychological needs;⁴⁴ medical⁴⁵ and educational neglect;⁴⁶ physical,⁴⁷ sexual⁴⁸ and psychological abuse;⁴⁹ risk of serious harm arising from exposure to domestic violence;⁵⁰ and a pregnant woman’s failure to engage with services to reduce reported risk to an unborn child.⁵¹

A finding that the risk of significant harm threshold is met permits the Department to take statutory action, which may include assessing the family’s needs and arranging support services.⁵² Importantly, a different statutory threshold applies to the commencement of Court proceedings for a care order, and establishes the basis for judicial intervention. This test is that the child ‘is in need of care and protection’.⁵³ It is somewhat wider than the ‘significant harm’ test which governs Departmental intake and assessment. A child may be in need of care and protection for reasons including the absence of a parent able to care for the child;⁵⁴ the parents having ‘serious difficulties’ in providing care;⁵⁵ the presence or likelihood of physical or sexual abuse;⁵⁶ the presence or likelihood of physical, psychological or educational neglect;⁵⁷ and a likelihood of serious psychological or developmental harm arising from the ‘domestic

³⁸ Ibid s 27.

³⁹ Ibid s 24.

⁴⁰ Ibid.

⁴¹ Ibid s 30.

⁴² Ibid s 36.

⁴³ Ibid s 23.

⁴⁴ Ibid s 23(1)(a).

⁴⁵ Ibid s 23(1)(b).

⁴⁶ Ibid s 23(1)(b1).

⁴⁷ Ibid s 23(1)(c).

⁴⁸ Ibid.

⁴⁹ Ibid s 23(1)(e).

⁵⁰ Ibid s 23(1)(d).

⁵¹ Ibid s 23(1)(f).

⁵² Ibid ss 17, 30, 35, 36, 37.

⁵³ Ibid s 71(1).

⁵⁴ Ibid s 71(1)(a).

⁵⁵ Ibid s 71(1)(b).

⁵⁶ Ibid s 71(1)(c).

⁵⁷ Ibid s 71(1)(d).

environment’.⁵⁸ The Department’s application for a care order must specify which of these grounds it relies on.⁵⁹ The Department must also present evidence that alternative options were considered,⁶⁰ and ‘active efforts’ made,⁶¹ to try to resolve the child protection concerns without court proceedings being necessary. With limited exceptions, it is mandatory for the family to be offered alternative dispute resolution,⁶² such as a family group conference,⁶³ as a pre-requisite to the decision to bring a Court application.

The parents are automatically parties to a care order application (‘care matter’).⁶⁴ Some parents self-represent in the Court, but many are legally represented – typically via a grant of legal aid.⁶⁵ The child is also a party to the case,⁶⁶ although in practice children do not generally attend Court.⁶⁷ Their participation is facilitated through their lawyer, acting on direct instructions for children age 12 years and older,⁶⁸ and for younger children on the ‘best interests’ model – in which the lawyer forms an independent view based on all of the evidence, while taking into consideration the expressed views of the child.⁶⁹ Other people claiming to have a ‘genuine concern’ for the child’s safety, welfare and wellbeing (such as relatives,⁷⁰ carers,⁷¹ and occasionally an NGO service provider⁷²) may seek the Court’s leave to be joined as a party.⁷³

⁵⁸ Ibid s 71(1)(e).

⁵⁹ Ibid s 61(1A).

⁶⁰ Ibid s 63(1)(b).

⁶¹ Ibid s 63(1)(a). See part D below in relation to the introduction of the ‘active efforts’ requirements.

⁶² Ibid s 37(1A).

⁶³ Amy Conley Wright et al, *Family Group Conferencing Evaluation: Final Report* (Research Centre for Children and Families, University of Sydney, 2022). See also Chapter 4, part B, section (iii) ‘Alternative dispute resolution and negotiated resolution’.

⁶⁴ *The Act* (n 7) s 98(1)(a).

⁶⁵ See Legal Aid NSW, Policy Online, 3.1 Care and Protection: <<https://www.legalaid.nsw.gov.au/for-lawyers/policy-online/family-policies>>.

⁶⁶ *The Act* (n 7) s 98(1)(a).

⁶⁷ Judith Cashmore, Peiling Kong and Meredith McLaine, ‘Children’s Participation in Care and Protection Decision-Making Matters’ (2023) 12(3) *Law* 49: 1–26, 4.

⁶⁸ *The Act* (n 7) ss 99A(1), 99C, 99D(a).

⁶⁹ Ibid ss 99A(2), 99B, 99D(b). The provisions also enable exceptions to the presumption that a child younger than 12 is incapable of giving direct instructions, and that a child from the age of 12 is capable of giving direct instructions, depending on the developmental capacity of the particular child.

⁷⁰ See, eg, *AB & JB v The Secretary & Ors* [2021] NSWDC 626; *Bell-Collins Children v Secretary, Department of Family and Community Services* [2015] NSWSC 701.

⁷¹ See, eg, *Re Elizabeth* [2011] NSWDC 45, [23]; *Secretary, Department of Communities and Justice v AM* [2024] NSWDC 646, [80].

⁷² *EC v Secretary, NSW Department of Family and Community Services* [2019] NSWSC 226.

⁷³ *The Act* (n 7) s 98(3).

Care matters are an ‘affidavit jurisdiction’, meaning that evidence is primarily in sworn written form.⁷⁴ Parents are given a specific timeframe to file affidavits in reply to the Department’s initiating application.⁷⁵ The Department is also required at an early stage of proceedings to file its ‘Summary of the proposed plan’ for the child,⁷⁶ indicating the risk or safety concerns, the nature of the placement proposed, whether restoration is regarded as a realistic possibility, and the tasks and changes expected of the parents in order to achieve restoration.⁷⁷ During the period between the commencement of the case and its final resolution, the child’s care is usually subject to an interim order placing the child in the ‘parental responsibility of the Minister’⁷⁸—in effect, giving the Department and its caseworkers authority for decisions about the child’s immediate living arrangements.⁷⁹

If the Court is not satisfied that the child is in need of care and protection (a quite rare eventuality),⁸⁰ the case fails to be established, and may be dismissed.⁸¹ In practice, although some parents challenge the grounds for the care application in an ‘establishment hearing’, it is more common for the issue of the child being in need of care and protection to be consented to.⁸²

The case then proceeds to the ‘disposition’ (or ‘placement’ phrase). It is at this stage the question of realistic possibility of restoration is determined.⁸³ This acts as the third threshold

⁷⁴ Children’s Court of New South Wales, *Practice Note 5: Case Management in Care Proceedings* (as amended, June 2017) 15 (*Practice Note 5*).

⁷⁵ *Ibid* 8.

⁷⁶ *Practice Note 5* (n 74) 8.

⁷⁷ *Ibid* 8–9.

⁷⁸ Judicial Commission of NSW, *Local Court Bench Book* (updated December 2025) 270.

⁷⁹ In practice, such interim arrangements often persist for extensive periods of, eg, 12 to 24 months, and longer: see Chapter 3, part B, section (iii) on data from the sample of judgments, and Chapter 4, part B, section (i) ‘Timeframes’.

⁸⁰ General Purpose Standing Committee No. 2, Legislative Council, Parliament of New South Wales, *Child Protection* (Report, March 2017) 71–3; Robert McLachlan, ‘Establishment in Care Proceedings’ *Children’s Law News*, November 2007, [27]; Nicola Ross, Wendy Foote and Kate Davies, ‘Family Inclusion in Child Protection: Law, Courts and Balancing Risks’ (2004) 49(3) *Alternative Law Journal* 198, 199.

⁸¹ *The Act* (n 7) s 72(2). However, the ‘Care Tree’ in Judicial Commission of New South Wales, *Children’s Court of New South Wales Resource Handbook* (2nd ed, 2023, updated November 2025) notes that, pending a decision to dismiss the matter due to insufficient evidence of grounds for establishment, the Court may adjourn the matter to give the Department further opportunity to file further evidence in support of the application: at 76, [2–2240] (*Children’s Court Resource Handbook*).

⁸² Megan Davis, Independent Review of Aboriginal and Torres Strait Islander Children in Out-of-Home Care in New South Wales, *Family Is Culture* (Review Report, 2019) 70 (*Family is Culture Report*); Simon Handebo, ‘Non Accidental Injury and the Children’s Court: Some Legal and Practical Observations’, *Children’s Law News*, July 2020, 12.

⁸³ *The Act* (n 7) s 83. See Chapter 1, part A for a brief description of the statutory components of the realistic possibility test, and Chapter 5, part D for a detailed analysis.

test,⁸⁴ following upon risk of significant harm and the child being in need of care and protection—which together limit the State’s ability to remove children from their families. Only if there is no realistic possibility of restoration is the child to be placed in long-term out-of-home care. Also key to resolution of the case is the hierarchy of options prescribed under the ‘permanent placement principles.’⁸⁵ In order of preference these are: restoration to the parent(s); guardianship to a relative or ‘other suitable person’; parental responsibility to a suitable person (such as a relative); adoption; and parental responsibility to the Minister.⁸⁶ In the case of an Aboriginal child the last two options are reversed in preference.⁸⁷

Prior to final orders being made, the Department presents to the Court a ‘Care Plan’, setting forth its proposals for the child’s placement and allocation of parental responsibility (and related details).⁸⁸ Final orders are further contingent on the Court’s acceptance of the Department’s ‘permanency plan’.⁸⁹ This conveys the reasons the Department does or does not believe restoration is a realistic possibility,⁹⁰ and should present a ‘reasonably clear picture’⁹¹ for meeting the child’s needs for long-term stability and security.⁹² If restoration is proposed, the permanency plan must also describe ‘minimum outcomes’ for the parents to achieve, and detail the services able to help facilitate restoration.⁹³ In practice, the care plan and permanency plan are integrated into the one document. For Aboriginal children a cultural plan is an additional requirement, providing for the maintenance of the child’s cultural identity and connection with Aboriginal family and community.⁹⁴

Cases in which the issue of restoration is in dispute are likely to be referred to a Dispute Resolution Conference, facilitated by a Children’s Registrar on a conciliation model.⁹⁵ Matters that settle, at conciliation or any other stage, go before the Magistrate for approval of the Care Plan and for formal determination that the parties’ proposed agreement complies with statutory requirements surrounding realistic possibility of restoration and permanency

⁸⁴ Realistic possibility of restoration was described by Judge Johnstone as ‘an important threshold construct’: *Department of Communities and Justice (DCJ) and Bloom* [2021] NSWChC 2, [158], [167].

⁸⁵ *The Act* (n 7) s 10A.

⁸⁶ *Ibid* s 10A(3).

⁸⁷ *Ibid* s 10A(3)(e).

⁸⁸ *Ibid* s 78.

⁸⁹ *Ibid* ss 83(2), (3), (6), (7).

⁹⁰ *Ibid* s 83(3A).

⁹¹ *Ibid* ss 78A(2A), 83(7A).

⁹² *Ibid* s 78A(1).

⁹³ *Ibid* s 84.

⁹⁴ *Ibid* ss 78(2A), 83A(3)(b).

⁹⁵ *Ibid* s 65; Children’s Court of New South Wales, *Practice Note 3: Alternative Dispute Resolution Procedures in the Children’s Court* (as amended, November 2015); *Practice Note 5* (n 74) 10.

planning.⁹⁶ This is in accordance with the crucial role of the Court in scrutinising any proposal in which the ordinary responsibilities of a parent are altered by the power of the State.⁹⁷

Cases that do not resolve by agreement proceed to contested hearing. By the time a matter reaches hearing, a series of updating affidavits will normally have added to the evidence presented at the commencement of the case.⁹⁸ Other documentary evidence may include subpoenaed material⁹⁹ and a report of the Children's Court Clinic.¹⁰⁰ Written evidence is commonly supplemented at hearing by oral testimony and cross-examination.¹⁰¹ Witnesses giving oral evidence are, typically, the Departmental caseworker or casework manager, the parent(s), and potentially the Children's Court Clinician or other provider of expert opinion.¹⁰²

Final orders are couched in terms of who is to hold parental responsibility for the child.¹⁰³ Although it is possible for discrete aspects of parental responsibility (for example, in respect of contact, or cultural issues) to be shared or separately allocated between parties,¹⁰⁴ a positive finding of realistic possibility of restoration usually results in an order for full parental responsibility to the parent(s). However, the reinstatement of responsibility to the parents is, almost invariably, accompanied by their entering 'undertakings' to do or refrain from doing certain things,¹⁰⁵ and/or by casework 'supervision' of the child,¹⁰⁶ both for a limited period of time.¹⁰⁷

Appeals may be made to the District Court.¹⁰⁸ Appeals are treated as a 'hearing de novo' – in which fresh evidence may be admitted,¹⁰⁹ and new arguments mounted.

⁹⁶ *The Act* (n 7) s 83.

⁹⁷ See Chapter 4, part B, section (iii) for further discussion of the status of care and protection law as 'not a consent jurisdiction'.

⁹⁸ See *Practice Note 5* (n 74) 11–13.

⁹⁹ *Ibid* 12.

¹⁰⁰ *Ibid* 10–12.

¹⁰¹ *Practice Note 5* (n 74) 15–16; *Children's Court Resource Handbook* (n 81) 263–4.

¹⁰² See *Children's Court Resource Handbook* (n 81) 57.

¹⁰³ *The Act* (n 7) s 79.

¹⁰⁴ *Ibid* ss 79(1), (2).

¹⁰⁵ *Ibid* s 73.

¹⁰⁶ *Ibid* s 76.

¹⁰⁷ *Ibid* ss 73(3), (3A), 76(2)(b).

¹⁰⁸ *Ibid* s 91. The exception is an appeal from a decision of the President of the Children's Court, which—because the President is a Judge of the District Court—go to the Supreme Court: *Children's Court Act 1987* (NSW) s 22A.

¹⁰⁹ *The Act* (n 7) s 91(2).

A subsequent application may be made, with the Court's leave, to rescind or vary the care order.¹¹⁰ This requires satisfying the Court that there has been a significant change in relevant circumstances,¹¹¹ and that changing the order is appropriate in consideration of the child's needs, stability, relationships, and situation in care.¹¹² Parents who have lost or conceded the issue of restoration in the original case commonly place their hopes, whether realistically or otherwise, in the prospect of a future rescission application¹¹³ – colloquially known, as per the relevant section of the legislation, as 'a section 90'.

D. The Evolution of the 'Realistic Possibility of Restoration' test

1987: The current Act replaced the relatively short-lived *Children (Care and Protection) Act 1987*. The 1987 Act, in turn, overhauled the (by then) outdated regime of the *Child Welfare Act 1939*,¹¹⁴ which bore echoes of the 19th century in blurring the lines between characterisations of children as neglected, uncontrollable and delinquent.¹¹⁵ The *Children (Care and Protection) Act* was part of a package of reforms separating child protection from the laws dealing with youth offending – the latter contained in the *Children (Criminal Proceedings Act) 1987*.¹¹⁶ The reforms did not, however, abandon the traditional practice of making a child a 'ward of the state'.

1998: A decade later, a major review of the 1987 Act found the concept of ward of the state to be misaligned with modern understandings of family and childhood – in its imposition of a label on the child, and its application of a rigid 'all or nothing' status to the role of parents in the child's life.¹¹⁷ The review recommended that new legislation adopt the terminology of

¹¹⁰ Ibid s 90.

¹¹¹ Ibid s 90(2).

¹¹² Ibid ss 90(2B), (2C), (6), (7).

¹¹³ See Frank Ainsworth and Patricia Hansen, 'Behind the Closed Door: A Guide and Parents' Comments on the Workings of the New South Wales Children's Court' (2013) 38(2) *Children Australia* 47, 51; Megan Davis, *Family is Culture Report* (n 82) 363–4; Patricia Hansen, 'Rescission or Variation of Children's Court Orders: A Study of Section 90 Applications in New South Wales' (2012) 37(2) *Children Australia* 69, 69.

¹¹⁴ Patrick Parkinson, Review Chairperson, Community Welfare Legislation Review, *Review of the Children (Care and Protection) Act 1987, Part A: The Government's Responsibility for the Care and Protection of Children and Young People – Recommendations for Law Reform* (Report, Legislation Review Unit, NSW Department of Community Services, December 1997) 6 ('Report: Review of the 1987 Act').

¹¹⁵ See Elizabeth Fernandez et al, *A Study of the Children's Court of New South Wales* (Research Report, UNSW, 2014) 8; John Seymour, *Children, Parents and the Courts: Legal Intervention in Family Life* (Federation Press, 2016) 20; Silink (n 6) 200.

¹¹⁶ Fernandez et al (n 115) 8.

¹¹⁷ Parkinson, *Report: Review of the 1987 Act* (n 114) 72; Patrick Parkinson, Review Chairperson, Community Welfare Legislation Review, *Review of the Children (Care and Protection) Act 1987, Discussion Paper 1: Law and Policy in Child Protection* (Legislation Review Unit, NSW Department of Community Services, October 1996) 80 ('Discussion Paper: Review of the 1987 Act').

‘parental responsibility’.¹¹⁸ Allocation of parental responsibility was to be flexibly adapted to the needs of the individual child,¹¹⁹ and presented to the Court in care plans.¹²⁰ Also proposed was formal planning for restoration to the parents where this is ‘realistic’.¹²¹ These recommendations were implemented when the current Act was enacted in 1998.¹²² The realistic possibility of restoration threshold was instated in section 83 of the Act, where it has remained since.

The reason for the choice of the specific wording ‘realistic possibility of restoration’, despite its singularity among Australian and other care jurisdictions, was not clearly elucidated in either the discussion paper or report for the above review. However, the rationale for legislating the concept was said to be the importance of certainty in the direction of case planning for each child, and the avoidance of ‘welfare drift’ whereby children are subjected to insecure care arrangements.¹²³

2001: The original iteration of ‘realistic possibility of restoration’ in the Act cannot properly be described as a ‘test’, as it contained no criteria for assessing either its realistic nature or its status as a ‘possibility’. Rather its existence was expressed as a precursor triggering a requirement for the Department to submit to Court a ‘restoration plan’.¹²⁴ This position altered with the ‘permanency planning’ amendments to the Act in 2001, which substituted ‘permanency plan’ for ‘restoration plan’, and introduced the current requirement that assessment of realistic possibility of restoration have regard to (a) the circumstances of the child, and (b) evidence of the likelihood of the parents satisfactorily addressing the issues that led to the child’s removal.¹²⁵ The emphasis on the notion of permanency (a child’s long-term security in a stable placement)¹²⁶ reflected a policy-political notion, at that time, that the

¹¹⁸ Parkinson, *Report: Review of the 1987 Act* (n 114) 72, 89–92, recommendations 4.21, 4.22.

¹¹⁹ Ibid 84, recommendation 4.15.

¹²⁰ Ibid 87–8, recommendation 4.20.

¹²¹ Ibid 94–5, recommendation 4.25.

¹²² New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 November 1998 (Mrs Lo Po, Minister for Community Services, 2nd Reading Speech, Children and Young Persons (Care and Protection) Bill 1998, 9758–67); Patrick Parkinson, ‘Child Protection Law Reforms in NSW’ (1999) 13 *Australian Journal of Family Law* 1, 6–7.

¹²³ Parkinson, *Discussion Paper: Review of the 1987 Act* (n 117) 97; Parkinson, *Report: Review of the 1987 Act* (n 114) 94; *Wood Inquiry* (n 20) 290.

¹²⁴ *Children and Young Persons (Care and Protection) Act 1998* (NSW), as enacted, s 83.

¹²⁵ *Children and Young Persons (Care and Protection) Amendment (Permanency Planning) Act 2001* (NSW), Schedule 1, [10], substituting new version of s 83.

¹²⁶ Ibid [7], inserting new section 78A.

pendulum of child protection had swung too far in favour of restoration¹²⁷ – as emphatically indicated in parliamentary debate by the Minister of the day:

I am aware of numerous cases in which birth parents, after many years without any contact, have decided that they want to reclaim their children—as if they are lost property—and the courts have actually decided to return the children to virtual strangers ... When children have been abused or neglected, then their rights must be considered ahead of those of their parents. After all, we are talking about child protection legislation here, not parent protection legislation... There has to be a point, in some cases, when enough is enough and we need to more actively protect children from incapable parents. We have to draw the line somewhere. Every time we give the parents another chance we are risking the future development of the child. Childhood is finite. Early years are precious, and we owe it to the children not to squander it by giving parents too many chances to get their act together.¹²⁸

2014: The next amendment to section 83 was part of the ‘Safe Home for Life’ reforms in 2014, which sought to further enhance children’s stability while simultaneously reducing reliance on permanent out-of-home care. The amendment emphasised a perceived need for ‘timely’¹²⁹ placement arrangements by prescribing time-frames for the Court to reach its decision on realistic possibility of restoration, being within six months for children under two years old, and 12 months for children from age two.¹³⁰ These time periods are subject to the Court’s discretion, having regard to the circumstances and the child’s best interests.¹³¹ The same package introduced the hierarchy of placement options named the ‘permanent placement principles’.¹³² It also created the new option of ‘guardianship order’ for children in long-term kinship and other stable care placements, and aimed to promote adoption as a preferable option to long-term parental responsibility of the Minister.¹³³

¹²⁷ Hansen (n 113) 70; Patrick Parkinson, ‘Child Protection, Permanency Planning and Children’s Right to Family Life’ (2003) 17 *International Journal of Law, Policy and the Family* 147, 153–4, 155–6, 162–3.

¹²⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 June 2000, 7327 (Mrs Lo Po, Minister for Community Services, 2nd Reading Speech, Children and Young Persons (Care and Protection) Amendment (Permanency Planning) Bill 2000) 7328). The Bill subject of the quoted 2nd reading speech was subsequently amended in response to controversy over the intention to prioritise early adoption as a placement option. This proposal waited another 14 years until the ‘Safe Home for Life’ package of amendments established a statutory hierarchy for permanent placement in which adoption is prioritised above allocation of parental responsibility to the Minister (*The Act* s10A). The other key proposals in the Minister’s speech remained largely unchanged in the second version of the Bill (the Children and Young Persons (Care and Protection) Amendment (Permanency Planning) Bill 2001 (No 2)), ultimately passed in 2001 and in force from early 2002.

¹²⁹ Family and Community Services, *A Safe Home for Life: Report on the outcomes of public consultations on the child protection legislative reforms discussion paper 2012* (NSW Government, November 2013) 28–9.

¹³⁰ *Children Protection Legislation Amendment Act 2014* (NSW), Schedule 1, [55].

¹³¹ *The Act* (n 7) s 83(5A).

¹³² *Children Protection Legislation Amendment Act 2014* (NSW), Schedule 1, [7].

¹³³ Explanatory Note, *Child Protection Legislation Amendment Bill 2013* (NSW); Lenny Roth, ‘Permanency planning and adoption of children in out-of-home care’ (Briefing Paper, NSW Parliamentary Research Service,

2018–19: Amendments in 2018, effective from February 2019, supplemented the phrase ‘realistic possibility of restoration’ with the words ‘within a reasonable period’.¹³⁴ ‘Reasonable period’ is defined as not exceeding 24 months.¹³⁵ Hence the Department and Court must assess whether there is a realistic possibility of the child being restored to the parents at a future time of up to two years from the date of hearing. This was a significant departure from the law as it stood prior to 2019, which applied a more onerous standard to parents by requiring the realistic possibility to be present as at the date of hearing itself. The restoration assessment now involves a *prediction* as to the parents’ likely progress within two years, thereby granting parents some additional leeway and breathing space in which to make change—albeit the forecast must be realistic and reasonable, and based on the evidence available at the time of the hearing.¹³⁶

This amendment was part of a renewed policy emphasis on reducing the number of children in out-of-home care by strengthening scope and support for family preservation and restoration.¹³⁷ The Department was now required to offer alternative dispute resolution to parents as a compulsory step prior to a decision to commence Court proceedings.¹³⁸ Other amended provisions were intended to further encourage and facilitate the making of orders other than long-term parental responsibility to the Minister—that is, restoration, guardianship or adoption—where suitable.¹³⁹ The introduction of these reforms in parliament was couched in language presenting a firm contrast to the stern sentiments of the former Minister 18 years prior.¹⁴⁰ The policy pendulum had apparently swung once more—with the government arguing that the existing ‘default position’ of long-term parental responsibility to the Minister had detracted from ‘restoration and other forms of permanency’.¹⁴¹ The emphasis was now on removing ‘legislative barriers to earlier restoration of children to their parents’,¹⁴²

2013); New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 March 2014, 27886, 2nd reading debates, Child Protection Legislation Amendment Bill 2013.

¹³⁴ *Children and Young Persons (Care and Protection) Amendment Act 2018* (NSW), Schedule 1, [23], [24], [25].

¹³⁵ *The Act* (n 7) s 83(8A).

¹³⁶ For analysis of the implementation of the ‘reasonable period’ amendment, see Chapter 5, part D, section (ii).

¹³⁷ New South Wales, *Parliamentary Debates*, Legislative Council, 24 October 2018, 53 (Scott Farlow, Second Reading Speech, Children and Young Persons (Care and Protection) Amendment Bill 2018, 53–5) (*‘Parliamentary Debates*, Legislative Council, 24 October 2018’). See also General Purpose Standing Committee No. 2, Legislative Council, Parliament of New South Wales, *Child Protection* (Report, March 2017) 178–9.

¹³⁸ *Ibid* 54; *Children and Young Persons (Care and Protection) Amendment Act 2018* (NSW), Schedule 1, [6], [12].

¹³⁹ *Parliamentary Debates*, Legislative Council, 24 October 2018 (n 137) 54, 55, 57; Explanatory Note, Children and Young Persons (Care and Protection) Amendment Bill 2018 (NSW).

¹⁴⁰ See above n 128.

¹⁴¹ *Parliamentary Debates*, Legislative Council, 24 October 2018 (n 137) 54.

¹⁴² *Ibid*.

supporting parents to ‘make and sustain positive changes’,¹⁴³ and ‘empower[ing]’ families to make their own decisions.¹⁴⁴

2022–23: The most recent¹⁴⁵ changes to section 83 were enacted during 2022 in the wake of the landmark *Family is Culture: Independent Review of Aboriginal Children and Young People in Out-of-Home Care*.¹⁴⁶ The Review analysed the Department’s case files for all Aboriginal children who entered care between mid-2015 and mid-2016.¹⁴⁷ Its goals were to identify reasons for the high numbers of Aboriginal children in out-of-home care, and recommend strategies to tackle this crisis.¹⁴⁸ A core thematic finding of the review was the phenomenon of ‘ritualism’,¹⁴⁹ by which practices in child protection casework are consumed by risk-averse, rigid adherence to compliance with superficial, box-ticking obligations. It was argued that this institutional culture impedes the true engagement and partnership with Aboriginal families and communities needed to work constructively to prevent child removal and to restore children home.¹⁵⁰ Another core finding was a low rate of restorations, with ‘the majority of Aboriginal children who are removed never return[ing] home’¹⁵¹ – thus revealing a glaring ‘gap’ between the formal prioritisation of restoration in law and policy, and its actual implementation.¹⁵² The review emphasised the harms caused to children by separation from parents, siblings, kin and culture,¹⁵³ and within the out-of-home care system itself.¹⁵⁴ For parents, practical barriers to restoration included unrealistic or unclear requirements,¹⁵⁵ insufficient help to make change,¹⁵⁶ and confusion about legal process.¹⁵⁷ The review made 125 recommendations for reform. Recommendations specific to the statutory framework for restoration sought greater scrutiny of the Department’s position in asserting ‘no realistic possibility of restoration’,¹⁵⁸ and

¹⁴³ Ibid 53.

¹⁴⁴ Ibid 54.

¹⁴⁵ As at the time of completing this thesis in early 2026.

¹⁴⁶ Davis, *Family is Culture Report* (n 82).

¹⁴⁷ Ibid, Executive Summary.

¹⁴⁸ Ibid, Terms of Reference.

¹⁴⁹ Ibid, Chairperson’s Foreword XIII–XIV, XV, 25.

¹⁵⁰ Ibid, Chairperson’s Foreword XIII–XIV, 267–73, 308, 312–14.

¹⁵¹ Ibid 344. For instance, the care plans for the review’s cohort of children identified restoration as a realistic possibility in just 16% of cases: at 346. See also BJ Newton et al, ‘Restoration from Out-of-Home Care for Aboriginal Children: Evidence from the Pathways of Care Longitudinal Study and Experiences of Parents and Children’ (2024) 149 *Child Abuse & Neglect* 106058, 1–14: 1, 5, 10, 12.

¹⁵² Davis, *Family is Culture Report* (n 82) 344.

¹⁵³ Ibid 320–42.

¹⁵⁴ Ibid 226–45.

¹⁵⁵ Ibid, Chairperson’s Foreword XVI, 347–9, 353, 355–60, 369

¹⁵⁶ Ibid 348–9, 352–5, 369, 405,

¹⁵⁷ Ibid 355–7, 365–7.

¹⁵⁸ Ibid 361, recommendation 112.

expanded, stronger measures to ensure the availability of services and strategies to avoid removal and facilitate restoration.¹⁵⁹

Taking effect in November 2023, the ‘Family is Culture’ amendments¹⁶⁰ included an obligation on the Department to make ‘active efforts’ – that is, efforts to prevent children entering care, restore children who have been removed, and, if restoration is not feasible, to place children with their kin or community.¹⁶¹ Evidence of active efforts is to accompany a care application (other than an emergency care and protection application),¹⁶² and again at the permanency planning stage if the Department is arguing no realistic possibility of restoration.¹⁶³ Modelled on equivalent laws for Indigenous families in the child protection system in the USA,¹⁶⁴ active efforts should be timely, practicable, thorough and purposeful,¹⁶⁵ culturally appropriate,¹⁶⁶ and developed in partnership with family and community.¹⁶⁷ Relevant steps include connecting with the child’s extended family,¹⁶⁸ facilitating access to support services and resources,¹⁶⁹ and the use of alternative dispute resolution¹⁷⁰ or other direct alternatives to litigation.¹⁷¹

The reforms embedded the Aboriginal and Torres Strait Islander Children and Young Persons Principle into the Act,¹⁷² requiring that decisions concerning Aboriginal children have regard to the elements of:

- *prevention* (of separation from family, kin and community);
- *partnership* (with Aboriginal communities);

¹⁵⁹ Ibid 361, 363, 364–5, recommendations 115, 116, 117.

¹⁶⁰ *Children and Young Persons (Care and Protection) Amendment (Family is Culture) Act 2022* (NSW).

¹⁶¹ Ibid, schedule 1, [2], [8], [12], [13].

¹⁶² *The Act* (n 7) s 63.

¹⁶³ Ibid ss 83(3A)(b), (5B)(b).

¹⁶⁴ Davis, *Family is Culture Report* (n 82) 159–60; New South Wales, *Parliamentary Debates*, Legislative Council, 13 October 2022, 12 (Natasha MacLaren-Jones, Second Reading Speech, Children and Young Persons (Care and Protection) Amendment (Family is Culture) Bill 2022, 13–14) (*‘Parliamentary Debates*, Legislative Council, 13 October 2022’).

¹⁶⁵ *The Act* (n 7) ss 9A(3)(a)–(b).

¹⁶⁶ Ibid s 9A(3)(e).

¹⁶⁷ Ibid s 9A(3)(d).

¹⁶⁸ Ibid s 9A(4)(c).

¹⁶⁹ Ibid s 9A(4)(a).

¹⁷⁰ Ibid s 9A(4)(d)(iv).

¹⁷¹ Ibid ss 9A(4)(d)(i)–(iii). The Act provides for several legal instruments as alternatives to a care application: parent responsibility contracts (s 38A), parenting capacity orders (ss 91A–F), temporary care arrangements (s 151), and a negotiated care plan registered with the Court (s 38).

¹⁷² Ibid s 12A. The Principle was adopted (*Parliamentary Debates*, Legislative Council, 13 October 2022, 14) from its establishment at a national level by the Aboriginal peak body SNAICC – National Voice for our Children: see <<https://www.snaicc.org.au/our-work/child-and-family-wellbeing/child-placement-principle/>>.

- *placement* (in accordance with the order of priority in the Aboriginal child placement principles);¹⁷³
- *participation* (of parents and family members); and
- the child's right to *connection* with their family, community, culture and country.

Cultural plans, previously established as a matter of policy but without legislative authority,¹⁷⁴ became a mandated component of care plans.¹⁷⁵

E. Recent Policy Developments

Child protection is an area of law particularly prone to cyclical and reactive shifts in the policy-political climate, alternating between a focus on family preservation and a more risk-averse predilection for removal of children into out-of-home care.¹⁷⁶ Of course, this is not in practice a neatly polarised pendulum; rather the differing goals and perspectives sit along a continuum. Every era since the inception of the *Children and Young Persons (Care and Protection) Act 1998* has seen policy-makers espouse the mantra of commitment to early intervention and family support, while also emphasising the importance of secure, stable care arrangements for children who cannot live with their parents. However, within these broad parameters, the phenomenon of swings and roundabouts is undoubtedly evident. Participants in this study described the pattern:

I've been here long enough that I've seen we've come full circle. When I first did this, it was all about short-term orders and trying to get kids back. What happened was that all these orders would lapse... The parents were not coming to the table. So, then we went to parental responsibility to the Minister to 18. The onus was on the parent to bring it back. Now we've gone back to restoration. I'm all for restoration, but not restoration for the sake of it. (Registrar 2)

What I find frustrating is the politics of the day. To speak frankly, I've been here for 18 years, so I've argued permanency planning is long-term decision-making, care plans should be until 18, no section 90s, don't touch. And now we're switched. ...

¹⁷³ *The Act* (n 7) s 13.

¹⁷⁴ Davis, *Family is Culture Report* (n 82) 334.

¹⁷⁵ *The Act* (n 7) s 78(2A), s 83A(3)(b); *Parliamentary Debates*, Legislative Council, 13 October 2022, 14–15.

¹⁷⁶ Valerie Braithwaite, 'Institutional Oppression That Silences Child Protection Reform' (2021) 4 *International Journal on Child Maltreatment* 49, 50, 51; Judy Cashmore, 'What Can We Learn from the US Experience on Permanency Planning?' (2001) 15 *Australian Journal of Family Law* 215, 220, 222; Joshua Gupta-Kagan, 'Confronting Indeterminacy and Bias in Child Protection Law' (2022) 33 *Stanford Law and Policy Review* 217, 260; JM Masson et al, *Child Protection in Court: Outcomes for Children: Establishing Outcomes of Care Proceedings for Children Before and After Care Proceedings Reform* (Report, University of Bristol, 2019) 50–52, 252–3; Alana Thompson, 'Therapeutic Jurisprudence and the Children's Court: Creating a More Relational Approach to Protection and Care Proceedings' (PhD Thesis, University of Western Australia, 2011) 56.

With experience and time you do get used to that and you just pull out what you need in order to achieve the results. But it's really hard to support the casework team through that cycle. (Lawyer 4)

As suggested in these quotes, the current policy context sits towards the family preservation and restoration end of the spectrum. This has been the case since the reforms of 2018–19 explicitly sought to reduce reliance on permanent out-of-home care. Further impetus for reform flowed from the release in late 2019 of the *Family is Culture* report,¹⁷⁷ and the Government's formal commitment to implement its recommendations.¹⁷⁸ Its progress and accountability in doing so is closely scrutinised by a coalition of Aboriginal community-controlled NGOs and partners.¹⁷⁹

In addition to the statutory amendments taking effect in 2023,¹⁸⁰ various developments at a policy and practice level have aimed to reduce the over-representation of Aboriginal children in the child protection system, and to support restoration more generally. Some examples are listed below:

- *Initiatives of the Children's Court*

Since September 2023, the Children's Court at Dubbo has run a specialised, dedicated list for care matters concerning Aboriginal children. Known as 'Winha-nga-nha', this program adapts standard court process to be more culturally welcoming and to better engage with parents, families and community.¹⁸¹ Although not expressly stated in its official descriptions, it is apparent that Winha-nga-nha adopts some elements of a 'problem-solving court' model.¹⁸²

¹⁷⁷ Davis, *Family is Culture Report* (n 82).

¹⁷⁸ NSW Government, *NSW Government Response to the Family is Culture Review Report* (undated); Department of Communities and Justice, *Family is Culture: Progress Report* (NSW Government, 25 November 2020); *Parliamentary Debates*, Legislative Council, 13 October 2022 (n 164) 12–13, 17; Department of Communities and Justice, *Family is Culture: Progress Report* (NSW Government, February 2024) ('DCJ, *Family is Culture Progress Report 2024*').

¹⁷⁹ See, eg, AbSec and Aboriginal Legal Service (NSW/ACT) on behalf of the Family is Culture Advocacy Working Group, *Family is Culture: 'Five Years On' Community Report* (November 2024) ('*Family is Culture: 'Five Years On'*').

¹⁸⁰ See above nn 160–74 and accompanying text.

¹⁸¹ Children's Court 2023 *Annual Review* (n 10) 28–9; Children's Court of New South Wales, *Practice Note 18: Winha-nga-nha List* (September 2023).

¹⁸² See, eg, Lillian De Bortoli et al, *The Family Drug Treatment Court: An Evaluation Report* (Centre for Forensic Behavioural Science, Swinburne University of Technology, November 2018) 24, 26; Michael S King and CL Tatasciore, 'Promoting Healing in the Family: Taking a Therapeutic Jurisprudence Based Approach in Care and Protection Applications' [2007] (1) *eLaw Journal: Murdoch University Electronic Journal of Law* 78, 80–81; Rosemary Sheehan, 'Child Protection and the Role of the Children's Court' in Elizabeth Fernandez and Paul Delfabbro (eds), *Child Protection and the Care Continuum: Theoretical, Empirical and Practice Insights* (Taylor & Francis, 2020) 123, 126–7, 130, 131; Thompson (n 176) 91–4, 179–80. See also Chapter 10, part C, section (ii)(b) 'Alternative Court Models'.

From May 2024 the Court piloted the use of Dispute Resolution Conferences ('DRCs') at an earlier stage than has been the norm. Named 'Support Plan Conference[s]', these follow the first court mention for new care applications, and aim to encourage the constructive participation of the parents and all parties in reaching an agreed 'support plan' to address the child protection concerns.¹⁸³ Feedback from parents and the profession is said to have been positive.¹⁸⁴ Independent of this specific pilot, several interview participants for this thesis volunteered the value of early DRCs in engaging parents and avoiding entrenchment of polarised positions.¹⁸⁵

- *Initiatives of the Department*

A new legal unit, 'Waruuguma Barrmarrany', was formed in 2024 within the Department's Child Law team, to focus on options for family preservation and restoration in Aboriginal children's cases.¹⁸⁶ Since September 2023 all new cases involving potential removal of an Aboriginal child go before a specialist panel: 'Safeguarding Decision Making for Aboriginal Children', for consultation on culturally-informed solutions to enable the child to remain with parents or kin.¹⁸⁷

The Department's former suite of risk and restoration assessment tools, an actuarial 'structured decision-making' model¹⁸⁸ ('SDM'), was replaced in late 2024 with an entirely new (interim) system.¹⁸⁹ This was partly in response to concerns raised by Aboriginal people, and in research literature, that SDM assessments carry an inherent

¹⁸³ Children's Court of New South Wales, *Practice Note 19: Support Plan Conference Pilot* (April 2024); Judicial Officer 21; Legal Aid NSW, *Legal Aid News*, November/December 2024.

¹⁸⁴ Legal Aid NSW (n 183).

¹⁸⁵ Judicial Officer 13 (Local Court); Registrar 1; Lawyers 3, 6, 7, 9.

¹⁸⁶ See Chapter 9, part B, section (ii) Child's Cultural Identity.

¹⁸⁷ Department of Communities and Justice, *Family is Culture Progress Report 2024* (n 178) 20; Department of Communities and Justice, *Evidence to Action Note 14: Pathways of Care Longitudinal Study – Restoration from Out-of-Home Care for Aboriginal Children: The Experiences of Children and Parents* (undated) 22.

¹⁸⁸ Kate Alexander et al, 'Bringing Dignity to the Assessment of Safety for Children Who Live with Violence' (2022) 52 *British Journal of Social Work* 3578, 3580; Karen Broadley, 'Making the Decision to Remove a Child from Parental Care: Twelve Decision-Making Criteria' (2015) 41(2) *Children Australia* 90, 91; Lillian De Bortoli et al, 'Preliminary Evaluation of Structured Professional Judgment to Assess Removal in Child Protection Practice' (2015) 5 *Journal of Forensic Social Work* 29, 30–31.

¹⁸⁹ The SDM Risk Assessment (RA) and Risk Re-assessment (RRA) were retired and replaced in September 2024. The SDM Restoration Assessment Tool (RAT) was replaced in November 2024. These assessments were replaced with an *interim* approach to assessing risk which includes the Family Based Assessment (replaces the SDM Risk Assessment), the In Need of Care and Protection Assessment record (new) and Measuring Change Assessment (replacing Risk Re-assessment). The (interim) Restoration Assessment Approach replaces the SDM RAT. These interim tools are in place until a future approach to child protection assessment is designed in partnership with AbSec and Aboriginal Legal Services (NSW/ACT). (Information provided by the Department, February 2026).

potential for racial and cultural bias.¹⁹⁰ Despite the empirical basis of SDM being intended to counteract worker subjectivity,¹⁹¹ problems lie in the fallibility of individual caseworkers in their interpretation of information,¹⁹² and in the compounding effect of premises driving the predictive algorithms.¹⁹³ For example, a parent's historical experience of factors such as incarceration, or inter-generational involvement with child protection services, may produce a deemed risk 'score' not fairly reflecting the family's current circumstances and protective factors.¹⁹⁴ An assessment of the likelihood of maltreatment may be driven by a family's mere 'resemblance' to other families with child protection involvement.¹⁹⁵ Hence the new system removes weighting and scoring of data. The risk assessment approach is described as encouraging professional judgment, focusing on the experiences of the child, and embedding consideration of the family's 'strengths, protective factors and networks'.¹⁹⁶ The *restoration* assessment incorporates, among other factors, the child's experiences,¹⁹⁷ requirements for 'culturally reflective'¹⁹⁸ and 'culturally safe' casework practice,¹⁹⁹ and an emphasis on extended family, kin and community networks.²⁰⁰

- *Inter-sector initiatives*

In mid-2022 Legal Aid NSW, the Aboriginal Legal Service and the Department of Communities and Justice entered a partnership agreement²⁰¹ whereby parents are referred for independent legal advice at their first stage of involvement with the Department's caseworkers. This is intended as an important strategy in diverting

¹⁹⁰ See, eg, Davis, *Family is Culture Report* (n 82) 213–220; Paul H Harnett and Gerald Featherstone, 'The Role of Decision Making in the Over-Representation of Aboriginal and Torres Strait Islander Children in the Australian Child Protection System' (2020) 113 *Children and Youth Services Review* 105019, 1–7; Brian Q Jenkins and Clare Tilbury, 'An Evaluation of the Racial Equity of the Actuarial Family Risk Assessment Instrument Used in Queensland, Australia' (2024) *Children and Youth Services Review* 107891: 1–12; Jacyntha Krakouer, Wei Wu Tan and Arno Parolini, 'Who is Analysing What? The Opportunities, Risks and Implications of Using Predictive Risk Modelling with Indigenous Australians in Child Protection: A Scoping Review' (2021) 56 *Australian Journal of Social Issues* 173, 176–7, 183–5.

¹⁹¹ Alexander et al (n 188) 3580; Davis, *Family is Culture Report* (n 82) 214; De Bortoli et al (n 188) 30–31.

¹⁹² Davis, *Family is Culture Report* (n 82) 213.

¹⁹³ Harnett and Featherstone (n 190); Jenkins and Tilbury (n 190) 9; Krakouer, Tan and Parolini (n 190) 183–5.

¹⁹⁴ Harnett and Featherstone (n 190) 2.

¹⁹⁵ Jenkins and Tilbury (n 190) 9.

¹⁹⁶ Department of Communities and Justice, 'Changes to assessing risk in child protection: Frequently Asked Questions' (September 2024) 2–3.

¹⁹⁷ Department of Communities and Justice, *Interim Restoration Assessment Approach* (Practice Manual, November 2024) 25.

¹⁹⁸ *Ibid* 13–14.

¹⁹⁹ *Ibid* 12–19.

²⁰⁰ *Ibid* 28–9, 41–2.

²⁰¹ Aboriginal Legal Service NSW/ACT, Communities and Justice, and Legal Aid NSW, *Legal Assistance for Families: Partnership Agreement* ('LAFPA').

families from care proceedings – remedying the status quo by which legal advice was typically not accessed by parents until the case had escalated to the point of child removal.²⁰²

An Aboriginal community-led research project²⁰³ proposed the establishment of a dedicated, ‘large-scale’ program to facilitate restoration, reconnection and healing for Aboriginal children in long-term out-of-home care.²⁰⁴ The Minister for Families and Communities expressed support for this idea,²⁰⁵ and options for its realisation are being considered.²⁰⁶

An extra dimension to the current reform momentum arose from a series of research reports released during 2024, exposing failures in the out-of-home care system.²⁰⁷ Particular attention was drawn to the instability, isolation and neglect of children who, in the absence of an available foster or kinship placement, were living in poorly-staffed ‘emergency’ arrangements (‘alternative care arrangements’) in accommodation such as motel rooms and serviced apartments.²⁰⁸ The Government responded to the exposure of this issue by discontinuing the use of the alternative care arrangement model,²⁰⁹ reporting this goal to have been fully achieved by April 2025.²¹⁰ Declaring the need to assert ‘stewardship’²¹¹ in the context of complex working arrangements with NGOs, the Government also partially reversed the

²⁰² Katie Kelso and Bianca Duffy, *Early Legal Assistance in Child Protection* (Report, Legal Aid NSW, May 2023); Aboriginal Legal Service NSW/ACT, Communities and Justice, and Legal Aid NSW, *Legal Assistance for Families: Partnership Agreement*.

²⁰³ BJ Newton, ‘Bring Them Home, Keep Them Home: Reunifying Aboriginal Families’ (Research Project, UNSW Sydney): <<https://www.unsw.edu.au/newsroom/news/2022/10/bring-them-home--keep-them-home--reunifying-aboriginal-families>>.

²⁰⁴ Family is Culture Advocacy Working Group, *Family is Culture: ‘Five Years On’* (n 179) 30.

²⁰⁵ Ibid.

²⁰⁶ Information provided by the Department of Communities and Justice, February 2026. See also Portfolio Committee No. 5 – Justice and Communities, Legislative Council, Parliament of New South Wales, ‘Examination of proposed expenditure for the portfolio areas Family and Communities, and Disability and Inclusion’ (uncorrected transcript of Committee Proceedings, 19 August 2025) 62–3.

²⁰⁷ Advocate for Children and Young People, *Moving Cage to Cage: Final Report of the Special Inquiry into Children and Young People in Alternative Care Arrangements* (Office of the Advocate for Children and Young People, NSW Government, August 2024); Auditor-General for New South Wales (n 22); Department of Communities and Justice, *System Review* (n 22); Ombudsman New South Wales (n 22).

²⁰⁸ Advocate for Children and Young People (n 207) 15–17, 33–47; Auditor-General for New South Wales (n 22) 39–43; Ombudsman New South Wales (n 22) 73; Department of Communities and Justice, *System Review* (n 22) 30, 31, 44. See also Department of Communities and Justice, *Summary Report: Independent Review of Two Children in OOH* (June 2023).

²⁰⁹ Department of Communities and Justice, *Reform Plan: Transforming the Out-of-Home Care System in NSW* (February 2025) 8 (‘Reform Plan’).

²¹⁰ Premier of NSW, ‘Rebuilding services for young people in out-of-home care’ (Media Release, 24 June 2025).

²¹¹ Department of Communities and Justice, *System Review* (n 22) 2–3, 6, 7, 20, 38, 45–8; Department of Communities and Justice, *Reform Plan* (n 209) 3.

outsourcing policy in place for over a decade, commencing the transition of case management back to the Department for (some) non-Aboriginal children in NGO-managed placements.²¹²

Whether recent reforms are yet achieving their underlying aims is unclear, and contingent on what, specifically, is being measured. For instance, there has been a reduced number of restorations and other ‘exits’ from out-of-home care between approximately 2018 and 2024,²¹³ while the number of children *entering* care, and total numbers in care, have dropped.²¹⁴ Although the declining numbers in care apply to both Aboriginal and non-Aboriginal children, the extent of the change is greater for the non-Aboriginal cohort.²¹⁵ Aboriginal children remain proportionally less likely to be restored to parents than are non-Aboriginal children.²¹⁶

Children’s Court data show a steady decline in the number of new care order applications between 2020 and 2024.²¹⁷ However, in relation to rates of restoration, the interviews for this thesis did not reveal a sense of any marked change over the past five years or so. Rather, a prevalent view was that children are being left longer at home in situations of risk, and that by the time cases reach Court the severity of the issues often renders restoration unlikely.²¹⁸

²¹² Department of Communities and Justice, *Reform Plan* (n 209); Department of Communities and Justice, *System Review* (n 22) 88, recommendation 10. In contrast, it remains the policy position that case management for all Aboriginal children in out-of-home care should be transferred from non-Aboriginal organisations to Aboriginal community-controlled organisations: *System Review* (n 22) 108, 126.

²¹³ Auditor-General for New South Wales (n 22) 9, 44–5; Department of Communities and Justice, *System Review* (n 22) 15, 29; Ombudsman New South Wales (n 22) 5.

²¹⁴ Department of Communities and Justice, *System Review* (n 22) 15, 18.

²¹⁵ Ibid 29; Ombudsman New South Wales (n 22) 5.

²¹⁶ Auditor-General for New South Wales (n 22) 9, 44.

²¹⁷ Children’s Court of New South Wales, *2024 Annual Review* 13–14: ‘2020–2024 workload trends’.

²¹⁸ See Chapter 5, part B, section (iii). See also Legal Aid NSW, Submission to the Parliamentary Joint Committee on Children and Young People, *Inquiry into the Child Protection and Social Service System* (18 December 2020) 6.

Conclusions

This chapter has described the essential ‘nuts and bolts’ of the NSW care and protection legal system and its operation. It has also traced various shifts in the policy landscape surrounding and affecting the ‘realistic possibility of restoration’ test, establishing that the current policy era is one of an intended emphasis on family preservation and restoration.

Almost all the judgments studied for this thesis pre-date both the ‘Family is Culture’ amendments, and the specific new initiatives detailed in Part E. However, the findings of the study have relevance to such reforms, by uncovering the extent to which the changes align with the Court’s views on what is needed in order for parents to achieve a realistic possibility of restoration. Chapter 10, the final part of the thesis, revisits these issues. It considers the potential policy and reform implications of the Court’s comparative emphasis on dominant themes such as parental mental health, insight, engagement, and children’s emotional security, and the moderately or less influential factors of support networks, children’s wishes and children’s cultural identity.

CHAPTER THREE

Methodology

Chapter Overview

This is a socio-legal, mixed methods study, with a substantial doctrinal aspect. Its primary method is a qualitative analysis of a body of judgments of the Children's Court. In examining the decisions of a 'lower' court within the judicial hierarchy, concerning a critical social issue, the study sits at the junction of doctrinal and empirical research. This nexus is elaborated upon in Part A below.

The analysis of judgments is supplemented with a further empirical strand in the form of insights gained from interviews with judicial officers, registrars, caseworkers and lawyers. Table 1 sets out these data sources, the numbers in each sample, means of access and methods of analysis.

Thematic content analysis was applied to both the judgments and interviews, in order to identify and critique the factors influencing the Court's application of the statutory 'realistic possibility of restoration' test. While essentially a qualitative, inductive approach, a basic quantitative underlay was applied in counting and comparing the prevalence of particular themes in the Court's decisions.

Part A discusses the rationales for choices of method, and how these address the research questions outlined in chapter 1. Part B explains how the data were sourced, describes the key features of each data sample, and provides an overview of the ethical requirements for its use. Part C describes the approach to the analysis—including its challenges, and Part D outlines the limitations of the research.

Table 1: Summary of Data Sources

Data Source	Sample size	Mode of access	Qualitative analysis method	Quantitative analysis method
Published Decisions (judgments)	74	Online case databases	Thematic Content Analysis, combined with doctrinal reading	Counts of descriptive codes; comparison of the prevalence of individual themes
Unpublished Decisions (judgments)	32	Provided by individual magistrates	Thematic Content Analysis, combined with doctrinal reading	Counts of descriptive codes; comparison of the prevalence of individual themes
Total Decisions	106	Mode of recruitment	Qualitative analysis method	Quantitative analysis method
Judicial Officer Interviews	21	Invitation via email by President of Court	Thematic Content Analysis	Not applicable
Registrar Interviews	2	as above	as above	not applicable
Caseworker Interviews	13	Invitation via email circulated within the Department's District units	as above	not applicable
Lawyer Interviews	9	Invitation via email circulated within the Department's legal services division	as above	not applicable
Total Interviews	45			

A. Methodology: Context and Rationale

(i) Uniting the Doctrinal and Empirical

This thesis analyses court judgments deciding the question of ‘realistic possibility of restoration’, in order to discover the driving considerations and patterns of reasoning that determine whether children return home or are placed in long-term care. While other methods—such as surveys, focus groups, and observation—can uncover impressions, experiences, and anecdotal understandings of the legal process, a comprehensive reading of the judgments is unique in revealing the actual substance of the formal decisions being made. Thus the thesis has, in part, a doctrinal character. Doctrinal research is concerned with the internal content, logic and coherence of law, as revealed in its primary sources: case law and legislation.¹ It seeks to critique or ‘systematise’ a body of law by identifying its rules, principles and evolving development, including any deficiencies in clarity or consistency.² In this sense, the study is substantially doctrinal in character, with its goal of deciphering patterns of judicial reasoning in the interpretation and application of a particular statutory provision.

As discussed in chapter 1, there has been very little Australian research on case law in care and protection, and no prior study in New South Wales (‘NSW’) specific to decisions on restoration. The doctrinal angle of this thesis is fundamental to understanding how the legislative principles governing restoration decisions are implemented in practice. By examining the reasoning in the judgments, this method addresses research question 1: ‘According to the factors influencing judicial determinations on whether restoration is or is not realistic, what is needed from the Court’s perspective for restoration to be achievable?’

There are, simultaneously, empirical elements to a study of Children’s Court judgments. As law does not operate in a vacuum, an assumption of a clear dividing line between doctrinal and empirical legal research can be argued to be over-stated or illusory.³ Empirical research

¹ Terry Hutchinson, *Researching and Writing In Law* (Thomson Reuters, 4th ed, 2018) 51–2; Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17(1) *Deakin Law Review* 83, 83–4; Mathias M Siems, ‘Legal Originality’ (2008) 28(1) *Oxford Journal of Legal Studies* 147, 148–50 (using the term ‘micro-legal’ research).

² Theunis Roux, ‘Judging the Quality of Legal Research: a Qualified Response to the Demand for Greater Methodological Rigour’ (2014) 24(1) *Legal Education Review* 177, 178, 186; Siems (n 1) 149–50.

³ See Felicity Bell, ‘Empirical Research in Law’ (2016) 2 *Griffith Law Review* 262, 263–4; Roux (n 2) 179–181; Lisa Webley, ‘Qualitative Approaches to Empirical Legal Research’ in Peter Crane and Herbert M Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 926, 927.

is based on data derived from ‘direct, observable information about the world’,⁴ as distinct from theorising on the basis of abstract principles and hypothesis.⁵ Judges reason to some extent in the abstract—but in doing so are applying principles to a set of case facts concerning real people and events, hence engaging in a form of empirical observation. An intersection between legal doctrine and empiricism is strongly evident in the care jurisdiction, with its reliance on so-called ‘empirical facts’⁶ in the form of interdisciplinary evidence, in order to assess and predict the behaviour of family members, and the impact of that behaviour on a child’s welfare.⁷

Beyond this natural overlap between judicial method and the external world, the socio-legal nature of this project unites its doctrinal character with the empirical. Socio-legal research is concerned with ‘understanding law in its social context’.⁸ Whereas traditional doctrinal research presents a version of law as emanating from ‘privileged voices’⁹ (such as the appellate judiciary), a socio-legal perspective explores the practical application of law as it applies to ordinary citizens, or to the sub-group of citizens targeted by the particular law.¹⁰ It may also be concerned with the actions of workers within legal institutions, including the courts, in administering the law on an everyday basis.¹¹ This thesis has in common with other studies of the lower courts (magistrates’ courts) a concern with the minutiae of everyday functioning of an area of the justice system that largely escapes the notice afforded to appellate case law, or to legal fields more prominent in professional, academic and public consciousness.¹²

The thesis meets the empirical character of being grounded in some form of ‘experience’,¹³ being the intersection of legal principles with the lives of families affected by child protection

⁴ Keith Punch, *Introduction to Social Research: Quantitative and Qualitative Approaches* (Sage, 2014) 2–3.

⁵ Ibid 3.

⁶ See Kylie Burns and Terry Hutchinson, ‘The Impact of ‘Empirical Facts’ on Legal Scholarship and Legal Research Training’ (2009) 43(2) *The Law Teacher* 153. Hutchinson (n 1) refers to the use of this term in relation to claims drawn from evidence about ‘relationships in society as a whole’ and individual ‘human behaviour’: at 131.

⁷ See Chapter 4, part D, ‘Expert Evidence’.

⁸ Roux (n 2) 191.

⁹ Hutchinson (n 1) 51.

¹⁰ See Bell (n 3) 266, 267.

¹¹ D J Galligan, ‘Legal Theory and Empirical Research’ in Peter Crane and Herbert M Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 976, 982–3.

¹² Bell (n 3) 264; Galligan (n 11) 983; Teresa Hinton, *Rebalancing the Scales: Access to Justice for Parents in the Tasmanian Child Safety System* (Report, Anglicare Tasmania, 2020) 12; Rosemary Sheehan, *Magistrates’ Decision-Making in Child Protection Cases* (Ashgate, 2001) 1–2.

¹³ Bell (n 3) 263.

law,¹⁴ and within the context of the significant and entrenched socio-economic disadvantage of most of these families.¹⁵ The Court's reasoning in determining restoration observes these issues both implicitly and explicitly, and the stakeholder interviews draw closer attention to the social context of the decisions made. The 'experience' of the magistrates, in the very process of deciding cases, is also encompassed. Studies of judicial behaviour have suggested, for example, that judicial decision-making is substantially based on discretion, pragmatism or notions of 'reasonableness', independent of rigid legal doctrine.¹⁶ Although the thesis does not venture into theories of judicial behaviour¹⁷ or broader decision theory,¹⁸ the magistrates interviewed emphasised the part played by discretion and intuition in making difficult decisions about child welfare, risk, and standards of parenting.¹⁹

These various empirical and socio-legal elements inform research question 2: 'What do the Court's decisions on realistic possibility of restoration indicate about the societal or systemic problems perceived as impeding or prohibiting "good enough parenting"?'

The blurred line between legal doctrine and empiricism is further reflected in the contribution of the courts to the realisation of 'practical goals'²⁰ or 'policy objectives'.²¹ Contemporary principles of statutory interpretation require judicial reading of statutory provisions to align with the intent or 'purpose' of the legislators.²² The *Children and Young Persons (Care and Protection) Act 1998* (NSW) has several co-existing objects,²³ and perceptions of its main

¹⁴ Judith Masson, 'What are Care Proceedings Really Like?' (2012) 36(1) *Adoption and Fostering* 5, 5.

¹⁵ Australian studies noting the disadvantaged socio-economic demographics of families in care proceedings include Frank Ainsworth and Patricia Hansen, 'A Study of the Use of Section 106A of the Children and Young Persons (Care and Protection) Act 1998 in the New South Wales Children's Court' (2017) 42(3) *Children Australia* 198, 203; Lillian De Bortoli, Jan Coles and Mairead Dolan, 'Aboriginal and Torres Strait Islander Children in Child Protection: A Sample from the Victorian Children's Court' (2014) 15(2) *Journal of Social Work* 186, 187–88; David McConnell, Gwynnyth Llewellyn and Luisa Ferronato, *Parents with a Disability and the NSW Children's Court* (Research Report, University of Sydney, 2000) 14; Tamara Walsh and Heather Douglas, 'Lawyers, Advocacy and Child Protection' (2011) 35(2) *Melbourne Law Review* 621, 622–3.

¹⁶ See, eg, Sharyn Roach Anleu and Kathy Mack, 'Trial Courts and Adjudication' in Peter Crane and Herbert M Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 545, 565; Kylie Burns, 'Judges, "Common Sense" and Judicial Cognition' (2016) 25(3) *Griffith Law Review* 319; Galligan (n 11) 985; Sheehan (n 12) 2, 19–20, 49–50, 148, 158.

¹⁷ See, eg, Australian Law Reform Commission, *Judicial Impartiality: Cognitive and Social Biases in Judicial Decision-Making* (Background Paper JI6, April 2021); Sheehan (n 12) 29–58.

¹⁸ Sheehan (n 12) 38–45.

¹⁹ See Chapter 4, part A, sections (i) and (ii).

²⁰ Richard Abel, 'Law Books and Books About Law' (1973) 26 *Stanford Law Review* 175, 186.

²¹ Siems (n 1) 155.

²² *Interpretation Act 1987* (NSW) s 33; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573; *Project Blue Sky v Australian Broadcasting Authority* (1988) 194 CLR 355; *Wilson v Anderson* (2002) 213 CLR 401.

²³ *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 8(a)–(c) ('The Act').

purpose depend on differing viewpoints, priorities and ideologies.²⁴ However, there is general and broad agreement with the principles of protecting children from harm, upholding their best interests, and preserving the family unit where this is consistent with children's safety and interests.²⁵ It is beyond the capacity of this thesis to evaluate the system's overall effectiveness in upholding these purposes (an ambition quite regularly embarked upon by larger-scale projects and inquiries).²⁶ Nonetheless, in revealing the Court's views on pre-requisites and obstacles to restoration (research questions 1 and 2), the thesis contributes to the evidence-base informing social policy and law reform debates in child protection. Hence the concluding chapter reflects on the implications of the study's findings, in accordance with question 3: 'How might the societal and systemic problems reflected in the Court's decisions be better addressed by the statutory child protection system?'

(ii) Qualitative and Quantitative approaches

This thesis is predominantly a qualitative study. Qualitative methods identify the nature and presence of a feature or phenomenon (in this case, factors associated by the Court with the adequacy of a person's parenting capacity), whereas quantitative methods measure the degree to which the feature is present.²⁷ Doctrinal research, and the judicial method from which it derives, have been described as 'qualitative in part'.²⁸ They involve nuanced consideration of evidence, understandings of which are context-contingent, to reach conclusions not capable of simple calculation.²⁹ The process of a court trial has been described as not purely 'a collection of facts married together by the logic of rules', but rather 'a web of stories'.³⁰ This is manifestly so for care and protection cases—which are weaving together the multi-faceted threads of a family's story, within which competing interpretations must be weighed and reconciled. Rarely does a care judgment present a neatly contained declaration of 'the ratio' for the outcome on realistic possibility of restoration. Instead, a holistic reading of the

²⁴ See Chapter 2, part D 'Evolution of the "realistic possibility of restoration test"' and part E 'Recent Policy Developments'.

²⁵ Ibid.

²⁶ See, eg, Auditor-General for New South Wales, *Oversight of the Child Protection System* (Performance Audit Report, June 2024); Committee on Children and Young People, Parliament of New South Wales, *Child Protection and Social Services System* (Report, December 2022); Department of Communities and Justice, *System Review into Out-of-Home Care* (Final Report, October 2024); General Purpose Standing Committee No. 2, Legislative Council, Parliament of New South Wales, *Child Protection* (Report, March 2017); Ombudsman New South Wales, *Protecting Children at Risk: An Assessment of Whether the Department of Communities and Justice is Meeting its Core Responsibilities* (Report, July 2024).

²⁷ Webley (n 3) 927, citing J Kirk and M L Miller, *Reliability and Validity in Qualitative Research* (Sage, 1986) 9.

²⁸ Hutchinson (n 1) 51. See also Webley (n 3) 927.

²⁹ Hutchinson (n 1) 51–2.

³⁰ Justice Darren Jackson, 'The Role of Narrative in the Judicial Process' (2023) 15(1) *The Judicial Review* 99, 99–100.

judgment is required in order to decipher and extract multiple, inter-related reasons for the decision.

This thesis seeks to discover not just the ‘what’ of realistic possibility of restoration—in the sense of pinpointing the factors influencing the outcomes—but also the ‘how’ and ‘why’ of the significance of these factors. The study has a ‘basic quantitative’³¹ element:³² it counts the prevalence of particular factors in order to determine their relative levels of influence (see part C below). However, rather than being an end in itself, this numerical aspect serves as a foundation from which to analyse the reasons for some factors emerging as more important than others, and the implications of these differences.

(iii) Stakeholder Interviews

Supplementing the analysis of judgments are interviews with key professional stakeholders within the Court and the Department of Communities and Justice (‘the Department’). Mixed-method approaches to socio-legal studies often incorporate interviews.³³ This method is consistent with the focus in qualitative research on studying people and phenomena ‘in their natural settings’³⁴—which may include a workplace setting such as a court.³⁵ Interviews with magistrates and judges add a layer of richness to thematic analysis, unlikely to be found in formal judicial discourse. The content and tone of a formal judgment, whether written or confined to an oral delivery, is shaped and constrained by institutional context and convention. It is a ‘mediated’³⁶ summary, and ‘cannot capture the full complexity’³⁷ of the ways in which evidence, arguments and shifting positions unfolded during the hearing.³⁸ In

³¹ Penny Mackieson, Aron Shlonsky and Marie Connolly, ‘Increasing Rigor and Reducing Bias in Qualitative Research: A Document Analysis of Parliamentary Debates Using Applied Thematic Analysis’ (2019) 18(6) *Qualitative Social Work* 965, 970, 978.

³² The use of the term ‘quantitative’ is qualified by the non-representative nature of the sample of judgments accessed—see part D ‘Limitations’.

³³ Bell (n 3) 266; Judith Masson, ‘Understanding Care Proceedings: Learning from Empirical Research’ in Jens M Scherpe and Stephen Gilmore (eds), *Family Matters: Essays in Honour of John Eekelaar* (Intersentia, 2022) 933, 939; Rosemary Sheehan, ‘The Marginalisation of Children by the Legal Process’ (2003) 56(1) *Australian Social Work* 28, 30.

³⁴ Norman K Denzin and Yvonna S Lincoln, ‘Introduction: The Discipline and Practice of Qualitative Research’ in Denzin and Lincoln (eds), *Strategies of Qualitative Inquiry* (Sage, 2nd ed, 2003) 1, 5.

³⁵ Sharyn Roach Anleu and Kathy Mack, ‘Law and Sociology’ in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge, 2020) chapter 11, 1–14, 11.

³⁶ Briony Horsfall, ‘Children’s Participation Rights During Child Protection Hearings: Recognition, Legal Representation and Redistribution of Care in Victoria’s Children’s Court’ (PhD Thesis, Swinburne University of Technology, 2016) 101.

³⁷ Sofia Nord Levin et al, ‘Attachment Goes to Court in Sweden: Perception and Application of Attachment Concepts in Child Removal Court Decisions’ (2024) 26(6) *Attachment & Human Development* 521, 539.

³⁸ *Ibid.*

a busy lower court, pragmatic factors such as time and workload limit a magistrate's opportunity or inclination for detailed, expansive articulation of reasoning.³⁹ The interviews, conducted on a 'semi-structured' basis,⁴⁰ sought a more subjective and reflective account of how restoration decisions are made. The results were invaluable in gleaning nuanced insights into the judicial process and numerous surrounding features of the care and protection legal system.

Interviews were also held with caseworkers and lawyers from the Department. The Department plays a central, crucially influential role in the determination of 'realistic possibility of restoration' in every case. Under section 83 of the Act, the application of the realistic possibility test originates with the Department, informing the 'permanency plan' presented to the Court.⁴¹ The Court decides whether to accept or reject the permanency plan, in accordance with prescribed considerations including realistic possibility of restoration.⁴² Thus the Department's perspective on realistic possibility of restoration establishes the direction from which the Court determines the issue—albeit the Court brings independent scrutiny and may form a view that diverts from the Department's direction. Hence it was important for the thesis to consider how realistic possibility of restoration is assessed in a casework and administrative context.

(iv) Content Analysis

Content analysis, incorporating thematic analysis, was the method applied to the data in both the judgments and transcripts of interviews. Content analysis is a systematic process for arranging data into categories,⁴³ while the thematic component builds on this structure to more deeply interrogate and interpret the data.⁴⁴ Content analysis relies on a 'coding' process: extracts from the source text are attached to descriptive 'codes' (or 'labels'),⁴⁵ which act to group the excerpts in accordance with common and distinguishing features.⁴⁶ The codes can

³⁹ The impact of resource and time constraints, on capacity to produce a written and/or thorough judgment in the Children's Court or Local Court, were affirmed in interviews: Judicial Officers 1, 2, 3, 4, 5, 6, 7, 8, 9, 13, 22.

⁴⁰ See, eg, Webley (n 3) 937.

⁴¹ *The Act* (n 23) ss 83(1)–(3).

⁴² *Ibid* ss 83(5B), (6), (7).

⁴³ Mackieson, Shlonsky and Connolly (n 31) 969.

⁴⁴ *Ibid*. Note that other commentators regard the thematic analysis stage as being part of content analysis, rather than a distinct method: see Hutchinson (n 1) 159 describing 'content analysis'; Hutchinson and Duncan (n 1) 117–18 on 'qualitative content analysis'; and Webley (n 3) 941 on 'classical content analysis'.

⁴⁵ Punch (n 4) 173; Tim Rapley, 'Some Pragmatics of Data Analysis' in David Silverman (ed) *Qualitative Research: Issues of Theory, Method and Practice* (Sage, 3rd ed, 2011) 273, 277, 280.

⁴⁶ See, eg, Hutchinson (n 1) 159; Punch (n 4) 173–6; Webley (n 3) 941–2.

be pre-determined, or allowed to evolve entirely from the content of the text without preconception.⁴⁷ Details of the coding process used are described in Part C of this chapter.

It is sometimes argued that by fragmenting data into isolated snippets, coding de-contextualises the material and risks losing the subtleties or full picture of its meaning.⁴⁸ The combination of ‘content’ and ‘thematic’ analysis overcame this concern. The individually coded excerpts each provided only a snapshot or limited glimpse of their meaning, but in aggregate enabled a view of the full range of factors in the Court’s decisions. A thematic interpretation then required comparing and relating excerpts with one another, and—importantly—returning to the full narrative of the judgments in order to understand the identified themes in the context of the ‘story’ of the particular case.⁴⁹

A conventional doctrinal reading of a judgment has parallels with coding-based methods of analysis⁵⁰—both extract key themes from a text in order to interpret meaning. Hypothetically it would have been possible to achieve the aims of this thesis using just a traditional doctrinal approach. However, social science methodology provided a more efficient way of digesting the content of a large volume of judgments, and a highly structured means of identifying patterns and drawing comparisons across the body of decisions.⁵¹ It also encouraged a meticulous identification of *all* contributing elements (‘deconstructing’ the text),⁵² whereas a reading restricted to a lawyer’s lens may have skimmed over the detail in searching for an overarching reason for the case outcome. For example, in a case deciding in favour of restoration, rather than a generalised finding that the parents ‘took responsibility and demonstrated change’, content analysis facilitates specificity: what exactly did the parents *do* to persuade the Court that they had taken responsibility and made positive changes, and why were these *particular* steps relevant and persuasive?

⁴⁷ Punch (n 4) 174.

⁴⁸ Ibid 187; Richard Kirkham and Elizabeth A O’Loughlin, ‘A Content Analysis of Judicial Decision-Making’ in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge, 2020) chapter 24, 1–15: 11.

⁴⁹ A similar approach, combining a coding method with doctrinal reading of cases, is recommended in Kirkham and O’Loughlin (n 48) 11.

⁵⁰ Hutchinson and Duncan (n 1) 117.

⁵¹ Kirkham and O’Loughlin (n 48) 2–3.

⁵² Hutchinson and Duncan (n 1) 118.

B. The Data: Access, Features and Ethics

(i) Published Judgments

Published judgments in contested restoration cases were found by searching the databases *NSW Caselaw*⁵³ and *Westlaw Australia*, and by checking every back edition of the Children's Court publication *Children's Law News*. A total of 69 relevant judgments were located, spanning a period of 20 years. The earliest available judgment located on realistic possibility of restoration is from 2004. Each subsequent year through to the present time has seen one or several judgments published. The 20-year span of the study sample was completed with a judgment delivered in June 2024.⁵⁴

(ii) Unpublished Judgments

The original intention was to focus primarily on unpublished judgments, as representing the 'normal' character of the decisions being regularly made in care and protection hearings across the State. Akin to the practice in the Local Court,⁵⁵ most Children's Court decisions are delivered orally and 'ex tempore' (meaning at or immediately after the conclusion of the hearing),⁵⁶ and never documented in writing. This is due to resource constraints,⁵⁷ and in the interests of 'timely resolution' of cases.⁵⁸ All hearings are audio-recorded,⁵⁹ enabling written transcripts of oral judgments to be produced in certain circumstances,⁶⁰ typically for the hearing of an appeal. Some magistrates choose to prepare written reasons from which to read their judgment onto the record, when and if afforded the luxury of time to do so within a crowded court schedule.⁶¹ The fact that a judgment is written or transcribed does *not* equate to publication; ordinarily these documents remain strictly out of sight of any person not

⁵³ NSW Caselaw is a comprehensive collection of decisions of NSW Courts and Tribunals, including the Children's Court: <www.caselaw.nsw.gov.au>.

⁵⁴ A restoration judgment published more recently was not included in the coded data for issues of fact, although it is referenced in chapter 5 in relation to new developments on specific questions of law: *Department of Communities and Justice (DCJ) and Ivy* [2025] NSWChC 1 (see Chapter 5, part B, 'Risk Analysis').

⁵⁵ New South Wales Law Reform Commission, *Open Justice: Court and Tribunal Information – Access, Disclosure and Publication* (Report No 149, May 2022) 213; Donna Reece, 'Publication of Unreported Judgments and Decisions in New South Wales' (2021) 3 *Australian Law Librarian* 209, 209.

⁵⁶ See, eg, Judge Peter Johnstone, President of the Children's Court of NSW, Letter of Submission to New South Wales Law Reform Commission, *Open Justice Review: Court and Tribunal Information – Access, Disclosure and Publication* (9 March 2021) 8.

⁵⁷ *Ibid*; New South Wales Law Reform Commission (n 55) 213.

⁵⁸ Judge Johnstone (n 56).

⁵⁹ See <<https://courts.nsw.gov.au/resources/transcripts.html>>.

⁶⁰ *Ibid*.

⁶¹ Information volunteered in interviews by Judicial Officers 1, 3, 9, 10, 17.

directly involved in the case or working within the court system. The small group of judgments published online are chosen by the Court as being important in relation to a significant point of law, a contentious or systemic issue, or an enhanced understanding of procedure and ‘good practice’.⁶² Thus the published judgments, by their selective character, do not fully reflect the norm. The ‘skewed’ nature of the pool of published judgments is elaborated upon at Part D of this chapter.

Obtaining unpublished judgments for this thesis proved difficult. The initial plan was to seek access to transcripts of the delivery of reasons for decision, in contested restoration hearings, from a range of urban, regional and rural court locations. It was hoped to gather a sample of approximately 50 to 80 such judgments, in order to undertake a representative, robust study of the Court’s reasoning in its ‘everyday’, heretofore unscrutinised decisions. From the outset of the research in 2020 the Children’s Court was supportive of this aim in principle, with former President Judge Johnstone and, subsequently, current President Judge Skinner expressing approval for access to unpublished decisions. However, it quickly became apparent that the Court has no centralised record of which cases proceeded to contested hearing—whether on the question of restoration or any other issue.⁶³ Nor was there any readily attainable systematic method, within the Court’s databases and files, of identifying these hearings (a problem suggestive of inadequate resourcing of Children’s Court administrative and technology systems, despite the importance of its work). Many meetings and discussions were held with the Court’s personnel, endeavouring to find a workable solution. For example, I was willing to visit different locations of the Court to search through ‘bench diaries’⁶⁴ to pinpoint hearing dates, but this was regarded as impracticable. Cooperative efforts extended to the Department’s child protection lawyers and information technology experts; a seemingly promising plan was hatched at one stage to match the Department’s records with those of the Court in order to identify relevant hearings. There were several posited strategies for how to achieve this. Ultimately, despite the good intentions of everyone involved, none of these ideas came to fruition. The process of trying to find a way to systematically identify unpublished judgments took three years (from mid-2020 to mid-2023), and caused considerable delay to the progress of the thesis.

⁶² Judge Ellen Skinner, Children’s Court of NSW Publications Protocol, updated 29 April 2025. See also <<https://childrenscourt.nsw.gov.au/judgments-and-legislation.html>>; Children’s Court of New South Wales, 2023 *Annual Review* 47.

⁶³ A similar problem was encountered by a PhD researcher seeking access to unpublished reasons for decision in the Children’s Court of Victoria: Horsfall (n 36) 99–100.

⁶⁴ ‘Bench’ or ‘Hearing’ diaries contain listing information entered by the magistrate.

All was far from lost, however. Firstly, the number of published restoration judgments was greater than I had expected, providing a decent sample size for analysis. Then, in 2023, the Children’s Court President agreed to the provision of unpublished decisions by individual magistrates willing and volunteering to make these available. A request was circulated by the President to all the Children’s Magistrates, but the response was mainly from magistrates who participated in interviews—during which there was serendipitous opportunity to raise and explain the study’s interest in their unpublished decisions. Some of the magistrates already had written reasons for decision in their possession. Others advised specific dates on which they had given an oral judgment, on the basis of which permission was given to obtain a written transcript (and for which the Court generously waived the usual transcription fees). Additionally, the family law division of Legal Aid NSW came on board to identify recent restoration hearings in which they had acted: transcripts of two judgments were obtained via this route.

Twenty-nine unpublished judgments, of seven magistrates, were gathered by these means. The span of years is very similar to the published judgments, covering 2005 to 2023. Although far from a randomised cross-section of the Court’s decisions—for instance, 24 of the 29 were provided by just three magistrates—the very fact of their unpublished status makes a valuable contribution to the overall pool of judgments and its level of representativeness.

(iii) Combined Features of the Published and Unpublished Judgments

The total number of judgments in the study sample is 98. In six cases, the outcome differed between the parents: there was a realistic possibility of restoration to the mother but not to the father, or vice versa—effectively comprising two separate decisions within the one judgment.⁶⁵ In another two cases there was a realistic possibility of restoration for two or three children within the family, but not for one of their siblings.⁶⁶ These eight cases of differential internal outcomes bring the total number of individual *decisions* to 106. Seventy-four of the decisions are from published judgments, and 32 are unpublished. By sheer coincidence, the 74:32 ratio is replicated in the outcomes on realistic possibility of restoration—74 decisions found no realistic possibility of restoration, and 32 were in favour of restoration.

⁶⁵ *Alfred* (pseudonym, Children’s Court, 13 October 2020); *Hatfield children* (pseudonym, unpublished judgment, Children’s Court, April 2018); *JMS v Department of Family and Community Services & Ors* [2018] NSWDC 25; *Lim children* (pseudonym, unpublished judgment, Children’s Court, July 2022); *DFaCS (NSW) re Oscar* [2013] NSWChC 1; *VC v Secretary, Department of Communities and Justice & Ors (No. 2)* [2024] NSWDC 192.

⁶⁶ *David White v The Director-General Department of Human Services* [2011] NSWDC 106; *DFaCS re Lilly, Wade and Caleb* [2012] NSWChC 21.

Seventy-three of the judgments are from the Children’s Court, 21 are appeals heard in the District Court, and 4 are appeals in the Supreme Court.⁶⁷ Eighteen were ‘section 90’ applications to vary or rescind existing care orders,⁶⁸ while 80 were original cases.⁶⁹ These characteristics of the judgments are shown in Table 2.

Table 2: Characteristics of the 98 Judgments (106 Individual Decisions)

Feature	Category	Frequency (n)	Percentage (%)
Publication status*	Published	74	70%
	Unpublished	32	30%
Court level**	Children’s Court	73	75%
	District Court (appeal)	21	21%
	Supreme Court (appeal)	4	4%
Type of cases**	Original cases	80	82%
	s 90 applications	18	18%
Outcome*	No realistic possibility	74	70%
	Realistic possibility	32	30%
Judicial officers	Total judicial officers	35	-

Note: *% of 106 decisions **% of 98 judgments

The 98 judgments represent the decisions of 35 judicial officers. There is a level of uneven weighting in this respect, with a little under half of the sample attributable to just 5 individual judicial officers. That is, 16 published judgments are by former Children’s Court President Judge Johnstone, and 7 by his predecessor Magistrate Mitchell. One magistrate provided 11 unpublished judgments. Two magistrates are the author of 10 judgments each, being a combination of the published and unpublished in both instances. However, the other half of the sample is not similarly concentrated, with the remaining 30 judicial officers each the author of between one and three judgments.

⁶⁷ Appeals from decisions of the President of the Children’s Court are heard in the Supreme Court: *Children’s Court Act 1987* (NSW) s 22A.

⁶⁸ *The Act* (n 23) s 90; see also Chapter 2, part C, ‘The Legal Process’, and Chapter 5, part A, ‘The Legal Framework’.

⁶⁹ or appeals from original decisions.

The Children:

There were 203 children within the pool of 98 judgments. Their characteristics are shown in Table 3.

Table 3: Descriptive Characteristics of Children ($n = 203$) in the sample of 98 Judgments

Characteristic	%
Gender	54% boys; 46% girls
Aboriginal representation	19%
Mean (average) age	6 years
Age distribution	42% under 5 years 38% aged 5 – 9 years 15% aged 10 – 13 years 5% aged 14+ years
Interim placement	40% foster care 20% kinship care 9% placed with other parent* 5% residential care 5% tentative restoration ~ 20% not specified
Average time to final orders	25 months
Final outcomes	32% realistic possibility of restoration 68% no realistic possibility of restoration

* a parent who was not caring for or living with the child at the time of removal, and not implicated in the child protection concerns

The Adults:

There were 141 parents pursuing restoration. In 22% of the judgments one or both parents were identified as Aboriginal.

The ratio of mothers to fathers was 60:40. In 39% of cases, both parents sought restoration—usually together, but in a few instances in competition with one another. In 49% of cases the mother alone pursued restoration, and in 12% the father alone.

(iv) Interviews

(a) *Judicial Officers*

The judicial officer interviews were part of a combined initiative spanning four separate studies. Although unorthodox, this approach was effective in the circumstances – which were the simultaneous projects of my supervisor Professor Judy Cashmore and three of her PhD students, all researching aspects of legal proceedings in the NSW care jurisdiction. In addition to my study on realistic possibility of restoration, the projects encompassed the use of social science evidence; the voice of the child in Children’s Court Clinic assessments; and cultural plans for Aboriginal children and children from culturally diverse backgrounds. Rather than seeking to set up interviews with busy magistrates in separate rounds, it was logical and pragmatic to ask the questions for all four projects together.

With the approval of the President of the Children’s Court, the Chief Magistrate of the Local Court, and Chief Judge of the District Court, an invitation to participate in interviews was sent to judicial officers. The responding participants were 12 Children’s Court magistrates, 7 Local Court magistrates who regularly hear care matters, and two District Court judges. Two children’s registrars of the Children’s Court were also included – although not technically ‘judicial officers’, their role is intimately connected with the judicial conduct of proceedings.⁷⁰ Interviews took place from March 2023 to March 2024, primarily via video-link (on the ‘Microsoft Teams’ platform), and a couple in person.

The interviews were semi-structured.⁷¹ A list of questions was sent to the judicial officers in advance, but acted as a springboard for conversation rather than as a script to be rigidly adhered to. As the lead investigator for the combined projects, Judy Cashmore was present in every interview; it was not practicable for all three PhD researchers to directly participate on every occasion,⁷² so involvement was shared between us. I was present in 13 of the 23 interviews; and when I was absent, my pre-established questions on the topic of restoration were asked on my behalf.

⁷⁰ See Chapter 2, part B ‘The Institutions’.

⁷¹ See, eg, Webley (n 3) 937.

⁷² Aside from the difficulty of finding dates suitable to not only the judicial officer and all 4 researchers, we felt that it would be cumbersome or even overwhelming to confront each magistrate with 4 simultaneous interviewers.

(b) Departmental Caseworker and Lawyers

Interviews with staff of the Department of Communities and Justice were authorised under a formal Research Agreement between the Department and the University,⁷³ and facilitated with the assistance of the Department's Research Partnerships unit.⁷⁴ An invitation to participate was distributed internally within the Legal Services division, and by each of the Districts employing the Department's approximately 2000 caseworkers. The Research Partnerships unit collated the names, positions, location within the State, and contact details of respondents to the invitation. By this stage of the research (the Departmental interviews being the third and final strand of methodology) my ability to gather and analyse large volumes of data was becoming limited by the practicalities of what can realistically be achieved by one person in a PhD. Over 50 caseworkers expressed interest in participating. My intention had been to interview approximately 10 caseworkers and 8 lawyers; this transpired in practice to 13 caseworkers and 9 lawyers. This total number was very close to that of the judicial interviews (22 and 23 respectively), which made for a convenient balance in drawing thematic comparisons between the perspectives of the Court and the Department.⁷⁵

The pool of potential interviewees was narrowed by seeking a level of diversity: that is, across their location in the State (urban, outer-urban, regional and remote districts), their seniority (caseworkers and casework managers), and their role (for instance, several were working in targeted positions such as court liaison, pre-natal casework, Aboriginal cultural support, and restoration specialist). Where multiple people met one of these characteristics – for example, if more than one manager had responded from a particular district – selection of which person to contact was random. Although no advance information was provided on the cultural identity of the people expressing interest in the project, three participants (one casework manager and two lawyers) volunteered during the interview that they are Aboriginal.

Interviews took place between July and September 2024. As with the judicial officers, interviews were semi-structured, conducted via Microsoft Teams, and took around one hour each.

⁷³ See below n 88.

⁷⁴ Research Partnerships and Knowledge Translation, within Family and Community Services Insights, Analysis and Research ('FACSIAR').

⁷⁵ See Part C, section (ii) below regarding the relationship between sample sizes and 'saturation' of the data.

(v) Ethical Considerations

As published judgments are publicly available documents, readily accessible on the internet, human ethics approval was not needed for this data. Importantly, in a jurisdiction dealing with children and sensitive family matters, it is the practice of the Courts to anonymise the names of children in all care and protection judgments, as well as the names of adults and other details (such as geographical locations) that might enable the child to be identified.⁷⁶

Ethics approval for access to and use of *unpublished* judgments was obtained from the University of Sydney Human Ethics Committee.⁷⁷ This was subject to the documented permission of the Children's Court President,⁷⁸ and conditions for secure storage,⁷⁹ de-identification of children and other parties to the cases, and destruction of original identifiable copies (this was done immediately upon creating de-identified versions, usually within hours of receiving the judgments). All citations in the thesis for unpublished judgments use pseudonyms, and care was taken to avoid referring to specific details or combinations of detail that might enable a child or family to be recognised.

Additional ethics approval in relation to unpublished judgments was obtained from the Aboriginal Health and Medical Research Council of NSW ('AH&MRC').⁸⁰ This was in recognition that, although a study of the Court's approach to determining cases for all children generally, the topic has strong significance to Aboriginal people due to the high level of over-representation of Aboriginal children and families in the statutory child protection system.⁸¹ Consequently the project's findings are likely to contribute to a growing body of knowledge on the ways in which the child protection legal process affects Aboriginal families, the barriers it presents to restoration, and the extent to which (if at all) cultural factors, cultural identity and children's cultural needs are factored into the Court's decisions on restoration. It was therefore important that the research be conducted with respectful and inclusive attention to these issues.

⁷⁶ See the 'Judgments and Legislation' and 'Children's Law News' links on the Children's Court website at <<https://childrenscourt.nsw.gov.au/>>.

⁷⁷ Project No. 2021/839.

⁷⁸ Received in a letter from Judge Ellen Skinner, 4 April 2023.

⁷⁹ The unpublished judgments were securely stored electronically on the University of Sydney's *Research Data Store* and in compliance with a Research Data Management Plan. De-identified copies for thematic analysis were uploaded to the qualitative and mixed-methods analysis software program 'Dedoose', a system protected by encryption and password: see <www.dedoose.com/platform/data-privacy-and-security>.

⁸⁰ AH&MRC Project No. 2203/23.

⁸¹ See Chapter 1, part C, section (i).

The AH&MRC human ethics approval was subject to terms equivalent to the University's ethics approval in respect of secure storage, privacy and de-identification (see above), but additionally required adherence to the 'Key Principles for Ethical Research affecting Aboriginal people'.⁸² In summary, for the context of the project this involved:

- (a) *Aboriginal community oversight of the research.* This took the form of a volunteer Aboriginal Reference Group comprised of four Aboriginal women holding relevant professional and community knowledge, and State-wide representation from the family law division of the Aboriginal Legal Service NSW/ACT.
- (b) *Cultural sensitivity* was aided by the guidance of the Reference Group and the external supervision to the thesis by Dr BJ Newton, a Wiradjuri woman and specialist in Indigenous research methods and child protection policy. Approaches to sensitivity encompassed avoidance of sensationalist or condemnatory language in referring to case facts; avoidance of a 'deficits'-focused narrative; analysing the judgments for the presence of 'strengths' in the families' circumstances;⁸³ integrating Aboriginal-led research literature (including the influential 2019 'Family is Culture' Review Report);⁸⁴ and referring to the various projects and ideas conveyed by interview participants—some in quite passionate terms—recognising the distinctive conceptualisations of 'family' for Aboriginal people, and commitment to tackling the crisis of Aboriginal over-representation in out-of-home care.⁸⁵
- (c) *Dissemination of knowledge for the benefit of Aboriginal people.* During the course of the research I engaged with Aboriginal organisations, forums and researchers, both in my local region and at a State-wide level, by giving presentations on emerging findings, and in less formal dialogue. It is anticipated that the final thesis findings will be widely available via publication and presentations, and hence potentially able to feed into relevant policy and reform initiatives.

Ethics approval for the caseworker and lawyer interviews was granted by both the University's Human Ethics Committee⁸⁶ and the AH&MRC.⁸⁷ Conditions included provision

⁸² Aboriginal Health & Medical Research Council of NSW, *NSW Aboriginal Health Ethics Guidelines: Key Principles* (AH&MRC Ethics Unit, 2023).

⁸³ See part C, section (i) below in relation to coding for 'non-determinative strengths'.

⁸⁴ Megan Davis, Independent Review of Aboriginal and Torres Strait Islander Children in Out-of-Home Care in New South Wales, *Family Is Culture* (Review Report, 2019).

⁸⁵ See Chapter 2, part E; Chapter 5, part D, section (i); Chapter 8, section (iv); Chapter 9, part B, section (ii); Chapter 10, part C, section (i).

⁸⁶ Project No. 2023/202.

⁸⁷ See above n 80.

of information to participants emphasising the voluntary nature of their involvement; oral or written recording of their consent; secure storage of data; de-identification of transcripts uploaded to qualitative analysis software; destruction of original, identifiable recordings and transcripts; and maintaining anonymity and privacy of participants in the writing of the thesis. The interviews were further subject to the Aboriginal Ethics principles and approaches outlined above. Additional, extensive preparatory discussions took place with the Department, in accordance with its standard procedures for assessing and approving research proposals by external stakeholders. This eventually resulted in the execution of a Research Agreement between the Department and the University.⁸⁸

The interviews with judicial officers, being a combined project of four researchers, were the subject of a separate, joint ethics application and approval from the University of Sydney Human Ethics Committee.⁸⁹ The conditions for consent, security and privacy were very similar to those cited above in relation to the Departmental interviews.

C. Approach to Analysis

(i) Judgments

The coding process was essentially inductive—I did not embark on the research with a pre-conceived ‘hypothesis’ to be tested.⁹⁰ The research literature, together with my professional experience in the field, provided knowledge of typical issues in child protection cases, but this did not enable assumptions about what would actually emerge from close scrutiny of the judgments. However, while an open approach was used to identify specific themes, several overarching categories were pre-determined, in order to create an organised, coherent structure from which to start and arrange the analysis. These were:

- (a) **Issues of Law and Process**—judicial commentary on legal principles, rules and tests, as distinct from substantive findings of fact. This category extended to matters concerning the nature and functioning of the care and protection jurisdiction (such as approaches to the decision-making task, the role of legal representatives, the influence

⁸⁸ The Crown in the right of the State of New South Wales acting through the Department of Communities and Justice, and the University of Sydney, Research Agreement (Staff /Client Access), executed 5 June 2024.

⁸⁹ Project No. 2022/190.

⁹⁰ See Webley (n 3) 943; Punch (n 4) 66–7, 133–4; Dan Jerker B Svantesson, ‘The Hypocritical Hype About “Hypothesis”: Why Legal Research Needs to Shed This Relic’ (2014) 39(4) *Alternative Law Journal* 259.

- of expert evidence, accommodations made for self-represented litigants, and systemic issues in the roles and relationships of the Court, Department and other agencies);
- (b) **Reasons for the Removal of the Child**—judicial observation of the reasons the Department removed the child and commenced care proceedings;
 - (c) **Reasons for Decision in finding a Realistic Possibility of Restoration**—the findings of fact influencing judicial determinations in favour of restoration;
 - (d) **Reasons for Decision in finding No Realistic Possibility of Restoration**—the findings of fact influencing judicial determinations adverse to restoration;
 - (e) **Non-Determinative Strengths**—judicial reference to positive aspects of the parent's situation, behaviours, or relationship with the child, that were *not* considered sufficient to result in a realistic possibility of restoration, and hence were not a direct part of the reasons for decision.

Additionally, informed by a distillation of themes in the literature, the factors influencing the Court's decisions were arranged into three main conceptual categories:

- *Adult-focused*: aspects of the parent's circumstances (such as a mental health condition, drug use, housing instability) that, while deemed to pose a risk to the child, have an existence independent of the adult's status as a parent.
- *Parent-child relationship and parenting behaviours*: the conduct and capabilities of the adult within their role as a parent to the particular child, including maltreatment of the child. This category also encompassed the child's bond and interactions with the parent.
- *Child-focused*: factors specific to the individual child—for example, special health needs, their wishes, their relationships with siblings or carers.

Within these broad categories, the material was allowed to 'speak for itself' through the process of closely reading the text of the judgments and extracting the excerpts from which codes were created and defined. This was not a straightforward process, especially as the style and structure of judicial discourse varies considerably from judgment to judgment.⁹¹ The resulting complexity in identifying 'the reasons that led to the child's removal' is discussed in chapter 6. No less challenging was how to decipher the reasons for decision on realistic

⁹¹ Equivalent observations were made in regard to research based on judgments in Victoria and England respectively: Horsfall (n 36) 101, and Yuval Saar-Heiman, Anna Gupta and Griet Roets, 'Parenting Through the Lenses of Risk and Othering: Constructions of Parenting Cannabis Use in Child Protection Court Proceedings' (2023) 28 *Child and Family Social Work* 690, 692.

possibility of restoration. While most of the judgments provide a concluding heading such as 'resolution of the issues' or 'findings', some list the reasons for determination in an ordered, concise way and others are more discursive. The determination is sometimes unaccompanied by any immediate explanation of 'reasons', instead relying on the issues canvassed in the judgment as a whole. Some judicial officers adopt a strong personal presence, expressing their views in the first person and frequently throughout the document, while in other cases the decision is expressed almost entirely by reference to 'agreement with' the summarised submissions of advocates for parties to the case (usually the Independent Children's Lawyer or the Department), or the opinions of a clinical expert.

In addition to determining *where* 'the decision' sits within the judgment's structure, there can be complexity in interpreting *what* has informed the judicial officer's reasoning. The analysis required care, and an unavoidable degree of discretion,⁹² in identifying the portions of the narrative that appear to be determinative, and distinguishing these from content intended as a merely descriptive account of the facts, a re-count of evidence presented, a neutral summary of arguments presented by the parties, or observations made in passing that are not integral to the outcome. One key to this distinction is the presence of *evaluative* language, for instance: 'I am satisfied that', 'it is evident that', 'it appears to me', 'the Court is impressed with', and 'I agree'. In other instances it is the *context* in which a statement is made, within the flow of the discussion, that distinguishes a judicial opinion from a non-committal reference to the arguments of others. For example, rather than noting that a caseworker or clinical assessor perceived the parent as lacking insight, the independent placement within the narrative of a statement that 'the mother lacks insight' suggests that this is a conclusion on the part of the magistrate. More broadly, accounts of the evidence and opinion of witnesses were treated as part of the reasons for decision when these are emphasised by repetition, or in the absence of any clear contradiction or doubt conveyed by the judicial officer.

The resulting codes are, according to constructs in methodology literature, aptly defined as 'descriptive' rather than 'analytical'.⁹³ They thematically grouped the kinds of issues persuasive to the Court, but were not further condensed to higher levels of abstraction. Instead, the codes laid the groundwork from which to analyse the excerpts within the context

⁹² See Kirkham and O'Loughlin (n 48) 9, discussing an 'inevitable...measure of ambiguity' in coding judgments.

⁹³ Punch (n 4) refers to 'descriptive' or 'topical' codes as 'identifying and labelling what is in the data', distinguished from 'pattern' or 'analytic' codes which interpret the data at a 'conceptual or theoretical level': at 176, citing MB Miles and AM Huberman, *Qualitative Data Analysis* (Sage, 2nd ed, 1994) and L Richards, *Handling Qualitative Data: A Practical Guide* (Sage, 2005).

of each judgment as a whole—this second stage taking a more conventional doctrinal approach. This style of content analysis is distinguishable from the traditional iteration of ‘grounded theory’, with its insistence on interpreting the data at incremental degrees of abstraction until reaching an overarching theme or theory.⁹⁴ There was no utility in this project of finding a single, unifying theme encapsulating all lower-level themes. To the contrary, the aim was to identify the *range of* factors influencing decisions on realistic possibility of restoration, including any diverse and comparative elements, and to explore the reasons that particular factors dominate and others carry less weight. A more purist grounded theory approach would produce a distorted conception of the way that child protection decisions are made.

The quantitative element of the thesis involved counting the number of judgments in which a particular factor appeared, its relative incidence then measured as a percentage of the total number of judgments in the sample. In relation to the child’s initial removal, the calculation was from a total of 98 judgments (there being one set of circumstances of removal in each case), whereas the reasons for decision on realistic possibility of restoration were calculated as a proportion of the 106 individual decisions to emerge from the 98 judgments.⁹⁵

Each factor was counted once only per judgment, regardless of its frequency of reference in the document—the fact that domestic violence, for example, was a reason for finding ‘no realistic possibility of restoration’ is not altered by the number of times domestic violence is mentioned in the judgment. However, for qualitative purposes *every* reference to a particular factor was coded (if informing the Court’s reasoning), to enable analysis of its substantive and contextual nature within the case.

The overall weight placed by the Court on particular factors, as indicated by their prevalence relative to one another, informed my grouping of the reasons for decision as the ‘leading’, ‘substantially’, ‘moderately’ and ‘less’ influential factors.⁹⁶ These were not pre-arranged categories; rather they flowed from the way the numbers naturally clustered. The structure of the discussion in chapters 7, 8 and 9 is arranged around these groups.

⁹⁴ See, eg, Punch (n 4) 180, 182–3, 184–6, and Webley (n 3) 944, both discussing the Grounded Theory method originating in the work of Glaser and Strauss in the 1960s and 1970s.

⁹⁵ See part B, section (iii) above.

⁹⁶ Webley (n 3) describes ‘classical content analysis’ as situated ‘at the cusp of quantitative and qualitative analysis in...involv[ing] thematic categorisation or coding, as well as counting the frequency with which those themes or codes appear’: at 941.

(ii) Interviews

Written transcripts of the interviews were produced by checking and editing the imperfect versions auto-generated by Microsoft Teams. The (de-identified) transcripts were uploaded to the same qualitative analysis software used for the judgments.⁹⁷ The categories of ‘child-focused’, ‘adult-focused’ and ‘parent-child relationship’ were carried over from the coding of judgments, enabling thematic consistency in analysing the factors affecting realistic possibility of restoration and participant perspectives on these. A uniform ‘start-list’ of codes, and attention to ‘parallel’ findings across data sources, have been noted in methodology literature as aiding the reliability of research findings.⁹⁸ Other themes to emerge from the interviews were more diverse than those in the judgments, straddling an array of policy, law reform, societal, systems and practice issues; new codes were created accordingly.

The interviews variously reinforced, qualified or challenged the findings to emerge from the judgments, as well as adding new information. Sample sizes across each group of participants proved amply sufficient for ‘saturation’ of the data – alternatively characterised as ‘conceptual depth’⁹⁹ – in enabling both clarity and richness of evidence.¹⁰⁰ That is, distinctly recurring themes were apparent, able to be applied in direct response to the research questions;¹⁰¹ while the analysis also considered areas in which participant views conflicted with one another and with the judgments,¹⁰² and revealed ambiguities,¹⁰³ complexity and subtlety¹⁰⁴ in the functioning of child protection law. Rather than attempt to distil these comprehensive insights

⁹⁷ ‘Dedoose’ (see above n 79).

⁹⁸ Karen Jiggins Colorafi and Bronwynne Evans, ‘Qualitative Descriptive Methods in Health Science Research’ (2016) 9(4) *Health Environments Research & Design Journal* 16, 23.

⁹⁹ Virginia Braun and Victoria Clarke, ‘To Saturate or Not to Saturate? Questioning Data Saturation as a Useful Concept for Thematic Analysis and Sample-Size Rationales’ (2021) 13(2) *Qualitative Research in Sport, Exercise and Health* 201, 202, citing J Nelson, ‘Using Conceptual Depth Criteria: Addressing the Challenge of Reaching Saturation in Qualitative Research’ (2016) 17(5) *Qualitative Research* 554.

¹⁰⁰ In the context of this thesis I concur with the position of Braun and Clarke, *ibid*, that it is artificial and unhelpful in qualitative research to apply the notion of ‘data saturation’ as a numerical point at which no additional sources will reveal new themes, and that to the contrary continued gathering and analysis of data will continue to present potential for new insights. Instead, saturation can be conceived of as the point at which the research questions can be sufficiently answered through ‘adequate data to tell a rich, complex and multi-faceted story about patternings related to the phenomena of interest’: Braun and Clarke, *ibid* 211.

¹⁰¹ Braun and Clarke (n 99) 207, 211.

¹⁰² See Patricia I Fusch and Lawrence R Ness, ‘Are We There Yet? Data Saturation in Qualitative Research’ (2015) 20(9) *The Qualitative Report* 1408, 1411.

¹⁰³ Robin Whittlemore, Susan K Chase and Carol Lynn Mandle, ‘Validity in Qualitative Research’ (2001) 11(4) *Qualitative Health Research* 522, 530.

¹⁰⁴ *Ibid* 530.

into a stand-alone section of the thesis, interview perspectives have been integrated wherever relevant throughout the thesis.

In accordance with recommended strategies in methodological literature for ensuring credibility and authenticity in qualitative research, the analysis draws on comprehensive¹⁰⁵ and contextualised¹⁰⁶ descriptions of interview data, meticulously referenced, and highlighting diverse and contradictory evidence where applicable.¹⁰⁷ ‘Triangulation’¹⁰⁸ is applied in considering the implications of participants’ views in light of their respective roles (judicial officer, caseworker or lawyer) and as compared with the data sourced from the judgments. In consciousness of my status as a semi-insider (having professional background in the jurisdiction), I strove to maintain objectivity via curiosity and receptiveness to different perspectives;¹⁰⁹ thoroughness¹¹⁰ in documenting, coding and reporting interview data; and attention to detail throughout. The thesis explicitly acknowledges specific instances in which prior knowledge or experience shaped my expectations and reactions (such as surprise) to interview findings.¹¹¹

D. Limitations

It is important to acknowledge that the pool of *published* judgments is inherently a distorted representation of the overall body of cases heard by the Court in its care jurisdiction. The nature of the bias arises from, firstly, the fact that most cases resolve without a fully contested hearing.¹¹² In these, more common, ‘consent’ determinations the magistrate must still provide formal reasons for satisfaction that there is or is not a realistic possibility of restoration,¹¹³ but these rulings do not make their way to published format.¹¹⁴ Meanwhile, the trajectory of the

¹⁰⁵ Colorafi and Evans (n 98) 24; Whittlemore, Chase and Mandle (n 103) 532.

¹⁰⁶ Colorafi and Evans (n 98) 24.

¹⁰⁷ Colorafi and Evans (n 98) 24; Whittlemore, Chase and Mandle (n 103) 531.

¹⁰⁸ See, eg, Colorafi and Evans (n 98) 24; Denzin and Lincoln (n 34) 8; Laura Beth Nielson, ‘The Need for Multi-Method Approaches in Empirical Legal Research’ in Denzin and Lincoln (eds), *Strategies of Qualitative Inquiry* (Sage, 2nd ed, 2003) 39, 953–4.

¹⁰⁹ See Whittlemore, Chase and Mandle (n 103) 530.

¹¹⁰ Ibid 532.

¹¹¹ Colorafi and Evans (n 98) 23; Mackieson, Shlonsky and Connolly (n 31) 3; Whittlemore, Chase and Mandle (n 103) 330.

¹¹² This was confirmed in interviews by Judicial Officers 2, 6, 14, 16 and Registrar 2. See also Chapter 4, part B, section (iii) ‘Alternative Dispute Resolution and Negotiated Outcomes’.

¹¹³ See Chapter 2, part C ‘The Legal Process’.

¹¹⁴ There would be value in a study of the Court’s consent determinations, but this would come up against the same practical access problems I encountered in seeking to identify and locate relevant segments of the Court’s audio-recorded proceedings.

cases that *do* proceed to defended hearing are shaped by particular circumstances not necessarily present in other cases. As a matter of conjecture, some of the parents who manage the feat of reaching contested hearing are likely to be in a position of comparative stability and better resourced than other parents before the Court, to have a reasonably arguable case, and to be relatively untrammelled by barriers of ill-health, drug addiction, homelessness or imprisonment. At the other end of the spectrum are parents perceived as intransigently determined to fight the case against them at all costs, regardless of prospects of success.¹¹⁵

Secondly, the published judgments are distinctive in being *chosen* for publication, usually on the basis of particular legal significance, complexity or interest. This does not mean their facts are so unusual as to be exceptional, but they are likely to diverge in some instances from the common congregation of issues affecting most families in the statutory child protections system. One consequence is, almost certainly, a disproportionate representation of cases of severe physical abuse—particularly ‘non-accidental injury’ to babies and young children.¹¹⁶ Additionally, as certain judicial officers have been more inclined than others to publish,¹¹⁷ the sample is somewhat skewed in reflecting their own decision-making approach and style of judgment.

Despite these unavoidable limitations, I am confident that the published judgments are a sufficiently large sample to be *reasonably* reflective of the range of typical issues and outcomes in care and protection cases in NSW. The addition of 29 *unpublished* judgments comprising 32 decisions, provides an important element of balance to the overall data (despite the aforementioned compromise that these too are somewhat dominated by the decisions of particular magistrates).¹¹⁸ Although the judgments span 20 years, during which time there have been changes to the legislation and to the internal workings of the Children’s Court, the factual issues in the cases, and the Court’s reasoning in response to these, appear generally similar throughout the period of time—and hence remain relevant to the law’s current operation.

The reliability of the interview findings is subject to ‘self-selection’ bias,¹¹⁹ in that the participants chose to respond to a general invitation to their professional peer group—as

¹¹⁵ See Chapter 8, section (i) ‘Candour and Credibility’.

¹¹⁶ See Chapter 6, part C, section (i) ‘Physical Abuse’.

¹¹⁷ See above part B, section (iii).

¹¹⁸ Ibid.

¹¹⁹ Hutchinson (n 1) 141.

distinct from a more representative, randomised process of recruitment. This is of less concern in relation to the Children’s Court magistrates, as the number participating was a sizeable proportion of their total number.¹²⁰ The number of Local Court participants was slightly less representative,¹²¹ and their volunteering to participate in the research was likely indicative of a particularly keen interest, and/or extensive experience, in the care jurisdiction. Self-selection bias was undoubtedly most at play in the caseworker interviews, with the 13 participants a small group if measured relative to their 2000¹²² peers. It was notable that several of the caseworkers expressed, during their interview, a particular interest, commitment or passion regarding the issue of restoration, and one or two volunteered that this was why they wanted to participate in the research. However, a requisite degree of caution based on self-selection is counter-balanced by the value of the individual experiences, knowledge and insights of each participant,¹²³ contextualised as one strand of data in a mixed-methods study. While the interviews were not intended to produce ‘generalisable’ data,¹²⁴ many of the findings share common themes with existing Australian and international research in comparable settings, noted throughout the discussion when arising. This degree of resonance suggests the interview findings contain broad elements of potential ‘transferability’¹²⁵ to other care and protection jurisdictions.

Conclusion

This chapter has described and explained the methodology of the study as a socio-legal fusion of doctrinal and empirical approaches. The next six chapters present and analyse the resulting data. The analysis commences in chapter 4 in relation to the institutional and professional conventions and practices forming the backdrop to care and protection proceedings. Chapter 5 discusses the Court’s approaches to ‘issues of law’ (statutory and common law tests and principles), while chapters 6 through to 9 are concerned with the issues of fact that inform and shape the Court’s decisions on realistic possibility of restoration.

¹²⁰ There are 16 specialist Children’s Magistrates attached to the Children’s Court: <<https://childrenscourt.nsw.gov.au/about-the-court/court-structure.html>>. Of the 12 interviewed, 9 were in the role at the time of interview, one was about to embark on the role, one was retired but continues to be called upon as an acting Children’s Magistrate, and one had moved to a different court.

¹²¹ Seven Local Court magistrates were interviewed. The total number of Local Court magistrates regularly hearing care and protection matters is unknown (as per advice in informal communication from the Children’s Court on 13 January 2025), but estimated by a participant to be approximately 20 (Judicial Officer 20).

¹²² Department of Communities and Justice, Statistics: DCJ Caseworkers – Quarterly Data: <https://public.tableau.com/app/profile/dcj.statistics/viz/DCJCaseworkerDashboardPublic_>.

¹²³ See Virginia Braun and Victoria Clarke, *Thematic Analysis: A Practical Guide* (Sage, 2022) 142–6.

¹²⁴ Webley (n 3) 933–5.

¹²⁵ Colorafi and Evans (n 98) 24.

CHAPTER FOUR

Approaches to Litigation in the Care and Protection Jurisdiction

Chapter Overview

While the main aim of the thesis is to identify and critique the factors influencing judicial decisions on ‘realistic possibility of restoration’, these decisions are not reached in abstract isolation. The reasoning process occurs within the bounds of institutional conventions and practices—some of which are formal and dictated by the relevant law, while others derive from the more subtle and evolving elements of the working culture of the Children’s Court and its participants. Chapter 2 provided an overview of the New South Wales (‘NSW’) care and protection jurisdiction, including its legislation, policy developments over time, and the roles of the Court and other key institutions. This chapter elaborates on distinctive features of the jurisdiction, drawing on both the body of judgments and stakeholder interviews to explore the contextual parameters that guide, shape and constrain the ways in which the Court’s decisions are made.

Part A discusses the challenges facing magistrates hearing care matters, their expertise, and their approaches to balancing objective legal analysis with the inherently discretionary, ‘nebulous’ character of decisions in child protection. Part B turns to the interplay of procedural elements of the jurisdiction: time limits, a level of adversarialism, and the role of alternative dispute resolution. Part C discusses the cooperation and tensions accompanying the respective powers of the Court and the statutory authority, and Part D explores the influence of clinical parenting capacity assessments and other forms of expert evidence.

A. The Judicial Task in care and protection

... it's so nebulous, it's like nailing jelly to a wall, you know? And it's a wisdom jurisdiction. It's a wisdom jurisdiction. Yes. How wise are you? (Judicial Officer 2)

(i) Striving for Objectivity

It is noticeable, on even a cursory perusal of the judgments, that the NSW care and protection jurisdiction has a firmly established, clearly articulated body of legal principles, derived from both statutory provisions and the common law. This is often referred to in the judgments as 'the legal framework', providing a synopsis of the law in this field and proper approaches to its application. Most of the published judgments contain a discrete section that re-states the legal framework, although varying in detail from brief summaries of three or four paragraphs, to expositions of up to 16 pages. Aspects of the principles are discussed in secondary literature authored by judicial officers and other practitioners, most commonly in the form of conference papers and contributions to the *Children's Law News* bulletin.¹

In brief, the stated legal framework addresses: the paramount concern of the child's safety, welfare and wellbeing; the non-adversarial nature of proceedings; the 'unacceptable risk' test; the views of the child; cultural needs and other aspects of the child's circumstances and identity; self-determination and participation for Aboriginal children, families and communities; the stages of a case; the 'realistic possibility of restoration' test; permanency planning; options for care orders and allocation of parental responsibility. Chapter 5 contains a more detailed summary,² followed by analysis of the ways in which certain aspects of the framework (the paramountcy principle, risk assessment and components of the realistic possibility of restoration test) are applied in practice.

The reiteration of the framework within each judgment contributes to an impression of a dispassionately methodical approach to the judicial task. This position in NSW contrasts with a prevalent perception, in both Australian and overseas literature, that court decision-making in child protection is compromised by inadequate guidelines.³ Children's Court magistrates

¹ *Children's Law News* is internally produced by the Children's Court, and is described on the Court's website as 'a regular online publication to alert legal practitioners and other interested persons of important cases and papers considered to be relevant to the Children's Court jurisdiction'.

² See Chapter 5, part A.

³ Vered Ben-David, 'Study of Termination of Parental Rights: An Analysis of Israeli Court Decisions in Favor or Against Termination of Parental Rights' (2015) 18 *Journal of Family Social Work* 225, 226–7 ('Termination of Parental Rights'); Lynda Campbell et al, 'High Risk Infants in the Children's Court Process in Australia: Dilemmas and

in Australia have been described as working in relative isolation, with little opportunity to be informed by decisions made by their peers in equivalent cases.⁴ Depending on the particular State or Territory, concerns are expressed regarding inadequate judicial training and specialisation in the child protection field.⁵ Interestingly, these observations are made largely in relation to jurisdictions other than NSW. Indeed, a national study of Australia's Children's Courts commended NSW magistrates for having a high level of specialised skill and knowledge,⁶ and found the NSW care jurisdiction to be 'generally held in high regard'.⁷

This is not to say that NSW magistrates find care and protection law to be straightforward. Its difficult nature is occasionally expressly acknowledged within the judgments, with the Court's decisions described as, for example, 'far from easy',⁸ 'very troubling',⁹ and 'fraught with major difficulties'.¹⁰ Frank descriptions of the challenges of the jurisdiction emerged in interviews for this study. A relatively new Children's Court magistrate remarked 'it's a harder job than I thought it would be',¹¹ and another volunteered 'the whole thing's quite overwhelming...I would like people to understand that this is a very different role to the Local Court magistrate role. The people that do it are, in my view, special people'.¹² The care

Directions' (2003) 25(2) *Journal of Social Welfare and Family Law* 121, 130; Hilary Hannam, 'Child Protection Law and Practice in the Northern Territory and Implications for the Court' (2013) 22 *Journal of Judicial Administration* 146, 153; Teresa Hinton, *Rebalancing the Scales: Access to Justice for Parents in the Tasmanian Child Safety System* (Report, Anglicare Tasmania, 2020) 20; Briony Horsfall, 'Children's Participation Rights During Child Protection Hearings: Recognition, Legal Representation and Redistribution of Care in Victoria's Children's Court' (PhD Thesis, Swinburne University of Technology, 2016) 250; Conor O'Mahony et al, 'Child Care Proceedings in Non-Specialist Courts: The Experience in Ireland' (2016) 30 *International Journal of Law, Policy and The Family* 131, 143–6; Rosemary Sheehan, *Magistrates' Decision-Making in Child Protection Cases* (Ashgate, 2001) 181–2 ('Magistrates' Decision-Making'); Alicia Summers, Sophia Gatowski and Shirley Dobbin, 'Terminating Parental Rights: the Relation of Judicial Experience and Expectancy-related Factors to Risk Perceptions in Child Protection Cases' (2012) 18(1) *Psychology, Crime and Law* 95, 95; Alicia Summers and Jennifer Renne, 'From Ambiguity to Action: Reframing Child Safety Measurement in the Child Welfare Court System' (2024) 75 *Juvenile & Family Court Journal* 67, 68; Clare Tilbury, 'Child Protection Proceedings in the Children's Court of Queensland: Therapeutic Opportunities Lost' (2013) 27 *Australian Journal of Family Law* 178–9 ('Therapeutic Opportunities Lost'); Clare Tilbury and Paul Mazerolle, 'The Children's Court in Queensland: Where to from Here?' in Rosemary Sheehan and Allan Borowski (eds), *Australia's Children's Courts: Today and Tomorrow* (Springer, 2013) 65, 76.

⁴ Sheehan, 'Magistrates' Decision Making' (n 3) 156; Tilbury and Mazerolle (n 3) 76.

⁵ Hannam (n 3) 152; Hinton (n 3) 127–8; Clare Tilbury, 'Obtaining Expert Evidence in Child Protection Proceedings' (2019) 72(4) *Australian Social Work* 392, 397 ('Obtaining Expert Evidence'); Tilbury, 'Therapeutic Opportunities Lost' (n 3) 177; Tilbury and Mazerolle (n 3) 79–80.

⁶ Elizabeth Fernandez et al, *A Study of the Children's Court of New South Wales* (Research Report, UNSW, 2014) 19–20, 39.

⁷ Allan Borowski, 'A Portrait of Australia's Children's Courts: Findings of a National Assessment', in Rosemary Sheehan and Allan Borowski (eds), *Australia's Children's Courts: Today and Tomorrow* (Springer, 2013) 165, 169.

⁸ *Re Elizabeth* [2011] NSWDC 245, [175] ('*Re Elizabeth*').

⁹ *In the Matter of Spencer* (Children's Court of New South Wales, 26 July 2005), [4] ('*Spencer*').

¹⁰ *Jonah* (pseudonym, unpublished judgment, Children's Court, May 2023) 18.

¹¹ Judicial Officer 4.

¹² Judicial Officer 2.

jurisdiction generally is described as ‘hard’, especially for its traumatic content and emotional burden,¹³ while the restoration decision itself is seen as the hardest stage within a care matter.¹⁴ Although the question whether to restore will sometimes be ‘obvious’,¹⁵ other, tightly balanced¹⁶ cases can be ‘absolutely opaque...excruciatingly difficult’,¹⁷ with magistrates struggling to ‘know what to do’¹⁸ in ‘the grey cases where you’re taking a bit of a chance’,¹⁹ and ‘just trying to layer [that doubt] with, “I don’t know that this is the right decision, but I think this kid’s going to be better off with their Mum”’.²⁰

These divulgements are consistent with widespread conceptions of child protection decision-making as inherently difficult—due to the *complexity* of its intersecting legal, moral and interdisciplinary dimensions,²¹ the *tension* in reconciling objects of child safety with family preservation and autonomy,²² and the *uncertainty* of prediction, in relation to both immediate risk and longer term outcomes for the child.²³ There will rarely be clear-cut ‘right and wrong’ options; rather decisions must navigate between competing considerations and risks, and an array of speculative consequences.²⁴

¹³ Judicial Officers 2, 10, 13, 21; Registrar 1.

¹⁴ Judicial Officers 3, 4, 9, 18, 19, 20.

¹⁵ Judicial Officers 2, 23.

¹⁶ Judicial Officer 23.

¹⁷ Judicial Officer 6.

¹⁸ Judicial Officers 2, 4.

¹⁹ Judicial Officer 18.

²⁰ Judicial Officer 21.

²¹ Campbell et al (n 3) 129; Fernandez et al (n 6) 19, 45; Sheila Gray, ‘Parenting Capacity: An Analysis of Parenting Capacity Assessment in the Children’s Court of New South Wales’ (PhD Thesis, University of Sydney, 2014) 8–9; Vicki Lens, ‘Engaging Parents in Family Court: Lessons from an Observational Study of Child Protection Cases’ (2017) 17(2) *Journal of Social Work* 129, 130; Rosemary Martyn and Greg Levine, ‘If Your Worship Pleases: An Australian Perspective on the Role of the Magistrate in Child Protection’ (1998) 7 *Child Abuse Review* 254, 260; Sheehan, ‘Magistrates’ Decision Making’ (n 3) 3, 20; Phillip A Swain and Nadine Cameron, ‘“Good Enough Parenting”: Parental Disability and Child Protection’ (2003) 18(2) *Disability and Society* 165, 174; Tilbury, ‘Obtaining Expert Evidence’ (n 5) 399; Tilbury, ‘Therapeutic Opportunities Lost’ (n 3) 178.

²² Campbell et al (n 3) 127; Martyn and Levine (n 3) 260; Sheehan, ‘Magistrates’ Decision Making’ (n 3) 20, 28, 60.

²³ Campbell et al (n 3) 129, 131; Dickens et al, ‘Courts, Care Proceedings and Outcomes Uncertainty: The Challenges of Achieving and Assessing ‘Good Outcomes’ for Children After Care Proceedings’ (2019) 24 *Child and Family Social Work* 574, 577, 580; Annalese Bolton and Chris Lennings, ‘Clinical Opinions of Structured Risk Assessments for Forensic Child Protection: The Development of a Clinically Relevant Device’ (2010) *Children and Youth Services Review* 1300, 1308; Karen Broadley, ‘Making the Decision to Remove a Child from Parental Care: Twelve Decision-Making Criteria’ (2015) 41(2) *Children Australia* 90, 95; George Economidis, ‘An Evaluation of the Implementation of Family-Based Therapy Programs to Enhance Government Responses to Child Physical Abuse and Neglect in New South Wales, Australia’ (PhD Thesis, UNSW Sydney, 2023) 48–9; Patricia Hansen, ‘Rescission or Variation of Children’s Court Orders: A Study of Section 90 Applications in New South Wales’ (2012) 37(2) *Children Australia* 69, 72–3; Horsfall (n 3) 208–211, 216; Rosemary Martyn and Greg Levine, ‘If Your Worship Pleases: An Australian Perspective on the Role of the Magistrate in Child Protection’ (1998) 7 *Child Abuse Review* 254, 260.

²⁴ Kenneth McK Norrie, ‘Appellate Deference in Scottish Child Protection Cases’ (2016) 20(2) *Edinburgh Law Review* 149, 149–50, 165–6. See also Jennifer G May, ‘Decision Making Processes of Judges in the Family Court: An

Hence child protection law and its central precept of ‘the best interests of the child’ are steeped with indeterminacy,²⁵ making it particularly subject to *discretionary* decision-making. Within much of the literature, discretion in child protection is criticised as relying on intuition,²⁶ emotional responses,²⁷ personal experiences and biases,²⁸ and ‘common sense’ assumptions that are not evidence-based.²⁹ Certainly, to the extent that the care and protection system is naturally shaped by societal and legal norms, the Children’s Court cannot be immune from applying normative standards in its reasoning.³⁰ Values-based social, cultural and institutional imperatives are embedded in the legislation, in underlying policies, and in the evidence and arguments that the parties choose to submit.³¹ In identifying the dominant ‘factors’ that influence restoration decisions, this thesis seeks to explore suppositions about what does and does not constitute ‘good enough parenting’ in contemporary Australian society.

However, at the level of deliberate expression, the sampled judgments contain very few explicit statements in which—independently of the evidence tendered—the judicial officer assumes something to be a ‘given’. Exceptions are largely (and arguably) non-contentious: comprising passing references to, for instance, ‘the common sense perspective’ that children

Investigation of Salient Features Relating to Termination of Parental Rights’ (PhD Thesis, University of South Carolina, 2015) 7.

²⁵ See, eg, Judith Cashmore, ‘“Best Interests” in Care Proceedings: Law, Policy and Practice’ in Elaine E Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Wellbeing* (Cambridge University Press, 2016) 326, 339; Asgeir Falch-Eriksen and Elisabeth Backe-Hansen, ‘Child Protection and Human Rights: A Call for Professional Practice and Policy’, in Asgeir Falch-Eriksen and Elisabeth Backe-Hansen (eds) *Human Rights in Child Protection* (Palgrave Macmillan, 2018) 1, 6; Joshua Gupta-Kahan, ‘Confronting Indeterminacy and Bias in Child Protection Law’ (2022) 33 *Stanford Law and Policy Review* 217; Horsfall (n 3) 63–7; Marit Skivenes and Line Marie Sorsdal, ‘The Child’s Best Interest Principle Across Child Protection Jurisdictions’, in Asgeir Falch-Eriksen and Elisabeth Backe-Hansen (eds) *Human Rights in Child Protection* (Palgrave Macmillan, 2018) 59, 59–60.

²⁶ Lillian De Bortoli et al, ‘Preliminary Evaluation of Structured Professional Judgment to Assess Removal in Child Protection Practice’ (2015) 5 *Journal of Forensic Social Work* 29, 30; May (n 24) 59–60; Sheehan, ‘Magistrates’ Decision Making’ (n 3) 158.

²⁷ Campbell et al (n 3) 129; May (n 24) 45–6, 54–6; Summer, Gatowski and Dobbin (n 3) 97–8, 107.

²⁸ Fernandez et al (n 6) 41–2; Gupta-Kagan (n 25) 262–3; May (n 24) 46–8; Sheehan, ‘Magistrates’ Decision Making’ (n 3) 158–163, 180–81; Tilbury, ‘Obtaining Expert Evidence’ (n 5) 399.

²⁹ May (n 24) 14–15; Horsfall (n 3) 252–3; Ilana Dodi Luther, ‘“On the Poverty of Responsibility”: a Study of the History of Child Protection Law and Jurisprudence in Nova Scotia’ (PhD Thesis, Dalhousie University, 2015) 366–9, 374–7; Sheehan, ‘Magistrates’ Decision Making’ (n 3) 5; Tilbury, ‘Obtaining Expert Evidence’ (n 5) 399.

³⁰ Examples of ‘normative’ value standards applied to care and protection judgments in other jurisdictions include Horsfall (n 3) 952–3 (a study in the Children’s Court of Victoria—discussing a judicial assumption that a ‘natural childhood’ required unsupervised contact between child and father despite a history of severe domestic violence), and Luther (n 29) 366–9, 374–7 (a study in Nova Scotia, Canada—discussing judicial assumptions equating household ‘uncleanliness’ with emotional harm).

³¹ See, eg, Jill Berrick et al, ‘Are Child Protection Workers and Judges in Alignment with Citizens When Considering Interventions into a Family? A Cross-country Study of Four Jurisdictions’ (2020) 108 *Children and Youth Services Review* 1, 1; Sheehan, ‘Magistrates’ Decision Making’ (n 3) 46–7.

need ‘love, security, nurturing guidance’;³² the ‘well established’ premise that ‘failure to form secure attachments’ in early life is likely to have adverse impacts;³³ an understanding ‘through common experience’ of the context in which some domestic violence victims provide accounts that downplay the violence;³⁴ and ‘judicial notice’ of ‘the known risks of harm’ to Aboriginal children removed from family.³⁵ More often, the Court seeks to emphasise that decisions on restoration are based not on common knowledge, but on objective application of the law to the facts of the individual case. Thus the judicial discourse conveys an air of confident rationality, albeit in the face of acknowledged difficulty. Judge Johnstone, then President of the Children’s Court, referred to ‘realistic possibility of restoration’ in the case of *Arnott-Bloom* as ‘a difficult concept’ with which the court must frequently ‘grapple’, while assuring the parties that a decision not to restore ‘is one which judicial officers do not make easily or lightly’, and which is made in accordance with established legal principles.³⁶ In the case of *Nellie*, the Court commented that the ‘imprecise exercise’ of predicting uncertain events ‘is not impossible and may be undertaken with some degree of confidence if sufficient other facts are known’.³⁷ In the appeal case of *ASK*, the District Court observed that ‘[t]o some extent there is always a degree of artificiality about...future predictions given the likelihood of change with and between children’;³⁸ however, the Court was pragmatically satisfied that the proposed Care Plan for the child ‘takes the matter as far as reasonably can be predicted in all the circumstances’.³⁹ Judgments in several cases observe that the outcome must not be influenced by ‘sentimental or emotional values’⁴⁰ or sympathy.⁴¹ Mere ‘intuition’⁴² or ‘common sense’⁴³ should have no place in assessing risk, especially when used as a ‘disguise’ for ‘unconscious prejudice or false logic’.⁴⁴ Unacceptable risk to a child, it is asserted, is ‘either open on the evidence or it is not’.⁴⁵

³² *In the Matter of Julian and Allan* (Children’s Court of New South Wales, 28 April 2006) [8] (*‘Julian & Allan’*).

³³ *Spencer* (n 9) [41].

³⁴ *JH v Secretary, Department of Communities & Justice & Ors* (No.3) [2023] NSWDC 517, [197] (*‘JH’*).

³⁵ *Re Malakhai* [2022] NSWChC 6, [61]–[62] (*‘Re Malakhai’*), with reference to ‘the Family is Culture Report’: Megan Davis, *Independent Review of Aboriginal and Torres Strait Islander Children in Out-of-Home Care in New South Wales, Family Is Culture* (Review Report, 2019) (*‘Family is Culture Report’*).

³⁶ *DFaCS re Arnott Bloom* [2015] NSWChC 6, [28]–[29].

³⁷ *Re Nellie* [2004] NSWLC 8 (*‘Nellie’*) (no page or paragraph numbers).

³⁸ *ASK v Secretary DFaCS* [2014] NSWDC 247, [223] (*‘ASK’*).

³⁹ *Ibid.*

⁴⁰ *SK v Secretary, Department of Family and Community Services* [2016] NSWDC 273, 12 (*‘SK’*).

⁴¹ *Re Elizabeth* (n 8) [175]; *JH* (n 34) [259].

⁴² *Depik and Senina* (pseudonym, unpublished judgment, Children’s Court, May 2012) [18]; *Keziah* (pseudonym, unpublished judgment, Children’s Court, October 2013) [7] (*‘Keziah’*).

⁴³ *Keziah* (n 42) [7].

⁴⁴ *Ibid.*

⁴⁵ *Department of Communities and Justice (DCJ) and Janet and Xing-fu* [2022] NSWChC 7, [179] (*‘Janet & Xing-fu’*), quoting *Isles & Nelissen* [2022] FedCFamC1A 97 at [85].

(ii) Discretion

But the truth is we're all muddling through... We're all just trying and there's still a lot of discretion. (Judicial Officer 10)

In contrast to the emphasis on objectivity within the formal language of the judgments, the judicial interviews revealed a strong thread of consensus that the decisions *do* have an inherently discretionary element. The language of the statutory test for restoration was viewed by one magistrate as 'probably deliberately loose, because you don't want to be applying too much law'.⁴⁶ The process of evaluating realistic possibility of restoration was described as intuitive,⁴⁷ fluid,⁴⁸ involving 'a significant element of instinctive synthesis',⁴⁹ and an 'incremental'⁵⁰ assessment of the 'whole picture',⁵¹ to 'decide what's fair enough in the circumstances'.⁵² This holistic approach is regarded not as imprecision, but as the exercise of 'sound, evaluative, discretionary judgment',⁵³ an appropriately 'flexible' evaluation of each case on its own facts.⁵⁴ It is integrated with a level of methodical approach to applying the legal framework⁵⁵—for example, in identifying risk factors and whether these have been mitigated.⁵⁶

The need to apply discretion to hypothetical predictions is not singular to the care jurisdiction—magistrates drew comparisons to decisions on bail,⁵⁷ and estimation of damages in a civil suit.⁵⁸ However the child protection arena is perhaps less amenable to formulaic resolution than are many fields of law. It has been argued that there is limited room for development of precedent in outcomes that are particular to each child and their circumstances,⁵⁹ and that statutory principles in care and protection are designed to allow discretionary assessments of imprecise concepts such as 'likelihood', 'significant' and

⁴⁶ Judicial Officer 6.

⁴⁷ Judicial Officer 20.

⁴⁸ Judicial Officer 14.

⁴⁹ Judicial Officer 7.

⁵⁰ Judicial Officer 23.

⁵¹ Judicial Officers 7, 22.

⁵² Judicial Officer 22.

⁵³ Ibid.

⁵⁴ Judicial Officer 20.

⁵⁵ Judicial Officer 7.

⁵⁶ Judicial Officers 3, 5, 9, 21, 23. See, however, the analysis in Chapter 5, part B, section (ii), discussing a lack of precision in many judgments in the application of the 'unacceptable risk' test.

⁵⁷ Judicial Officers 9, 13.

⁵⁸ Judicial Officer 22.

⁵⁹ Norrie (n 24) 24.

‘serious’ – a ‘correct’ decision may fall within a range of justifiable possibilities.⁶⁰ The judgment in *Fiona Farmer* observed that realistic possibility of restoration ‘necessarily involves a consideration of possible future events. That is something upon which reasonable minds will differ’⁶¹:-

...In this case, already, minds have differed. Two caseworkers have formed diametrically opposed views on restoration. Two clinicians have expressed different opinions about the father. And two independent legal representatives have taken different positions. (Judge in *Fiona Farmer*)⁶²

In order, then, to reach a decision on issues capable of such disparate views, does the application of judicial discretion reach beyond a holistic yet objective assessment of the specific case, to imbibe the subjective and the personal? Several candid statements in the interviews suggest it is normal and inevitable that decisions are influenced by the personality, background and values of the individual magistrate⁶³ – including aspects of middle-class privilege,⁶⁴ degrees of cultural sensitivity,⁶⁵ and capacity (or lack thereof) to empathise with the ordinary struggles of parenthood.⁶⁶ Experience in the jurisdiction also has a bearing: one participant observed ‘we will all make different decisions depending on where we’re up to in our judicial cycle’ – citing a personal shift over time towards greater scrutiny and scepticism of the arguments presented by the Department.⁶⁷ In turn, several Departmental caseworkers and lawyers lamented what is, in their view, marked inconsistency in views and approaches among individual magistrates.⁶⁸

(iii) Experience and Expertise

Don’t take me as the country model...but...if the person in my seat is enthusiastic and really caring, we’ll get there, and I think we’ll get there with the right result. (Judicial Officer 15)

It is unavoidable, as in any workplace, that some magistrates are more experienced than others. However, while the sample of magistrates who volunteered to participate in the

⁶⁰ Ibid 1, 12.

⁶¹ *The Secretary of the Department of Communities and Justice (DCJ) and Fiona Farmer* [2019] NSWChC 5, [148] (*‘Fiona Farmer’*).

⁶² Ibid.

⁶³ Judicial Officers 6, 16, 21, 22; Registrar 1.

⁶⁴ Judicial Officers 6, 12, 16, 22.

⁶⁵ Judicial Officer 21.

⁶⁶ Judicial Officer 10.

⁶⁷ Judicial Officer 21.

⁶⁸ Caseworkers 1, 4, 9, 12, 13; Lawyers 6, 7, 8.

interviews for this project is not fully representative of the whole,⁶⁹ responses to a question about their professional background revealed, overall, a wealth of accrued experience. This relates to both the number of years spent dealing with care and protection cases, and relevant prior roles. Care matters in NSW are heard by the specialist Children's Magistrates of the Children's Court, and in some regional and rural locations by non-specialist Local Court Magistrates.⁷⁰ Among the 12 current or former Children's Magistrates who were interviewed, length of experience in care matters ranged from under 12 months through to 23 years, with an average of approximately eight years in the jurisdiction at the time of interview. Four of the seven Local Court participants had particularly striking tenure as magistrates: respectively 16, 18, 21, and 30 years. Each had been dealing with care and protection for all⁷¹ or some⁷² of those years. Of the three relatively newer Local Court magistrates, experience in hearing care matters ranged from one to five years.⁷³

The interviews revealed considerable diversity in professional roles prior to becoming a magistrate, including, for several, experience in child protection. There is a perception that due to its juvenile justice jurisdiction,⁷⁴ the Children's Court bench has tended to attract criminal law practitioners,⁷⁵ and that hence there is a relative dearth of care and protection knowledge brought to the specialist role.⁷⁶ However, only three of the Children's Magistrates described their background as being mainly in criminal law. One Children's Magistrate had started working life as a child protection social worker. A Local Court magistrate was initially qualified in welfare before becoming a lawyer, and had done some early-career work in child protection 'complaints handling' with a statutory authority. Six of the participants across both the Children's and Local Courts had been solicitors in care and protection before appointment as magistrates, five having worked in care for sustained periods ranging between 10 and 30 years.

⁶⁹ See Chapter 3, part D 'Limitations'.

⁷⁰ See Chapter 2, part B 'The Institutions'.

⁷¹ Judicial Officers 10, 15, 16.

⁷² Judicial Officer 14.

⁷³ Judicial Officers 13, 17, 18.

⁷⁴ Juvenile criminal law ('juvenile justice') constitutes the substantial volume of Children's Court work, alongside its care and protection role.

⁷⁵ Judicial Officers 2, 4, 8, 9.

⁷⁶ The theme of magistrates being more familiar with criminal law than care and protection is also raised in relation to the Children's Courts of other Australian States and Territories: see Alana Thompson, 'Therapeutic Jurisprudence and the Children's Court: Creating a More Relational Approach to Protection and Care Proceedings' (PhD Thesis, University of Western Australia, 2011) 181; Tilbury, 'Therapeutic Opportunities Lost' (n 3) 178.

Notably, and contrary to the formal position that Local Court magistrates are not ‘specialists’ in Children’s Court work, the substance of the interviews revealed no discernible difference between the two groups in their apparent familiarity and ease with the care jurisdiction, the depth of their knowledge, and their practical insights in discussing this field of law.

Notwithstanding this finding, it is likely that the interviews with Local Court magistrates represent a somewhat skewed data-set—in that their volunteering to participate in the research may indicate a level of keen interest, and/or experience in the care jurisdiction, in comparison with other of their peers. Certainly a number of participants expressed concerns that *some* Local Court magistrates hearing care matters have limited expertise,⁷⁷ leading to delays in cases resolving,⁷⁸ or conversely to matters settling by consent with a questionable degree of judicial scrutiny over the detail of the final orders.⁷⁹ Local Court magistrates themselves referred to the difficulty of ‘squeezing’⁸⁰ care matters into the busy and stretched workload of a rural court circuit⁸¹—the stress of the work exemplified in the comment: ‘half the time you’re screaming in the back of your head “I’ve got seven bails to do today as well as this care hearing...”’.⁸² But equally, Local Court magistrates perceive there to be benefit in their knowledge of local communities,⁸³ and in familiarity with multiple fields of law, including care and protection, applicable to the intersecting issues facing the people appearing before the Court.⁸⁴ Concern about relative expertise of non-specialist magistrates is further qualified by expanding coverage of the specialist Children’s Court. The geographic reach of Children’s Court circuits has increased in recent years,⁸⁵ and outside the circuits a Children’s Magistrate will travel to preside over any contested hearing estimated to last for more days than the Local Court can reasonably accommodate.⁸⁶ Around 90% of contested hearings State-wide are now dealt with by Children’s Magistrates.⁸⁷

⁷⁷ Judicial Officers 1, 7, 18; Registrar 1. Similar concerns about ‘geographic variability in case processing and decision-making’ were identified in relation to the NSW jurisdiction in a National Study of Australia’s Children’s Courts: see Borowski (n 7) 172.

⁷⁸ Judicial Officer 12; Registrar 1.

⁷⁹ Judicial Officer 3; Registrar 1.

⁸⁰ Judicial Officer 18.

⁸¹ Judicial Officer 15.

⁸² Judicial Officer 10. Similar issues were raised in a study of the care orders jurisdiction of non-specialist judges in generalist courts in Ireland: O’Mahony et al (n 3) 140–42.

⁸³ Judicial Officers 10, 13, 15.

⁸⁴ Judicial Officers 13, 16.

⁸⁵ Judicial Officers 7, 18, 20; Children’s Court of NSW, 2024 *Annual Review* 4.

⁸⁶ Judicial Officers 15, 16; Registrar 1.

⁸⁷ Children’s Court of NSW, 2022 *Annual Review*, 10; Judicial Officer 20.

Although it was observed that the Local Court contingent ‘don’t get the full spread at the dinner table’⁸⁸ when it comes to training opportunities,⁸⁹ the Local Court magistrate making this comment spoke of regularly consulting with the Children’s Court President for informal guidance, and of receiving valuable help from the Children’s Court in navigating a particularly complex case with international dimensions.⁹⁰ The importance of peer support⁹¹ was raised by other participants. The Children’s Magistrates referred to a ‘really collegiate’⁹² culture of ‘talking to each other’⁹³ about difficult decisions, as well as a commitment to various forums for judicial education and professional development.⁹⁴

It is outside the scope of this thesis to review the extent to which the Children’s Court, operating in partnership with the Local Court, is adequately equipped with the skills, training and support needed to deliver high quality care and protection work equitably across the entire State. The observations drawn from the interviews reflect only moment-in-time insights from a select number of insiders from both Courts. What these insights do provide, nonetheless, is an impression of a jurisdiction functioning with a significant volume of accumulated experience in child protection law, and an evident culture of commitment to the field,⁹⁵ within the bounds of limited resources.⁹⁶

⁸⁸ Judicial Officer 16.

⁸⁹ This was a reference to what are known as ‘section 16 meetings’ – day-long training events for Children’s Court judicial officers, held twice yearly: see *Children’s Court Act 1987* (NSW) s 16; Children’s Court of New South Wales, *2022 Annual Review* 35, *2023 Annual Review* 45, *2024 Annual Review* 34.

⁹⁰ Judicial Officer 16. The value of collegiate support, especially for non-specialist Local Court magistrates and including opportunity to ‘debrief’, was also raised in the NSW component of the National Study of Children’s Courts: Fernandez et al (n 6) 31.

⁹¹ Judicial Officer 21.

⁹² Judicial Officer 4. Similar observations were made by magistrates interviewed in a study of the Victorian Children’s Court care jurisdiction: see Rosemary Sheehan and Allan Borowski, ‘Australia’s Children’s Courts: An Assessment of the Status of and Challenges Facing the Child Protection Jurisdiction in Victoria’ (2014) 36(2) *Journal of Social Welfare and Family Law* 95, 101–2 (‘Child Protection Jurisdiction in Victoria’).

⁹³ Judicial Officer 4.

⁹⁴ Judicial Officers 1, 7, 19, 21. Cited examples include the *Children’s Court of New South Wales Resource Handbook*, and its ‘Care Tree’ (a guide to law and procedure in care matters); the Children’s Court Education Committee; ‘section 16’ training sessions (see above n 89); peer circulation of papers/articles; and ‘reflective practice sessions’ for wellbeing (see Children’s Court of New South Wales, *2022 Annual Review* 35).

⁹⁵ The apparent commitment of the jurisdiction’s magistrates is additionally notable in the face of a perceived ‘low status’ of Children’s Court work (Judicial Officer 9). The low status of care and protection has also been noted in another Australian States: see Martyn and Levine (n 23) 261; Tilbury, ‘Therapeutic Opportunities Lost’ (n 3) 178–9, and overseas: O’Mahony et al (n 3) 151.

⁹⁶ Judicial Officers 2, 3, 4, 13, 14, 15. See also discussion on the resources of the Children’s Court and of the wider child protection system in Fernandez et al (n 6) 21–2, 44.

B. The Progress of a Case

The State's taking kids away. So let's not kid ourselves...it is adversarial—you're kidding yourself if you think it's not—because the stakes are high. (Judicial Officer 19)

Particular features of the care and protection jurisdiction stipulate, in theory, the conduct of litigation and the typical pathways to resolution of a case. The legislation prescribes specific timeframes for the making of a decision on whether there is a realistic possibility of restoration (effectively setting limits on case duration): being within six months of the commencement of proceedings for children under two years old, and within 12 months for children above this age.⁹⁷ The proceedings are intended not to be adversarial⁹⁸ and should avoid formality and legal technicality to the extent that 'the circumstances of the case permit'.⁹⁹ Alternative dispute resolution is an embedded aspect of the legal process, both as a pre-litigation requirement (usually in the form of a family group conference),¹⁰⁰ and as a standard case management stage in the court itself (via a dispute resolution conference).¹⁰¹ These features of the jurisdiction share, broadly, the rationales of a child-focused effort to efficiently reach a 'timely'¹⁰² decision, and where possible to do so through consensus of the adult parties as to the interests of the child.¹⁰³ But the course of true litigation never did run smooth, and complexity surrounds the ideals of timeliness and consensus in practice.

⁹⁷ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 83(5) ('*The Act*'), with the Court having discretion to extend these time periods as appropriate to the circumstances of the case: s 83(5A). Additionally, pursuant to policy guidelines the Court 'aims to complete 90% of care cases within 9 months of commencement and to complete all cases within 12 months of commencement': *Practice Note 5: Case Management in care proceedings*, 5.1 'Time Standards' (Children's Court of New South Wales, as amended June 2017).

⁹⁸ *The Act* (n 97) s 93(1).

⁹⁹ *Ibid* s 93(2). A closely related provision is that 'the rules of evidence' will ordinarily not apply to care proceedings: s 93(3).

¹⁰⁰ Amendments to the Act in 2018 made it obligatory for the Department to offer alternative dispute resolution ('ADR'), to the family of a child at risk of significant harm, prior to commencing care proceedings: s 37(1A). The main ADR model adopted for this purpose has been the Family Group Conference ('FGC'); however, the 'Legal Assistance Partnership for Families', entered into in 2022 by Legal Aid NSW, the Aboriginal Legal Service and the Department agrees that families should be offered a choice between an FGC and an alternative lawyer-assisted Family Dispute Resolution Conference facilitated by Legal Aid (see Katie Kelso and Bianca Duffy, *Early Legal Assistance in Child Protection* (Report, Legal Aid NSW, May 2023)) 12–13.

¹⁰¹ *The Act* (n 97) s 63; Children's Court of New South Wales, *Practice Note 3: Alternative Dispute Resolution Procedures in the Children's Court* (as amended, November 2015); Children's Court of New South Wales, *Practice Note 5: Case Management in Care Proceedings* (as amended, June 2017) 16.1.

¹⁰² *The Act* (n 97) s 9(2)(e).

¹⁰³ See, eg, Children's Court of New South Wales, *Practice Note 3: Alternative Dispute Resolution Procedures in the Children's Court* (as amended, November 2015) 3. 'purpose and aims of a DRC'; Children's Court of New South Wales, *Practice Note 5: Case Management in Care Proceedings* (as amended, June 2017) 2. 'overriding objective'; 'Legal Assistance for Families: Partnership Agreement Document', objective 4., in Kelso and Duffy (n 100) 21.

(i) Timeframes

People need time sometimes and I don't know whether the courts or the parties want to give the parents that time...we're talking about long term care things for a child who might be newborn and it's for the next 18 years of their life. Let's put some more thought into this. Rather than making a decision in three months about the child's next 18 years. (Caseworker 11)

Time limits are time limits. We do what we can, everybody does what they can. (Judicial Officer 3)

Despite best intentions the prescribed time limits are frequently exceeded. Published data from the Children's Court shows that of the 1224 initiating care applications finalised during 2024, 769 had taken longer than 12 months.¹⁰⁴ Across the 106 decisions studied for this thesis, the 12 month goal was met in only (approximately) 20% of cases, and the average case duration hovered around the 24 month mark.¹⁰⁵ These latter figures need to be treated with caution – being reliant on information that is inconsistently included within the judgments,¹⁰⁶ and because the body of judgments in contested restoration hearings is not representative of the majority of care matters finalised with consent. Cases proceeding to hearing are likely to spend a longer period in the court process than those that settle, although this is not invariably so; protracted delays can also accompany the path to consent orders. However, the interviews confirmed that, overall, it is challenging, and often impossible, to meet the legislated timeframes. Contributing factors include too few available services to assist parents to make changes,¹⁰⁷ difficulty finding long-term placements for children,¹⁰⁸ recurring adjournment requests by the Department,¹⁰⁹ lengthy periods between court sittings in rural circuits,¹¹⁰ limited availability of witnesses in remote locations,¹¹¹ and poor legal representation in some instances.¹¹²

¹⁰⁴ Children's Court of New South Wales, *2024 Annual Review* 14. In the previous year, 906 of 1553 finalised matters (initiating care applications) had taken longer than 12 months.

¹⁰⁵ The mean duration was 25 months, and the median was 21 months.

¹⁰⁶ While the date of decision is always included in a judgment, and most of the judgments made reference to an approximate date the matter had commenced, there was variation between whether this cited date was that of the child's removal from parents, or the date of the Department filing its initiating application for care orders, or the date that the case was 'established' and an interim order made.

¹⁰⁷ Judicial Officers 14, 16; Registrar 2.

¹⁰⁸ Judicial Officers 3, 19.

¹⁰⁹ Judicial Officer 2; Registrar 2. See also *Yarran Taylor children* [2024] NSWChC 3, [55]–[61] ('*Yarran Taylor children*').

¹¹⁰ Judicial Officer 15.

¹¹¹ Judicial Officer 14.

¹¹² Registrar 2.

While delays are viewed with a level of frustration,¹¹³ there is a contrasting perspective – quite prevalent¹¹⁴ – that set timeframes are *unhelpful* in ‘find[ing] the most stable and secure environment for the child to be’.¹¹⁵ If the parents are reasonably on track and committed,¹¹⁶ and subject to the child being in a ‘good’ interim placement,¹¹⁷ prescribed timeframes give way, in judicial and caseworker practice, to the importance of thoroughly exploring evidence and options to meet the best interests of the child.¹¹⁸

(ii) Adversarialism

It’s the most adversarial of any process that’s going around in these courts. They’re more cooperative in criminal. (Judicial Officer 18)

It should be less adversarial, but the trouble is when you get these contentious cases, what it boils down to is ‘who do you believe?’ (Judicial Officer 20)

The issue of whether care proceedings are or should be adversarial is contentious. The very meaning of ‘adversarial’ is a shifting one, depending on the identity of the observer.¹¹⁹ For child protection caseworkers, it tends to be associated with a rigid, rule-bound and intimidating legal system which undermines the premises and professionalism of their casework.¹²⁰ Parents are likely to regard child protection workers themselves as unduly adversarial, in the combative way that allegations are mounted arguing parental unfitness.¹²¹ For lawyers the term refers to the systems of argument, testing of evidence and impartial

¹¹³ Judicial Officers 2, 10, 15; Registrar 1; Caseworkers 3, 6, 8, 9.

¹¹⁴ Permutations of the view that timeframes are often counter-productive to reaching a constructive resolution of the case appeared in the observations of Judicial Officers 5, 14, 16, 19, 20; Caseworkers 1, 4, 8, 11; Lawyer 8.

¹¹⁵ Judicial Officer 16.

¹¹⁶ Judicial Officer 20.

¹¹⁷ Judicial Officers 14, 19.

¹¹⁸ Judicial Officers 5, 14, 19; Caseworkers 1, 4, 8, 11; Lawyer 2.

¹¹⁹ Honourable James Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (State of New South Wales, 2008) (*Wood Inquiry*) 512.

¹²⁰ Dale Abbotts and Alyson Norman, ‘Social Worker Decision Making in Court’ (2023) 28 *Child & Family Social Work* 469, 474; Judith Bessant, Michael Emslie and Rob Watts, ‘In Defence of Victoria’s Children’s Court: Its Value and Role in the Child Protection System’ (2012) 37(4) *Alternative Law Journal* 244, 245, citing Paul McDonald, ‘Children lost in a chaotic court system’, *The Age* (Melbourne) 11 October 2010; Allan Borowski, ‘Whither Australia’s Children’s Courts? Findings of the National Assessment of Australia’s Children’s Courts’ (2013) 46(2) *Australia and New Zealand Journal of Criminology* 268, 281 (*Whither Australia’s Children’s Courts?*); Campbell et al (n 3) 127–8; David McConnell, Gwynnyth Llewellyn and Luisa Ferronato, *Parents with a Disability and the NSW Children’s Court* (Research Report, University of Sydney, 2000) 21; Sheehan and Borowski, ‘Child Protection Jurisdiction in Victoria’ (n 92) 105–6; *Wood Inquiry* (n 119) 412–13.

¹²¹ See Fernandez et al (n 6) 28; Hinton (n 3) 65; Nicola Ross et al, ‘Evidence-based law and practice with disadvantaged populations: Perspectives of parents involved in child protection proceedings’ (2017) 12 *Newcastle Law Review* 23, 29–30, 37–8; Senate Community Affairs Reference Committee, *Report: Out of Home Care* (Commonwealth of Australia, 2015) 139; Tamara Walsh and Heather Douglas, ‘Lawyers, Advocacy and Child Protection’ (2011) 35(2) *Melbourne Law Review* 621, 623 (*Lawyers, Advocacy and Child Protection*).

adjudication conventional to, and largely accepted as appropriate to, the common law tradition. Essentially, the adversarial method ‘requires the parties, rather than the judge to define the issues’¹²² by selecting the relevant evidence and challenging the case of the opponent party¹²³ – rather than seeking common ground (in the care and protection context) to identify a solution that is in the best interests of the child’.¹²⁴ In spite of the Act’s directive that care matters ‘are not to be conducted in an adversarial manner’,¹²⁵ the jurisdiction in NSW, as in other parts of Australia, sits squarely within the mainstream common law tradition.¹²⁶

It is true that ‘less adversarial’ elements do apply to care matters: including varying degrees of slightly reduced formality within the courtroom.¹²⁷ The extent to which adversarial norms are relaxed sits on a subtle continuum, influenced by the inclination and temperament of the professionals in the case, including the presiding judicial officer.¹²⁸ Significantly, some magistrates interviewed for this thesis regard the jurisdiction as ‘semi-inquisitorial’,¹²⁹ in presenting scope for a level of judicial intervention to, for instance, question witnesses,¹³⁰ and direct some elements of the progress of a case.¹³¹ Examples of the latter include personally addressing the parents to inform them of the Court’s expectations in order for restoration to

¹²² Lillian De Bortoli et al, *The Family Drug Treatment Court: Evaluation Report* (Centre for Forensic Behavioural Sciences, Swinburne University of Technology, November 2018) 16, citing P Cummins, DS Scott and B Scales, *Report of the Protecting Victoria’s Vulnerable Children Inquiry* (2012).

¹²³ John Farrar, *Legal Reasoning* (Lawbook Co, 2010) 80.

¹²⁴ Ibid 17. See also Hinton (n 3) 115, 136.

¹²⁵ *The Act* (n 97) s 93(1).

¹²⁶ Cashmore (n 25) 330; Nicola Ross, ‘Different Views? Children’s Lawyers and Children’s Participation in Protective Proceedings in New South Wales, Australia’ (2013) 27(3) *International Journal of Law, Policy and the Family* 332, 348; Rosemary Sheehan, ‘Introduction: Australia’s Children’s Courts – the Study and its Context’ in Rosemary Sheehan and Alan Borowski (eds) *Australia’s Children’s Courts Today and Tomorrow* (Springer, 2013) 1, 2; Sheehan and Borowski, ‘Child Protection Jurisdiction in Victoria’ (n 92) 98, 101, 104, 106, 108; Tilbury, ‘Therapeutic Opportunities Lost’ (n 3) 170; Walsh and Douglas, ‘Lawyers, Advocacy and Child Protection’ (n 121) 623, 636.

¹²⁷ An example of reduced formality is the Children’s Court practice whereby lawyers remain seated at the bar table instead of rising to speak.

¹²⁸ This contingency is observed in relation to NSW, other Australian care jurisdictions, and child protection courts overseas: Sophia Gatowski, ‘Examining the Judge’s Role in Achieving Permanency for Children in Foster Care: Judicial Best Practice-Focused Performance Measurement’ (2024) 75(2) *Juvenile & Family Court Journal* 79, 93; Lens (n 21) 134–5; McConnell, Llewellyn and Ferronato (n 120) 58, 59; Thompson (n 76) 215–6; Max Travers, Rob White and Michael McKinnon, ‘The Children’s Court in Tasmania’ in Rosemary Sheehan and Allan Borowski (eds), *Australia’s Children’s Courts: Today and Tomorrow* (Springer, 2013) 103, 111.

¹²⁹ Judicial Officer 13. See also the observation of the magistrate in *Department of Communities and Justice (DCJ) and Ivy* [2025] NSWChC 1 (*Ivy*): ‘Care proceedings sit, varyingly and flexibly, on the continuum between adversarial and inquisitorial. Usually closer to inquisitorial’: at [38].

¹³⁰ Judicial Officers 1, 8.

¹³¹ Judicial Officers 4, 9, 15, 17.

be granted;¹³² requiring the Department's proposed Care Plan¹³³ accompanying final orders to be changed in some way;¹³⁴ and suggesting that a certain type of evidence be obtained, such as drug testing.¹³⁵ However, the degree to which the magistrate can engage in active case-management is constrained by the respective powers of the Court vis-à-vis the statutory authority – discussed in Part C below, and in chapter 10.¹³⁶ Overall, there was a dominant consensus amongst the interviewees that the system is resoundingly adversarial.¹³⁷

Adversarialism in the care jurisdiction carries negative connotations in some respects. Magistrates mentioned needing to reign in aggressive advocacy techniques on the part of some lawyers.¹³⁸ There were references to the Department being 'a very tricky litigant',¹³⁹ with overly 'invested'¹⁴⁰ caseworkers losing sight of the best interests of the child.¹⁴¹ Several magistrates argued in favour of a more unequivocally inquisitorial model:¹⁴²

...it shouldn't be fought tooth and nail; it should be all the people with resources working together to come to the outcome. (Judicial Officer 14)

...why aren't we doing it inquisitorially or on the coronial model? Imagine having an inquisitorial system for finding the manner of cause of death and still having an adversarial system as to where the child is going to live. This seems to me to make no sense whatsoever. (Judicial Officer 10)

On the other hand, judicial officers were mindful of the importance of ensuring procedural fairness and an appropriately rigorous approach to assessing evidence,¹⁴³ especially given the inherently serious allegations levelled against parents in care matters.¹⁴⁴ This perspective is reflected in much of the literature, arguing that judicial responsibility to oversee the State's powers of child removal requires a level of formality in upholding the rule of law and

¹³² Judicial Officer 9.

¹³³ See Chapter 2, part C 'The Legal Process'.

¹³⁴ Judicial Officer 17.

¹³⁵ Judicial Officer 15.

¹³⁶ See Chapter 10, part C, section (ii).

¹³⁷ Judicial Officers 2, 3, 7, 8, 10, 13, 17, 18, 19.

¹³⁸ Judicial Officers 2, 7, 8, 13, 15. Lawyer 6 also spoke about an inappropriate 'guns blazing' approach of lawyers inadequately familiar with the care jurisdiction.

¹³⁹ Judicial Officer 3.

¹⁴⁰ Judicial Officer 18.

¹⁴¹ Judicial Officer 3.

¹⁴² Judicial Officers 3, 10, 14, 17, 19. See further discussion of this issue in Chapter 10, part C, section (ii) 'Adjustments to Court Process or Model'.

¹⁴³ Judicial Officers 7, 13, 20, 22. The importance of applying procedural fairness and 'appropriate rules of natural justice' was noted in *Ivy* (n 129) [40]–[45].

¹⁴⁴ Judicial Officer 22.

protecting the rights and interests of the child.¹⁴⁵ Relaxation of the rules of evidence is seen by some to jeopardise the integrity of the case – parents have often protested that child protection workers are able to rely on hearsay or conjecture to make allegations that, from the parents’ perspective, are misconstrued or unfounded.¹⁴⁶ In a similar vein, judicial officers have expressed concern about poor case presentation by child protection workers, including quality of evidence.¹⁴⁷

In debating the appropriateness of adversarialism in care matters, a distinction can be drawn between the threshold ‘establishment’ phase that determines whether the child is ‘in need of care’ (in practice, turning on whether there was proper basis for the removal), and the subsequent disposition or ‘placement’ phase in which final orders are made for the long-term care of the child.¹⁴⁸ An adversarial approach is arguably suited to the former stage, and is essential if the parents wish to contest the justification for the proceedings being initiated.¹⁴⁹ Decisions at the second stage, about restoration or other permanency arrangements for the child, may be more conducive to an inquiry-based evaluation of the child’s interests. However, in practice this conceptual distinction is overly simplistic – the details of allegations surrounding the child’s removal often remain a live dispute when restoration is sought, and the Court is usually dealing with disputed versions of the extent to which the parents have subsequently addressed the child protection concerns.¹⁵⁰ Nuanced perspectives suggest that adversarial and collaborative approaches are not mutually exclusive at any stage. The course of a care matter typically shifts over time, somewhat organically, as multiple events occur in the circumstances of family and child and within the legal forum itself.¹⁵¹ Dynamic forms of decision-making, including negotiation, take place inside and outside the courtroom in a

¹⁴⁵ Andrew Bainham, ‘What is Justice in Care Proceedings?’ in Jens M Scherpe and Stephen Gilmore (eds), *Family Matters: Essays in Honour of John Eekelaar* (Intersentia, 2022) 915, 919; Bessant, Emslie and Watts (n 120) 247–8; Melissa Carter, Cristopher Church and Vivek Sankaran, ‘A Quiet Revolution: How Judicial Discipline Essentially Eliminated Foster Care and Nearly Went Unnoticed’ (2022) 12(1) *Columbia Journal of Race and Law* 496, 498, 501–502, 513–14; Gatowski (n 128) 80, 89; Horsfall (n 3) 154–5; Shelley Kierstead, ‘Therapeutic Jurisprudence and Child Protection’ (2011) 17(1) *Barry Law Review* 31, 32–4; *Wood Inquiry* (n 119) 514–15.

¹⁴⁶ Frank Ainsworth and Patricia Hansen, ‘Behind the Closed Door: A Guide and Parents’ Comments on the Workings of the New South Wales Children’s Court’ (2013) 38(2) *Children Australia* 47, 49; Davis, *Family is Culture Report* (n 35) 381–2; Hinton (n 3) 69–72; Ross et al (n 121) 30, 37.

¹⁴⁷ Davis, *Family is Culture Report* (n 35) 101; Martyn and Levine (n 23) 261; Judith Masson, ‘What are Care Proceedings Really Like?’ (2012) 36(1) *Adoption and Fostering* 5, 9; Marit Skivenes and Milfrid Tonheim, ‘Improving Decision-Making in Care Order Proceedings: A Multijurisdictional Study of Court Decision-Makers’ Viewpoints’ (2018) *Child & Family Social Work* 1, 6–7; Tilbury, ‘Obtaining Expert Evidence’ (n 5) 397–8.

¹⁴⁸ See Chapter 2, part C.

¹⁴⁹ See Bainham (n 145) 917; Luther (n 29) 362; *Wood Inquiry* (n 119) 489–90.

¹⁵⁰ Bainham (n 145) at 919–22 raises a similar point in the UK context.

¹⁵¹ Bainham (n 145) 921; Horsfall (n 3) (n 3) 152.

process that is not classically adversarial.¹⁵² A ‘culture of advocacy’, it is argued, requires that parties work cooperatively in a shared approach to problem solving in the best interests of the child, while also being prepared to litigate relevant, important issues in dispute.¹⁵³ As put more bluntly by a magistrate: ‘it’s a team sport in advocacy—until you reach the killing field’.¹⁵⁴

(iii) Alternative Dispute Resolution and Negotiated Outcomes

Sometimes, understandably, it is a practical reality that a parent is combative on the removal of a child. Sometimes caseworkers have a fixed view. This is for the Court to manage so that the focus is on the finish—not the fight. (Magistrate in *Ivy*)¹⁵⁵

A number of things have been asked of the parties and we’re going to meet back in two months’ time...giving people the opportunity to try and get it all together and sorted... Even today, the Nan and daughter were sort of hugging each other as they walked out, feeling like they’re going to try something. If they do, then that would be great. We’ll see what happens. (Judicial Officer 8)

The judicial interviews revealed consensus in the desirability of alternative dispute resolution (‘ADR’) and its central role in care matters. Reasons include an implicit assumption that settling litigation is an appropriate norm in the interests of efficiency and time-saving.¹⁵⁶ ADR forums such as dispute resolution conferences serve as a useful ‘reality check’ for parents¹⁵⁷—and sometimes also for the Department¹⁵⁸—producing ‘sensible’ and ‘constructive’ outcomes.¹⁵⁹ Several magistrates referred to their practice of indicating to the parties a preliminary view on the way the case is heading (as opposed to adopting a ‘Sphinx’-like¹⁶⁰ mystique), thus encouraging resolution without a contested hearing.¹⁶¹ Beyond these pragmatic concerns, there were references to the building, preservation or healing of

¹⁵² Horsfall (n 3) 151–3.

¹⁵³ Carter, Church and Sankaran (n 145) 514–15. See also *DCJ and Harry* [2023] NSWChC 5, in which the Court reprimanded the Department for an overly litigious approach to an interim contact dispute, remarking ‘the Department, parents, carers and the Court should work together, where appropriate, to ensure that the care needs of a child are being met. Communication and compromise may be necessary to make decisions efficiently while supporting the relationship between the current primary care givers...and the future care givers of a child in keeping a child safe from harm’: at [43].

¹⁵⁴ Judicial Officer 2.

¹⁵⁵ *Ivy* (n 129) [39].

¹⁵⁶ Judicial Officers 7, 8.

¹⁵⁷ Judicial Officer 8; Registrar 2.

¹⁵⁸ Registrar 1.

¹⁵⁹ Judicial Officer 6, 17.

¹⁶⁰ The Sphinx analogy was used by Judicial Officers 2 and 7.

¹⁶¹ Judicial Officers 2, 7, 8, 15.

relationships,¹⁶² the empowerment of parents,¹⁶³ and the benefit of parties feeling invested in a resolution they have personally negotiated, as distinct from an outcome judicially imposed.¹⁶⁴ Lawyers similarly emphasised the benefits of ADR for resolving matters early,¹⁶⁵ avoiding contested hearings, including in difficult, protracted cases,¹⁶⁶ and facilitating inclusion of parents and wider family more effectively than in conventional litigation.¹⁶⁷

The view that negotiated outcomes help give parents ‘a voice’ in the legal process is disputed in some of the literature. Many Australian studies have referred to parents’ experience of the legal proceedings as alienating and disempowering.¹⁶⁸ Contributing factors include the trauma of the child’s removal,¹⁶⁹ the unfamiliar and intimidating court environment,¹⁷⁰ and co-existing stressors such as homelessness, domestic violence and mental illness.¹⁷¹ These are compounded by intellectual disability for some parents,¹⁷² cross-cultural or language barriers for many,¹⁷³ and bewildering legal jargon as a universal barrier.¹⁷⁴ These contexts belie common law assumptions of the capacity of individual adults to make legal decisions in a way that fully exercises agency.¹⁷⁵ A well-managed ADR forum will moderate these aspects of power imbalance, but is unlikely to eliminate them.¹⁷⁶ Further, the court system’s

¹⁶² Judicial Officers 7, 8.

¹⁶³ Judicial Officer 21; Registrar 2.

¹⁶⁴ Judicial Officer 7; Registrar 1

¹⁶⁵ Lawyers 6, 7, 9.

¹⁶⁶ Lawyers 6, 7.

¹⁶⁷ Lawyers 3, 6, 9.

¹⁶⁸ See, eg, Fernandez et al (n 6) 23; Hinton (n 3) 46; McConnell, Llewellyn and Ferronato (n 120) 86; BJ Newton, ‘Aboriginal Parents’ Experiences of Having their Children Removed by Statutory Child Protection Services’ (2020) 25 *Child & Family Social Work* 814, 820; Ross et al (n 121) 25, 29, 37–8; Thompson (n 76) 234; Walsh and Douglas, ‘Lawyers, Advocacy and Child Protection’ (n 121) 623, 635.

¹⁶⁹ Hinton (n 3) 38; Newton (n 168) 818; Ross et al (n 121) 38; Thompson (n 76) 140–42, 178; Walsh and Douglas, ‘Lawyers, Advocacy and Child Protection’ (n 121) 629, 636.

¹⁷⁰ Susan Collings et al, ‘“She was there if I needed to talk or to try and get my point across”: Specialist Advocacy for Parents with Intellectual Disability in the Australian Child Protection System’ (2018) 24(2) *Australian Journal of Human Rights* 162, 169; Hinton (n 3) 39; Ross et al (n 121) 29–30; Rosemary Sheehan, ‘The Marginalisation of Children by the Legal Process’ (2003) 56(1) *Australian Social Work* 28, 32; Swain and Cameron (n 21) 174.

¹⁷¹ See Hinton (n 3) 53; Ross et al (n 121) 24–5; Walsh and Douglas, ‘Lawyers, Advocacy and Child Protection’ (n 121) 622–3.

¹⁷² Collings et al (n 170) 164; Fernandez et al (n 6) 24; Hinton (n 3) 53; McConnell, Llewellyn and Ferronato (n 120) 55, 86; Swain and Cameron (n 21) 174; Thompson (n 76) 156–7; Walsh and Douglas, ‘Lawyers, Advocacy and Child Protection’ (n 121) 623.

¹⁷³ Borowski, ‘Whither Australia’s Children’s Courts?’ (n 120) 278; Fernandez et al (n 6) 24, 46; Thompson (n 76) 70–71, 107, 157, 176–7.

¹⁷⁴ Collings et al (n 170) 173; Hinton (n 3) 46; Thompson (n 76) 154–5, 227.

¹⁷⁵ Hinton (n 3) 53.

¹⁷⁶ See Anthony Morgan et al, *Evaluation of Alternative Dispute Resolution Initiatives in the Care and Protection Jurisdiction of the NSW Children’s Court* (Report, Australian Institute of Criminology, Research and Public Policy Series 118, 2012) 58; Amy Conley Wright et al, *Family Group Conferencing Evaluation: Final Report* (Research Centre for Children and Families, University of Sydney, 2022) 51–2, 59, 63–4.

imperative drive for matters to ‘settle’ can involve the exclusion of parents from any real participation in ‘court corridor’ negotiations between lawyers.¹⁷⁷ Participants in two Australian studies used the word ‘clubby’ in critically observing the atmosphere of interactions between parents’ lawyers and lawyers acting for other parties.¹⁷⁸ Studies of child protection courts internationally have described a distinctive workplace culture that suppresses active dissent by parents. This operates as an overt pressure on lawyers to move through the stages of a case expeditiously,¹⁷⁹ and as a more subtle ‘group think’¹⁸⁰ environment in which lawyers for parents are frowned upon by their peers and by judicial officers if perceived as determinedly concerted in efforts for their clients.¹⁸¹ In the face of these dynamics, negotiated agreements—particularly when conceding ‘no realistic possibility of restoration’—may represent capitulation on the part of the parents, rather than truly voluntary and informed consent.¹⁸²

At the same time, is it clear that few, if any, of the participants in this study regard fully contested litigation as the optimum route for parents facing removal of their child. There is increasing attention on options for adapting and expanding approaches to alternative dispute resolution in ways that engage families in creating their own solutions, especially in the early stages of intervention.¹⁸³ Aspects of this current policy climate are expanded upon in chapter 10.¹⁸⁴

Despite the emphasis on avoiding contested hearings, it is important to note that care and protection is ‘not a consent jurisdiction’:¹⁸⁵ cases must be finalised by a decision of the Court. Any negotiated proposal for settlement is scrutinised by the magistrate for its compliance with the criteria for realistic possibility of restoration, and its suitability in meeting permanency

¹⁷⁷ See McConnell, Llewellyn and Ferronato (n 120) 86; Thompson (n 76) 184–6, 191.

¹⁷⁸ Hinton (n 3) 50; McConnell, Llewellyn and Ferronato (n 120) 60–61.

¹⁷⁹ Gupta-Kagan (n 25) 262–3; Judge Robin D Sage and Tara Grigg Green, ‘Improving Hearing Quality in Child Welfare Cases’ (2022) 73 *Juvenile and Family Court Journal* 17, 21.

¹⁸⁰ Melissa L Breger, ‘Making Waves or Keeping the Calm’: Analyzing the Institutional Culture of Family Courts Through the Lens of Social Psychology Groupthink Theory’ (2010) 34 *Law & Psychology Review* 55; Gupta-Kagan (n 25) 263.

¹⁸¹ Breger (n 180) 76; see also Sage and Green (n 179) 21.

¹⁸² See Hinton (n 3) 54–5, 72–3; Lens (n 21) 143; Masson (n 147) 6; Thompson (n 76) 150.

¹⁸³ Judicial Officers 13, 12, 17, 19; Registrar 1; Caseworker 10; Lawyers 3, 6, 7, 9.

¹⁸⁴ See Chapter 10, part C, section (i) ‘Building on Strengths’.

¹⁸⁵ *FaCS v AH and AN* [2017] NSWDC 412, [160] (‘AH & AN’), citing *CAC v Secretary, Department of Family and Community Services* [2014] NSWSC 1855.

planning for the child, before being encapsulated as a Court order and its accompanying Care Plan.¹⁸⁶

On occasion the judicial officer will reject a proposed settlement.¹⁸⁷ Given that the Department is always party to any negotiated agreement put to the Court, the rejection of an agreement casts implicit aspersions on the Department's fulfilment of its responsibilities to plan for the best interests of the child. The next section discusses the ways in which the Court critiques the evidence of and decisions made by the Department's caseworkers, and explores some of the associated complexities in the relationship between the State and the Court in exercising their respective powers.

C. The Gatekeeper and the Model Litigant

This Court expects the Secretary to always place independent, objective, relevant evidence before the Court. Evidence which is transparent and provides full disclosure rather than moulding the evidence to assist their case. Caseworkers have difficult and tiring roles on the frontline and require many skills, but they include understanding the court process, and what being the model litigant is, and what is appropriate courtroom behaviour. (Magistrate in *Lim children*)¹⁸⁸

A fundamental role of courts in child protection is to act as a check on the powers of the State to separate children from their families, thereby holding the State to account and ensuring that the drastic action of removing a child into care occurs only and fully in accordance with the law. This role is sometimes described as that of 'gatekeeper'¹⁸⁹ of the out-of-home care system. The statutory authority, in its turn, is required to behave as 'the model litigant', meaning that, as an entity involved in legal disputes on behalf of the State and its citizens, it acts with 'complete propriety', fairness, efficiency and honesty—including transparency in disclosing all information relevant to a case whether or not favourable to its position.¹⁹⁰

¹⁸⁶ *The Act* (n 97) s 83(7). See, eg, *AH & AN* (n 185) [160]; *Department of Communities and Justice (DCJ) and Jacinta* [2021] NSWChC 5, [107]–[109] ('*Jacinta*'), citing *CAC v Secretary, Department of Family and Community Services* [2014] NSWSC 1855; *RC and PK v The Secretary, Department of Communities and Justice* [2024] NSWDC 196, [63] ('*RC & PK*').

¹⁸⁷ Specific instances of the Court rejecting the parties' agreement were referred to by Judicial Officers 3, 4, 5, 17. Case examples of this occurring include *Adriana* (pseudonym, unpublished judgment, Children's Court, July 2022), [20] ('*Adriana*'); *Charlie* (pseudonym, unpublished judgment, Children's Court, December 2021), 2 ('*Charlie*'); *Jacinta* (n 186), [48], [55], [56]–[58], [122].

¹⁸⁸ *Lim children* (pseudonym, unpublished judgment, Children's Court, July 2022) 18 ('*Lim children*').

¹⁸⁹ *Carter et al* (n 145) 497; *Gatowski* (n 128) 80; Sheehan, 'Magistrates' Decision Making' (n 3) 8.

¹⁹⁰ NSW Government, *Model Litigant Policy for Civil Litigation*; NSW Government, Communities and Justice, 'Children's Court', <<https://dcj.nsw.gov.au/service-providers/deliver-services-to-children-and-families/nsw-interagency-guidelines-for-practitioners/courts-involving-children-and-young-people/childrens-court.html>>.

These respective responsibilities of the judiciary and executive arm of government in the care jurisdiction are, for the most part, performed without controversy in accordance with delineated legislative and common law powers. As explored in this section, the Court in NSW takes seriously its role in scrutinising the case of the statutory authority for thoroughness and objectivity. Ordinarily this critique raises no contention regarding the boundaries between the role of the Department in preparing a case and that of the Court in evaluating its merits. However, intermittent tensions—discussed in part (iii) below—do arise in relation to the extent to which the Court can or should *direct* the Department’s exercise of its work in protecting the children in its care, and the corollary issue of whether certain casework decisions are improperly pre-empting the Court’s authorisation.

(i) The Court and the Caseworker: Alignment and Praise

Logan is fortunate to have the stability and consistency of Mr H as a caseworker. He was just as the Court should expect from the Secretary’s delegate, an objective and independent witness who was keen to assist me in my decision-making and fill gaps in evidence. He readily made concessions and acknowledged the dilemma for the Court when there are two loving homes available... (Magistrate in *Logan*)¹⁹¹

...even when I’m dissatisfied with what [the Department] are doing, I feel like they’re listening and going ‘what is it you want and how can we give it to you?’ (Judicial Officer 4)¹⁹²

Among the sampled judgments, the Court’s decision was aligned with the Department’s position in 40% of the outcomes in favour of restoration,¹⁹³ and in 90% of cases finding no realistic possibility of restoration.¹⁹⁴ Overall, the Court and Department were in agreement in 75% of the decisions.

Approximately two-thirds of the judgments do not explicitly comment on the quality of the Department’s approach to its evidence and associated casework; instead the Court’s view of these matters is tacitly embedded in its overall findings in the case. This might seem surprising. As the statutory authority is responsible for the instigation and carriage of each case, and carries the burden of proof on factual allegations, the evidence of its caseworkers could not be more central. On the other hand, the very centrality of this material, forming the basic substance of the case itself, may tend to give it an ‘assumed’ status—its content is taken

¹⁹¹ *Logan* (pseudonym, unpublished judgment, Children’s Court, March 2022) 11.

¹⁹² Judicial Officer 4.

¹⁹³ 13 of 32 decisions.

¹⁹⁴ 67 of 74 decisions.

for granted, unless some element of the case is directly challenged by another party. Given that it is normally a parent who disputes caseworker evidence, and that the credibility and ‘insight’ of parents is often in doubt,¹⁹⁵ it can be difficult to gain traction in disputing the Department’s versions of events.

There is a considerable volume of literature lamenting poor quality and inaccuracy of caseworker material tendered in proceedings.¹⁹⁶ However, within an essentially adversarial process there is no expectation on magistrates to routinely query the veracity of the evidence before them when the legal advocates have not chosen to do so.¹⁹⁷ Some critics raise the bolder notion of ‘rubber-stamping’ by the courts.¹⁹⁸ The present study indicates that this allegation is over-simplified if applied to the NSW context, and not an accurate reflection of the way cases are decided. In the one-third of judgments that *do* make express observations on the Department’s casework and its witnesses (or that of caseworkers from outsourced non-government agencies), the commentary is evenly split between the positive and negative.¹⁹⁹ Prevalent themes within judicial praise for caseworkers are objectivity and balance,²⁰⁰ thoughtfulness,²⁰¹ thoroughness,²⁰² avoidance of a rigid attitude towards the parents,²⁰³ and willingness to make concessions.²⁰⁴ These comments overall emphasise fairness, and align with Judge Johnstone’s statement that in his experience, caseworkers in a majority of cases do

¹⁹⁵ See Chapter 7, section (ii) ‘Insight’, and Chapter 8, section (i) ‘Candour and Credibility’.

¹⁹⁶ See, eg, Ainsworth and Hansen (n 146) 49; Davis, *Family is Culture Report* (n 35) 381–8; Hinton (n 3) 69–77; Masson (n 147) 9; Ross et al (n 121) 30, 37; Sheehan and Borowski, ‘Child Protection Jurisdiction in Victoria’ (n 92) 105; Skivenes and Tonheim (n 147) 6–7; Tilbury, ‘Obtaining Expert Evidence’ (n 5) 397–8.

¹⁹⁷ An interview participant argued that the role of lawyers in proceedings should be much more focused on distinguishing between agreed and disputed facts, before moving to the stages of risk assessment and clinical opinion which are ostensibly based on established facts (Lawyer 2).

¹⁹⁸ Davis, *Family is Culture Report* (n 35) 122, citing previous studies and submissions to the Family is Culture Review, but noting firm denial by the President of the Children’s Court of the ‘rubber stamping hypothesis’. See also Tammy Richards and Anne Fromknecht, ‘Measuring Due Process and Fairness in the Child Welfare Court System’ (2024) 75(2) *Juvenile and Family Court Journal* 27, 35; Tamara Walsh and Heather Douglas, ‘Lawyers’ Views of Decision-Making in Child Protection Matters: the Tension Between Adversarialism and Collaborative Approaches’ (2012) 38(2) *Monash University Law Review* 181, 201–2.

¹⁹⁹ Positive comments regarding caseworkers appear in 17 judgments, and negative comments in 19.

²⁰⁰ *Braidan* (pseudonym, unpublished judgment, Children’s Court, August 2022), 32 (‘*Braidan*’); *Logan* (n 191) 11; *Re Malakhai* (n 35) [95], [105], [107]; *Naunton children* (pseudonym, unpublished judgment, Children’s Court, August 2023) 21 (‘*Naunton children*’).

²⁰¹ *ASK* (n 38) [103]; *Braidan* (n 200) 8; *DFaCS (NSW) re Kim* [2013] NSWChC 6, [88] (‘*Kim*’); *Naunton children* (n 200) 21; *RC & PK* (n 186) [27]; *Re Saunders and Morgan* [2007] NSWDC 5589 [54] (‘*Saunders and Morgan*’); *VC v Secretary, Department of Communities and Justice & Ors (No. 2)* [2024] NSWDC 192, [170] (‘*VC*’).

²⁰² *Kim* (n 201) [88]; *Saunders & Morgan* (n 201) [54].

²⁰³ *ASK* (n 38) 100; *Re Malakhai* (n 35), [107]; *VC* (n 201) [169].

²⁰⁴ *Kim* (n 201) [88]; *Logan* (n 191) 11; *Re Malakhai* (n 35), [96]; *Yarran Taylor children* (n 109) [215], [245].

‘their best’ in difficult circumstances to perform as model litigants.²⁰⁵ Other indications of good casework, mentioned in judgments, are commitment and consistency in supporting the needs of the individual child.²⁰⁶ Similarly, interviewed magistrates spoke in praise of (some) caseworkers’ diligence,²⁰⁷ attention to detail,²⁰⁸ recognition of nuance,²⁰⁹ and cooperation with the Court.²¹⁰

From the perspective of several of the Department’s participants, the reason the Court’s decisions are usually aligned with the Department’s position is not because of biased rubber stamping, but due to the hard work put into presenting an appropriate case:²¹¹

The [DCJ] lawyer carries the burden of proof, so it’s not easy. A lot of work goes into it. It’s easy to sit on the outside and throw stones and tell people what they’re doing wrong, but a stack of work goes into preparing those cases, to fit with the legal framework, which is the same framework the judicial officer is applying. And that’s probably why we come to the same outcomes. (Lawyer 2)

However, as seen below, some caseworkers perceive less equanimity between the two institutions, feeling that their efforts in support of restoring children to parents are undermined, even thwarted, by the court process.

(ii) The Court and the Caseworker: Misalignment and Censure

I feel that in the court process, the expectation for the parents is compared to, I don’t know, like foster carers who have no police history, who have nothing...and trying to work with those expectations can be very frustrating and out of your control, as to ‘why can’t you see that this parent is ready, why can’t you see this is best for this child?’ (Caseworker 8)

... the evidence from the [Department] is not about what they do see, but what they were hoping and wanting to see. (Magistrate in *Braidan*)²¹²

²⁰⁵ Judge Peter Johnstone, ‘Perspectives from the President’ (Conference Paper, NSW Child Protection Legal Conference, 4 February 2021) 17.

²⁰⁶ *Logan* (n 191) 11; *Naunton children* (n 200) 36; *Ramsay children* (pseudonym, unpublished judgment, Children’s Court, April 2021) 21 (*‘Ramsay children’*).

²⁰⁷ Judicial Officers 7, 10, 12, 16, 17.

²⁰⁸ Judicial Officer 17.

²⁰⁹ Judicial Officer 10.

²¹⁰ Judicial Officers 4, 10.

²¹¹ Caseworkers 5, 9, 13; Lawyer 2.

²¹² *Braidan* (n 200) 10.

Within the judgments, negative commentary on the carriage of the Department's case focuses on neglect to be objective and thorough,²¹³ regardless of whether the Department's arguments are in favour of or opposed to restoration. These omissions may transpire in lack of fairness to parents: for instance when casework decisions appear inconsistent or 'ad hoc',²¹⁴ are based on incomplete and decontextualised information,²¹⁵ or reveal missed opportunities for constructive support.²¹⁶ Similar issues were raised in the judicial interviews, but with a more pervasive view that caseworkers often hold a rigid stance against parents,²¹⁷ and that the capacity to be a truly independent, model litigant is compromised by the 'inherent bias'²¹⁸ in pursuing a legal outcome justifying the initial decision to remove the child.²¹⁹

In a curious dichotomy to this perception of caseworkers as biased against parents, many of the Department's participants expressed essentially the opposite: that is, they see themselves as supportive of restoration, and the Court as resistant.²²⁰ This view was emphatically conveyed by some as a sense of frustration and bewilderment – with language such as 'blown away',²²¹ 'gobsmacked',²²² 'worlds apart'²²³ and 'career defining moment'²²⁴ used to describe their experience of cases in which they firmly believe the parent is ready for restoration but have struggled to convince the Court that this is so. These conflicting perspectives may be partly explained by self-selection bias in the sample of caseworkers who responded to the invitation to participate in the research;²²⁵ the interviews predominantly revealed an ardent commitment to supporting families to stay together. Also relevant is the emphasis on

²¹³ *Adriana* (n 187) 6–7, 12–13; *Braidan* (n 200) 11, 12; *Charlie* (n 187) 8; *Department of Communities and Justice (DCJ) and the Dalton Tomkins children* [2023] NSWChC 10, [90]–[92] ('*Dalton Tomkins children*'); *Esther* (pseudonym, unpublished judgment, Children's Court, March 2006) [39]–[43] ('*Esther*'); *Fiona Farmer* (n 61) [163]; *George* (pseudonym, unpublished judgment, Children's Court, November 2022) 26; *Lim children* (n 188) 18; *Yarran Taylor children* (n 109) [32], [310], [313].

²¹⁴ *Re: Alison Claire, Lauren Donovan and Victoria Claire* (Children's Court of New South Wales, 10 July 2009), [24]–[28], [31] ('*Alison Claire*'); *Fiona Farmer* (n 61) [163]; *FaCS v the Harris children* [2012] NSWChC 9, [45] ('*Harris children*').

²¹⁵ *DHK & Anor v Secretary, Department of Family and Community Services & Ors* [2018] NSWDC 221, [185]–[189], [553]–[556] ('*DHK*'); *Harris children* (n 214) [45]; *SK* (n 40) [114]–[127], [161]–[165].

²¹⁶ *Esther* (n 213) [39]–[40]; *Re Malakhai* (n 35) [67]–[90], [198]; *Vlachos children* (pseudonym, unpublished judgment, Children's Court, June 2009) [60]–[68] ('*Vlachos children*').

²¹⁷ Judicial Officers 9, 10, 13, 20, 22, 23; Registrar 2.

²¹⁸ Judicial Officer 6.

²¹⁹ Judicial Officers 3, 7, 18, 20, 21. See also Walsh and Douglas, 'Lawyers, Advocacy and Child Protection' (n 121) 623.

²²⁰ Caseworkers 2, 4, 7, 8, 9, 12; Lawyers 4, 8, 9.

²²¹ Caseworker 12.

²²² *Ibid.*

²²³ Lawyer 8 ('worlds apart'); Caseworker 4 ('worlds between').

²²⁴ Caseworker 7.

²²⁵ See also Chapter 3, part D, 'Limitations'.

restoration in the current policy climate, which has caused marked disagreement between professionals embracing the policy and those who feel children are being left in harm's way.²²⁶ As indicated by a group of relatively recent judgments sharing common themes, the Court is increasingly concerned about risk of harm posed by restoration itself. This is in contexts in which the Department's support of restoration is regarded by the magistrate as ill-considered – in the face of little evidence of the parents' progress on crucial issues,²²⁷ lack of casework action in carrying out relevant assessments,²²⁸ and 'rushed, reactive'²²⁹ attempts at planning for a transition to restoration.²³⁰

(iii) Hazy Lines and Systemic Constraints

...in care, there is an opportunity to make some differences, to ask relevant questions, to 'intervene' if you like. (Judicial Officer 1)

Our job seems to me to be supervisory... but what I find difficult is there is a lack of capacity to really direct the Department...You're powerless, really, ultimately. (Judicial Officer 2)

In his reiterations of the legal framework, Judge Johnstone observed that the NSW care legislation 'contains an inextricable mixture and combination of both judicial and administrative powers, duties and responsibilities. It is often difficult to precisely discern where the Department's powers and responsibilities end as opposed to those of the Court'.²³¹

Despite this comment, both judgments and interviews indicate that the Court has a firm understanding of what it *cannot* do. Its authority to approve a Care Plan for the child does not extend to involvement in implementation of the Plan.^{232 233} Neither during nor after the legal case can the Court direct the detail of support services provided to children, parents and

²²⁶ See Chapter 2, part E 'Recent Policy Developments', and Chapter 5, part B, section (iii) 'Striking a balance'.

²²⁷ *Braidan* (n 200) 10, 15; *Dalton Tomkins children* (n 213) [66]–[67], [106], [332]; *Yarran Taylor children* (n 109) [110], [115].

²²⁸ *Adriana* (n 187) 12; *Braidan* (n 200) 11; *Dalton Tomkins children* (n 213) [67].

²²⁹ *Yarran Taylor children* (n 109).

²³⁰ *Braidan* (n 200) 7–8, 12; *Yarran Taylor children* (n 109) [216], [263], [265].

²³¹ *DFaCS (NSW) and the Colt Children* [2013] NSWChC 5, [145] ('Colt children'); *Department of Communities and Justice (DCJ) and Bloom* [2021] NSWChC 2, [122] ('Bloom'); *Fiona Farmer* (n 61) [62]; *Department of Communities and Justice (DCJ) and the McAlister Children* [2020] NSWChC 4, [64] ('McAlister children').

²³² *Alison Claire* (n 214) [49].

²³³ See Chapter 10, part C, section (ii) in relation to a degree of power to *monitor* the implementation of the Care Plan, pursuant to section 82 of the Act.

carers, nor exercise any control over service availability and expenditure.²³⁴ ²³⁵ It can comment on deficiencies in the handling of a matter by caseworkers, but the role is not akin to ‘an Ombudsman’²³⁶ able to ‘make fair, unfair things that may have occurred’.²³⁷ As expressed in the case of *Julian and Allan*,

... a court determination can only go so far. At best it provides the framework and skeleton upon which others must put the flesh of co-operation, dedication, diligence, goodwill and common sense to make the court orders work for the benefit of the children. (Magistrate in *Julian & Allan*)²³⁸

That much is clear. However, elements of doubt attach to practicalities of what the Court *can* or *should* do, within the boundaries of its role as gatekeeper and scrutineer. The interviews revealed considerable divergence among magistrates as to whether their placing ‘pressure’ on the Department is influential in getting things done,²³⁹ limited to ‘managing relationships, around the edges’,²⁴⁰ or ultimately futile.²⁴¹ Some magistrates are more ‘interventionist’ than others in conveying firm expectations about steps to be taken in the time between court appearances,²⁴² or in utilising their judgments to draw attention to systemic failures – which the Court itself cannot mend, but with the implicit intention of encouraging a remedial response at the administrative level.²⁴³

Within the Department there are mixed views on prescriptive approaches by the Court: a demanding approach to Departmental accountability was recognised in the interviews as producing results and encouraging attention to detail,²⁴⁴ but less welcome if seen as intruding in the minutiae of caseworker discretion.²⁴⁵ It was argued that judicial critique of past

²³⁴ *Re Malakhai* (n 35) [184]–[185]; *In the Matter of Melanie* (Children’s Court of New South Wales, 15 September 2008), [9] (*‘Melanie’*); Judicial Officer 18.

²³⁵ See Chapter 10, part C, section (ii) in relation to section 85 of the Act, which enables the Court to *request* (as distinct from *require*) that a relevant government or non-government agency provide services to a child or family to facilitate restoration.

²³⁶ *Lim children* (n 188) 12; *Mario* (pseudonym, unpublished judgment, Children’s Court, October 2022) 19.

²³⁷ *Dalton Tomkins* (n 213) [23]; an equivalent comment was made in interviews by Judicial Officer 21.

²³⁸ *Julian & Allan* (n 32) [11].

²³⁹ Judicial Officers 1, 4, 8, 18.

²⁴⁰ Judicial Officer 21.

²⁴¹ Judicial Officers 2, 3, 6.

²⁴² Examples provided by Judicial Officers 4, 8, 9, 15, 17.

²⁴³ See, eg, *Braidan* (n 200) 36; *Dalton Tomkins children* (n 213) [18]–[19], [200]–[201], [347]; *Finn, Lincoln, Marina and Blake Hughes* [2022] NSWChC 4, (entire judgment) (*‘Hughes children’*); *Malakhai* (n 35) [73]–[89]; *Department of Family and Community Services and Nathan* [2018] NSWChC 1, [67]–[70] (*‘Nathan’*); *Yarran Taylor children* (n 109) [14]–[18], [110], [180], [211]–[212], [241]–[243], [259]–[261], [269], [272], [299]–[301], [311]–[315].

²⁴⁴ Caseworker 6; Lawyers 1, 2, 7.

²⁴⁵ Caseworker 12; Lawyers 1, 9.

casework deficiencies 'is interesting, and touches on public policy issues, but it's not the purpose of the care proceedings, which is to plan for the future of the child'.²⁴⁶

Three issues broadly dominate the systemic concerns raised by judicial officers. These are: inadequate availability of services to help parents change their circumstances;²⁴⁷ children being subjected to prolonged instability²⁴⁸ or exposed to actual harm in substandard, or abusive, out-of-home care placements;²⁴⁹ and an added layer of complexity associated with the Department's outsourcing of day-to-day case management to non-government agencies ('NGOs').²⁵⁰ It is often the decisions of NGO staff that are the direct subject of the magistrate's ire or dismay,²⁵¹ but with the Court firm in reminding the Department of its overarching accountability in exercising interim parental responsibility and as model litigant.²⁵² Similarly, while judicial officers acknowledge the resource constraints that affect caseworker recruitment, retention, workload²⁵³ and availability of wider services (especially in rural areas),²⁵⁴ it is nonetheless maintained that as statutory authority for child protection the onus is on the Department to ensure the provision of essential services and support.²⁵⁵ As aptly put by one magistrate, responding to reports of an impasse preventing caseworkers from investigating a child's complaint about an NGO-run placement: 'who's funding this? The tail, the dog – what's going on?'²⁵⁶

²⁴⁶ Lawyer 2. A similar view was expressed by Judicial Officer 21, in relation to parents 'who are quite properly testing the case management decisions, but...I don't intend to sit in the court for two weeks and talk about the decisions the caseworker has made, because the child that I'm making orders about is the child as presents today'.

²⁴⁷ Judicial Officers 5, 7, 8, 13, 14, 17, 19, 23.

²⁴⁸ Judicial Officers 3, 4, 15. See also, eg, *Braidan* (n 200) 15–16, 33–4; *Dalton Tomkins children* (n 213) [195]; *Hughes children* (n 243) [67]; *Yarran Taylor children* (n 109) [226].

²⁴⁹ Judicial Officer 3; *Department of Family and Community Services (DFaCS) and the Ali Children* [2018] NSWChC 6, [186], [203]–[209], [229], [243], [248]–[250], [260]–[262] ('*Ali children*'); *Braidan* (n 200) 3–4, 6, 30–31; *Hughes children* (n 243) (entire judgment); *Mario* (n 236) 19–20; *Yarran Taylor children* (n 109) [18]–[20]; [119]–[120], [142], [191]–[199], [208]–[212], [237], [243], [272]–[301].

²⁵⁰ This issue, including problems associated with under-resourced NGOs and barriers in communication flow between NGO, Department and Court, was raised impromptu by many of the participants: Judicial Officers 1, 3, 4, 8, 9, 10, 13, 17, 21; Registrar 2; Caseworkers 2, 4, 7, 9, 10; Lawyers 4, 5, 7. See also Susan Collings et al, 'Working Towards Reunification in New South Wales: Professional Perspectives on Navigating Complex Systems' (2024) 59 *Australian Journal of Social Issues* 752, 759–68; BJ Newton et al, 'Restoring Children From Out-of-Home Care: Insights From an Aboriginal-Led Community Forum' [2024] *Child & Family Social Work* 1, 7. See also Chapter 2, part B 'The Institutions'.

²⁵¹ *Ali children* (n 249) [150]–[231]; *Dalton Tomkins children* (n 213) [143]–[217], [274]–[296]; *Department of Communities and Justice (DCJ) and Phoebe and Katelyn Wilson* [2024] NSWChC 9, [96]–[102] ('*Phoebe and Katelyn Wilson*'); *Hughes children* (n 243) [28]–[35], [47]–[54], [56]–[110]; *Yarran Taylor children* (n 109) [161]–[252].

²⁵² *Braidan* (n 200) 36; *Dalton Tomkins children* (n 213) [12]–[19]; [73]–[74], [200]–[201], [290], [292]; *Hughes children* (n 243) [43], [111], [120]; *Phoebe and Katelyn Wilson* (n 251) [102], [135]; *Yarran Taylor children* (n 109) [17], [300]–[301].

²⁵³ *Yarran Taylor children* (n 109) [259]; Judicial Officers 5, 10, 14, 15, 16, 18.

²⁵⁴ Judicial Officers 7, 13, 14, 17; Registrar 1.

²⁵⁵ *Yarran Taylor children* (n 109) [259]; Judicial Officers 15, 16, 19; Registrar 1.

²⁵⁶ Judicial Officer 9.

Several judgments raise a contentious issue straddling the line between systemic issues and the Court's actual authority.²⁵⁷ In each instance, either prior to the court application or while proceedings were on foot, casework for a transition to restoration had actively commenced on an assumption that restoration was to occur. The Court denounced the actions—in some instances largely driven by an outsourced agency²⁵⁸—that had improperly pre-empted the Court's decision. Not only were the judicial officers concerned at poor planning and disrespect for due process,²⁵⁹ they raised the potential for emotional harm to children who were given unsettling messages or false assurances that restoration was imminent.²⁶⁰

These tensions between the State and the Court appear to increasingly revolve around the plight of children in dire circumstances in spite of, or because of, the child protection system. Attention to this issue is evident in a trend, considered in chapter 5,²⁶¹ towards greater explicit attention by some judicial officers to 'the circumstances of the child' in applying the statutory test for assessing realistic possibility of restoration.

D. Expert Evidence

...for the real on the ground sense of likely progress, how would I know? Even if parents give evidence in the witness box, how would I know what their parenting is going to be like? Just as a result of that, you can't... Whereas the clinician at least spends time with them, sees them interact with the kids—again that's not perfect, but it's certainly better than what I do, and all of those clinicians have expertise that I don't have. (Judicial Officer 6)

...but these clinicians who form a view that is so fixed—no shades of grey. You read it and you think to yourself 'Really? You've had two meetings with these people and you say that the father is autistic, and shallow, and can't do this, that or the other'? (Judicial Officer 10)

²⁵⁷ *Braidan* (n 200); *Dalton Tomkins children* (n 213); *Department of Family and Community Services (DFaCS) and Bridget* [2019] NSWChC 4 ('*Bridget*'); *The Secretary, Department of Family and Community Services and Tyson Tanner (Costs)* [2017] NSWChC 1 ('*Tyson Tanner*').

²⁵⁸ *Braidan* (n 200) 10–11, 18–19, 28–32, 34; *Dalton Tomkins children* (n 213) [41].

²⁵⁹ *Braidan* (n 200) 4, 7–8, 12, 21; *Bridget* (n 257) [99]–[103]; *Dalton Tomkins children* (n 213) [41], [163]–[164]; *Tyson Tanner* (n 257) [35]–[36], [73(vii)].

²⁶⁰ *Braidan* (n 200) 8, 19–20, 24, 25, 26, 27, 30–32, 35; *Bridget* (n 257) [80], [98], [104]; *Dalton Tomkins children* (n 213) [125], [302]–[303]; *Tyson Tanner* (n 257) [31]–[32].

²⁶¹ See Chapter 5, part D, section (i).

(i) The Significance of Expert Evidence

Issues in care and protection are inherently interdisciplinary, with perspectives from psychology, medicine, social work and social sciences recognised as important in ensuring legal decision-making is properly informed by evidence-based expertise.²⁶² As put by a magistrate, ‘in many ways the decision that we make in the Children’s Court is not legal...a lot of what happens is not legal. It comes from a far more complex background than that’.²⁶³ Expert evidence is pertinent to many aspects of the ‘realistic possibility of restoration’ question, assisting the Court’s understanding of the family circumstances contributing to the child’s removal, the impact of neglect or abuse on the child, the child’s current and longer-term needs, and the prospects of the parents being able to meet those needs. Application of specialised, independent opinion helps counter concerns that court decision-making in this field is overly discretionary²⁶⁴ and based on subjective assumptions regarding parenting capacity and child development.²⁶⁵ It also helps magistrates to develop their own knowledge of the interdisciplinary issues they must wrestle with:²⁶⁶ ‘...you build up expertise, but you build it up from having listened to the experts – that’s how you do it’.²⁶⁷

A report from the Children’s Court Clinic²⁶⁸ was in evidence in 40% of the judgments. Other sources of expert evidence – most commonly a parent’s own psychologist, or an assessment arranged by the Department from a clinician external to the Children’s Court Clinic – were present in 45% of cases. In total, 63% of judgments referred to at least one form of expert opinion. It is unknown whether these percentages reflect the actual presence of expert assessments across all NSW care matters; not only is the study sample biased to cases selected for publication or provided to the researcher by certain magistrates, it spans a 20-year period and may not reflect current practice. The interviews suggest that while all the magistrates find clinical evidence valuable in principle, there is variance in their recourse to this evidence. Responses to a question about the proportion of cases in which a clinical assessment is ordered

²⁶² See Cashmore (n 25) 335–6; Peter W Choate, ‘Termination of Parental Rights: A Commentary on Ben-David’ (2015) 18 *Journal of Family Social Work* 243, 246; Krissie Fernandez Smith and Phillip C O’Donnell, ‘Practice Tips for Managing Challenges in Parenting Capacity Assessments in Child Protection Court’ (2023) 61 *Family Court Review* 818, 819; Ain Suomi and Jeanette A Lawrence, ‘Clinical Family Assessment for the Children’s Court of Victoria: Building the Evidence Base in Court Child Protection Matters’ (2013) 27 *Australian Journal of Family Law* 220, 223; Tilbury, ‘Obtaining Expert Evidence’ (n 5) 393.

²⁶³ Judicial Officer 6.

²⁶⁴ Tilbury, ‘Obtaining Expert Evidence’ (n 5) 401.

²⁶⁵ Ibid 399.

²⁶⁶ Judicial Officers 7, 14.

²⁶⁷ Judicial Officer 14.

²⁶⁸ See Chapter 2, part B for a brief description of the nature of the Children’s Court Clinic.

ranged from ‘really not that many’,²⁶⁹ to 50%,²⁷⁰ 80%,²⁷¹ and ‘nearly all’.^{272 273} In the words of a Children’s Registrar, ‘some magistrates like them, some don’t’.²⁷⁴

Despite uncertainty as to the number of cases relying on clinical expertise, it is clear that it forms a key part of the landscape of care and protection law in NSW. Prevalent purposes for which the expertise was sought in the judgments include: parenting capacity assessments broadly; evaluations of a parent’s mental health and progress of therapeutic treatment; evaluations of the wellbeing and therapeutic needs of the child; and medical explanations for ‘unexplained’ injury to a child. The large majority of judicial participants, along with some caseworkers and lawyers, expressed the view that expert assessments on the viability of restoration are (mostly) very helpful²⁷⁵ – especially in more complex cases.²⁷⁶ Reasons include bringing a perspective to bear that is independent of the Department²⁷⁷ and which challenges fixed positions,²⁷⁸ often facilitating settlement of the dispute.²⁷⁹ Although it is most often the parents who concede their position, there were also references to the Department being persuaded to revise its oppositional stance.²⁸⁰ As observed by a British child protection scholar, expert opinion sometimes supports a parent’s case to care for the child, ‘much to the irritation of those who think otherwise’.²⁸¹ Magistrates appear particularly reliant on expert assessors to provide informed evidence on children’s circumstances, wishes, attachments and needs.²⁸² They value clinical recommendations for a clear, practical series of steps for either a transition to restoration, or to address other issues in the child’s situation if restoration is not to occur.²⁸³

²⁶⁹ Registrar 2.

²⁷⁰ Judicial Officers 2, 14.

²⁷¹ Judicial Officer 3.

²⁷² Judicial Officer 15.

²⁷³ The reliability of these estimates is qualified by inconsistent clarity, due to differences in the flow of questions and answers, as to whether participants were referring to a proportion of *all* care matters, including those reaching an early settlement, or only matters reaching contested hearing (it is likely that most respondents were referring to the latter).

²⁷⁴ Registrar 2.

²⁷⁵ Judicial Officers 1, 2, 3, 4, 5, 6, 7, 8, 9, 13, 14, 15, 16, 17, 23; Registrars 1 and 2; Lawyers 1, 3, 4, 5, 7, 8; Caseworkers 1, 3, 6, 7, 8, 9.

²⁷⁶ Judicial Officers 4, 7, 18, 21.

²⁷⁷ Judicial Officer 7; Registrar 1; Caseworker 7; Lawyers 1, 3, 5.

²⁷⁸ Judicial Officer 8; Registrar 1; Lawyer 1.

²⁷⁹ Judicial Officers 7, 9, 14.

²⁸⁰ Judicial Officers 7, 14; Registrar 1.

²⁸¹ Masson (n 147) 9. See also Hinton (n 3) 77.

²⁸² Judicial Officers 1, 4, 5, 6, 8, 17, 18, 19, 20, 21, 23.

²⁸³ Judicial Officers 6, 23; Registrar 2.

A subset of magistrates expressed a stronger conviction: that expert evidence is not only *helpful*, it is *vital*. This is for the very fact that a judicial officer, being a lawyer, is not qualified to form an opinion on the interdisciplinary issues crucial to an understanding of the capacity of the parent to meet the child's needs. As rhetorically posed, 'who would we be as a lawyer to go, "okay, well I'm trained in how to write a contract, you're trained in the psychology of development and attachment, I don't agree, so I'm going to do this instead"'?²⁸⁴ The experts, it is asserted, provide an 'interface with the real world'.²⁸⁵ In the absence of 'demonstrable errors' in the expert's reasoning, it would be sheer 'arrogance' for a magistrate to disregard their opinion.²⁸⁶

Other magistrates, while holding expert evidence in high regard, tend to perceive it as just one of a matrix of factors guiding the Court's assessment. They usually prefer that clinicians, rather than presenting a fixed position, provide a range of suggestions that are contingent on the direction the Court chooses to take:²⁸⁷ '...where there's a recommendation, I always try to say "well that's one person's view, and I'm still open to hearing all the evidence"' ;²⁸⁸ '...at the end of the day, it might be that I can take a little bit out of option number one, and put it in option number two'.²⁸⁹ Pragmatically, clinicians' reports are described as useful for 'a really good summary of some factual findings',²⁹⁰ or providing 'the words and the scaffolding to make the decisions that I probably thought I was going to make anyway'.²⁹¹

The degree of actual alignment between clinical recommendation and the Court's decision (as indicated in this study's sample of judgments) contradicts perceptions in some scholarly literature that expert reports, and especially parenting capacity assessments, are ubiquitously or uncritically relied upon in child protection law, and to the disadvantage of parents.²⁹² The analysis found that the Court disagreed with the conclusions of the Children's Court Clinic in one-quarter of instances,²⁹³ in over half of which the variance of opinion was determined in favour of a parent.²⁹⁴ The rate of disagreement with experts other than Children's Court

²⁸⁴ Judicial Officer 23.

²⁸⁵ Judicial Officer 2.

²⁸⁶ Judicial Officer 6.

²⁸⁷ Judicial Officers 7, 10, 15, 19, 22, 23.

²⁸⁸ Judicial Officer 10.

²⁸⁹ Judicial Officer 15.

²⁹⁰ Judicial Officer 9.

²⁹¹ Judicial Officer 4.

²⁹² See Hinton (n 3) 78–9; Luther (n 29) 341–2; McConnell, Llewellyn and Ferronato (n 120) 70–71, 78–9, 82, 84.

²⁹³ 10 of the total 40 judgments that referred to a Children's Court Clinic Report.

²⁹⁴ *DHK* (n 215) [504], [522]–[524]; *Hatfield children* (pseudonym, unpublished judgment, Children's Court, April 2018) 50–53, 66–7; *J & T v Department of Communities and Justice* [2023] NSWDC 78, [340]–[398], [502]–[506] ('*J & T*');

Clinicians was approximately 40%.²⁹⁵ This higher instance reflects, at least partially, cases of alleged ‘non-accidental’ injuries presenting competing medical opinions from which the magistrate must choose, and a tendency (across the wider range of cases) for the evidence of parents’ own treating doctors or counsellors to be assessed as lacking objectivity. Still, even within the diverse sources independent of the Children’s Court Clinic, expert evidence was quite often relied upon to the benefit of a parent’s case for restoration.²⁹⁶

(ii) Evaluating Expert Evidence

Some scholars query the extent to which judicial officers and legal advocates have the skills to properly understand, critically evaluate and apply the interdisciplinary sciences.²⁹⁷ Judicial officers, it is argued, need to be appraised of the quality of the research²⁹⁸ and the qualifications of the witness to express opinion on particular issues,²⁹⁹ and aware of the contested status of most scientific or social research and its interpretations.³⁰⁰ Conclusions of a single study are ‘rarely decisive,’³⁰¹ and established opinions are subject to revision and change.³⁰² In the child protection context, there exist particular reservations about the validity of applying ‘generalised’ research findings to the circumstances of an individual family and case.³⁰³ However, both the judgments and interviews indicated that magistrates are cognisant of such complexities, and of the boundary between *being* and *being informed by* an expert in a field other than law.³⁰⁴ Care is often taken within a judgment to articulate why the decision is, or is not, relying on an expert or preferring one to another – with reference to the *substance* of the evidence, the *reasoning process* of the witness, and the *manner* in which the evidence was

DFaCS *re Lilly, Wade and Caleb* [2012] NSWChC 21, [53]–[60] (*‘Lilly, Wade and Caleb’*); SK (n 40) [207], [238]; *Vlachos children* (n 216) [52], [72]–[74].

²⁹⁵ 18 of the total 46 judgments that referred to one or more experts external to the Children’s Court Clinic.

²⁹⁶ *Ali children* (n 249) [38]–[55], [92]; *Department of Family and Community Services v Borg* [2011] NSWChC 4, [50]; *J & T* (n 294) [502(5)–(7), [505], [507], [510]–[511]; *Janet and Xing-fu* (n 45) [21], [81], [87], [89], [124]; *KH v Secretary, Department of Communities and Justice* [2021] NSWDC 498, [508], [517], [604]–[608], [625], [640]–[641] (*‘KH’*); *Lilly, Wade and Caleb* (n 294) [44]–[46], [56]–[69]; *Naunton children* (n 200) 19–20; *Nellie* (n 37); *O’Connor v The Minister for Family and Community Services* [2020] NSWDC 453, [24]–[32] (*‘O’Connor’*); SK (n 40) [238].

²⁹⁷ *Hinton* (n 3) 78; *Luther* (n 29) 341–2; *Tilbury, ‘Obtaining Expert Evidence’* (n 5) 394, 399.

²⁹⁸ *Dickens et al* (n 23) 580; *Tilbury, ‘Obtaining Expert Evidence’* (n 5) 393.

²⁹⁹ *Luther* (n 29) 342; *Tilbury, ‘Obtaining Expert Evidence’* (n 5) 394.

³⁰⁰ *Campbell et al* (n 3) 131; *Dickens et al* (n 23) 580.

³⁰¹ *Tilbury, ‘Obtaining Expert Evidence’* (n 5) 393.

³⁰² *Campbell et al* (n 3) 131; *Dickens et al* (n 23) 580; *Tilbury, ‘Obtaining Expert Evidence’* (n 5) 394.

³⁰³ *Cashmore* (n 25) 339; *Dickens et al* (n 23) 580; Chris Lennings, ‘Risk Assessment in Care and Protection: The Case for Actuarial Approaches’ (2005) 4(1) *Australian e-Journal for the Advancement of Mental Health* 1, 9.

³⁰⁴ This distinction is expressly discussed and approved by the Supreme Court in *Re Benji and Perry* [2018] NSWSC 1750, [62]–[76].

delivered. Amalgamated, these factors lead the Court in many cases to declare a particular witness to be ‘impressive’³⁰⁵ and the evidence ‘compelling’.³⁰⁶

In relation to substance and reasoning, the interviews showed that judicial officers value clear³⁰⁷ and reasonably succinct³⁰⁸ explanations, which are nonetheless based on comprehensive evaluation of the relevant material in the case.³⁰⁹ Opinions must be balanced and objective, that is, not slanted to one party or selectively drawn from narrow sources of information,³¹⁰ nor vague³¹¹ and ‘skirting around the issue’.³¹² Overall, there was emphasis on the need for lucidity, ensuring the Court’s understanding of ‘[w]hat were the foundational facts that you relied upon to form your opinion? How does your expertise relate to your capacity to give that opinion? What is your opinion and how can that be implemented safely?’³¹³

While sharing a concern for objectivity,³¹⁴ in a subtle distinction the judgments themselves tend to dwell less on the fabric of the expert’s reasoning than on the *demeanour* of the witness in providing oral evidence—for instance that they were respectful,³¹⁵ calm,³¹⁶ measured,³¹⁷

³⁰⁵ See, eg, *Colt children* (n 231) [289]; *Dalton Tomkins children* (n 213) [139]; *Kim* (n 201) [65]; *Lilly, Wade and Caleb* (n 294) [56]; *McAlister children* (n 231) [58]; *Malakhai* (n 35) [123]; *In the Matter of Samantha* (Children’s Court of New South Wales, 21 July 2008) [19]; *SS v Department of Human Services (NSW)* [2010] NSWDC 279, [47], [102] (‘SS’); *Yarran Taylor children* (n 109) [153].

³⁰⁶ See, eg, *Colt children* (n 231) [288]; *Dalton Tomkins children* (n 213) [140]; *The Secretary, Department of Family and Community Services and the Harper Children* [175] (‘Harper children’); *Lim children* (n 188) 12; *DFaCS (NSW) re Oscar* [2013] NSWChC 1, [82] (‘Oscar’); *Ramsay children* (n 206) 18; *Saunders and Morgan* (n 201) [54].

³⁰⁷ Judicial Officers 3, 5, 6, 7, 8, 18; Registrar 2.

³⁰⁸ Judicial Officers 5, 15, 22.

³⁰⁹ Judicial Officers 3, 4, 14, 16, 19, 23.

³¹⁰ Judicial Officers 6, 9, 19, 21; Registrar 1.

³¹¹ Registrar 2.

³¹² Judicial Officer 22.

³¹³ Judicial Officer 23.

³¹⁴ See, eg, *Ali Children* (n 249) [40]; *Department of Family and Community Services (NSW) and the Bell-Collins Children* [2014] NSWChC 5 [105] (‘Bell-Collins’); *Bloom* (n 231) [219], [312]; *Colt Children* (n 231) [290]; *Dalton Tomkins children* (n 213) [139]; *David White v The Director-General Department of Human Services* [2011] NSWDC 106, [63] (‘David White’); *Harper* (n 306) [174]; *Lim children* (n 188) 12; *McAlister children* (n 231) [59]; *Oscar* (n 306) [79]; *Ramsay children* (n 206) 18; *SS* (n 305) [53], [66], [100], [102].

³¹⁵ *Ali children* (n 249) [231]; *Re Lincoln and Raymond* (Children’s Court of New South Wales, 9 April 2008), [48] (‘Lincoln & Raymond’); *Samantha* (n 305) [19].

³¹⁶ *Lim children* (n 188) 12; *Lincoln and Raymond* (n 315) [48]; *Oscar* (n 306) [79]; *Ramsay children* (n 206) 18; *SS* (n 305) [102], [103].

³¹⁷ *Department of Communities and Justice (DCJ) and Murphy* [2020] NSWChC 11, [97] (‘Murphy’); *Oscar* (n 306) [79].

willing to make concessions,³¹⁸ yet firm³¹⁹ and unshaken.³²⁰ These aspects of demeanour are associated with perceived professionalism. Assessments of the quality of evidence are often preceded by references to reputation—for example that the witness is highly qualified, experienced and respected,³²¹ ‘a professional of the highest standing’,³²² ‘amongst the top rank’,³²³ ‘eminent’,³²⁴ with ‘unassailable’ expertise.³²⁵

In respect of expert evidence that does *not* persuade, judicial critique has been strident when responding to opinions perceived as flawed by subjectivity. Instances of the Children’s Court Clinic found wanting are expressed in language including ‘impetuous’,³²⁶ ‘zealous’,³²⁷ ‘superficial and poorly reasoned’,³²⁸ and based on ‘precious little evidence’.³²⁹ In fraught cases turning on the most probable cause of a child’s unexplained injury or illness, the Court gives short shrift to outliers among their peers, whose theories—invariably exculpatory of the parents—are perceived as fringe or radical, and especially when their opinions are delivered in a manner described variously as ‘garrulous’,³³⁰ ‘dogmatic’,³³¹ ‘shrill’,³³² and ‘anything but sober and considered’.³³³

In more moderate terms, clinical opinions are treated cautiously if based on insufficiently substantiated assumptions. Examples are distorted or incomplete information provided to the clinician,³³⁴ lapse of time and shifting developments,³³⁵ and concern that the witness has ‘over-

³¹⁸ *Ali Children* (n 249) [290]; *Bell-Collins* (n 314) [105]; *Dalton Tomkins children* (n 213) [139]; *O’Connor* (n 296) [24]; *Oscar* (n 306) [79]; *SS* (n 305) [103].

³¹⁹ *Ali Children* (n 249) [290]; *Bell-Collins* (n 314) [105]; *Bloom* (n 231) [220]; *McAlister* (n 231) [58]; *Ramsay children* (n 206) 18.

³²⁰ *Bell-Collins children* (n 314) [105]; *Bloom* (n 231) [220]; *McAlister children* (n 231) [58]; *Malakhai* (n 35) [124].

³²¹ *Ali children* (n 249) [40]; *Re Anthony* [2008] NSWLC 21, [9] (‘*Re Anthony*’); *Bloom* (n 231) [216]; *Harper* (n 306) [174]; *Re Jillian and Jacinta* [2008] NSWLC 23, [7]; *Murphy* (n 317) [97]; *Nellie* (n 37); *Oscar* (n 306) [80]; *Samantha* (n 305) [15].

³²² *Ali children* (n 249) [231].

³²³ *Colt children* (n 231) [290].

³²⁴ *Samantha* (n 305) [13].

³²⁵ *SS* (n 305) [103].

³²⁶ *Re Tanya* [2016] NSWSC 794, [63].

³²⁷ *Ibid.*

³²⁸ *DFaCS (NSW) re Amanda & Tony* [2012] NSWChC 13, [77].

³²⁹ *Melanie* (n 234) [9].

³³⁰ *SS* (n 305) [103].

³³¹ *Ibid.*

³³² *Lincoln and Raymond* (n 315) [36].

³³³ *Samantha* (n 305) 14. See also *Rogers v The Secretary Department of Family and Community Services NSW* [2019] NSWDC 194, [93]–[98].

³³⁴ *Hatfield children* (n 294) 51–3; *J & T* (n 294) [7]–[10], [415]; *SK* (n 40) [168]–[169], [206]; Judicial Officer 8.

³³⁵ *J & T* (n 294) [343], [502(7)]; *Lilly, Wade and Caleb* (n 294) [60]; Judicial Officers 2, 8.

stepped' the bounds of their field of expertise.³³⁶ Evidence of parents' treating psychologists or doctors are often given credence, but not if neglecting to address relevant issues,³³⁷ presenting as partisan,³³⁸ and uncritically based on parents' self-reported accounts which deny or downplay the presence of key concerns such as domestic violence.³³⁹

(iii) Systemic Critiques of Expert Evidence

I think there's problems with the process of clinic assessments. Like the clinician just gets, you know, a pile of history, and then we've got a scared, nervous parent trying to present well. (Lawyer 8)

As a common form of expert evidence,³⁴⁰ the general utility of parenting capacity assessments appears widely assumed. Yet their methods and underlying premises are the subject of some reservations and scepticism. One area of concern is the brevity and artificial nature of the clinical process.³⁴¹ Assessment interviews in the NSW Children's Court Clinic usually take place in a single session for each parent.³⁴² A study of the Clinic's assessments noted that observations of parent-child interactions were typically held on an additional one-off occasion, lasting between 30 minutes and two hours.³⁴³ Most assessments are inevitably conducted at a time of extreme stress for the family, and hence parents might present in a way not reflective of their ordinary temperament and capabilities.³⁴⁴ While there was consensus across judicial officer and Departmental interviews that the quality of Children's Court Clinic reports is 'mixed',³⁴⁵ caseworkers were on the whole more critical than magistrates, for instance describing clinical evidence with the recurring terms 'hit and miss'³⁴⁶ and 'lucky dip'.³⁴⁷ In the United Kingdom, it has been argued that experts should be used sparingly and

³³⁶ *JH* (n 34) [206]; Judicial Officer 9.

³³⁷ *Ezekial* (pseudonym, unpublished judgment, Children's Court, May 2021) 14.

³³⁸ *Harper* (n 306) 169; *GR v The Department of Communities and Justice* [2021] NSWSC 1081, [859]–[862]; *Department of Communities and Justice (DCJ) and Lewis* [2018] NSWChC 5, [173]–[175]; *Saunders and Morgan* (n 201) [32].

³³⁹ *Bloom* (n 231) [313]; *McAlister* (n 231) [168]–[169].

³⁴⁰ *Cashmore* (n 25) 335; *Choate* (n 262) 246; *Hinton* (n 3) 77; *Luther* (n 29) 341; *McConnell, Llewellyn and Ferronato* (n 120) 56.

³⁴¹ *Lawyer 8*; *Fernandez et al* (n 6) 31; *Hinton* (n 3) 78.

³⁴² See, eg, 'assessment process' information on the website of the Children's Court Clinic:

<<https://www.schn.health.nsw.gov.au/clinical-hub/childrens-court-clinic/authorised-clinicians/assessment-process>>.

³⁴³ *Gray* (n 21) 209.

³⁴⁴ S Collings, M Spencer and P Kong, *Towards Access and Equity: Improving Clinical Assessment of Parenting Capacity for the Children's Court of NSW* (Final Report, Research Centre for Children and Families, University of Sydney, 2022) 32–33; *Hinton* (n 3) 78–9.

³⁴⁵ *Judicial Officers* 3, 4, 5, 8, 9, 10, 19, 12, 22; *Registrars* 1, 2; *Caseworkers* 3, 6, 7, 8, 9, 12; *Lawyers* 1, 3, 4.

³⁴⁶ *Caseworkers* 3, 9, 12.

³⁴⁷ *Caseworker* 3, 8.

selectively to address particularly complex issues, and not merely to substitute for the evidence of statutory child protection workers due to their ‘lack of confidence and poor public image’.³⁴⁸ Similarly NSW caseworkers expressed frustration at a sense of their own professional skills being sidelined³⁴⁹:-

When you think about it, how much can a clinician really know of a parent, by sitting with them for two hours? It’s a really hard space to be in. You’re reading all these documents, then the parents are presenting themselves the best they can be. They’ll likely say things that the clinician wants to hear, or they think the clinician will want to hear... But as caseworkers, you’re seeing the parents quite regularly. You’ll see patterns. You’ll see, you know, nuances. That’s different. (Caseworker 11)

The constrained context, together with the highly defined nature of a clinician’s brief, is likely to focus on parents’ deficits rather than allowing for a nuanced incorporation of their strengths.³⁵⁰ Critics, including participants in this study, are also concerned about cultural and values-based biases on the part of some clinicians:³⁵¹

You might have a clinician who’s complaining that 16 and 17 year old children within a Tongan or Samoan family are parentified and how terrible this is. Well, I’m sorry, but within those cultures, it’s quite common for the older children to look after the younger children. And I don’t think the parents should be considered not doing their duty, to be bad parents, because of that. I also find that some of the clinicians don’t understand that we’re in the court of ‘good enough parenting’ for want of a better term. You cannot bring your Eastern Suburbs, North Shore expectations of parenting into our court and our families. You can’t complain that these parents aren’t doing anything about their 16 year olds having sex for goodness sake... there are some clinicians who identify strongly as Christian, a matter for them, but don’t bring that into the reports. Sometimes I see that seeping through, moral judgments seep through. (Registrar 1)

The Children’s Court Clinic has been criticised for lacking Aboriginal membership in its panel of experts,³⁵² and for inconsistent efforts—as in other parts of Australia—to include and embed Aboriginal voices and perspectives in the assessment process.³⁵³

³⁴⁸ Masson (n 147) 11.

³⁴⁹ Caseworkers 4, 8, 11.

³⁵⁰ See Philippa M Eve, Mitchell K Byrne and Cinzia R Gagliardi, ‘What is Good Parenting? The Perspectives of Different Professionals’ (2014) 52(1) *Family Court Review* 114, 115; Gray (n 21) 198; Peiling Kong, Susan Collings and Margaret Spencer, ‘Assessments, Assumptions and Ableism: Examining Court-Ordered Parenting Capacity Assessments of Parents with Intellectual Disability and Cognitive Difficulties’ (2024) *Journal of Intellectual & Developmental Disability* 1, 12.

³⁵¹ Lawyers 4, 8; Registrar 1; Eve, Byrne and Gagliardi (n 350) 124; Fernandez Smith and O’Donnell (n 262) 826-8; Hinton (n 3) 78.

³⁵² Judicial Officer 20; Lawyer 4.

³⁵³ A Wright et al, ‘Attachment and the (Mis)Apprehension of Aboriginal Children: Epistemic Violence in Child Welfare Interventions’ (2024) *Psychiatry, Psychology and Law* 1, 10.

These various concerns intersect with scholarly criticism of the ‘pathologising’ of child protection and family welfare, with parenting capacity and risk assessments argued to represent a narrow forensic gaze on the individual parent or child, divorced from the wider context of structural societal inequality or discrimination.³⁵⁴ As will be seen in chapter 7, the two foremost prevailing factors in the Court’s decisions on realistic possibility of restoration are the parents’ ‘insight’ and state of mental health. Expert evidence informs the Court’s evaluation of these issues in many cases, along with the intersecting theme of capacity to provide for the child’s emotional needs. This suggests that, in line with the international literature, care and protection decision-making in NSW is strongly oriented to a critique of the individual parent’s psychological functioning.

Conclusions

This chapter has explored several facets of the operation of the care jurisdiction in NSW, each of which frames and contextualises the ways in which the Court’s decisions are made. It found that specialist magistrates, and many of those hearing care matters in the generalist Local Court, have substantial and confident expertise in this field of law. However, despite their experience in applying a well-established set of legal principles, there is consensus that decision-making in care and protection is challenging, and requires application of discretion and intuition to each case as a holistic whole. Subsequent parts of the thesis analyse how the realistic possibility of restoration test is applied to the substance of case facts, within the apparently wide bounds of this ‘instinctive synthesis’.

The chapter confirms existing perceptions that care matters are more adversarial in practice than in principle. It also aligns with existing literature in finding that the Court places substantial reliance on interdisciplinary expert evidence. However, complexities within these issues are apparent. Although recognising the importance of a degree of evidentiary rigour, many of the study’s participants concur that the jurisdiction is too adversarial, and there is considerable interest in building on its inquisitorial and alternative dispute resolution

³⁵⁴ See, eg, Ainsworth and Hansen (n 146) 51-2; Daryl Higgins et al, *Experiences of People with Mental Ill-Health Involved in Family Court or Child Protection Processes: a Rapid Evidence Review* (Report, Institute of Child Protection Studies, Australian Catholic University, 2021) 17; Horsfall (n 3) (n 3) 26-27; Emily Keddell, ‘Reasoning Processes in Child Protection Decision Making: Negotiating Moral Minefields and Risky Relationships’ (2011) 41 *British Journal of Social Work* 1251, 1254-5; Kong, Collings and Spencer (n 350) 12; Luther (n 29) 342; Kate Morris et al, ‘Social Work, Poverty and Child Welfare Interventions’ (2018) 23 *Child & Family Social Work* 364, 369-70; Yuval Saar-Heiman, Anna Gupta and Griet Roets, ‘Parenting Through the Lenses of Risk and Othering: Constructions of Parenting Cannabis Use in Child Protection Court Proceedings’ (2023) 28 *Child and Family Social Work* 690, 692.

elements (a momentum for change which is expanded upon in chapter 10). There is general consensus among magistrates that expert evidence is useful, but they have divergent views on the degree of weight this form of evidence should carry. The analysis of judgments also dispelled any assumption that the Court uniformly, uncritically follows the opinions of clinical parenting capacity reports.

The Court takes seriously its role in scrutinising the objectivity, diligence and fairness of the Department's case for child removal. Increasingly its judgments are exposing poor practices and systems that jeopardise children's wellbeing under the parental responsibility of the State. Ordinarily the delineation between the respective powers of the Department and the Court is clear, but there is some variability between magistrates in the extent to which they strive to intervene in, or 'manage', aspects of the Department's casework. There is an apparent tension for magistrates in having a degree of immediate capacity to make small changes during the process of holding the Department to account, and a sense of frustration at their inability to have an impact on wider system-level barriers. This concerns not only children's wellbeing, but also arises in relation to inadequate provision of services to parents to constructively pursue restoration. Later parts of the thesis further explore these systemic issues, particularly regarding mental health support,³⁵⁵ and the concluding chapter considers implications for law and policy reform.

³⁵⁵ See Chapter 7, section (iii) 'Mental Health'; Chapter 10, part B, section (ii) 'Lack of integrated mental health service provision'.

CHAPTER FIVE

Issues of Law

Chapter Overview

This chapter explores the conceptualisation and application of abstract legal principles that are central to the Court's decisions on realistic possibility of restoration. It focuses on the express application of these legal tests within the judgments, and considers additional dimensions and insights gleaned from participant interviews.

Part A summarises 'the legal framework' and discusses the varied extent to which it is explicitly applied in the judgments. Part B turns to 'unacceptable risk of harm', and is the longest part of the chapter due to the complexity of this theme and the various sub-components of the test. Part C explores the application of the paramount concern of the child's 'safety, welfare and wellbeing' (or 'best interests'). Part D addresses the specific legislative test for realistic possibility of restoration, including its two distinct elements: the circumstances of the child, and likelihood of the parents addressing the issues that led to the child's removal. The chapter makes some references to substantive issues of fact associated in the judgments with concepts such as risk and best interests. However, a comprehensive analysis of the factual issues influential in court outcomes is left for chapters 7, 8 and 9.

A. The Legal Framework

Almost every judgment under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) reiterates a version of the established 'legal framework', which consolidates key legislative principles and their interpretation through evolving case law. In summary,¹ the established legal principles are:-

¹ This summary is a very condensed version, and omits aspects of less direct relevance to the thesis topic of realistic possibility of restoration. It is primarily adapted from the legal framework comprehensively set out in *Department of Communities and Justice (DCJ) and Bloom* [2021] NSWChC 2, [118]–[206] ('*Bloom*'), with additional cases referenced where applicable. The 'Care Tree' in the *Children's Court of New South Wales Resource Handbook* (Judicial Commission of New South Wales, 2nd ed, 2023, updated November 2025) ('*Children's Court Handbook*') has also been relied upon with regard to legal developments occurring since *Bloom*.

The Paramountcy Principle

The safety, welfare and wellbeing of the child are paramount² and prevail over all other considerations, including the interests of parents. Action to protect a child from harm must be the ‘least intrusive intervention’ in the life of the child and family that is consistent with the paramount concern.³

Evidence

The rules of evidence do not apply, the proceedings are non-adversarial and to be conducted with as little formality and technicality as suited to the circumstances.⁴ While the Court is not bound by the rules of evidence, it must draw its conclusions from material that is satisfactorily ‘probative’.

Risk Assessment

The ‘unacceptable risk of harm’ test applies to the making of final orders. The risk to the child is assessed from an accumulation of factors, with reference to the risk’s existence, seriousness, and potential for amelioration. Affirmative findings of fact on which a risk is based are established on the balance of probabilities, but the absence of a proven fact does not preclude the possibility of a risk to the child. No onus or standard of proof applies to the assessment of whether there is an unacceptable risk of harm, as future *possibilities* cannot be forensically ‘proven’, and instead rely on evidence that is sufficiently reliable and convincing.⁵

Views of the Child

The views of the child are to be given due weight in accordance with the child’s developmental capacity and circumstances.⁶

Cultural identity

Regard is had to the child’s culture, language and religion.⁷ In the case of Aboriginal and Torres Strait Islander children additional principles apply: the Aboriginal and

² *Children and Young Persons (Care and Protection Act) 1998* (NSW) s 9(1) (*‘The Act’*).

³ *Ibid* s 9(2)(c).

⁴ *Ibid* ss 93(1)–(3).

⁵ *Department of Communities and Justice (DCJ) and Ivy* [2025] NSWChC 1, [55]–[57], [66]–[80] (*‘Ivy’*); *Department of Communities and Justice (DCJ) and Janet and Xing-fu* [2022] NSWChC 7, [168]–[174] (*‘Janet & Xing-fu’*), citing *Isles & Nelissen* [2021] FedCFamC1F 295 and *Isles & Nelissen* [2022] FedCFamC1A 97.

⁶ *The Act* (n 2) s 9(2)(a).

⁷ *Ibid* ss 9(2)(b), (d).

Torres Strait Islander Children and Young Persons Principle⁸ (enshrining the elements of prevention, partnership, placement, participation and connection); the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles;⁹ and provisions for family and community self-determination and participation in decision-making.¹⁰ Approval of a permanency plan is subject to compliance with the above principles, active efforts having been made to place the child with kin, and cultural planning to maintain the child's connection with family, community and identity.¹¹

Active Efforts

At all stages of proceedings, the Secretary (Department) must demonstrate that active efforts¹² have been made to avoid the child entering out-of-home care, to restore the child to the parents, and if restoration is not practicable, to place the child with family, kin or community.¹³

Permanency Planning

The Court must not make a final Care Order unless satisfied that permanency planning for the child has been appropriately and adequately addressed.¹⁴ This requires a plan to provide the child with a safe, stable, secure and nurturing long-term environment.¹⁵

Realistic Possibility of Restoration

The determination of 'a realistic possibility of restoration' is a threshold construct that informs permanency planning. Consideration of realistic possibility involves two arms: the circumstances of the child, and the evidence, if any, that the parents are likely to be able to satisfactorily address the circumstances that led to the child's removal.¹⁶ While a possibility is something less than a probability, it must be 'sensibly' realistic – not fanciful, sentimental, idealistic or based on unlikely hopes for the future. Since amendments (effective from early 2019) allowing for a realistic possibility of

⁸ Ibid s 12A.

⁹ Ibid ss 13, 78A(3).

¹⁰ Ibid ss 11, 12.

¹¹ Ibid s 83A.

¹² Ibid ss 9A, 63, 83(3A)(b). The active efforts provisions apply to decisions made since 15 November 2023.

¹³ See Chapter 2, part D for more detail on the 'active efforts' provisions. The majority of judgments in the study sample pre-dated this reform.

¹⁴ Ibid s 83(7).

¹⁵ Ibid ss 8(a1), 9(2)(e)–(f), 10A(1), 78A.

¹⁶ Ibid ss 83(1), (7).

restoration ‘within a reasonable period’,¹⁷ this may be evidenced at the time of hearing by a ‘coherent program’ on the part of the parents, already commenced and with some significant progress demonstrated, and/or by commitment to a ‘cohesive and viable plan’, that is sensible, practicable and viable.¹⁸ The ‘reasonable period’ is not to exceed 24 months, other than in exceptional circumstances.¹⁹

Subsequent Applications for Restoration

Applications to rescind or vary an existing order involve a wider range of prescribed considerations than those applying to primary applications for care orders, including a necessary focus on the children’s attachments and stability in their established care arrangements.^{20 21}

Legal principles are, by their very nature, abstract, and a judicial exposition of ‘the law’ does not necessarily translate to clarity in its application to the reasons for decision. It is one thing to provide, within a judgment, a discrete section explaining *what* the legal framework is, but another to explain *how* each element of the framework intersects with the particular facts of the given case. The latter approach requires an express (or ‘explicit’) application of the generalised principles (or ‘tests’) to specific factual issues. The judgments in this study are highly variable in this respect. Some make virtually no mention of the legal tests other than in the standard statement of the legal framework. Others do so in a patchy way, for instance expressly addressing ‘unacceptable risk’ but not ‘safety, welfare and wellbeing’, or vice versa. Overall, a clearly delineated, precise approach to applying the tests has been the exception rather than the rule.

In scrutinising the judgments for precision in applying the legal tests, it must be recognised that limitations of time and resources constrain the opportunity for Children’s Court magistrates to produce meticulous judgments—or indeed to prepare written reasons for decision at all. As part of the lowest rung in the court hierarchy (alongside the Local Court),

¹⁷ Ibid ss 83(1)–(3), (7), (8A).

¹⁸ *Bloom* (n 1) [173]; *Department of Communities and Justice (DCJ) and Jamzie* [2022] NSWChC 1, [206] (*‘Jamzie’*).

¹⁹ *The Act* (n 2) s 83(8A).

²⁰ Ibid s 90. The ‘leave’ of the Court is first required in order for the application to be brought. Matters required to be considered before a rescission or variation order can be made include, inter alia, the length of time the child has been with the present caregivers and the stability of those arrangements, the strength of attachments to the caregivers, the capacity of the birth parents to provide an adequate standard of care, and the risk of psychological harm to the child if present arrangements are changed (s 90(6)).

²¹ Approximately 20% of the judgments in this study are ‘section 90’ applications for restoration to a parent following a previous final order placing the child in out-of-home care.

they are working in a time-strapped, high volume jurisdiction,²² without the assistance of an associate or clerk,²³ and usually delivering reasons for decision immediately ('ex tempore'). Furthermore, whether judgments should aim for a consistent, 'formulaic'²⁴ approach is contentious. Variations in style are a normal aspect of judicial discourse. Several judicial officers who participated in this study commented that they do not have a particular format for determining realistic possibility of restoration.²⁵ While the structure of some judgments is organised around the legal tests, others follow a sequential account of the evidence of each witness, and some have a more fluid, meandering story-telling approach. In keeping with the broad consensus that decision-making in care matters is appropriately discretionary,²⁶ judicial officers are opposed to a template or 'checklist'²⁷ approach – 'there's no need to laboriously recite the legislation as long as the spirit is referred to, this is just common sense'.²⁸ Evaluating risk against 'the reality of the factual circumstances' is said to be 'to some extent intuitive, [and] the more you try to put rules and guidance around that, the more complicated it becomes'.^{29 30}

Arguably then, the style and form of each judgment does not matter, as long as its reasoning can be understood. This is all well and good for an audience of insiders who are unfazed by reading care and protection judgments. A legally-trained person, especially if familiar with the care jurisdiction, has little difficulty following the internal logic of the judgments in melding findings of fact with issues of law. However, there have been calls for greater

²² Judicial Officers 1, 2, 3, 8, 9, 13, 21.

²³ Judicial Officers 1, 2, 3, 9.

²⁴ Judicial Officer 9.

²⁵ Judicial Officers 13, 15, 20, 22.

²⁶ Judicial Officer 20; see also Chapter 4, part A, section (ii) 'Discretion'.

²⁷ Judicial Officer 9.

²⁸ Judicial Officer 22.

²⁹ Judicial Officer 20.

³⁰ The issues raised here are somewhat reflected in the contentious decision of the Supreme Court of the United Kingdom in *Re H-W Children* [2022] UKSC 17. In a 32-page judgment delivered ex tempore at the end of a 6-day hearing, the judge at first instance made care orders for the removal of three children into long-term foster care. The Supreme Court was 'impressed by the care and attention' [at 24] of the appealed judgment, and took no issue with its findings of fact, assessment of risk in parental care, and 'recitation of the legal tests' [at 25]. Nonetheless the appeal was upheld and the matter remitted for rehearing on the basis that the judge had failed to conduct a sufficiently detailed, 'side by side' comparison of every technically available alternative option and their mitigatory potential, and had thereby erred in law in respect of the requirement to demonstrate the necessity and proportionality of the care orders [52]–[62]. The decision has been criticised for its implications in delaying the preparation of judgments, the consequent impact on timeliness of outcomes for children, and for requiring that judicial decisions be not only correct in 'substance' but also in 'structure and form': Judith Masson, 'Judging Care Proceedings: It's Not What You Do, It's the Way That You Do It' (2022) 44(4) *Journal of Social Welfare and Law* 4; Ming Ren Tan, 'Care Orders: Assessing Proportionality and Necessity' (Case and Comment) (2022) 81(3) *The Cambridge Law Journal* 485.

accessibility and transparency of the Court's decisions for a wider audience,³¹ not least for the benefit of the parents³² and the children³³ themselves. From this angle there is merit to a relatively prescriptive, ordered approach, which explains in straightforward terms how conclusions on concepts such as unacceptable risk and the best interests of the child are linked to particular factual circumstances. Examples of judgments doing exactly this are mentioned in this chapter, as part of its analysis of the ways in which the Court constructs its decisions on the central legal tests of unacceptable risk, the paramountcy principle, and the statutory components of a realistic possibility of restoration.

B. Risk Analysis

The parents' views reflect a lack of insight into their failure as parents that is persistent and unlikely to change to any significant extent. They deny the gravity of the situation at the time of Lucy's removal from their care and their responsibility for the substantial failure to meet Lucy's psychological, educational and social needs. This risk is beyond unacceptable. To return Lucy to their care would be to expose her to the certainty that she will again suffer deeply damaging neglect. (Magistrate in *Lucy*)³⁴

The concept of risk is fundamental to child protection, informing decisions across both the administrative and judicial phases of intervention. In New South Wales ('NSW'), the common law test of 'unacceptable risk of harm' is integral to the legislated test of 'realistic possibility of restoration': there can be no possibility of restoration if this would pose an unacceptable risk to the child.

This central precept, however, does not appear in the legislation. The unacceptable risk test is absent from the express provisions for realistic possibility of restoration; and indeed the phrase 'unacceptable risk' is not in the Act at all.³⁵ Where the individual word 'risk' appears

³¹ Judicial Officers 3, 9; Judy Cashmore, 'Procedural Justice and the Impact of Court and Other Decision-Making Processes on Children and Families in the Child Protection System' (2024) 46(2) *Children Australia* 1, 1–2; Megan Davis, Independent Review of Aboriginal and Torres Strait Islander Children in Out-of-Home Care in New South Wales, *Family is Culture* (Review Report, 2019) 122–3, 131–3, 381, recommendation 12 ('*Family is Culture Report*'). In the United Kingdom context see Judith Masson, 'Understanding Care Proceedings: Learning from Empirical Research' in Jens M Scherpe and Stephen Gilmore (eds), *Family Matters: Essays in Honour of John Eekelaar* (Intersentia, 2022) 933, 946.

³² Judicial Officer 7.

³³ Judicial Officer 10.

³⁴ *Lucy* (pseudonym, unpublished judgment, Children's Court, October 2012) [77] ('*Lucy*').

³⁵ By way of comparison, the term 'unacceptable risk' appears in the care legislation of the State of Victoria as part of the considerations informing the 'best interests of the child' principle: *Children, Youth and Families Act 2005* (Vic) s 10(3)(g). It also appears in the *Family Law Act 1975* of the Commonwealth, but solely in relation to risk of family violence: s 60CG(1)(b).

in the legislation it is in contexts other than assessment of restoration and the making of care orders.³⁶ Nonetheless, the established approach, derived from precedents in the family law jurisdiction,³⁷ is to apply the unacceptable risk test to all decisions in respect of final orders under the Act.³⁸ The centrality of the test was echoed by judicial officers, with the care jurisdiction described as ‘a court of risk’,³⁹ in which decision-making on restoration is ‘fundamentally a risk assessment’⁴⁰—it being ‘crystal clear that...it is all about unacceptable risk’.⁴¹ Although other elements come into play, such as the statutory criteria of the parents’ likelihood of addressing the child protection concerns, it is said that it all ‘boils down to an unacceptable risk test’.⁴²

Despite such emphatic statements, the fact of the Act being silent on unacceptable risk does create elements of ambiguity. Several magistrates and lawyers queried the practical relevance, to (most) care matters, of the High Court’s precedent in the family law case of *M v M*,⁴³ despite its standard citation within the legal framework.⁴⁴ *M v M* concerned a father’s future contact with his child in the context of sexual abuse allegations. In establishing the ‘unacceptable risk’ principle, the High Court affirmed the reasoning of the Family Court in the decision under appeal, holding that a suspicion of sexual abuse in a parenting dispute does not require a positive finding that the abuse occurred, in order for there to be an unacceptable risk of harm based on the *possibility* of abuse, and on the child’s best interests in all the circumstances of the case.⁴⁵ Whether the risk is unacceptable requires consideration of its magnitude, likelihood, and prospect for mitigation, weighed against the potential benefit to the child of spending time with the parent.⁴⁶ While this precedent has been adapted to care matters

³⁶ The main use of the concept of ‘risk’ in the Act is in relation to the minimum threshold for notification, investigation and intervention regarding children ‘at risk of significant harm’: see s 23, and associated provisions relating to reporting of children at risk of significant harm and the actions able to be taken by the statutory authority (‘the Secretary’) – eg ss 16, 17, 24, 25, 27, 30, 37. If the threshold is met, the Secretary can take a variety of actions in response (s 34), one of which is to commence court proceedings seeking a Care Order. The grounds for Care Orders, however, do not refer to ‘risk’: s 71.

³⁷ *M v M* (1988) 166 CLR 69 (*‘M v M’*); *Isles & Nelissen* [2022] FedCFamC1A 97.

³⁸ *Bloom* (n 1) [129]; *The Secretary of the Department of Communities and Justice (DCJ) and Fiona Farmer* [2019] NSWChC 5, [67] (*‘Fiona Farmer’*); *Janet & Xing-fu* (n 5) [143]–[184].

³⁹ Judicial Officer 21.

⁴⁰ Judicial Officer 7.

⁴¹ Judicial Officer 8.

⁴² Judicial Officer 9. Other observations describing risk assessment as fundamental to the Court’s decisions include those of Judicial Officers 3, 4, 20, 21, 22.

⁴³ *M v M* (n 37).

⁴⁴ The unacceptable risk test derived from *M v M* has been applied to NSW care matters since (at least) the case of *Re Anthony* [2008] NSWLC 21 (*‘Anthony’*)—see discussion in Simon Handebo, ‘Non-Accidental Injury and the Children’s Court: Some Legal and Practical Observations’, *Children’s Law News*, July 2020, 7–8.

⁴⁵ *M v M* (n 37) [13]–[26].

⁴⁶ *Ibid* [24]–[25].

generally, its most obvious translation is to cases in which a parent's responsibility for sexual abuse or other physical assaults has not been definitively established,⁴⁷ necessitating an assessment of the degree of risk flowing from an uncertain event.⁴⁸ This particular context is less pertinent to most situations of neglect,⁴⁹ or to any case in which the essential circumstances giving rise to legal intervention are not disputed by the parent.⁵⁰ Moreover, *M v M* was not grappling with the additional layers of legal principle, applicable to State intervention to remove a child into out-of-home care, that do not arise in the family law arena of private parenting disputes.⁵¹

While most judicial officers appear unperturbed by the test's absence from the legislation, one magistrate said 'it drives me crazy',⁵² and further referred to the perplexing relationship between various core concepts in the Act, each of which appears to demand primacy. There does seem to be a tension in the relationship between the paramountcy principle and unacceptable risk, and to a lesser extent 'realistic possibility of restoration'. For instance, a magistrate mused that because 'the real issue' is risk, it follows that 'realistic possibility of restoration is the wrong question' and is 'not the test'.⁵³ Conversely, although unacceptable risk has traditionally been described as 'the proper test'⁵⁴ for final orders, a recent Children's Court case has stated this to be incorrect.⁵⁵ This is because the significance of risk may, on occasion, *give way to* the paramountcy principle.⁵⁶ The best interests of the child (discussed in more detail in Part C) are ordinarily assumed to be congruous with the Court's findings on risk, each informing the other, and making any practical distinction between the two a moot point in the large majority of cases. However, a parent's successful efforts to mitigate risk will not always be 'determinative of the wider issue' of the child's best interests,⁵⁷ which are multifaceted and may require 'a comparative examination of available options' for the child's placement.⁵⁸ The child's safety, welfare and wellbeing might be best met by remaining in an

⁴⁷ Judicial Officers 5, 9; Lawyers 5, 6.

⁴⁸ Judicial Officer 5.

⁴⁹ Lawyer 5. See *DCJ and Alice* [2024] NSWChC 12 ('*Alice*'), in which the unacceptable risk 'framework' is described as 'particularly useful when applied to allegations of physical, sexual or psychological abuse': at [134].

⁵⁰ Judicial Officer 5.

⁵¹ Judicial Officers 9; 20; Lawyer 6.

⁵² Judicial Officer 9.

⁵³ Judicial Officer 19.

⁵⁴ *Bloom* (n 1) [129].

⁵⁵ *Ivy* (n 5) [210].

⁵⁶ *Alice* (n 49) [135]–[138]; *Department of Communities and Justice (DCJ) and May, June and Roy* [2023] NSWChC 15, [175]–[176] ('*May, June & Roy*').

⁵⁷ *Ivy* (n 5) [210]; *May, June & Roy* (n 56) [176].

⁵⁸ See, eg, *Department of Communities and Justice (DCJ) and the Dixon Children* [2024] NSWChC 8, [69]; *Ivy* (n 5) [213].

existing, stable placement, despite the ‘acceptable’ status of any modest residual risks attached to parental care.⁵⁹

The corollary position is that ‘the benefits of keeping a child out of out-of-home care may be preferable even if the child is restored to a high-risk environment’⁶⁰ – a scenario realised in the 2024 case of *Yarran Taylor*. In this case the children’s situation in out-of-home care was so ‘dire and untenable’⁶¹ that there was little prospect of safety, welfare and wellbeing being assured in the care of the Minister.⁶² Despite the Court’s concern about serious risk factors not yet addressed by the parents, and which might normally be deemed ‘unacceptable’, the risks in parental care were treated as comparatively tolerable to the alternative.⁶³

Despite these ambiguities, or in light of them, the significance of ‘unacceptable risk’ calls for clarity in its application. The following sections explore the ways in which the principle is implemented by both caseworkers and judicial officers in decisions on restoration.

(i) Risk Assessment in the Preparation of a Case

Evidence in child [protection] proceedings is ‘created’, not found. Thus, all sources have to be explored, the standards have to be high and the implications well argued. There is no point in feeding a pot-pourri of information into a computer in the hope that evidence-based recommendations will emerge.⁶⁴

I keep saying to the lawyers, ‘What are the risks? Tell me what the risks are’. They give you all this information, and unless it’s actually a risk that I can find factually to be a risk, then it’s not much help to me. (Judicial Officer 9)

The difficulty of harm prediction in child protection is widely recognised.⁶⁵ Yet commentators have also urged that courts, clinicians and caseworkers should strive for clarity and precision

⁵⁹ *May, June & Roy* (n 56) [175].

⁶⁰ *Ivy* (n 5) [199].

⁶¹ *Department of Communities and Justice (DCJ) and the Yarran Taylor children* [2024] NSWChC 3, [307] (‘*Yarran Taylor children*’).

⁶² *Ibid* [272], [307].

⁶³ *Ibid* [303]–[307]. While the Court was concerned about the parents’ neglect to satisfactorily address serious risk factors, including domestic violence, the risk of harm attached to restoration was mitigated by the transition to restoration being accompanied by Ministerial parental responsibility for an extended period beyond the usual maximum of 24 months, under the section 79(10) allowance for ‘special circumstances’. See also *Ivy* (n 5) [229], [231].

⁶⁴ Judith Masson, ‘What are Care Proceedings Really Like?’ (2012) 36(1) *Adoption and Fostering* 5, 10.

⁶⁵ See, eg, Jill Berrick et al, ‘Are Child Protection Workers and Judges in Alignment with Citizens When Considering Interventions into a Family? A Cross-country Study of Four Jurisdictions’ (2020) 108 *Children and Youth Services Review* 1, 2; Annalese Bolton and Chris Lennings, ‘Clinical Opinions of Structured Risk Assessments for Forensic

in evaluating risk: by identifying the nature of harm a child is at risk of suffering, its causal connection to shortcomings in parental care, the reasons the harm meets relevant threshold criteria, the dividing line between a tolerable and intolerable risk, and the likely efficacy of available mitigatory measures.⁶⁶

The Court's capacity to apply precision in risk evaluation is constrained by the 'passive' dimension of the judicial role in the adversarial system. Unable to actively direct the gathering of evidence, or exercise control over risk mitigation strategies that might be available, the judicial officer is restricted to considering the information provided by the parties—and is fundamentally reliant on the way in which a case for unacceptable (or acceptable) risk is presented by the statutory authority. Literature, both Australian and international, has drawn attention to problems in caseworkers' preparation of litigated cases: suggesting, for instance, that caseworkers underestimate the need to 'actively argue' a case before court, assuming its serious nature is 'self-evident';⁶⁷ that file-based descriptions of past events lack clear analysis of future implications for family and child;⁶⁸ and that there is insufficient attention to balancing parenting deficiencies with 'risk reducing' factors.⁶⁹

There was broad consistency between interviewed magistrates and caseworkers in associating a parent's attitude (acknowledgement, insight and engagement) with 'risk' and its management.⁷⁰ However, beyond this attitudinal theme, most caseworkers struggled to articulate what constitutes unacceptable risk. Their responses tended to be vague ('obviously

Child Protection: The Development of a Clinically Relevant Device' (2010) *Children and Youth Services Review* 1300, 1300; Lynda Campbell et al, 'High Risk Infants in the Children's Court Process in Australia: Dilemmas and Directions' (2003) 25(2) *Journal of Social Welfare and Family Law* 121, 121-2, 127, 131; Sheila Gray, 'Parenting Capacity: An Analysis of Parenting Capacity Assessment in the Children's Court of New South Wales' (PhD Thesis, University of Sydney, 2014) 56-7, 80-81; 228-9; Clare Tilbury, 'Obtaining Expert Evidence in Child Protection Proceedings' (2019) 72(4) *Australian Social Work* 392, 400.

⁶⁶ See Jonathan Dickens et al, 'Courts, Care Proceedings and Outcomes Uncertainty: The Challenges of Achieving and Assessing 'Good Outcomes' for Children After Care Proceedings' (2019) 24 *Child and Family Social Work* 574, 580; Sophia Gatowski, 'Examining the Judge's Role in Achieving Permanency for Children in Foster Care: Judicial Best Practice-Focused Performance Measurement' (2024) 75(2) *Juvenile & Family Court Journal* 79, 90; Gray (n 65) 229-30; Sofia Nord Levin et al, 'Attachment Goes to Court in Sweden: Perception and Application of Attachment Concepts in Child Removal Court Decisions' (2024) 26(6) *Attachment & Human Development* 521, 537-8; Masson (n 64) 9, 10; Mary Ryan and Rachel Cook, *Born into Care: Case Law Review* (Report, Nuffield Foundation, 2019) 16, citing *Re B (A Child)* [2013] UKSC 33, [193]; Alicia Summers and Jennifer Renne, 'From Ambiguity to Action: Reframing Child Safety Measurement in the Child Welfare Court System' (2024) 75 *Juvenile & Family Court Journal* 67, 71, 76-7.

⁶⁷ Campbell et al (n 65) 131.

⁶⁸ Dickens et al (n 66) 580; see also Masson (n 64) 9.

⁶⁹ Jenny Krutzinna and Marit Skivenes, 'Judging Parental Competence: a Cross Country Analysis of Judicial Decision Makers' Written Assessment of Mothers' Parenting Capacity in Newborn Removal Cases' (2021) 26 *Child and Family Social Work* 50, 57, 58.

⁷⁰ Judicial Officers 3, 6, 9, 21; Caseworkers 3, 5, 6, 7, 8, 9, 11, 12, 13.

you're either safe or you're unsafe...I mean, risk is risk'), or refer to the *process* rather than substance of risk assessment ('most of all, what happens in the Department is called "shared risk"'). Caseworkers, including Managers carrying some authority in deciding which legal outcomes to pursue,⁷¹ made no mention of concepts such as the severity of the risk and the likelihood of its occurrence. My observations in this regard are confirmed in statements by lawyers for the Department, conveying their difficulties in bridging the worlds of child protection casework and the intricacies of the law:⁷²

You try and tell [caseworkers], explain to them that they have to turn their mind to risk and how to mitigate those risks... And they go one way totally or the other. Totally. No, there is no thinking fully about the circumstances relevant to a particular matter or a particular family. (Lawyer 1)

I don't think caseworkers are looking at unacceptable risk. They're just looking at risk. (Lawyer 2)

Magistrates expressed annoyance with inadequate clarity in the Department's cases – citing a sea of information presented in court documents,⁷³ much of which is 'totally irrelevant'⁷⁴ to risk of harm and its 'salient points'.⁷⁵ There was also concern about tasks set for parents without direct connection to the risk factors,⁷⁶ or without clarity as to *how* the goals are to be achieved in practical terms.⁷⁷ In the context of dispute resolution, a children's registrar expressed the following frustration:

The Department tends to make its position and stick to it. Very rarely will it change it through the proceedings. I ask the Department to say what is it within this summary proposed plan that you're saying hasn't been done to the point that the risk is still present for those children? That it can't be mitigated with any sort of supports that you could offer? I take it back to risk mitigation. How can we put supports in? ... You're this huge big department with lots of funds. You say there might be a risk. Could we mitigate it in another way? (Registrar 1)

⁷¹ The extent to which the position of Manager Casework involves responsibility to make decisions about court proceedings, and instruct the legal team accordingly, was somewhat unclear in the interviews. It appears that this is variable depending on the nature and circumstances of the case. Caseworker 1 advised that decisions that used to be solely made by Managers Casework are increasingly required to involve consultation 'higher up' in the Department. See also the discussion on collaborative decision-making in part D.

⁷² Lawyers 1, 2, 4, 8.

⁷³ Judicial Officer 9.

⁷⁴ Judicial Officer 16.

⁷⁵ Ibid.

⁷⁶ Judicial Officer 9.

⁷⁷ Judicial Officers 4, 9; Registrar 1.

These comments appear consistent with common criticisms that parents' *strengths*, and opportunities to develop these, are marginalised in decision-making around family preservation, child removal and restoration.⁷⁸ As emphasised in the literature, risk evaluation should consider parents' capacity to achieve change,⁷⁹ within the context of their existing strengths and that of their family, community and cultural environment.⁸⁰ Notably, if such disregard was uniformly and blatantly evident in the NSW context, it would be in breach of Departmental permanency policy requiring 'working in collaboration with parents in a strength-based, hopeful and dignity driven way', and to provide 'every opportunity to achieve the change needed for restoration to be possible'.⁸¹ It would be at odds with the legislation's 'least intrusive intervention' principle⁸² and the statutory hierarchy prioritising restoration to parents⁸³ – which by implication require risk assessment to incorporate factors that mitigate the possibility of harm to the child in parental care.

In fairness to the caseworkers, they were not appraised in advance of the interview questions, and were responding off the cuff to abstract concepts such as the distinction between acceptable and unacceptable risk. But when discussing risk more generally, or the connected issue of 'safety', specific illustrations were forthcoming. There was consistent emphasis on the importance of informal family networks to 'bolster and buffer'⁸⁴ the efforts of parents.⁸⁵ There were references to the development of *trust* between parent and caseworker, in order for the parent to be 'given a chance'⁸⁶ to demonstrate adequate parenting capacity, despite

⁷⁸ See, eg, Campbell et al (n 65) 128; BJ Newton et al, 'Restoring Children From Out-of-Home Care: Insights From an Aboriginal-Led Community Forum' [2024] *Child & Family Social Work* 1, 6; Davis, *Family is Culture Report* (n 31) 182, 270, 348–9, 382, 383–4, 397; Teresa Hinton, *Rebalancing the Scales: Access to Justice for Parents in the Tasmanian Child Safety System* (Report, Anglicare Tasmania, 2020) 73.

⁷⁹ Judith Cashmore, "'Best Interests" in Care Proceedings: Law, Policy and Practice' in Elaine E Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Wellbeing* (Cambridge University Press, 2016) 326, 329 ('Best Interests'); Peter W Choate and Sandra Engstrom, 'The "Good Enough" Parent: Implications for Child Protection' (2014) 20(4) *Child Care in Practice* 368, 376; Krissie Fernandez Smith and Phillip C O'Donnell, 'Practice Tips for Managing Challenges in Parenting Capacity Assessments in Child Protection Court' (2023) 61 *Family Court Review* 818, 824–5; Krutzinna and Skivenes (n 69) 3.

⁸⁰ See K Arabena et al, *Evaluation of Marram-Ngala Ganbu* (Report for the Children's Court of Victoria, 2019) 46; Choate and Engstrom (n 79) 377–8; Philippa M Eve, Mitchell K Byrne and Cinzia R Gagliardi, 'What is Good Parenting? The Perspectives of Different Professionals' (2014) 52(1) *Family Court Review* 114, 115; Krutzinna and Skivenes (n 69) 3; Newton et al (n 78) 7, 8.

⁸¹ See, eg, PSP Learning Hub, *Foundations of Restoration* (Department of Communities and Justice, last modified 21/8/20) 3; Department of Communities and Justice, 'Permanency Case Management Policy: Rules and Practice Guidelines' (September 2021) 11, 12, 71, 82–3.

⁸² *The Act* (n 2) s 9(2)(c).

⁸³ *Ibid* s 10A(3)(a) ('permanent placement principles').

⁸⁴ Caseworker 7.

⁸⁵ Caseworkers 1, 2, 3, 4, 7, 8, 10, 13. The theme of extended family support was also raised by Lawyers 6 and 9.

⁸⁶ Caseworker 5.

outstanding risks,⁸⁷ and for a mutual commitment to ‘work through any problems that come up and keep the kids safe in this process’.⁸⁸

These themes, echoed in phrases such as ‘sit with’,⁸⁹ ‘carry’⁹⁰ or ‘hold’ the risk,^{91 92} appear reflective of a strengths-based perspective (‘dignity-driven’ being the term proffered in interviews),⁹³ even if it is not consistently implemented. Overall the interviews suggest caseworkers *do* have a clear sense of how risk can be managed: via the parents acknowledging the child protection concerns, their trustful engagement with casework interventions, and by drawing on existing support networks. However, this framework is not conceived of in terms of a methodical legal test. As expressed by a lawyer, caseworkers are ‘kind of flying blind...kind of have an idea of what they want to do, and where policy and the powers that be are driving them’, but ‘without necessarily knowing what we need to hit off on in the law’.⁹⁴

(ii) Risk Assessment in the Judgments

(a) *Structure and precision*

I would look at all the risks and look to see what risks have been addressed or are being addressed, or will be addressed. And look at the circumstances of the child and perhaps what future risks there might be. And so that’s the way about it. (Judicial Officer 3)

‘Unacceptable risk’, it’s like ‘balance of probabilities’, ‘beyond reasonable doubt’, it’s impossible to define. You can’t even talk about the bounds of it. (Judicial Officer 23)

Under ‘the legal framework’, the unacceptable risk test comprises the existence of the risk, its gravity (also referred to as ‘seriousness’, ‘severity’ or ‘magnitude’), the likelihood of occurrence of the feared harm or event, and prospect for mitigation.⁹⁵ However it has been quite rare for this delineation to translate to a systematic approach within the language of judgments. At one extreme, some 15% of judgments in the study sample make no direct

⁸⁷ Caseworkers 5, 6.

⁸⁸ Caseworker 6.

⁸⁹ Caseworkers 1, 7; Lawyer 7.

⁹⁰ Lawyer 9.

⁹¹ Caseworker 9.

⁹² Scholarly literature refers to ‘calculated risk’, by which ‘elements of trust and empowerment’ give parents ‘the motivation to engage in personal change’: Emily Keddel, ‘Reasoning Processes in Child Protection Decision Making: Negotiating Moral Minefields and Risky Relationships’ (2011) 41 *British Journal of Social Work* 1251, 1263.

⁹³ Caseworker 8; Lawyers 3, 8.

⁹⁴ Lawyer 8.

⁹⁵ Bloom (n 1) [133]–[135].

reference to risk in their reasoning, leaving its relevance as tacit.⁹⁶ Many of the judgments that *do* discuss risk adopt a quite free-flowing narrative style, fluidly integrating consideration of legal tests with facts, submissions and judicial opinion. In keeping with the ‘instinctive synthesis’ described in the interviews,⁹⁷ references to ‘risk’ or ‘unacceptable risk’ are somewhat ad hoc under this approach, appearing as naturally incidental to the stream of discourse, rather than applied in a particularised way.

In contrast, a small number of judgments (around 12%) use narrative devices, such as headings⁹⁸ and lists,⁹⁹ to explicitly set out the factors posing risk. A sub-set of these cases specifically articulate whether and why each risk, or total level of risk, is or is not capable of mitigation.¹⁰⁰

The most thoroughly precise risk analyses tend to be in difficult, contentious decisions: for instance, justifying restoration despite sexual abuse allegations¹⁰¹ and physical injuries to infants,¹⁰² or finding *no* realistic possibility of restoration to parents who are acknowledged to have some relevant strengths, against a background of particularly complex, disputed facts.¹⁰³ There also seems to be a trend towards greater specificity in breaking down the application of the law to the facts¹⁰⁴ – four of the six judgments cited in the previous sentence date from the last six years of the 20-year span of the sample. The 2022 case of *Jamzie* is particularly notable

⁹⁶ The judgments that do not refer to risk tend to be older cases, dating predominantly from 2005–2013.

⁹⁷ See Chapter 4, part A, section (ii).

⁹⁸ *FACS v AH and AN* [2017] NSWDC 412, [130], [162] (‘AH & AN’); *Department of Family and Community Services (DFaCS) and the Ali Children* [2018] NSWChC 6, [56] (‘Ali children’); *Alice* (n 49) [32]; *ASK v Secretary DFaCS* [2014] NSWDC 247, [173], [185], [255] (‘ASK’); *Grierson children* (pseudonym, unpublished judgment, Children’s Court, August 2019) [102] (‘Grierson children’); *Hatfield children* (pseudonym, unpublished judgment, Children’s Court, April 2018) 11, 67 (‘Hatfield children’); *Jamzie* (n 18) [215]; *Department of Communities and Justice (DCJ) and Lewis* [2018] NSWChC 5, [110] (‘Lewis’); *Mihar children* (pseudonym, unpublished judgment, Children’s Court, August 2012), [61] (‘Mihar children’).

⁹⁹ *AH & AN* (n 98) [164]; *Alice* (n 49) [32]; *Charlie* (pseudonym, unpublished judgment, Children’s Court, December 2021) 24–6 (‘Charlie’); *Department of Communities and Justice (DCJ) and Evie & Grace* [2023] NSWChC 1, [53] (‘Evie & Grace’); *Hatfield children* (n 98) 11, 67–87; *Re Lincoln and Raymond* (Children’s Court of New South Wales, 9 April 2008) [58] (‘Lincoln & Raymond’).

¹⁰⁰ *AH & AN* (n 98) [133]–[135], [153]–[159]; *Alice* (n 49) [111], [138], [140], [145]; *Charlie* (n 99) 26–8; [248]–[262]; *Evie & Grace* (n 99) [54], [73]; *Grierson children* (n 98) [117]–[127], [248]–[262]; *Jamzie* (n 18) [167], [173]–[174], [182]–[183], [216]; *Lewis* (n 98) [235]–[237].

¹⁰¹ *AH & AN* (n 98) [153]–[159], [162]–[164], [174]–[187]; *Hatfield children* (n 98) 11–60 (re: restoration to the father).

¹⁰² *Ali children* (n 98) [56]–[86]; *Evie & Grace* (n 99) [37]–[77].

¹⁰³ *Charlie* (n 99) 24–34; *Grierson children* (n 98) [71]–[127], [248]–[264]; *Hatfield children* (n 98) 67–93 (re: no realistic possibility of restoration to the mother).

¹⁰⁴ Another indication of this trend is the resource known as the ‘Care Tree’, added from May 2022 to the long-established *Children’s Court of NSW Resource Handbook* (n 1). The Care Tree is a detailed guide for magistrates to law and procedure in care matters. It includes a risk assessment table, providing examples of typical risk factors and modes of classifying and evaluating these in accordance with elements of the unacceptable risk test.

for its marked clarity of structure. Nothing in the factual circumstances was particularly exceptional—a baby had been removed from his mother for the all-too familiar child protection concerns of drug use, domestic violence, mental health and homelessness. The Court’s decision, however, was likely contentious: being a finding of realistic possibility of restoration against the opposition of both the Department¹⁰⁵ and the Independent Children’s Lawyer,¹⁰⁶ and the mother’s engagement with caseworkers and support services being in a quite fledgling state as at the date of hearing.¹⁰⁷ The judgment identifies five issues as being ‘in dispute’—either as to whether the issue poses an actual risk, and/or whether the risk is unacceptable.¹⁰⁸ Each issue is individually discussed, with consideration of mitigatory actions taken by the mother, and brief assessment of whether the issue poses a risk at all, and if so, the severity of the risk and likelihood of its occurrence.¹⁰⁹ These findings are succinctly consolidated under an ‘unacceptable risk’ heading towards the end of the judgment, concluding that each confirmed risk can be satisfactorily ameliorated, such that their ‘accumulation’ does not support ‘an overall finding of unacceptable risk’.¹¹⁰ Recurring use of headings gives the judgment a very structured style, and its language is clear, concise and sufficiently simple to be accessible to a non-legal audience.

(b) *Elements of risk: nature, magnitude, likelihood and amelioration*

The Court has found three risks—Mental Health, Drug Use and Domestic Violence. Each risk has been assessed, mental health being the most serious. (Magistrate in *Jamzie*)¹¹¹

Sometimes it’s very hard to understand or even to get a baseline so you can figure out ‘what’s happening here? Is this really poor mental health as a result of the drug use, or is it the other way around?’ (Caseworker 1)

Nature of the risk

Most of the judgments identify specific risk factors attached to the conduct or circumstances of the parents. The parent characteristics associated with risk are heavily dominated by mental

¹⁰⁵ *Jamzie* (n 18) [14], [32]–[35].

¹⁰⁶ *Ibid* [14], [39]–[41].

¹⁰⁷ *Ibid*, see [35], [40], [44], [46], [48], [51]–[57], [59], [93], [94], [95], [99], [132], [167].

¹⁰⁸ *Ibid* [25]–[27].

¹⁰⁹ *Ibid* [163]–[167], [169]–[174], [175]–[183], [184]–[186], [187]–[192].

¹¹⁰ *Ibid* [215]–[219].

¹¹¹ *Ibid* [215].

health concerns and emotional volatility,¹¹² and inadequate acknowledgement of, or insight into, the incidents resulting in the child's removal.¹¹³

This is usually accompanied by some reference to the nature of the potential impact on the child. In addition to risks of physical neglect¹¹⁴ and physical and sexual abuse,¹¹⁵ there is a recurring emphasis on psychological harm and an absence of stability and security for the child. The adult behaviours associated with risk of psychological harm to children include domestic violence,¹¹⁶ other forms of violence, aggression and conflict,¹¹⁷ and poor mental health or erratic behaviour.¹¹⁸

¹¹² *Alice* (n 49) [97], [140]–[146]; *Re: Alison Claire, Lauren Donovan and Victoria Claire* (Children's Court of New South Wales, 10 July 2009) [45] ('*Alison Claire*'); *DFaCS re Arnott Bloom* [2015] NSWChC 6, [80]–[81] ('*Arnott-Bloom*'); *Bloom* (n 1) [313]–[314]; *DFaCS and Boyd* [2013] NSWChC 9, [20]–[29] ('*Boyd*'); *Charlie* (n 99) 25, 27; *Dorothy* (pseudonym, unpublished judgment, Children's Court, September 2019) [101] ('*Dorothy*'); *Esther* (pseudonym, unpublished judgment, Children's Court, March 2006) [8]; *Grierson children* (n 98) [115], [248]; *The Secretary, Department of Family and Community Services and the Harper Children*, [94]–[96] ('*Harper children*'); *DFaCS (NSW) re Kim* [2013] NSWChC 6, [131] ('*Kim*'); *Lewis* (n 98) [178]–[180]; *Department of Communities and Justice (DCJ) and the McAlister Children* [2020] NSWChC 4, [168] ('*McAlister children*'); *Department of Communities and Justice (DCJ) and Murphy* [2020] NSWChC 11, [102]–[105] ('*Murphy*'); *Department of Family and Community Services and Nathan* [2018] NSWChC 1, [58] ('*Nathan*'); *Nicholls children* (pseudonym, unpublished judgment, Children's Court, March 2023), [81] ('*Nicholls children*').

¹¹³ See, eg, *Department of Family and Community Services (NSW) and the Bell-Collins Children* [2014] NSWChC 5, [134] ('*Bell-Collins*'); *Bloom* (n 1) [309]–[310]; *Boyd* (n 112) [20]–[29]; *Charlie* (n 99) 24; *DFaCS (NSW) and the Colt Children* [2013] NSWChC 5, [343], [353] ('*Colt children*'); *Dorothy* (n 112) [101]; *Kee children* (pseudonym, unpublished judgment, Children's Court, June 2011) [68]–[69] ('*Kee children*'); *Keziah* (pseudonym, unpublished judgment, Children's Court, October 2013) [125]–[126] ('*Keziah*'); *McAlister children* (n 112) [53]; *Mihar children* (n 98); *MXS v Department of Family and Human Services (NSW)* [2012] NSWDC 63, [62]–[64] ('*MXS*'); *Nathan* (n 112) [43]; *Nicholls children* (n 112) [75], [81]; *Department of Communities and Justice (DCJ) and the Prince and Johns Children* [2023] NSWChC 8, [67] ('*Prince & Johns children*'); *Rogers v The Secretary Department of Family and Community Services NSW* [2019] NSWDC 194, [70], [120] ('*Rogers*'); *Re Saunders and Morgan* [2007] NSWDC 5589 [54] ('*Saunders and Morgan*'); *Waller children* (pseudonym, unpublished judgment, Children's Court, September 2022) [157], [167], [174] ('*Waller children*'); *Y v The Secretary, Department of Communities and Justice (No. 6)* [2021] NSWDC 392, [895], [902]–[904] ('*Y*').

¹¹⁴ *DFaCS (NSW) and Abbey* [2013] NSWChC 3, [114], [119] ('*Abbey*'); *Ezekial* (pseudonym, unpublished judgment, Children's Court, May 2021) 12; *Kim* (n 112) [47]; *Rogers* (n 113) [34]; *Waller children* (n 113) [157].

¹¹⁵ *A v Secretary, Department of Communities and Justice (No. 4)* [2019] NSWSC 1872, [117] ('*A*'); *Bell-Collins* (n 113) [133]–[134]; *Charlie* (n 99) 2; *Colt children* (n 113) [343]; *Harper Children* (n 112) [84], [179]–[180]; *Kee children* (n 113) [68]–[69], [70]; *Keziah* (n 113) [126]; *In the Matter of Leonard* [2009] NSWLC 5, [17], [24] ('*Leonard*'); *Mihar children* (n 98) [61]–[62]; *MXS* (n 113) [62]; *Nicholls children* (n 112) [81]; *Prince & Johns children* (n 113) [66]–[68]; *Re Tanya* [2016] NSWSC 794, [70(1)]; *Y* (n 113) [907].

¹¹⁶ *Bloom* (n 1) [308]–[310]; *Charlie* (n 99) 16–17, 24; *Dupont v The Secretary, Department of Family and Community Services* [2014] NSWDC 240, [107]–[113] ('*Dupont*'); *Kim* (n 112) [122], [132]; *Lewis* (n 98) [156]; *LZ & QJ* [2017] NSWDC 414, [250]–[253] ('*LZ & QJ*'); *McAlister children* (n 112) [162]–[163]; *DFaCS (NSW) re Oscar* [2013] NSWChC 1, [114]–[117] ('*Oscar*'); *Rogers* (n 113) [70]; *VC v Secretary, Department of Communities and Justice & Ors (No. 2)* [2024] NSWDC 192, [326] ('*VC*'); *Y* (n 113) [907].

¹¹⁷ *Alfred* (pseudonym, unpublished judgment, Children's Court, October 2020) [104]–[105] ('*Alfred*'); *Alison Claire* (n 112) [43]; *Dupont* (n 116) [107]; *Waller children* (n 113) [158]–[167], [174], [175]; *Nicholls children* (n 112) [80].

¹¹⁸ *Alison Claire* (n 112) [41], [44]–[45]; *Dorothy* (n 112) [44]–[45], [101]; *GR v The Department of Communities and Justice* [2021] NSWSC 1081, [850] ('*GR*'); *Hatfield children* (n 98) 73, 91; *JH v Secretary, Department of Communities & Justice & Ors (No.3)* [2023] NSWDC 517, [258] ('*JH*'); *Kim* (n 112) [133]; *Lewis* (n 98) [177], [240]; *Nicholls children* (n 112) 81; *Oscar* (n 116) [114]–[117].

Magnitude

The degree of gravity of the feared harm, and/or its likelihood of occurrence, are articulated in many of the decisions *in favour of* restoration,¹¹⁹ but are absent from most of the decisions finding no realistic possibility of restoration. This difference suggests that judicial officers feel a greater need to justify at length their decisions to restore, than is the case in the more frequent, cautious route of deciding against restoration. Hence in findings of realistic possibility of restoration there is careful explanation of why any residual risks are relatively ‘low’ and unlikely to eventuate, whereas the seriousness of the risks in ‘no realistic possibility’ outcomes is deemed self-evident from the evidence.

Amelioration

A similar disparity is apparent in discussion of risk amelioration. When finding that restoration is realistic, the Court is often at pains to pinpoint the steps and safeguards that reduce the risk of harm from the ‘unacceptable’ to the ‘acceptable.’ Common mitigatory factors are the parents’ willingness to accept supervision, direction and support,¹²⁰ and their progress with counselling or other mental health assistance.¹²¹ Other factors are the passage of time, during which previous risk factors have diminished or evaporated,¹²² and the competent parenting ability of mothers for whom domestic violence was but is no longer an issue.¹²³ Where risks remain, the Court looks to the Department to provide careful plans for staged transition to restoration,¹²⁴ and may also be persuaded by the support and watchful

¹¹⁹ *Depik and Senina* (pseudonym, unpublished judgment, Children’s Court, May 2012) [23] (*‘Depik & Senina’*); *DFaCS re Eggleton* [2016] NSWChC 4, [46.3] (*‘Eggleton’*); *Evie and Grace* (n 99) [54(11)]; *Hatfield children* (n 98) 66; *Jamzie* (n 18) [162], [165], [173], [182], [186], [192], [215]; *Janet & Xing-fu* (n 5) [45], [81]; *Mario* (pseudonym, unpublished judgment, Children’s Court, October 2022) 27 (*‘Mario’*); *Re Nellie* [2004] NSWLC 8 (*‘Nellie’*); *O’Connor v The Minister for Family and Community Services* [2020] NSWDC 453, [25(8)] (*‘O’Connor’*); *SK v Secretary, Department of Family and Community Services* [2016] NSWDC 273, [242] (*‘SK’*).

¹²⁰ *Alfred* (n 117) [137]; *Department of Family and Community Services v Borg* [2011] NSWChC 4, [52]–[53] (*‘Borg’*); *Evie and Grace* (n 99) [54(6)]; *Fiona Farmer* (n 38) [154]–[155]; *The Department of Community Services and Rachel Grant, Tracy Reid, Sharon Reid and Frank Reid* (Children’s Court of New South Wales, August 2009) [74]; *Jamzie* (n 18) [162], [167], [174], [216]–[217]; *Lim children* (pseudonym, unpublished judgment, Children’s Court, July 2022) 19 (*‘Lim children’*); *Naunton children* (pseudonym, unpublished judgment, Children’s Court, August 2023) 43 (*‘Naunton children’*).

¹²¹ *Ali Children* (n 98) [71]; *Borg* (n 120) [50], [52]–[53]; *Jamzie* (n 18) [166]–[167]; *DFaCS re Lilly, Wade and Caleb* [2012] NSWChC 21, [44]–[45] (*‘Lilly, Wade and Caleb’*); *Ramsay children* (pseudonym, unpublished judgment, Children’s Court, April 2021) 26; *SK* (n 119) [241]–[242].

¹²² *Ali Children* (n 98) [69]–[72]; *Fiona Farmer* (n 38) [153]; *J & T v Department of Communities and Justice* [2023] NSWDC 78, [109] (*‘J & T’*); *Nellie* (n 119).

¹²³ *Lilly, Wade and Caleb* (n 121) [44]–[45]; *SK* (n 119) [241]–[242]; *VC* (n 116) [313], [315].

¹²⁴ *AH & AN* (n 98) [153]–[159], [163]–[177]; *Eggleton* (n 119) [44]; *J & T* (n 122) [109]; *Yarran Taylor children* (n 61) [304]–[316].

eyes of family members and friends.¹²⁵ In contrast, most of the judgments adverse to restoration provide no explicit consideration of the availability and viability of potential ameliorative strategies. In the minority of judgments that do expressly articulate *why* the risk cannot be satisfactorily managed, the most common reasons are the parents' lack of acknowledgement that there is a problem needing addressing,¹²⁶ dishonesty or evasiveness affecting relationships with the Department and other services,¹²⁷ and inadequate attention to a mental health condition or concern.^{128 129}

It is also rare for 'no realistic possibility' outcomes to pinpoint the distinction between an 'acceptable' and 'unacceptable' risk in the specific circumstances. There are exceptions—for instance, in the case of *Keziah*, 'a real risk of ongoing neglect' by the parents was capable of mitigation and hence *acceptable*, but not if accompanied by a failure to protect the child from the *unacceptable* risk of sexual abuse.¹³⁰ In several cases the suggestion is that an *accumulation* of overall risk factors, some of which might be acceptable in isolation, creates the unacceptable status.¹³¹ Mostly, however, the 'unacceptable' character of the risk is assumed, along with the implicit finding that mitigation is not viable.

In this respect the Court's approach reflects, at least partially, the notion that risk assessment in child protection is based on a holistic view¹³² of all the relevant factors.¹³³ As most families in the child protection system experience multiple and entrenched problems,¹³⁴ any

¹²⁵ *Evie and Grace* (n 99) [5], [54(4), (8), (9)], further applied in the interim contact case of *Department of Communities and Justice (DCJ) and Harry* [2023] NSWChC 5, [37](7) ('Harry'); *Naunton children* (n 120) 43; *O'Connor* (n 119) [29]; *SK* (n 119) [242].

¹²⁶ *Bell-Collins* (n 113) [134]; *Charlie* (n 99) 26–7, 31; *Dorothy* (n 112) [102]; *Grierson children* (n 98) [252]; *Hatfield children* (n 98) 92; *Lewis* (n 98) [236(a)]; *Nathan* (n 112) [43]; *Prince & Johns children* (n 113) [67].

¹²⁷ *Alice* (n 49) [145]; *Charlie* (n 99) 27–8; *Grierson children* (n 98) [248]–[262]; *Lewis* (n 98) [236(b)]–[237]; *Prince & Johns children* (n 113) [67]; *RC and PK v The Secretary, Department of Communities and Justice* [2024] NSWDC 196, [199] ('RC & PK').

¹²⁸ *Alice* (n 49) [140], [146]; *Harper children* (n 112) [93]–[96]; *Murphy* (n 112) [105]; *Nathan* (n 112) [59].

¹²⁹ See also Chapter 7, part (iii) in relation to reasons for mental health concerns being deemed not satisfactorily addressed.

¹³⁰ *Keziah* (n 113) [126]–[127].

¹³¹ *Dorothy* (n 112) [101]; *McAlister children* (n 112) [172]; *Harper Children* (n 112) [181]–[182]; *Nathan* (n 112) [66]; *Nicholls children* (n 112) [82]; *In the Matter of Spencer* (Children's Court of New South Wales, 26 July 2005) [22] ('*Spencer*').

¹³² See *Ezekial* (n 114) 15; *Re Malakhai* [2022] NSWChC 6, [189] ('*Malakhai*'); *Judicial Officers* 7, 22.

¹³³ The established legal principles in the NSW care jurisdiction provide that unacceptable risk is based on 'the accumulation of factors': *Bloom* (n 1) [133], citing *Johnson v Page* [2007] Fam CA 1235.

¹³⁴ See, eg, Leah Bromfield et al, 'Issues for the Safety and Wellbeing of Children in Families With Multiple and Complex Problems' (National Child Protection Clearinghouse Issues Paper 33, 2010); Dickens et al (n 66) 577; Briony Horsfall, 'Children's Participation Rights During Child Protection Hearings: Recognition, Legal Representation and Redistribution of Care in Victoria's Children's Court' (PhD Thesis, Swinburne University of Technology, 2016) 9–10.

endeavour to segment the issues into ‘acceptable’ and ‘unacceptable’ categories is complicated by their very nature as numerous and interlocking.¹³⁵ It has been argued that interventions should target the ‘overriding concern’,¹³⁶ ‘tipping point’¹³⁷ or ‘strongest driver’¹³⁸ among the array of issues that may be present in one family. While this idea is sound in principle, caseworkers and judicial officers spoke about the actual difficulty of determining the underlying cause ‘that’s led to the presentation of the risk factors’,¹³⁹ in order to consider how this precipitating issue might be constructively addressed.¹⁴⁰

The tipping point?

Despite the complexity of isolating one of the many factors in a typical case, the analysis of the judgments suggests that the overriding concern is, often, the parent’s mental health. The following quote is from a case, *Nathan*, in which the mother’s risk factors included a drug history,¹⁴¹ potential incarceration¹⁴² and insecure housing.¹⁴³ The extract intimates that an unresolved mental health concern, along with an associated failure to take responsibility, are the overarching factors that need to be addressed as a pre-condition to the prospect of other risks being resolved:

It is not just her reckless conduct that is of concern, but also her disoriented and irrational conduct later that Saturday night and Sunday morning. There is also what I regarded as her reluctance to take ownership of what occurred on that evening. I accept the submissions...that her conduct is indicative of possible unresolved mental health issues, and that the evidence in relation to that is incomprehensive and unhelpful in terms of being able to assess whether or not it does give rise to a risk of harm if Nathan were to be restored. In my view the Secretary has established that further work in this area is required to satisfactorily address potential risk factors, or at least to ameliorate them to an appropriate degree. (Judge in *Nathan*)¹⁴⁴

In the case of *Alison Claire* the Court identified a mental health condition as the pivotal concern, contrasting this issue to other, background factors that did not of themselves warrant long-term removal of the children. The Magistrate was critical of much of the Department’s

¹³⁵ Judicial Officers 13, 21.

¹³⁶ Peter W Choate, ‘Termination of Parental Rights: A Commentary on Ben-David’ (2015) 18 *Journal of Family Social Work* 243, 246.

¹³⁷ Ibid 244.

¹³⁸ Helen M Stallman et al ‘New Directions in the Treatment of Child Physical Abuse and Neglect in Australia: MST-CAN, A Case Study’ (2010) 9 *Advances in Mental Health* 148, 151.

¹³⁹ Judicial Officer 21.

¹⁴⁰ Judicial Officers 13, 12; Caseworkers 1, 9.

¹⁴¹ *Nathan* (n 112) [55], [59].

¹⁴² Ibid [56], [61].

¹⁴³ Ibid [62].

¹⁴⁴ Ibid [58]–[59].

evidence, finding various purported risks to be poorly investigated, vague or misconstrued,¹⁴⁵ and observed that caseworkers ‘had a number of concerns but were unable, to put it in the vernacular, to put their finger on what the concerns were’.¹⁴⁶ During the course of proceedings the mother was diagnosed with a specific mental health condition,¹⁴⁷ which posed an unacceptable risk to the children and against which the peripheral concerns were contextually explained:

The case is no longer simply about the possibility of her drug use, or unstable accommodation. [The Children’s Court Clinician] summed it up best when he said she was currently seriously unstable... It is only now, having had all the experts consider a number of matters, that the extent of her condition is apparent. It was this dysphoric condition—the apparent ability to simply tune out or shut down—that puts the children at risk. [The clinician] said it was simply a miracle that something more serious had not happened to the children. (Magistrate in *Alison Claire*)¹⁴⁸

The dominance of mental health as a determining factor in court outcomes on restoration is further explored in Chapter 7.

(iii) Striking a Balance

I think we’re on a really dangerous pendulum—where I kind of feel we’re leaving kids unsafe for too long and then when we get them before the Court, we’re then kind of told to work towards bringing them home. But how do we do that? Like, when we’ve sat with that amount of risk. So yeah, I just think we’re on a really slippery, dangerous slope. (Caseworker 9)

...even the placements can put the kids at risk and the placements can have breakdowns, the placements can have domestic violence within them. You know all of that. That’s just going to be—that’s just life. Nothing is static. (Judicial Officer 13)

The established ‘legal framework’ for risk analysis includes a requirement to ‘balance’ the risks and benefits to the child of remaining in the parents’ care.¹⁴⁹ The balancing exercise may also encompass the slightly different contexts of (a) comparing the risk of harm at home with

¹⁴⁵ *Alison Claire* (n 112) [9], [14], [23], [24], [26], [29], [31].

¹⁴⁶ *Ibid* [29].

¹⁴⁷ *Ibid* [31]–[32], [34].

¹⁴⁸ *Ibid* [33].

¹⁴⁹ *Bloom* (n 1) [135]. Specific applications of this test appear in, eg, *George* (pseudonym, unpublished judgment, Children’s Court, November 2022) [106]; *Jamzie* (n 18) [218]; *Mario* (n 119) 27; *Nellie* (n 119).

the risks attached to out-of-home care,¹⁵⁰ and (b) comparing the benefits of restoration with the risk of harm in detaching a child from an existing, secure out-of-home care placement.¹⁵¹

In practice, only around 15% of the judgments refer to these balancing issues when *expressly* assessing risk. This is perhaps surprising, given the standard reference to this element of the test in reiterations of the legal framework. However, the weighing of potential outcomes for the child is often interwoven with other parts of the judgment, rather than confined to discussion of risk. Additionally, by the time a case reaches a contested hearing, the risks attached to the parents' circumstances are (in some instances) so serious¹⁵² that these overshadow any competing considerations.

The need to weigh competing considerations was more strongly emphasised in the interviews than in the judgments. The inherent harm of separation from family,¹⁵³ and for Aboriginal children—severance from culture and community,¹⁵⁴ appear to be at forefront of mind for magistrates, caseworkers and lawyers, as is the risk of detriment in the out-of-home care system itself.¹⁵⁵ Participants observed that any restoration,¹⁵⁶ and indeed any family,¹⁵⁷ poses some risk, and that placement in care doesn't necessarily provide safety:¹⁵⁸

I don't think that Mary Poppins is sailing in with her umbrella, ready to take kids off to a magical island. I think we're just trying to help them have a sense of who they are, and keep them as physically and psychologically safe as possible, while recognising that no one's particularly psychologically safe, and physical safety can be a bit hit and miss. (Judicial Officer 21)

The decision in the 2023 case *Evie & Grace*¹⁵⁹ was cited several times as representing a shift towards greater willingness to prioritise the benefits of restoration over a preoccupation with risk.¹⁶⁰ This case involved infant twins, with unexplained injuries for which neither parent

¹⁵⁰ *Anthony* (n 44) [44]; *Evie & Grace* (n 99) [51], [53(12)]; *Ivy* (n 5) [199]; *Lincoln & Raymond* (n 99) [55]–[60].

¹⁵¹ *The Act* (n 2) s 90(6)(f); *Ali children* (n 98) [97]–[117]; *In the Matter of Chanlina* (Children's Court of New South Wales, 1 May 2009) [25], [51] ('*Chanlina*'); *Re Elizabeth* [2011] NSWDC 245, [141]–[168] ('*Elizabeth*'); *Jonah* (pseudonym, unpublished judgment, Children's Court, May 2023) 18–19 ('*Jonah*'); *Logan* (pseudonym, unpublished judgment, Children's Court, March 2022) 15 ('*Logan*'); *May, June & Roy* (n 56) [175]; *DFaCS re Poppy* [2012] NSWDC 281, [52]–[62], [78] ('*Poppy*'); *RC & PK* (n 127) [184]–[187].

¹⁵² See below nn 175–181 and accompanying text.

¹⁵³ Judicial Officers 6, 7, 9, 17, 19, 21; Caseworkers 5, 10; Lawyers 4, 8.

¹⁵⁴ Judicial Officers 2, 9, 13, 16, 17, 18, 19, 21; Caseworkers 2, 3, 6, 10; Lawyers 2, 4, 7, 8.

¹⁵⁵ Judicial Officers 3, 6, 10, 13, 19, 21; Registrar 2; Caseworkers 9, 11, 12, 13; Lawyers 3, 4, 5, 7, 8.

¹⁵⁶ Judicial Officer 8; Caseworker 7.

¹⁵⁷ Judicial Officers 10, 13; Caseworker 8; Lawyer 6.

¹⁵⁸ Judicial Officers 13, 17; Judicial Officer 21.

¹⁵⁹ *Evie & Grace* (n 99).

¹⁶⁰ Judicial Officers 8, 9, 21; Lawyers 4, 6.

took responsibility. In the absence of other risk factors, the Court found a realistic possibility of restoration to the apparently caring, competent and well-supported parents.¹⁶¹ This decision departed, perhaps controversially,¹⁶² from precedents espousing the mantra that a risk cannot be mitigated without knowledge of its cause.^{163 164}

Participants raised other circumstances that might justify taking a ‘bigger chance’¹⁶⁵ with restoration than is usual. They referred to the capacity of relatively ‘robust’ children ‘to cope a little bit better [than a vulnerable child] with a parent with particular challenges’.¹⁶⁶ Several spoke about children for whom there is no hope on the horizon of a decent, long-term placement:¹⁶⁷ ‘...if you’ve already said you’re going to restore to Dad in 18 months’ time, why can’t you do it now? Or do you stick this kid, an eight-year-old girl, in a hotel room, again, for months at a time?’¹⁶⁸

There was undisputed consensus that there has been a major policy and practice shift within the Department, over the past five to ten years, in favour of family preservation and restoration,¹⁶⁹ and away from treating long-term parental responsibility to the Minister as effectively the default position.¹⁷⁰ Unsurprisingly, there is a gamut of perspectives on how to strike the balance along the continuum between taking risks and ‘erring on the side of caution’ – as well as recognition that perceptions of risk are unavoidably variable and subjective to the individual magistrate, lawyer or caseworker.¹⁷¹ Still, the interviews revealed a palpable tension between, on the one hand, perceptions that some magistrates,¹⁷² or (more

¹⁶¹ A more detailed discussion of this case is provided in Chapter 9, part A, section (ii).

¹⁶² Lawyers 4, 7.

¹⁶³ *Bell-Collins children* (n 113) [134]; *MXS* (n 113) [61]–[64]; *SS v Department of Human Services (NSW)* [2010] NSWDC 279, [111]–[113] (‘SS’). Note however that *Evie & Grace* is not the first case, but rather the most recent, to find a realistic possibility of restoration despite the cause of injury to an infant not being identified by the parent(s): see *Ali children* (n 98), and *Nellie* (n 119).

¹⁶⁴ Recent literature has observed that there is a lack of research-based evidence on whether, or to what degree, there is a connection between denial of child abuse ‘and the risk of future maltreatment’: Smith and O’Donnell (n 79) 822.

¹⁶⁵ Judicial Officer 3.

¹⁶⁶ Judicial Officer 7. The same issue of children’s ‘resilience’ and ‘protective capacity’ was raised by Caseworker 2 and Lawyer 3.

¹⁶⁷ Judicial Officer 3; Caseworker 1; Lawyers 5, 7, 8.

¹⁶⁸ Lawyer 5.

¹⁶⁹ Judicial Officers 3, 4, 6, 9, 18; Registrars 1, 2; Caseworkers 1, 2, 3, 6, 7, 8, 9, 11, 12, 13; Lawyers 1, 2, 3, 4, 5, 7, 8. See also Chapter 2, part D ‘Evolution of the “Realistic Possibility of Restoration” test, and part E ‘Recent Policy Developments’.

¹⁷⁰ Registrar 1; Caseworkers 4, 8, 9; Lawyer 7.

¹⁷¹ Judicial Officers 7, 9, 16; Caseworkers 1, 9; Lawyers 1, 2.

¹⁷² Caseworkers 4, 7, 8; Lawyers 4, 9.

often) the independent children's lawyers,¹⁷³ are too 'risk averse',¹⁷⁴ and conversely a concern that the current policy climate has led to risks to children being alarmingly high by the time court action is taken.¹⁷⁵ Prolonged efforts to avoid removal are seen as 'delaying the inevitable',¹⁷⁶ which in turn constrains the scope for the Court to 'turn the ship around',¹⁷⁷ due to the serious nature of the cases before it.¹⁷⁸ This view was expressed in strong terms by some. Two magistrates described being 'horrified'¹⁷⁹ at children being left in harm's way for 'so long',¹⁸⁰ while a lawyer confided that an 'exponential' increase in levels of tolerated risk 'causes sleepless nights...there are times when I read applications and I feel physically ill'.¹⁸¹

Arguably, critique of the severity of these cases presents a distorted picture: a focus on the nature of the cases reaching court overlooks the many, less visible casework interventions, which through persistent effort have lowered the risk of harm and prevented children needing to be removed.¹⁸² More broadly, it is argued that the core dilemma should not be the point at which the legal system removes a child, but rather the adequacy of social support systems to protect children in the first place.¹⁸³

We need to have more structural change...putting services into the home, getting more rehabs up and running, getting more housing available for vulnerable mothers with kids, getting all those things in place. And then we can stop removing children at the rate we're removing them. Because I'm not saying that children are removed unnecessarily. Children are removed, usually when I see the documents, too late, something should have been done ages ago, because it's usually a crisis point... So we need to have a great change in what is there to address, to mitigate the risks, in a way that doesn't always involve removing kids. That's my magic wand. (Registrar 1)

¹⁷³ Caseworkers 3, 8, 9, 11; Lawyers 4, 6, 8, 9.

¹⁷⁴ Caseworkers 4, 7.

¹⁷⁵ Judicial Officers 3, 4, 9, 18, 19; Registrars 1, 2; Caseworkers 2, 3, 5, 9, 12; Lawyers 1, 3.

¹⁷⁶ Lawyer 1.

¹⁷⁷ Lawyer 7.

¹⁷⁸ Judicial Officers 4, 9; Registrar 2; Caseworkers 3, 7, 9; Lawyer 2.

¹⁷⁹ Judicial Officers 4, 9.

¹⁸⁰ Judicial Officer 4.

¹⁸¹ Lawyer 3.

¹⁸² Lawyer 2.

¹⁸³ Judicial Officers 5, 8, 14, 19; Caseworkers 2, 6; Registrar 1; Lawyers 3, 5.

C. The Paramount Concern: Safety, Welfare and Wellbeing

The Act prescribes that ‘in any action or decision concerning a particular child or young person, the safety, welfare and well-being of the child or young person are paramount’.¹⁸⁴ This choice by the NSW legislature of the phrase ‘safety, welfare and wellbeing’ differs from the expression ‘best interests of the child’, more commonly used in law, policy and literature as representing the paramount concern in legal decisions about children. The term ‘best interests’ does appear elsewhere in the Act, as a factor underpinning or qualifying the making of particular decisions.¹⁸⁵ Both phrases appear frequently in the published judgments – used for the most part interchangeably. Despite ‘safety, welfare and wellbeing’ being (perhaps) a narrower concept than the generic ‘best interests’,¹⁸⁶ for analysis purposes this study groups the phrases together, along with the term ‘paramountcy principle’, as jointly recognising that determination of the dispute must prioritise children’s needs and interests over other considerations.¹⁸⁷

Even more-so than ‘unacceptable risk’, the concept of a child’s best interests is beset by indistinct, competing understandings.¹⁸⁸ Adding to the complexity, legal systems for child protection vary as to whether ‘best interests’ criteria are legislatively prescribed or left to

¹⁸⁴ *The Act* (n 2) s 9(1).

¹⁸⁵ See, eg, s 9(2)(d): arrangements for child unable to remain in family environment in his or her best interests; s 9(2)(f): child to retain relationships with people of significance unless contrary to his or her best interests; s 9A(2)(b)(ii): ‘active efforts’ to be made to place a child with family, kin or community if restoration to the parents is not in the child’s best interests; s 10A(3): each preference within the permanent placement principles is subject to best interests; ss 13(1)(b)–(c), ss 13(3), (4), (6)(a): aspects of Aboriginal and Torres Strait Islander Child Placement Principles subject to best interests; s 65(2): a dispute resolution conference provides opportunity to agree on actions to be taken in the child’s best interests; s 79(3): order allocating parental responsibility subject to best interests; s 86(1)(c): order may be made denying contact with a particular person if not in child’s best interests.

¹⁸⁶ See, eg, *Alice* (n 49) [137]–[138].

¹⁸⁷ See also the observation of the Supreme Court in *Re Benji and Perry* [2018] NSWSC 1750, that the paramount concern in the care legislation ‘differs in wording only, and not in substance’ from the counterpart ‘best interests’ test in the family law jurisdiction: at [48] (McDougall J).

¹⁸⁸ See, eg, Judith Bessant, Michael Emslie and Rob Watts, ‘In Defence of Victoria’s Children’s Court: Its Value and Role in the Child Protection System’ (2012) 37(4) *Alternative Law Journal* 244, 246; Elizabeth Fernandez et al, ‘A Study of the Children’s Court of New South Wales’ (Research Report, UNSW, 2014) 32; Tommie Forslund et al, ‘Attachment Goes to Court: Child Protection and Custody Issues’ (2022) 42(1) *Attachment and Human Development* 1, 5–6; Horsfall (n 134) 63–5; Rosemary Sheehan, *Magistrates’ Decision-Making in Child Protection Cases* (Ashgate, 2001) 58; Marit Skivenes and Karl Harald Sovig, ‘Judicial Discretion and the Child’s Best Interests: The European Court of Human Rights on Adoptions in Child Protection Cases’ in Elaine E Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Wellbeing* (Cambridge University Press, 2016) 341, 343.

decision-maker discretion.¹⁸⁹ Unlike some other Australian care and protection regimes,¹⁹⁰ the NSW Act has no provision listing the considerations to be applied in determining the child's interests, nor does it comprehensively define 'safety, welfare and wellbeing'. Indirect guidance as to the substance of a child's safety, welfare and wellbeing can however be derived from other provisions of the legislation, especially its stated 'objects' and 'principles'. For instance, 'the primary means' of achieving safety, welfare and wellbeing is by providing children with 'long-term, safe, nurturing, stable and secure environments'.¹⁹¹ Other guiding themes include protection from 'violence and exploitation';¹⁹² promotion of health and development;¹⁹³ preservation of the child's relationships¹⁹⁴ and cultural and family identity;¹⁹⁵ and consideration of the child's views,¹⁹⁶ culture, disability, language, religion and sexuality.¹⁹⁷ A lawyer emphasised the importance of these provisions in avoiding narrow, subjective constructions of the paramount concern, which tend to preference the immediate 'safety' of removal into care, above other dimensions of children's identity and needs:

We have a paramount principle: safety, welfare and wellbeing, and then we have all these other principles that have come into the Act at different periods of time. All of them are subordinate to safety, welfare and wellbeing, but it's simplistic to say 'Oh these are well and good, but it's all about safety, welfare and wellbeing'. Even though they're subordinate to it, the fact that they're in the Act tells us that they should inform how we construe that paramount principle. And if we're not doing that, we're just construing it based on what we think, and—and our position of privilege. (Lawyer 8)

In exploring the Court's interpretation of the paramountcy principle, the first thing to note is that the majority of the judgments do not expressly apply the 'safety, welfare and wellbeing' test at all. While many judgments mention safety, welfare and wellbeing (or best interests) in a general sense, just over one-quarter¹⁹⁸ articulate a *specific* link between the abstract principle and *substantive* aspects of the parents' conduct or the child's needs. Within this pool, decisions

¹⁸⁹ Cashmore, 'Best Interests' (n 79) 326, citing M Skivenes, 'Judging the child's best interests: Rational reasoning or subjective presumptions?' (2010) 53(4) *Acta Sociologica* 339, 340.

¹⁹⁰ The care and protection legislation of most other Australian States and Territories specifies a list of considerations for determining best interests: see *Children and Young People Act 2008* (ACT) s 349(2); *Care and Protection Act 2007* (NT) s 10(2); *Children, Young Persons and Their Families Act 1997* (Tas) s 10E(2); *Children, Youth and Families Act 2005* (Vic) ss 10(1)–(3); *Children and Community Services Act 2004* (WA) s 8.

¹⁹¹ *The Act* (n 2) s 8(a1), ss 9(2)(e), (f).

¹⁹² *Ibid* s 8(b).

¹⁹³ *Ibid*.

¹⁹⁴ *Ibid* s 9(2)(d).

¹⁹⁵ *Ibid* s 9(2)(d).

¹⁹⁶ *Ibid* s 9(2)(a).

¹⁹⁷ *Ibid* s 9(2)(b).

¹⁹⁸ 28 (approximately) of the 106 sampled judgments.

in favour of restoration associate a child's safety, welfare and wellbeing with the parent's basic competence,¹⁹⁹ and with the inherent benefit of growing up with biological family.²⁰⁰ Decisions that restoration would be contrary to the child's best interests emphasise inadequate protection from domestic violence²⁰¹ and from physical²⁰² and emotional²⁰³ abuse, and the parent's inability to provide the child with consistency, stability and security.²⁰⁴ Additionally, both groups of cases connect the paramount concern with the parent prioritising the child's needs above conflicting adult concerns.²⁰⁵

Several other cases apply the principle in a generic way which bundles the various legal tests into one. Hence the question of the child's best interests is treated as synonymous with the presence or absence of risk, and/or with the child's circumstances and the failure of the parents to address the issues of concern:²⁰⁶

...the circumstances of the children are such that it is not in their best interest to be restored to these parents unless and until the risk posed to their safety is appropriately addressed. (Judge in *Bell-Collins*)²⁰⁷

Of course, the absence of an explicit approach does not mean the judicial officer has neglected to consider which of the case facts are central to the child's best interests; however, inference is needed to decipher this from reading the judgment as a whole.

The principle is also cited in connection with the conduct of proceedings and evidentiary rules, with the Court rejecting strident appeals to adversarial rigour and strict due process as inconsistent with a resolution focused on the child's safety, welfare and wellbeing.²⁰⁸ For example, a child's interests in certainty and timely decision-making were prioritised against ostensible 'procedural fairness' considerations in the context of delays wrought by a

¹⁹⁹ *Ali children* (n 98) [253], [258]; *Eggleton* (n 119) [24]; *Lilly, Wade & Caleb* (n 121) [74]; *Naunton children* (n 120) 44.

²⁰⁰ *Ali children* (n 98) [253], [254], [260]; *Depik & Senina* (n 119) [14]–[16]; *Fiona Farmer* (n 38) [161]; *SK* (n 119) [239]–[240].

²⁰¹ *Nerayah and Kalista* (pseudonym, unpublished judgment, Children's Court, March 2009) [54] ('*Nerayah & Kalista*'); *Rogers* (n 113) [9], [120].

²⁰² *A* (n 115) [115]–[117]; *Abbey* (n 114) [117], [119]–[120]; *Charlie* (n 99) 28; *Prince & Johns children* (n 113) [66]–[68].

²⁰³ *Charlie* (n 99) 28; *Dupont* (n 116) [113]; *Lewis* (n 98) [224].

²⁰⁴ *Alison Claire* (n 112) [55]; *ASK* (n 98) [247]–[248]; *Chanlina* (n 151) [25]; *Elizabeth* (n 151) [178]–[180]; *Lewis* (n 98) [240]; *Spencer* (n 131) [63].

²⁰⁵ *A* (n 115) [117]; *Abbey* (n 114) [117], [119]–[120]; *Fiona Farmer* (n 38) [152]; *Hatfield children* (n 98) 66; *Lewis* (n 98) [224]; *Nerayah & Kalista* (n 201) [54]; *RC & PK* (n 127) [195]–[196]; *SK* (n 119) [238(l)].

²⁰⁶ *Anthony* (n 44) [48]; *Arnott-Bloom* (n 112) [92]; *Bell-Collins* (n 113) [136]; *Harper children* (n 112) [182]; *Logan* (n 151) 15; *McAlister children* (n 112) [176]; *RC & PK* (n 127) [212]–[213].

²⁰⁷ *Bell-Collins* (n 113) [136].

²⁰⁸ *Colt children* (n 113) [297]; *Elizabeth* (n 151) [183]; *SS* (n 163) [57], [95].

vexatiously litigious, self-represented father.²⁰⁹ The best interests of the child are also relied upon to support the *logistical* viability of a decision for restoration—including the planning and timing of the child’s transition back to parental care,²¹⁰ and the implementation of various safeguards to manage potential risk.²¹¹

There were disparate and contrasting references to the paramountcy principle in the judicial interviews. One magistrate referred to his frustration with parents’ lawyers persisting with ‘unrealistic’ cases for restoration that are not in the children’s best interests and cause delay,²¹² whereas another magistrate emphasised the need for restoration options to be ‘properly explored’ pursuant to the paramount concern, despite this prolonging proceedings.²¹³ The principle was associated with obtaining the child’s views,²¹⁴ and with attaching little weight to those views.²¹⁵ A magistrate emphasised the profound impact of removal from family and community on a child’s safety, welfare and wellbeing;²¹⁶ another noted that a parent’s achievement in addressing the reasons for removal does not necessarily equate to the child’s psychological wellbeing being met by restoration.²¹⁷ A grimmer perspective is that the Court is frequently forced to select ‘the least worst’²¹⁸ option for the child, rather than genuinely making a decision in the child’s best interests.²¹⁹ ‘Wellbeing’, it is argued, is a neglected gap in the mantra of ‘safety, welfare and wellbeing’:

We look at safety and welfare, but never wellbeing, and wellbeing is such a big issue now, because there’s so many children in alternative care arrangements.²²⁰ So many young children in those sorts of arrangements and they’ve got no quality of life at all, those kids. (Judicial Officer 3)

²⁰⁹ Y (n 113) [41], [515], [532].

²¹⁰ *KH v Secretary, Department of Communities and Justice* [2021] NSWDC 498, [649] (‘KH’); *Naunton children* (n 120) 10; *Oscar* (n 116) [142].

²¹¹ *AH & AN* (n 98) [168]–[176]; *Eggleton* (n 119) [41]; *Naunton children* (n 120) 44.

²¹² Judicial Officer 15.

²¹³ Judicial Officer 14.

²¹⁴ Judicial Officer 22.

²¹⁵ Judicial Officers 5, 14.

²¹⁶ Judicial Officer 7.

²¹⁷ Judicial Officer 8.

²¹⁸ Judicial Officer 3. See also Horsfall (n 134) 216; Kenneth McK Norrie, ‘Appellate Deference in Scottish Child Protection Cases’ (2016) 20(2) *Edinburgh Law Review* 149, 150.

²¹⁹ Judicial Officer 3.

²²⁰ An ‘alternative care arrangement’ is defined as ‘an emergency and temporary fee-for-service arrangement for a child...after every effort has been made to place them with relatives/kin, a foster carer, or contracted OOHc placement’. It includes ‘temporary accommodation (eg hotel, motel) and/or direct care provided by staff from a non-designated agency’: ‘Permanency Support Program: Emergency and Temporary OOHc Arrangements’: <<https://dcj.nsw.gov.au/documents/service-providers/out-of-home-care-and-permanency-support-program/ACA-STEP-IPA/psp-ohc-terminology-emergency-and-temp-arrangements.pdf>>. The use of alternative care arrangements has recently been discontinued: see Chapter 2, part E.

Only three caseworkers mentioned best interests (in any of its guises of phraseology). Although the semi-structured format of the interviews did not include a specific question on the paramountcy principle, it might be envisaged, given the wide-ranging discussions and overall focus on realistic possibility of restoration, that there would be more spontaneous references to best interests. From a law-oriented perspective, it was disconcerting to hear a caseworker express the misunderstanding that the ‘best interests’ test applies only in ‘section 90’ cases (post-disposition applications to re-open a case), thus not conceiving of the fundamental character of the principle as paramount across all stages of child protection intervention. The error was however expressed tentatively: ‘correct me if I’m wrong...’, and grounded in a perception that ‘realistic possibility of restoration’ and ‘best interests’ are distinctly separate tests, the former applying in initial proceedings, and the latter when a parent’s rescission application is weighed against the interests of the child in remaining in a stable and positive care placement. The worker’s confusion about the intricacies of the inter-related statutory provisions is understandable,²²¹ and reflects the remarks of several participants about flaws in the internal coherence of the legislative scheme.²²²

Among the small number of Departmental participants (including lawyers) who mentioned the best interests principle, there was a spectrum of standpoint. This ranged from seeing restoration as inherently aligned with best interests,²²³ to cautiously acknowledging nuances across competing considerations,²²⁴ to a cynical concern that the system is unduly pre-occupied with helping ‘the poor parents’ to the detriment of ‘what’s best and safe for the child’.²²⁵

²²¹ Although the paramountcy principle and the realistic possibility of restoration test both apply to both stages, section 90 applications require consideration of additional prescribed factors pertaining to, eg, the stability and attachments of the child in their present care arrangements.

²²² See above nn 52–55 and below nn 315–316 and accompanying text.

²²³ Caseworker 11.

²²⁴ Caseworkers 7, 10; Lawyers 5, 6.

²²⁵ Lawyer 1.

D. Realistic Possibility of Restoration: Prescribed Considerations

Can we stop looking at the parents' progress and start looking at what's actually going on for the child in placement? It's obviously not great. Let's not be hyper focused on, you know, this parent hasn't done this parenting program—that is just...it's not the most important thing in the world, guys. The most important thing in the world is what is going on for this child. (Caseworker 11)

It's all about the parents and their chaos. (Judicial Officer 2)

Under the Act, the pivotal issue of restoration is determined not once, but twice. Although the Court bears the ultimate responsibility for this decision, 'the Secretary' (the Department) first makes an assessment as to whether there is a realistic possibility of restoration of the child to the parents, within a reasonable period, having regard to (a) 'the circumstances of the child', and (b) 'the evidence, if any, that the...parents are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care'.²²⁶ The Court then makes its own 'express finding' on the same prescribed considerations,²²⁷ in order to decide whether it 'accepts' the Secretary's assessment.^{228 229}

Under this process, the Department takes the lead on the restoration decision. I embarked on the interviews assuming caseworkers—or at least those with 'manager' status²³⁰—would be confidently familiar with the statutory test and its prescribed components. My scripted questions on *how* the 'realistic possibility' issue is decided at casework level started, initially, with the phrase 'as you are aware...', in referring to section 83 and its two 'arms' of the child's circumstances and the likelihood of the parents addressing the issues. As it transpired, my presumption of this prior knowledge was probably misplaced. Responses almost invariably took a different turn: focusing overwhelmingly on the *collaborative processes* undertaken by casework staff in effort to reach a consensus view.²³¹ There was little apparent

²²⁶ *The Act* (n 2) s 83(1).

²²⁷ *Ibid* s 83(7)(b).

²²⁸ *Ibid* ss 83(5), (6).

²²⁹ Pursuant to amendments which took effect in November 2023, in deciding whether to accept the Secretary's assessment the Court may also require the Secretary to provide evidence of its 'active efforts' to facilitate restoration: s 83(5B)(b)(i). Most of the judgments in this study pre-date this amendment, and none specifically address it.

²³⁰ 9 of the 13 interviewed caseworkers were in the 'manager casework' role.

²³¹ 'Consensus-based' approaches are recognised as one category of 'several major approaches to risk assessment' in child protection: Elizabeth Fernandez, 'Assessment in Child Protection', in Elizabeth Fernandez and Paul Delfabbro (eds), *Child Protection and the Care Continuum: Theoretical, Empirical and Practice Insights* (Taylor & Francis, 2020) 96, 103–4. In relation to NSW specifically, 'group supervision...aimed at sharing risk and responsibility' has been described as a 'key component' of the Department's practice framework: Natasha Cortis et al, 'Changing

conceptualisation of restoration decisions being based on legislatively-prescribed considerations.

The focus of this collaborative decision-making appears to be *consultation* with a variety of senior or specialist staff: including Directors,²³² Managers of Client Services,²³³ Casework Specialists,²³⁴ Permanency Coordinators,²³⁵ Aboriginal Cultural Consultants,²³⁶ and a 'Care Pathways Panel'.²³⁷ There were also many references to 'group supervision'.²³⁸ Practices vary across the State, and are guided by the 'unique' character of each case,²³⁹ rather than there being a uniform chain of authority for evaluating realistic possibility of restoration.²⁴⁰ This is beginning to change in relation to Aboriginal children, with the State-wide introduction from late 2023 of referrals to specialist 'SDMAC' panels ('Safeguarding Decision Making for Aboriginal Children')²⁴¹ for a consistent approach in efforts to avoid removals. But with the exception of SDMAC, it was evident that programs exist inconsistently across regions, resulting in distinctive localised approaches. For example, interviewed caseworkers in certain outer urban districts included 'restoration specialists' working closely with parents to assist them achieving restoration goals. A 'prenatal' caseworker was attached to a pilot partnership between the Department and NSW Health in a suburban district. A 'permanency' caseworker in a regional city described their district's 'co-allocated' model, in which one team supports the children in their placements while the other team 'are very much embedded in the court work'. In contrast, a manager from a rural district running at 'about 40 percent' staff capacity referred to the struggle to retain caseworkers at all, let alone dream of innovative projects.

At the time the interviews were conducted, all of this human teamwork was operating in parallel with a suite of 'structured decision-making' tools.²⁴² The assessment tool for restoration was described as 'play[ing] a very big part in the decision-making process',²⁴³ but

Practice Cultures in Statutory Child Protection: Practitioners' Perspectives' (2019) 24 *Child & Family Social Work* 50, 52.

²³² Caseworkers 3, 4, 10, 13.

²³³ Caseworkers 3, 5, 8, 12, 13.

²³⁴ Caseworkers 4, 6, 13.

²³⁵ Caseworkers 4, 6, 9.

²³⁶ Caseworker 8.

²³⁷ Caseworker 9.

²³⁸ Caseworkers 4, 6, 8, 9, 12, 13.

²³⁹ Caseworkers 3, 5.

²⁴⁰ Caseworker 9; Lawyer 2.

²⁴¹ Caseworkers 1, 3, 4, 5, 7, 10, 12, 13; Lawyers 2, 4, 8; see also Department of Communities and Justice, *Family is Culture Progress Report* (February 2024) 20.

²⁴² Caseworkers 1, 3, 4, 5, 8, 10, 12; Lawyer 5.

²⁴³ Caseworker 5.

with allowance for occasional ‘override’ in the application of professional discretion.²⁴⁴ There is a substantial body of research literature debating the utility and ‘predictive accuracy’ of actuarial and structured risk and reunification assessments versus professional judgment in child protection,²⁴⁵ and there were varied opinions on this topic within judgments and interviews.²⁴⁶ Shortly after the interviews took place the assessment tools were entirely replaced with an (interim) new system (as discussed in Chapter 2), which removes scoring of data and is instead premised on guided professional judgment.²⁴⁷

The seemingly flexible nature of the casework process for assessing realistic possibility of restoration has some affinity with the discretionary, ‘intuitive’ method described by judicial officers.²⁴⁸ Both approaches are reflected, to some degree, in the implementation of the statutory test within the judgments – which, as discussed below, is often indirect rather than explicit.

(i) The Circumstances of the Child

We get a lot of information about where the parents are sitting; we don’t get a lot of information about where the kids are sitting. (Judicial Officer 19)

It is very parent focused. You’ve got a little person in a placement with family, and as a caseworker, you just breathe a sigh of relief and move on to your next matter. (Caseworker 1)²⁴⁹

²⁴⁴ Caseworkers 3, 4, 5.

²⁴⁵ See, eg, Bolton and Lennings (n 65); Karen Broadley, ‘Making the Decision to Remove a Child from Parental Care: Twelve Decision-Making Criteria’ (2015) 41(2) *Children Australia* 90, 91–2; Karen Broadley, ‘What is Good Professional Judgment in Child Protection?’ (PhD Thesis, RMIT University 2021); Lillian De Bortoli et al, ‘Preliminary Evaluation of Structured Professional Judgment to Assess Removal in Child Protection Practice’ (2015) 5 *Journal of Forensic Social Work* 29; Fernandez (n 231); Jacynta Krakouer, Wei Wu Tan and Arno Parolini, ‘Who is Analysing What? The Opportunities, Risks and Implications of Using Predictive Risk Modelling with Indigenous Australians in Child Protection: A Scoping Review’ (2021) *Australian Journal of Social Issues* 1; Eileen Munro, Julie S Taylor and Caroline Bradbury-Jones, ‘Understanding the Causal Pathways to Child Maltreatment: Implications for Health and Social Care Policy and Practice’ (2014) 23 *Child Abuse Review* 61. See also Chapter 2, part E, ‘Recent Policy Developments’.

²⁴⁶ Anthony (n 44) [34]–[35]; *Depik & Senina* (n 119) [18]–[22]; *Keziah* (n 113) [123]; Judicial Officers 3, 4, 20; Lawyer 1.

²⁴⁷ Department of Communities and Justice, *Interim Restoration Assessment Approach* (Practice Manual, November 2024). See also Chapter 2, part E.

²⁴⁸ See Chapter 4, part A, section (ii).

²⁴⁹ The comment was in the context of a comparison between standard casework and this caseworker’s role in a special ‘co-allocation’ model. The quoted words were followed by: ‘...co-allocation doesn’t let you do that, which is brilliant, because we are all about that little person and that placement and then having all of the standards met that we have to meet for children in statutory care’.

The term ‘circumstances of the child’ is not defined or expanded upon in the Act. Case law has established that it should be construed broadly.²⁵⁰ While the judgments have tended to interpret the phrase as pertaining to children’s current circumstances and their maltreatment prior to the removal,²⁵¹ a recent case emphasised the relevance of *future* circumstances—particularly if there is risk of detriment to the child in an out-of-home care environment.²⁵² Thus the permanency plan²⁵³ prepared by the Department, including its proposals for a long-term placement, may be considered a vital part of the child’s circumstances for the purposes of evaluating realistic possibility of restoration.²⁵⁴ This differs from the traditional approach by which ‘placement’ is effectively treated as a separate issue, becoming relevant only when and if a decision is made that there is no realistic possibility of restoration.²⁵⁵

Despite its clear importance as a prescribed statutory consideration, over half²⁵⁶ of the judgments do not explicitly mention ‘the circumstances of the child’ in reaching a conclusion on realistic possibility of restoration.

Even when the phrase is expressly engaged, it is often used to immediately refer back to *the parents’* conduct—that is, the risks posed by the parents’ circumstances preclude any prospect of the children being safely restored:

...there is not, at this time, a realistic possibility of restoration to [the parents] by reason of the limb of s 83...which requires me to have regard to the circumstances of the children. In simple terms, in their present circumstances, [the parents] are unable to provide adequate care for these children. Firstly, they have neither the financial means to support themselves, let alone two children in addition, nor do they have the necessary level of financial understanding to run a household. Secondly, they lack the necessary parenting skills to properly care for the children. (Judge in *MXS*)²⁵⁷

Thus the children’s own personal circumstances are either not specified, or, in rather circular reasoning, *are* the absence of a realistic possibility of restoration:

²⁵⁰ *DHK & Anor v Secretary, Department of Family and Community Services & Ors* [2018] NSWDC 221, [9]; *Ivy* (n 5) [187]; *Rogers* (n 113) [148]; *VV v District Court of New South Wales* [2013] NSWCA 469, [59]–[69].

²⁵¹ See, eg, *Rogers* (n 113) at [8(5)]: ‘in determining the appeal it is necessary to consider the present circumstances of the children’, and at [149]: ‘the current and historical circumstances of the children are proper matters to consider’; *VC* (n 116) at [302]: ‘I must firstly compare the circumstances of the child at the time of his removal against his current circumstances’.

²⁵² *Ivy* (n 5) [190], [199], [221].

²⁵³ *The Act* (n 2) ss 83(2), (3).

²⁵⁴ *Ivy* (n 5) [191]–[197].

²⁵⁵ *Ibid* [196]–[197].

²⁵⁶ 57 of the 106 sampled judgments.

²⁵⁷ *MSX* (n 44) [70]–[72]. See also *Abbey* (n 114) [122]–[123]; *Bell-Collins* (n 113) [136]; *Bloom* (n 1) [314]–[315]; *Boyd* (n 112) [31]; *McAlister children* (n 112) [176]–[177].

I find...that the father is unlikely to be able to satisfactorily address the issues that led to the removal of the child. I am also comfortably satisfied that the circumstances of the child are such that restoration to the father is contra-indicated. The risk associated with a restoration to the father supports that proposition. (Judge in *Abbey*)²⁵⁸

A minority of the judgments, approximately one-third, do specify discrete aspects of the child's circumstances. In some instances a dedicated heading introduces the circumstances of the child;²⁵⁹ alternatively the issue is integrated within the flow of discussion. Prevalent themes are children's bonds with parents, siblings, and carers,²⁶⁰ and the importance of children's health and developmental needs being met by stable and secure care arrangements.²⁶¹ The circumstances are occasionally the subject of extensive commentary,²⁶² at other times briefly touched upon. Several of the most comprehensive critiques relate to damaging or 'sub-optimal'²⁶³ experiences of children in out-of-home care arrangements.²⁶⁴ Notably, these are mostly relatively recent cases, indicating—as suggested by interviewed lawyers²⁶⁵—that children's circumstances are 'becoming much more of a focus'.²⁶⁶ However, the subject-matter affirms observations that parties to the proceedings typically raise the child's circumstances only when these 'are bad'.²⁶⁷

The absence in two-thirds of the judgments of an express application of the 'circumstances of the child' arm of the restoration test does not mean that these decisions disregard the child's situation. Some participants defended the logic of the children's circumstances being conflated with the parents' conduct:²⁶⁸ 'if the behaviour doesn't change, then what the children experience doesn't change, so they're linked in a way that really can't be

²⁵⁸ *Abbey* (n 114) [122]–[123]; see also *Bell-Collins* (n 113) [136].

²⁵⁹ See, eg, *AH & AN* (n 98) [190]; *Ali children* (n 98) [123]; *Braidan* (pseudonym, unpublished judgment, Children's Court, August 2022) 33 ('*Braidan*'); *Department of Communities and Justice (DCJ) and the Dalton Tomkins children* [2023] NSWChC 10, [297] ('*Dalton Tomkins children*'); *Jamzie* (n 18) [131]; *Janet & Xing-fu* (n 5) [53]; *Lucy* (n 34) [64]; *Lewis* (n 98) [88]; *Malakhai* (n 132) [191(a)]; *Mario* (n 119) [24]–[29]; *Waller children* (n 113) [140]; *Yarran-Taylor children* (n 61) [270].

²⁶⁰ See, eg, *Arnott Bloom* (n 112) [90]; *Charlie* (n 99) 12; *Jamzie* (n 18) [131]–[140]; *Janet & Xing-fu* (n 5) [54]; *May, June & Roy* (n 56) [193].

²⁶¹ See, eg, *DFaCS (NSW) re Amanda & Tony* [2012] NSWChC 13, [81]; *Arnott Bloom* (n 112) [90]; *Braidan* (n 259) 33–4; *Dalton Tomkins* (n 259) [307]; *JH* (n 118) [244]–[245]; *Lewis* (n 98) [88]–[108]; *Rogers* (n 113) [130], [162].

²⁶² See, eg, *Ali children* (n 98) [123]–[252]; *Dalton Tomkins children* (n 259) [298]–[307]; *Lewis* (n 98) [88]–[109]; *Mario* (n 119) [24]–[29]; *Yarran-Taylor children* (n 61) [270]–[301].

²⁶³ *Mario* (n 119) [29].

²⁶⁴ *Ali children* (n 98) [123]–[252]; *Mario* (n 119) [24]–[29]; *Yarran-Taylor children* (n 61) [270]–[301].

²⁶⁵ Lawyers 2, 4, 7, 8.

²⁶⁶ Lawyer 7.

²⁶⁷ Lawyer 6. A similar point was made by Caseworker 12.

²⁶⁸ Judicial Officers 14, 22; Caseworker 5; Lawyer 1.

separated'.²⁶⁹ From this perspective, the child's circumstances are indirectly accommodated in the Court's emphasis on parental capacity to meet the child's emotional needs, which is a leading factor in decisions on restoration.²⁷⁰ Additionally, many of the judgments make passing mention of aspects of the child's experiences, or discuss these in re-counting, for instance, the opinion of a clinician's assessment of the family. Although not expressed as a deliberative application of the section 83 criteria, these references tacitly inform the decision. The themes of children's stability and relationships are substantially influential factors in the Court's decisions,²⁷¹ irrespective of whether the judgments directly engage the 'circumstances of the child' test in discussing these matters.

Overall, however, the content of most judgments is weighted towards scrutiny of adult lives. This aligns with arguments in existing research literature, both in Australia and elsewhere, that child protection courts tend to concentrate on adult behaviours, rather than on the specific implications of those behaviours for children,²⁷² or 'separate'²⁷³ and 'holistic'²⁷⁴ elements of children's interests. There was a strong sense in the interviews that the entire legal process, from the casework stage through to court proceedings, is disproportionately centred on the parents.²⁷⁵ Many participants felt this should, in some way, change. Magistrates, lawyers and caseworkers alike raised the importance of children's emotional and developmental wellbeing, especially as affected by trauma,²⁷⁶ and the impacts on children of inadequate (or non-existent) placement options.²⁷⁷ A caseworker and a magistrate both argued for decision-making and planning to have a better 'lens'²⁷⁸ on the details of the child's daily life and

²⁶⁹ Caseworker 5.

²⁷⁰ See Chapter 7, section (iv).

²⁷¹ See Chapter 8, sections (iii), (iv).

²⁷² Ilana Dodi Luther, ' "On the Poverty of Responsibility": a Study of the History of Child Protection Law and Jurisprudence in Nova Scotia' (PhD Thesis, Dalhousie University, 2015) 304, 364–5, 374; Yuval Saar-Heiman, Anna Gupta and Griet Roets, 'Parenting Through the Lenses of Risk and Othering: Constructions of Parenting Cannabis Use in Child Protection Court Proceedings' (2023) 28 *Child and Family Social Work* 690, 693–4, 697;

²⁷³ Rosemary Sheehan, 'The Marginalisation of Children by the Legal Process' (2003) 56(1) *Australian Social Work* 28, 36.

²⁷⁴ Lorie L Sifacuse et al, 'Evaluating the Child Abuse and Neglect Institute: Does Training Affect Decision-Making?' (2015) 66(1) *Juvenile and Family Court Journal* 1, 11.

²⁷⁵ Judicial Officers 2, 3, 19; Caseworkers 1, 3, 4, 8, 9, 11; Lawyers 1, 2, 6, 8.

²⁷⁶ Judicial Officers 4, 15; Caseworkers 3, 8, 11, 13; Lawyers 4, 8.

²⁷⁷ Judicial Officers 3, 4; Caseworkers 1, 8, 11, 12; Lawyers 5, 7, 8.

²⁷⁸ Judicial Officer 19; Caseworker 1.

community connectedness—in areas such as health, schooling, recreational activities, friendships, and current relationships with family and carers.^{279 280}

Participants also spoke about drawing on *strengths* in children's circumstances as a way to build the potential for restoration, or to avoid removal in the first place. A caseworker mused that 'what our practice does not do well before removal...is looking at what the kids can actually do. What do they do in [their] circumstances to reach out for help and keep themselves safe?'²⁸¹ A child's protective ability, stemming from insight into their parents' behaviours²⁸² and buffered by supportive 'networks',²⁸³ may justify restoration where the emotional bond is intact—'a parent can be dysfunctional and a child still have emotional safety with them'.²⁸⁴ Several participants argued for a more fluid approach to kinship care, in which the involvement of a grandparent, for instance, provides a temporary stop-gap during a difficult period for the parent,²⁸⁵ or acts as a springboard for restoration by 'interact[ing] with the parent's strengths'.²⁸⁶ This perspective was strongly evident in relation to Aboriginal children and the harm of disconnection from family, community and culture.²⁸⁷ A kinship placement provides children with 'stability and being connected',²⁸⁸ the parents have breathing space to 'address their issues',²⁸⁹ and sources of help are strengthened for both parent and child in the event of future need.²⁹⁰

²⁷⁹ Judicial Officer 19; Caseworker 1.

²⁸⁰ Children's education, health and other 'wellbeing factors' were similarly noted in a US study to be typically absent from the issues canvassed in child protection hearings: Judge Robin D Sage and Tara Grigg Green, 'Improving Hearing Quality in Child Welfare Cases' (2022) 73 *Juvenile and Family Court Journal* 17, 25, 32.

²⁸¹ Caseworker 2.

²⁸² Lawyer 3.

²⁸³ Caseworker 2.

²⁸⁴ Lawyer 8.

²⁸⁵ Judicial Officer 5; Caseworker 10.

²⁸⁶ Lawyer 6.

²⁸⁷ Judicial Officers 5, 19; Caseworkers 3, 7, 10; Lawyers 7, 8, 9.

²⁸⁸ Judicial Officer 19.

²⁸⁹ Judicial Officers 5, 19.

²⁹⁰ Caseworkers 1, 8, 10, 13; Lawyers 5, 6, 9.

(ii) Likelihood of the Parents Satisfactorily Addressing the Issues

It is submitted that [the father's] past behaviours are predictive of his likely future conduct. I disagree. My view of the history of the events that unfolded is that the father was a victim of a set of difficult circumstances... What is more important, however, is the future, and my assessment of him going forward is that he understands the risk posed by the mother's mental illness and is sufficiently equipped, emotionally, to take appropriate protective measures. (Judge in *Fiona Farmer*)²⁹¹

The second limb of the 'realistic possibility of restoration' test requires consideration of the likelihood that the parent(s) will be able to satisfactorily address the issues that led to the child being removed from their care. Previously this 'likelihood' needed to be evident as at the date of final orders being made. Amendments effective from early 2019 added the qualifying term 'within a reasonable period' to the assessment of the realistic possibility,²⁹² defining the reasonable period as 'not exceeding 24 months'.²⁹³

The likelihood of the parents 'addressing the issues' is based on an evaluation of 'the totality' of the evidence.²⁹⁴ It is 'not a static test' confined to existing risk factors, instead it involves 'an appreciation of the real issues...as they have emerged and unfolded'.²⁹⁵ The legal framework uses the cricket metaphor of 'runs on the board' to suggest that the parents will ordinarily have taken steps, and demonstrated some success, in addressing the child protection concerns by the time realistic possibility is determined.²⁹⁶ Alternatively, a parent's commitment to a 'cohesive, viable plan' for the goal of restoration may be sufficient if likely to be achieved within a reasonable period, even if significant success has not yet eventuated.²⁹⁷

Identifying the 'issues that led' to the child's removal is usually treated as non-contentious: the judgments either summarise these as contained in the Department's application, or deem the issues as self-evident within an account of the case history.²⁹⁸ But in relation to the latter approach, a Supreme Court judge hearing an appeal observed wryly that 'the "issues" for the purposes of section 83 have never been established...being held in the head of [a Children's

²⁹¹ *Fiona Farmer* (n 38) [151].

²⁹² *The Act* (n 2) ss 83(1), (5), (7)(b).

²⁹³ *Ibid* s 83(8A).

²⁹⁴ *Bloom* (n 1) [173].

²⁹⁵ *Oscar* (n 116) [119].

²⁹⁶ *Bloom* (n 1) [170]–[171], [173].

²⁹⁷ *Bloom* (n 1) [173]; *Jamzie* (n 18) [206]–[207].

²⁹⁸ See Chapter 6, part A, for a more detailed discussion of the ways in which the judgments refer to the reasons for removal.

Court Magistrate] and unknown to this Court'.²⁹⁹ The judge in a District Court appeal admitted being unclear as to which issues to consider,³⁰⁰ noting that the major precipitating causes justifying the removal 'are obvious', but questioning whether an array of other neglect and parenting capacity issues presented in the Department's documentation are also expected to be addressed.³⁰¹ On a different tack, a Children's Court judgment, in an application to vary existing orders, challenged the very relevance of the historic issues attached to the removal several years past, as distinct from the issues that matter for the seven-year old child now:

The second question is the evidence regarding Braidan's mother, that she is likely to be able to address the issues that led to his removal. This is somewhat artificial. She last had him in her care when he was seven months old. She was not able to meet his needs and the question is 'Is the mother likely to be able to meet his needs to the standard required?' (Magistrate in *Braidan*)³⁰²

The caseworker interviews revealed a rather bewildering response to the 2019 reform enabling a 'realistic possibility' to be realised within 24 months of the date of hearing. This amendment was accompanied by separate provisions encouraging the use of 'short-term' final orders for parental responsibility to the Minister, of up to two years, in certain circumstances.³⁰³ Caseworkers conflated these issues, believing that the longer timeframe for the forecast of realistic possibility equates *only* to the making of short-term orders.³⁰⁴ They perceive that the reform has been unsuccessful, due to magistrates, reputedly, 'not liking' time-limited orders.³⁰⁵ These comments reflect a controversy arising from the Department's interpretation of the amendments, pursuant to which it had been bringing short-term order applications with the intention, effectively, of utilising the two-year period to assess the viability of restoration (or of guardianship or adoption by the carers).³⁰⁶ A caseworker described the idea thus:

²⁹⁹ GR (n 118) [243].

³⁰⁰ *David White v The Director-General Department of Human Services* [2011] NSWDC 106, [82].

³⁰¹ *Ibid* [82]–[85].

³⁰² *Braidan* (n 259) 34.

³⁰³ New South Wales, *Parliamentary Debates*, Legislative Council, 24 October 2018, 53 (Scott Farlow, Second Reading Speech, Children and Young Persons (Care and Protection) Amendment Bill 2018) 53, 54–5; *The Act* s 79(9). The duration of an order for parental responsibility to the Minister is limited to 24 months, if the Court approves a permanency plan for restoration, guardianship or adoption.

³⁰⁴ Caseworkers 1, 3, 9, 10, 12.

³⁰⁵ Caseworkers 1, 9; Lawyer 1.

³⁰⁶ Stephan Herridge, 'Short Term Care Orders: Synopsis', *Children's Law News*, July 2020, 2, 5; Caseworker 12; Lawyer 5.

For two years, we're going to walk alongside you, give you two years to do some progression. We're doing updates to the Court as to how that's going, and at the end of the two years, that's when your final [restoration] order's made. (Caseworker 10)

This contingent approach to permanency planning, rife with uncertainty for the child's future, was not favourably regarded by the Court,³⁰⁷ and 'tend[ed] to obscure the real issue, which is "is there a realistic possibility of restoration, or not?"'³⁰⁸ Although the Court is now able to forecast the likelihood that conditions for restoration will be met within 24 months, this estimation must still be based on the evidence available at the time the prediction is made. As described by Legal Aid NSW, an 'unintended consequence' of the reforms was the notion that restoration be pursued 'for up to two years in circumstances where it is not realistic'.³⁰⁹

This approach misunderstands and distracts from the significant potential³¹⁰ of 'realistic possibility within a reasonable period.' It had long been standard practice, prior to the amendments, for restoration orders to be structured to enable a staged transition of parental responsibility back to the parents, via a temporary period – say, six to twelve months – during which the Minister continues to hold parental responsibility. In this respect 'short-term orders' were not novel.³¹¹ But this does not involve the restoration decision itself being deferred for two years. It simply enhances the opportunity for orders for children's *long-term* restoration to their parents, if the Court is reasonably confident that the parents, with a little more time up their sleeves, will be able to consolidate a process of change.³¹²

There are quandaries about the level of optimism, versus stringency, that should be attached to consideration of parents' efforts. Participants felt that 24 months is either not long enough for parents to overcome long-standing problems,³¹³ or is too long a period for 'crystal ball gazing' while children are left in limbo.³¹⁴ A magistrate and a caseworker both suggested that the practical operation of the legislation tends towards a 'realistic *probability*'. From the caseworker's perspective, parents are given false hope: 'because anything's a possibility and

³⁰⁷ Herridge (n 306) 6–9, 11; Lawyer 5.

³⁰⁸ Lawyer 5.

³⁰⁹ Legal Aid NSW, Submission to the Parliamentary Joint Committee on Children and Young People, *Inquiry into the Child Protection and Social Service System* (18 December 2020) 6.

³¹⁰ Judicial Officer 22; Lawyers 2, 5, 8. See also *Family is Culture Report* (n 31) 360–61, 369.

³¹¹ Herridge (n 306) 2, 3; Lawyers 4, 5.

³¹² Judicial Officers 9, 20. See additional discussion on this amendment in Chapter 10, part C, section (i) 'Building on Strengths'.

³¹³ Judicial Officers 5, 16; Caseworker 7; Lawyer 6.

³¹⁴ Permutations of these themes were expressed by Judicial Officers 4, 7, 15; Caseworker 2.

anything would be realistic to a parent’.³¹⁵ The magistrate similarly argued that a ‘possibility’ is theoretically ‘not a high hurdle’ and logically entails a reasonable likelihood of failure, whereas in practice the question is closer to ‘have they achieved enough to demonstrate that a restoration is going to work?’³¹⁶ He was overall critical of the obscurity of the statutory concepts:

Is it more likely than not that a restoration will succeed? And that’s not the test at all. Even if it’s a test on the balance of probabilities, ‘is it more likely than not that it’s possible that there’s a realistic restoration?’ So the language doesn’t help. I think it’s a poor test. (Judicial Officer 6)

Less than half³¹⁷ of the judgments directly link the ‘likelihood of the parents addressing the issues’ with substantive aspects of the case. The Court does not, usually, refer back to specific grounds for removal in order to apply a ‘step by step’, task-based evaluation of the prospects of restoration. Although the Department at the start of each case presents the ‘Summary of the proposed plan for the child’, listing the tasks the parent is expected to fulfil in order for restoration to be considered,³¹⁸ it is uncommon for the content of this document to be delineated in the judgments.³¹⁹

As with unacceptable risk and the child’s circumstances, the judgments that *do* apply a deliberative approach to the test do so via the use of headings, lists, and/or language expressly articulating this part of the analysis.³²⁰ The case of *Jamzie*, noted earlier as an exemplar of structured precision in risk assessment, is equally clear in its analysis of the tests for realistic possibility. It lists the issues that led to the baby’s removal;³²¹ concisely analyses the mother’s progress to date and further plans in respect of each separate issue;³²² notes the alignment of this progress with specific tasks in the ‘summary of proposed plan’;³²³

³¹⁵ Caseworker 1.

³¹⁶ Judicial Officer 6.

³¹⁷ Approximately 50 of the total 106 sampled judgments.

³¹⁸ See Children’s Court of New South Wales, *Practice Note 5, Case management in care proceedings: Standard Directions*, 16.6.1 (c).

³¹⁹ The exceptions, which do cite some or all of the tasks listed in the ‘summary of proposed plan’, include *Dalton Tomkins children* (n 259) [25]–[26]; *Dorothy* (n 112) 8; *Jamzie* (n 18) [154]–[156], [161], [166], [172], [177], [178], [181], [184], [190]; *RC & PK* (n 127) [97]; *Rogers* (n 113) [84]; *VC* (n 116) [143]; *Waller children* (n 113) [21]; *Yarran Taylor children* (n 61) [27].

³²⁰ See, eg, *Charlie* (n 99) 13, 28, 24; *Jamzie* (n 18) [28], [34]–[35], [152]–[192]; *Kim* (n 112) [2]–[51]; *Malakhai* (n 132) [59]–[60], [191]–[192]; *Mario* (n 119) [30]–[48]; *Saunders & Morgan* (n 113) [16]–[21], [43]–[63]; *Waller children* (n 113) [143]–[179].

³²¹ *Jamzie* (n 18) [152].

³²² *Ibid* [153]–[192].

³²³ *Ibid* [154]–[156], [161], [166], [172], [177], [178], [181], [184], [190].

summarises the circumstances of the child;³²⁴ integrates these assessments with consideration of level of risk;³²⁵ and finds that the mother is committed to a ‘sensible, practicable’ plan for achieving restoration within a reasonable period.³²⁶

Factors strongly associated with ‘addressing the issues’ are insightful understanding of the child protection concerns, and compliant engagement with casework expectations, usually inclusive of mental health therapy. Parents deemed *unlikely* to meet the test are lacking in insight, effort and honesty, and many are regarded as having ‘unaddressed’ mental health issues.³²⁷ The emphasis on intrinsic and attitudinal characteristics is captured in the following quote from the case of *Saunders and Morgan*:

Have these parents commenced the journey to self-awareness in respect of their past abuse and the issues that led to the removal of the children? If so, have they progressed along the continuum of increasing insight and awareness to a sufficient degree to support an express finding that there is a realistic possibility of restoration? (Judge in *Saunders & Morgan*)³²⁸

Given that the bulk of content of most judgments is focused on the parents, the Court’s decisions implicitly embed the ‘addressing the issues’ limb of the realistic possibility test—regardless of whether the test is specifically referenced. Indeed, the ‘parent factors’ most influential in shaping court outcomes, irrespective of the style and structure of each judgment, are the major focus of this thesis. An explicit approach, systematically measuring the ‘likelihood’ against each relevant ‘issue’, is not essential for the Court’s reasoning to be gleaned. Nonetheless, a wider adoption of the highly structured format and concise language applied in judgments such as *Jamzie* may assist in responding to concerns that parents, along with services engaged to help them, struggle to understand what the legal system ‘expects’ in order for restoration to be achieved.³²⁹

³²⁴ Ibid [131]–[140].

³²⁵ Ibid.

³²⁶ Ibid [213].

³²⁷ See Chapters 7 and 8 for detailed exploration of these themes.

³²⁸ *Saunders & Morgan* (n 113) [38].

³²⁹ References to difficulty understanding the Court’s expectations or reasoning appeared in the interviews of Caseworkers 4, 8, 9, 12. See also Susan Collings et al, ‘Working Towards Reunification in New South Wales: Professional Perspectives on Navigating Complex Systems’ (2024) 59 *Australian Journal of Social Issues* 752, 761–2; Davis, *Family is Culture Report* (n 31) 365–7, 381.

Conclusions

This chapter has focused on the issues of law that directly inform the question of realistic possibility of restoration. The established legal principles are subject to ongoing refinement, including quite recent, significant clarification of the relationship between unacceptable risk and the paramountcy principle.

In practice, many of the judgments do not expressly articulate the application of unacceptable risk, the best interests of the child, and the prescribed considerations for realistic possibility of restoration. The most common approach is to treat the legal principles as implicitly addressed within the overall discussion of the evidence and factual findings. Although there has been somewhat of a shift over time towards a more precise application of the legal tests, judicial officers are not in favour of the discretionary nature of decision-making in care and protection being constrained by any formulaic parameters.

To the extent that the legal principles are applied in a specific way, the associated substantive issues are quite consistent across risk, best interests, and realistic possibility. These include parental insight, parental mental health, and children's stability. Although most cases involve multiple, intersecting risk factors, perceptions of 'unresolved mental health issues' are prevalent in findings of unacceptable risk, and are similarly influential in decisions that a parent is unlikely to satisfactorily address the child protection issues.

I found caseworkers to be less familiar with the legal tests than I had assumed. In making this observation I am conscious of my own law-centric perspective, which might be subject to the retort that I lack familiarity with the principles and practice of social work. Further, that caseworkers are not expected to be quasi-lawyers, and that they rely upon the expertise of the Department's legal team. The relevant distinction here is that lawyers do not perform child protection casework, but caseworkers *do* make legal decisions – and fundamentally important ones at that. Lawyers expressed frustration at caseworkers' inappreciation of law and legal process,³³⁰ surprise at the extent of the in-house legal role as 'educative',³³¹ and concern that

³³⁰ Lawyers 1, 3, 5.

³³¹ Lawyer 8.

the working partnership between the lawyers and caseworkers is not as consistently strong as is ideal.^{332 333}

However, when engaged in non-legalistic discussion, caseworkers were reasonably clear about ways in which risks can be managed. They emphasised the development of trust between parent and worker, and the importance of extended family networks to support parents and strengthen children's existing 'protective' capacities. While caseworkers tend to be in favour of 'sitting with' a degree of risk in the interests of family preservation and restoration, it was evident across all participant groups that the question of how much risk is tolerable is highly fraught.

Overall, this chapter's analysis of the legal principles is limited in revealing the Court's reasoning on the issue of restoration, as the application of the legal tests is often a matter of inference, or reading between the lines. A clearer understanding requires identification of the Court's findings on 'issues of fact', as these are referred to and relied upon in its reasons for decision. Chapters 6, 7, and 8 turn to these substantive issues.

³³² Ibid. This comment encompassed the context of a substantial proportion of the Department's litigation in care matters being outsourced to private solicitors.

³³³ Studies in England have made similar observations about difficulties encountered by some child protection caseworkers ('social workers') in understanding and navigating legal and court processes: Dale Abbotts and Alyson Norman, 'Social Worker Decision Making in Court' (2023) 28 *Child & Family Social Work* 469, 473–4; and Masson (n 64) which described the instructions of child protection social workers to their in-house lawyers as 'often incoherent', resulting in the lawyers 'ending up managing staff to meet court standards': at 10.

CHAPTER SIX

Reasons for the Initial Removal of the Child

Case Stories: Sarita and Sonya

Sarita's story¹

Sarita's baby son Sammy was removed into care within a month of his birth. Sarita was already sole parent to two teenage boys, for whom there were no significant child protection concerns. Her first marriage had ended following her husband's alcoholism, gambling habit, abuse and violence. Many years later Sarita travelled to her country of origin to marry Sammy's father. It quickly became evident that he also was violent and abusive. Sarita returned to Australia alone, pregnant, and trying to preserve the marriage from a distance.

Under extreme emotional and financial distress, she was briefly hospitalised for overdosing on anti-depressant medication, and on a separate occasion for punching herself in the abdomen during a heated phone conversation with her husband. For reasons unrelated to this incident, Sammy was born seven weeks premature.

Suffering post-caesarean pain and discomfort, Sarita made her best efforts to care for Sammy in the following days. By this time her husband had arrived in Australia. Within a few weeks he had assaulted and injured Sarita multiple times. Against this background, baby Sammy was assumed into care from the neo-natal ward and placed with foster carers – the stated reasons being domestic violence, Sarita's state of mental health, physical abuse of Sammy in-utero, and failure to be attuned to Sammy's needs in relation to his physical care and development.

Sonya's story²

Sonya was an involuntary patient in a psychiatric hospital at the time her four-year-old daughter, Merinda, and toddler son, Nate, were removed.

In the days leading up to the removal, police had been called to a fight between Sonya's partner John and her father, whereupon John and Sonya were described as heavily affected by drugs, and Sonya as mentally unwell. It was also noted that Sonya had been holding the child Nate while attempting to intervene in the physical altercation between her partner and father.

Care proceedings were commenced on the basis of mental health concerns, drug abuse and domestic violence. Merinda and Nate were placed with Merinda's father (Sonya's ex-partner).

Sarita's and Sonya's stories continue in chapter 7.

¹ Based on *SK v Secretary, Department of Family and Community Services* [2016] NSWDC 273 ('SK').

² Based on an unpublished judgment of the Children's Court, 2009.

Chapter Overview

This is the first of four chapters presenting findings from thematic analysis of the judgments. The chapter identifies and explores the Court's understanding of the child protection and risk issues resulting in the child's removal from the parents and the initiation of legal proceedings.³ Identifying the original child protection concerns is integral to the analysis in chapters 7, 8 and 9 of the Court's reasoning on whether there is a realistic possibility of restoration. It is important not only in providing contextual background to the cases, but also because the legislation *requires* that the possibility of restoration be measured against the likelihood of the original reasons for removal being addressed.⁴

Part A describes the varied ways in which the judgments canvass the reasons for the child's removal, and the study's approach to identifying these reasons. Parts B and C discuss the prevalent factors in the Department's decisions to remove, as these are evident in the judgments. The most prevalent factors appear as grounds for removal in 30–40% of judgments. These are: *domestic violence, misuse of alcohol and other drugs, mental health issues, and physical neglect and physical abuse* of the child. These are followed in frequency by reasons appearing in 15–29% of cases: *housing issues, inadequate engagement and cooperation with caseworkers, generic parenting capacity concerns, and sexual abuse or risk thereof*. Overall, these factors present a fairly even mix of adult-focused risk issues and concerns about the parent-child relationship and child maltreatment.⁵

The fact that no single cause for initial removal appears in more than 40% of the judgments contrasts with the much weightier dominance of particular factors in decisions on restoration. Several of the influential factors determining realistic possibility of restoration appear in above 50% of judgments,⁶ and the leading factor ('insight') in more than 70%.⁷ This difference suggests that a relatively disparate array of family circumstances lead the Department to view children as in need of care and protection, with the issues becoming concentrated into a narrower field of concern in assessing whether the child should go home. As found in

³ See Chapter 2, part C, 'the Legal Process' for an overview of the legislative provisions governing reporting and assessment of a child 'at risk of significant harm', and grounds for commencing court proceedings for a care order.

⁴ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 83(1)(b) ('*The Act*').

⁵ See Chapter 3, part C 'Approach to Analysis' for an explanation of factors being categorised as (i) 'adult-focused', (ii) concerned with 'the parent-child relationship and child maltreatment', or (iii) 'child-focused'.

⁶ Candour and credibility (53%); capacity to meet the child's emotional needs (58%); engagement, cooperation and compliance (59%) (see Chapter 7).

⁷ 'Insight' is cited in 72% of decisions on realistic possibility of restoration, followed by mental health issues in 67% (see Chapter 7).

subsequent chapters, there is not a consistently direct alignment between the Court's reasons for decision on realistic possibility of restoration and the reasons the child was removed. The Department's decisions to remove are dominated by extrinsic manifestations of risk, while the course of litigation shifts the focus to intrinsic elements of capacity to recognise and provide for the child's emotional wellbeing and stability.

A. Identifying the Reasons for the Child's Removal into Care

In reading the judgments it can be difficult to precisely pinpoint the reasons the child was removed. The judicial officer is referring to decisions made externally to the Court, by caseworkers in the Department – yet only sometimes are those reasons quoted verbatim from documents submitted in the proceedings. Instead the reasons may be conveyed in the magistrate's own words, as part of the story of the family's troubles and the involvement of the Department. Although usually quite brief, this re-telling of the case history does not always equate to a neatly encapsulated summary of the specific factors justifying removal. Some judgments refer to the history in a fragmented or incidental way, spread across various references to the evidence and arguments presented in the case. Other judgments do succinctly list the child protection issues identified by the Department at time of removal – citing, for example: 'issues of ongoing domestic disharmony and drug abuse, mental issues and substantial neglect';⁸ 'the parents' drug use, domestic and family violence, unstable housing, parenting incapacity, and the father's inability to engage appropriately with support and health services';⁹ 'illicit drug use by both parents, a risk of homelessness, exposure to domestic violence, a lack of consistent care, [and] exposure to the mother's unmanaged mental health'.¹⁰

Each of these differing approaches conveys, usually, a range of concerns within the family's history, some or all of which converged in a decision by caseworkers to remove the child. As widely recognised in child protection literature, many children experiencing maltreatment are subject to 'cumulative harm', built up over time and derived from intersecting circumstances.¹¹ However, an account of multiple issues does not necessarily identify *which*,

⁸ *DFaCS re Arnott Bloom* [2015] NSWChC 6, [48] ('*Arnott-Bloom*').

⁹ *Department of Communities and Justice (DCJ) and the Yarran Taylor children* [2024] NSWChC 3, [25] ('*Yarran Taylor children*').

¹⁰ *Braidan* (pseudonym, unpublished judgment, Children's Court, August 2022) 3 ('*Braidan*').

¹¹ See, eg, Kate Alexander et al, 'Why Do Mothers Stay? Challenging Attitudes in Decision Making About Children at Risk Because of Domestic Violence' (2023) 146 *Child Abuse & Neglect* 106511: 1–11, 1–2 ('*Why Do Mothers Stay?*'); Leah M Bromfield, Philip Gillingham and Daryl J Higgins, 'Cumulative Harm and Chronic Child Maltreatment'

if any, of these circumstances were regarded by caseworkers as the most serious risks, pivotal to the decision to remove the child, and *why*. This is potentially problematic in the context of the statutory test for ‘realistic possibility of restoration’, which is, on its face, very specific. Pursuant to section 83(1)(b) of the Act,¹² the Court must decide to accept or reject the Department’s assessment of whether the parents ‘are likely to be able to satisfactorily address’ the issues ‘that have led to the removal’. Based on this wording, it would seem that the very issues that *led to the removal* should be identified with clarity and precision – so that the Court, and all parties to the case, are aware of what it is, exactly, that the parents are required to satisfactorily address.¹³

Against this somewhat elusive backdrop, the analysis process extracted the portions of each judgment that appear to convey the Court’s understanding of key factors in the decision to remove the child – whether these were concisely listed or discursively narrated. It must be emphasised that the ‘reasons’ are from the Court’s perspective. When recounting the facts, the Court’s capacity to provide detail is constrained by the level of information presented in the Department’s documents, and by the pragmatic need for economy in time and length when delivering a judgment. Hence, the version in the judgment may differ from the administrative case records of the Department, although a close correlation between the two is to be hoped and expected.

It should also be noted that the judgments in this study do not directly reflect the overall incidence of child protection removals across New South Wales (‘NSW’). The sample is not fully representative of all cases commenced in the jurisdiction, for reasons explained in the methodology chapter.¹⁴ However, this is a study of judicial rather than administrative (Departmental) decision-making. In this context, the significance of the ‘reasons for initial removal’ lies in the intersections between the circumstances justifying removal of the child from family in the first instance, and the Court’s consequent assessment of whether the child should be restored.

(2007) 19 *Developing Practice* 34, 37; Rosemary Sheehan, ‘Cumulative Harm in Child Protection: the Hidden Concern’ (2019) 72(4) *Australian Social Work* 434, 435, 442, 444 (‘Cumulative Harm in Child Protection’).

¹² *The Act* (n 4).

¹³ See also Chapter 5, part D, section (ii) for examples of judicial commentary on problematic aspects of identifying ‘the issues’ that led to the child’s removal.

¹⁴ See Chapter 3, part D ‘Limitations’.

B. Adult-focused Risk Factors

As outlined in Chapter 3, the factors characterised in the study as ‘adult-focused’ are parent behaviours or circumstances that, although assumed to pose a child protection risk, may also exist independently of any direct impact on a child. The leading adult-focused reasons for removal, in order of prevalence, are domestic violence (cited in 40% of judgments), alcohol and other drug misuse (in 37%), and mental health concerns (in 30%). The significance and confluence of these three issues as dominant child protection concerns is widely noted in Australian and international literature,¹⁵ their prominence captured in the informal notion of ‘the trifecta’^{16 17} or ‘toxic trio’.¹⁸ Noticeable in interviews for the study were unprompted references to all three factors, with drug use the most frequent issue raised by both magistrates¹⁹ and Departmental participants,²⁰ followed by domestic violence²¹ and mental health.²²

¹⁵ See, eg, Fiona Arney, Carole Zufferey and Ruth Lange, “‘Mental Health is One Issue. The Child is Another Issue. Issues Bounce Back and Clash Against Each Other’: Facilitating Collaboration Between Child Protection and Mental Health Services’ (2010) 5(1) *Communities, Children and Families Australia* 21, 22; Dominiek Coates, ‘Working with Families with Parental Mental Health and/or Drug and Alcohol Issues where there are Child Protection Concerns: Inter-Agency Collaboration’ (2017) 22 *Child & Family Social Work* 1, 1–2; Megan Davis, Independent Review of Aboriginal and Torres Strait Islander Children in Out-of-Home Care in New South Wales, *Family Is Culture* (Review Report, 2019) 40 (*‘Family is Culture Report’*); Tracey De Simone and Susan Heward-Belle, ‘Evidencing Better Child Protection Practice: Why Representations of Domestic Violence Matter’ (2020) 32(4) *Current Issues in Criminal Justice* 403, 405, 406, 410; Judith Harwin et al, ‘Child and Parent Outcomes in the London Family Drug and Alcohol Court Five Years On: Building on International Evidence’ (2018) 32 *International Journal of Law, Policy and The Family* 140, 154; Briony Horsfall, ‘Children’s Participation Rights During Child Protection Hearings: Recognition, Legal Representation and Redistribution of Care in Victoria’s Children’s Court’ (PhD Thesis, Swinburne University of Technology, 2016) 109–110; Betty Luu et al, *Analysis of Linked Longitudinal Administrative Data on Child Protection Involvement for NSW Families with Domestic and Family Violence, Alcohol and Other Drug Issues and Mental Health Issues* (Research Report, ANROWS, February 2024); J M Masson, J F Pearce and K F Bader, *Care Profiling Study* (Research Report, Ministry of Justice UK, 2008) 20; M O’Donnell et al, ‘Child Protection Proceedings for Infants: Analysis of Court Files to Identify Court Outcomes and Requirements for Families in Child Protection Safety Plans’ (2024) 157 *Children and Youth Services Review* 1, 9.

¹⁶ See, eg, Steve Kinmond, Children’s Guardian, ‘November update from the Children’s Guardian’ (NSW Office of the Children’s Guardian, 28 November 2023): <<https://ocg.nsw.gov.au/news/november-update-childrens-guardian>>; Laura Lievano-Karim et al, ‘A Balancing Act: How Professionals in the Foster Care System Balance the Harm of Intimate Partner Violence as Compared to the Harm of Child Removal’ (2024) 7(1) *International Journal on Child Maltreatment* 61, 69–70.

¹⁷ The terms ‘trifecta’ or ‘big three’ were also used in interviews: Caseworker 6; Lawyers 1, 5.

¹⁸ See, eg, Lillian De Bortoli, Jan Coles and Mairead Dolan, ‘Parental Substance Misuse and Compliance as Factors Determining Child Removal: A Sample from the Victorian Children’s Court in Australia’ (2013) 35 *Children and Youth Services Review* 1319, 1319–20; Kate Morris et al, ‘Social Work, Poverty and Child Welfare Interventions’ (2018) 23 *Child & Family Social Work* 364, 367, 368–9.

¹⁹ Judicial Officers 2, 3, 4, 5, 6, 7, 8, 9, 14, 15, 16, 17, 18, 19, 20; Registrars 1, 2.

²⁰ Caseworkers 2, 3, 4, 6, 8, 9, 10, 11, 12, 13; Lawyers 1, 2, 5, 8, 9.

²¹ Judicial Officers 2, 3, 4, 5, 6, 8, 13, 14, 15, 19, 20, 21; Registrar 1; Caseworkers 1, 2, 3, 8, 13; Lawyer 6.

²² Judicial Officers 2, 3, 4, 10, 13, 21; Registrar 2; Caseworkers 3, 7, 9; Lawyer 3.

Other adult-focused grounds for removal are insecure or substandard housing (in 22% of judgments), and deficient engagement with child protection or other services (20%). The following sections discuss the depiction of each factor in the judgments, and identify any distinct differences in the relative significance placed on the factor at the later Court determination stage versus its status as a ground for initial removal.

(i) Domestic Violence

Domestic violence is the most commonly cited reason for the child's initial removal. Despite this manifest indication of its significance, most of the references to 'domestic violence' or 'exposure to domestic violence' as a ground for removal are brief and generic, often conveyed as part of a sequence of several child protection concerns. Only occasionally are particular incidents of violence pinpointed as the immediate, precipitating cause of the child's removal.²³ The generic references do not always identify the perpetrator. When specified, the perpetrator is usually the father,²⁴ or another male partner of the mother²⁵ — although several cases depict both mother and father as engaging in violence against one another.²⁶ The issue is not restricted to violence in a current or recent relationship; a mother's 'history' or 'pattern' of abusive relationships is sometimes cited as part of the Department's concerns.²⁷ The nature and implications of 'mother-blaming' and gender 'mutualising' conceptualisations of domestic violence in child protection are discussed in chapter 8.²⁸

²³ *Department of Communities and Justice (DCJ) and Bloom* [2021] NSWChC 2, [63]–[65] ('Bloom'); *Bradford children* (pseudonym, unpublished judgment, Children's Court, July 2011) [5]–[7] ('Bradford children'); *The Department of Community Services and Rachel Grant, Tracy Reid, Sharon Reid and Frank Reid* (Children's Court of New South Wales, August 2009) [30]–[33] ('Grant & Reid'); *FaCS v the Harris children* [2012] NSWChC 9, [4] ('Harris children'); *VC v Secretary, Department of Communities and Justice & Ors* (No. 2) [2024] NSWDC 192, [8] ('VC').

²⁴ See, eg, *Grant & Reid* (n 23) [30]–[33]; *Harris children* (n 23) [4]; *DFaCS re Lilly, Wade and Caleb* [2012] NSWChC 21, [8] ('Lilly, Wade and Caleb'); *Department of Communities and Justice (DCJ) and the McAlister Children* [2020] NSWChC 4, [31], [34], [36]–[37], [41] ('McAlister children'); *DFaCS (NSW) re Oscar* [2013] NSWChC 1, [74] ('Oscar'); *Department of Communities and Justice (DCJ) and the Prince and Johns Children* [2023] NSWChC 8, [1] ('Prince & Johns children'); *Ramsay children* (pseudonym, unpublished judgment, Children's Court, April 2021) 14; *Rogers v The Secretary Department of Family and Community Services NSW* [2019] NSWDC 194, [44]; *VC* (n 23) [3], [8].

²⁵ *Department of Family and Community Services v Borg* [2011] NSWChC 4, [13] ('Borg'); *Department of Communities and Justice (DCJ) and Jamzie* [2022] NSWChC 1, [96], [152] ('Jamzie'); *Department of Communities and Justice (DCJ) and Lewis* [2018] NSWChC 5, [4] ('Lewis'); *Lim children* (pseudonym, unpublished judgment, Children's Court, July 2022) 4 ('Lim children').

²⁶ *DFaCS (NSW) re Amanda & Tony* [2012] NSWChC 13, [45], [58], [65] ('Amanda & Tony'); *ASK v Secretary DFaCS* [2014] NSWDC 247, [47]–[48] ('ASK'); *Lucy* (pseudonym, unpublished judgment, Children's Court, October 2012) [48]–[49], [58] ('Lucy'); *Rogers* (n 24) [47].

²⁷ *DCJ and Alice* [2024] NSWChC 12, [43] ('Alice'); *Borg* (n 25) [10]; *DFaCS and Boyd* [2013] NSWChC 9, [6], [12] ('Boyd'); *DFaCS (NSW) v Carl* [2013] NSWChC 2, [18] ('Carl'); *Nerayah and Kalista* (pseudonym, unpublished judgment, Children's Court, March 2009) [10] ('Nerayah & Kalista'); *Ramsay children* (n 24) 14.

²⁸ See Chapter 8, section (ii).

The substance of the violence, when stated, is most commonly physical assault and injury,²⁹ although there are some references to non-physical controlling and abusive behaviour.³⁰ An adverse impact on the children – of ‘witnessing’,³¹ ‘seeing’,³² being ‘present’³³ or ‘exposed’³⁴ to domestic violence – is usually assumed without elaboration. However there is sometimes a more graphic picture of children’s involvement. These include third party accounts, or in some instances, children’s first-hand descriptions,³⁵ of extreme physical violence inflicted on their mothers,³⁶ of children trying to intervene,³⁷ being themselves injured,³⁸ fearful,³⁹ and in danger of ‘lethality’.⁴⁰ These accounts capture the fact that children *experience* the violence, rather than the more distanced notion of their observing it.⁴¹

Very few judgments mention casework efforts to address the domestic violence prior to the decision to remove. Exceptions to this include references to parents neglecting to engage with domestic violence services;⁴² non-compliance with ‘undertakings’ entered under a voluntary care plan;⁴³ and, with regard to mothers exclusively, their maintaining a (suspected) relationship with a perpetrator of violence⁴⁴ despite the Department’s assistance with matters such as housing.⁴⁵

Domestic violence remains a prevalent concern at the stage of the Court’s determination. It appears as a factor contributing to the restoration decision in a slightly increased number of

²⁹ See, eg, *Bradford children* (n 23) [6]; *Grant & Reid* (n 23) [33]; *Harris children* (n 23) [4]; *Lewis* (n 25) [4]; *Lilly, Wade & Caleb* (n 24) [8]–[9]; *Lucy* (n 26) [48]–[49]; *McAlister children* (n 24) [34], [36], [37], [41]; *Oscar* (n 24) [74]; *VC* (n 23) [8].

³⁰ *Jamzie* (n 25) [152]; *DFaCS (NSW) re Kim* [2013] NSWChC 6, [21] (‘Kim’); *Lilly, Wade and Caleb* (n 24) [8]; *McAlister children* (n 24) [36]–[37]; *Oscar* (n 24) [74]; *VC* (n 23) [8].

³¹ *ASK* (n 26) [52]; *Harris children* (n 23) [4]; *Lilly, Wade and Caleb* (n 24) [37].

³² *Dupont v The Secretary, Department of Family and Community Services* [2014] NSWDC 240, [18] (‘*Dupont*’).

³³ *Amanda & Tony* (n 26) [58], [65], [68], [74]; *Director of Family and Community Services v Jack* [2012] NSWChC 7, [3] (‘*Jack*’); *Lewis* (n 25) [4]; *Lim children* (n 25) 8; *Lucy* (n 26) [48].

³⁴ See, eg, *ASK* (n 26) [41], [48]; *Braidan* (n 10) 3; *Dupont* (n 32) [60]; *Lim children* (n 25) 4, 8; *Lucy* (n 26) [3], [4], [58]; *Prince & Johns children* (n 24) [1]; *Rogers* (n 24) [6]; *RC and PK v The Secretary, Department of Communities and Justice* [2024] NSWDC 196, [29] (‘*RC & PK*’).

³⁵ *Dupont* (n 32) [18]; *Grant & Reid* (n 23) [32]–[33]; *Lewis* (n 25) [7], [137]–[139].

³⁶ *Amanda & Tony* (n 26) [47]; *Bloom* (n 23) [15]; *Grant & Reid* (n 23) [33]; *Harris children* (n 23) [4]; *Lewis* (n 25) [4], [113].

³⁷ *Grant & Reid* (n 23) [33].

³⁸ *Bloom* (n 23) [42]–[45]; *Grant & Reid* (n 23) [33].

³⁹ *Dupont* (n 32) [18]; *Grant & Reid* (n 23) [33]; *McAlister children* (n 24) [39].

⁴⁰ *VC* (n 23) [8].

⁴¹ Alexander et al, ‘Why Do Mothers Stay?’ (n 11) 2.

⁴² *DHK & Anor v Secretary, Department of Family and Community Services & Ors* [2018] NSWDC 221, [17] (‘*DHK*’); *Lewis* (n 25) [10].

⁴³ *Harris children* (n 23) [3]. Pursuant to s 38 of the Act, a voluntary care plan, independent of litigated care proceedings, can be developed ‘in the course of alternative dispute resolution’ and registered with the Court.

⁴⁴ *Grant & Reid* (n 23) [12]; *Lewis* (n 25) [7], [10]; *Lim children* (n 25) 9.

⁴⁵ *Grant & Reid* (n 23) [15], [23]; *Lewis* (n 25) [10]; *Lim children* (n 25) 8–9.

cases to its presence in the original removal of the child.⁴⁶ However, its weight *relative to other factors* decreases substantially – being superseded by an emphasis on mental health, engagement, insight and capacity to meet the child’s emotional needs. The contexts and implications of this shift are explored in chapters 7 and 8.

(ii) Alcohol and Other Drugs Misuse

Parents’ dependency on or misuse of alcohol or other drugs (‘AOD’) contributed to the child’s removal in 37% of the judgments, making this the second-most dominant factor, following close on the heels of domestic violence. AOD use as a reason for removal tends to be generically cited in the judgments, using terms such as ‘drug use’,⁴⁷ ‘drug taking’,⁴⁸ ‘substance use’⁴⁹ and ‘substance abuse’.⁵⁰ Alcohol,⁵¹ cannabis⁵² and methamphetamine⁵³ are the drugs most often mentioned; however the particular substance is often not specified.

In many instances the judgments treat the negative implications of AOD use as self-evident, unaccompanied by elaboration on the impact this behaviour had on the parent’s day-to-day life, ability to function, or care of the child. Exceptions link illicit drugs with poor antenatal health,⁵⁴ unsafe ‘co-sleeping’,⁵⁵ unhygienic living conditions,⁵⁶ lack of supervision,⁵⁷ and

⁴⁶ Domestic violence is a reason for removal in 40% of the judgments, and a reason for decision on realistic possibility of restoration in 45%.

⁴⁷ *DFaCS (NSW) and Abbey* [2013] NSWChC 3, [34] (‘Abbey’); *Department of Communities and Justice (DCJ) and the Dalton Tomkins children* [2023] NSWChC 10, [7] (‘Dalton Tomkins children’); *Ezekial* (pseudonym, unpublished judgment, Children’s Court, May 2021) 9 (‘Ezekial’); *Jack* (n 33) [3] (‘Jack’); *JMS v Department of Family and Community Services & Ors* [2018] NSWDC 25, [18] (‘JMS’); *Lim children* (n 25) 4, 9; *Prince & Johns children* (n 24) [2]; *Yarran Taylor children* (n 9) [25].

⁴⁸ *DFaCS re Eggleton* [2016] NSWChC 4, [2] (‘Eggleton’).

⁴⁹ *Nicholls children* (pseudonym, unpublished judgment, Children’s Court, March 2023) [5] (‘Nicholls children’); *Waller children* (pseudonym, unpublished judgment, Children’s Court, September 2022) [5] (‘Waller children’).

⁵⁰ *Adriana* (pseudonym, unpublished judgment, Children’s Court, July 2022) 2; *Boyd* (n 27) [12]; *J & T v Department of Communities and Justice* [2023] NSWDC 78, [87] (‘J & T’); *Lilly, Wade and Caleb* (n 24) [10], [33].

⁵¹ *Alice* (n 27) [11], [25]; *Bloom* (n 23) [1]; *Eggleton* (n 48) [19]; *Harris children* (n 23) [3]–[4]; *Jonah* (pseudonym, unpublished judgment, Children’s Court, May 2023) 18 (‘Jonah’); *In the Matter of Julian and Allan* (Children’s Court of New South Wales, 28 April 2006) [13] (‘Julian & Allan’); *KH v Secretary, Department of Communities and Justice* [2021] NSWDC 498, [139] (‘KH’); *Lilly, Wade and Caleb* (n 24) [10]; *Prince & Johns children* (n 24) [2].

⁵² *Borg* (n 25) [12]; *DHK* (n 42) [15]; *Jamzie* (n 25) [152]; *In the Matter of Jay* [2007] NSWChC 343, [6] (‘Jay’); *J & T* (n 50) [437]; *Nerayah & Kalista* (n 27) [6]; *Ramsay children* (n 24) 14.

⁵³ *Dupont* (n 32) [14]; *Jamzie* (n 25) [152]; *JH v Secretary, Department of Communities & Justice & Ors (No.3)* [2023] NSWDC 517, [5] (‘JH’); *Lim children* (n 25) 9; *Ramsay children* (n 24) 14.

⁵⁴ *J & T* (n 50) [87]–[89]; *DFaCS re Poppy* [2012] NSWDC 281, [6].

⁵⁵ *Re Malakhai* [2022] NSWChC 6, [53] (‘Malakhai’).

⁵⁶ *Ramsay children* (n 24) 9.

⁵⁷ *JH* (n 53) [5]; *Ramsay children* (n 24) 9.

exposure to criminal activity⁵⁸ and other ‘unsafe’ environments.⁵⁹ ⁶⁰ Noted impacts of alcohol include intoxicated driving⁶¹ and aggressive or violent behaviour.⁶²

AOD use is usually presented as just one aspect of accumulated concerns, but in a minority of cases appears to have spearheaded the decision to remove the child. Most examples of this relate to alcohol: either because a parent’s use impairs their overall ability to safely care for the child,⁶³ or, in one case, due to a drink-driving car accident resulting in injury to the subject child and the death of a sibling.⁶⁴

References to casework interventions to address the parent’s AOD dependency prior to the decision to remove (for example, via assistance with admission to residential rehabilitation programs) are almost entirely absent from the judgments. This does not mean such efforts did not occur, but these are not part of the distilled summary in which the factor is portrayed as, essentially, an entrenched issue.

Like domestic violence, there is a close correlation between the number of cases referencing AOD use as a ground for removal and as a subsequent basis for the Court’s determination.⁶⁵ However, its relative significance diminishes more substantially than does domestic violence—so much so that it moves from being a leading factor in children’s removal, to a *moderately* influential factor in decisions on their restoration. Possible explanations for this rather surprising finding are discussed in chapter 9.⁶⁶

⁵⁸ *Dupont* (n 32) [17].

⁵⁹ *JH* (n 53) [5]; *Department of Family and Community Services and Nathan* [2018] NSWChC 1, [20], [29], [38] (‘*Nathan*’).

⁶⁰ Research internationally has observed the phenomenon whereby drug-using parents ‘expose their children to dangerous environments arising from drug manufacturing and related criminal activity’: Peter W Choate and Sandra Engstrom, ‘The “Good Enough” Parent: Implications for Child Protection’ (2014) 20(4) *Child Care in Practice* 368, 375.

⁶¹ *Alice* (n 27) [11]; *Borg* (n 25) [12]; *Jonah* (n 51) 18; *KH* (n 51) [139].

⁶² *Harris Children* (n 23) [4]; *KH* (n 51) [139].

⁶³ *Bloom* (n 23) [92]–[93] (in relation to a failed restoration after the initial removal); *Eggleton* (n 48) [5] (also in relation to a failed restoration post-initial removal); *KH* (n 51) [131]–[145].

⁶⁴ *Jonah* (n 51) 18.

⁶⁵ AOD misuse is a reason for removal in 37% of the judgments, and a reason for decision on realistic possibility of restoration in 31%.

⁶⁶ See Chapter 9, part A, section (i).

(iii) Mental Health

Concern about the mental health of a parent was a contributing cause of the child's removal in 30% of the judgments. In approximately one-third of these instances, the judgments identify a diagnosed mental health condition, known at the time the proceedings commenced. Most prevalent are depression⁶⁷ and personality disorders.⁶⁸ There are also references to suicidal ideation or suicide attempts,⁶⁹ self-harming,⁷⁰ and psychosis.⁷¹ Mental ill-health is otherwise referred to in generalised terminology, such as mental health 'issues'⁷² and 'concerns',⁷³ or simply the parent's 'mental health'.⁷⁴ Some of these judgments do, however, become more specific about diagnosis—or reasons for an absence of diagnosis—when discussing the evidence arising during proceedings and formulating a final decision.⁷⁵

The practical implications of the parent's mental health issues are sometimes made evident. Poor mental health is linked to lack of cooperation with caseworkers,⁷⁶ disengagement with support services,⁷⁷ and difficulty comprehending and appropriately responding to child protection concerns.⁷⁸ An express and specific connection with child maltreatment is described, as part of the circumstances leading to removal, in around one-third of instances—and is invariably in relation to the mental health of mothers, rather than that of fathers.⁷⁹ ⁸⁰ For example, a mother's mental health condition caused her to be verbally abusive to her

⁶⁷ *Carl* (n 27) [7]; *Borg* (n 25) [11]; *Jay* (n 52) [6]; *Oscar* (n 24) [70], [74]; *Prince & Johns children* (n 24) [1].

⁶⁸ *Borg* (n 25) [11]; *Boyd* (n 27) [12], [21]; *Kim* (n 29) [5].

⁶⁹ *Arnott-Bloom* (n 8) [52]; *Borg* (n 25) [11]; *Jamzie* (n 25) [152]; *George* (pseudonym, unpublished judgment, Children's Court, November 2022) [12] ('George').

⁷⁰ *Kim* (n 29) [5]; *SK* (n 1) [26], [34].

⁷¹ *Kim* (n 29) [8], [9]; *Nerayah & Kalista* (n 27) [6].

⁷² *Lim children* (n 25) 9; *McAlister children* (n 24) [1].

⁷³ *Alice* (n 27) [8]; *Arnott-Bloom* (n 8) [52]; *Dalton Tomkins children* (n 47) [7]; *JH* (n 53) [5]; *J & T* (n 50) [474]; *SK* (n 1) [28].

⁷⁴ *JMS* (n 47) [18]; *Mario* (pseudonym, unpublished judgment, Children's Court, October 2022) 9 ('Mario'); *Nicholls children* (n 49) [5].

⁷⁵ See Chapter 7, section (iii).

⁷⁶ *Lewis* (n 25) [8].

⁷⁷ *The Secretary of the Department of Communities and Justice (DCJ) and Fiona Farmer* [2019] NSWChC 5, [27(11)] ('Fiona Farmer').

⁷⁸ *Arnott-Bloom* (n 8) [52]; *Kim* (n 29) [3]; *Lewis* (n 25) [8].

⁷⁹ Similarly, a study in the Children's Court of Victoria observed that '[t]he mental health concerns that brought the child to the attention of child protection overwhelmingly related to the child's mother, who tended to have sole care of the child or children': Rosemary Sheehan, 'Partnership in Mental Health and Child Welfare' (2005) 39(3)–(4) *Social Work in Health Care* 309, 316.

⁸⁰ A small number of judgments link a father's mental health issues with violent, aggressive or volatile behaviours, and associated risks to the child; however these issues were identified during the course of the hearing as reasons for finding no realistic possibility of restoration, rather than being specified as part of the original reasons for removal: *Alfred* (pseudonym, Children's Court, 13 October 2020) [97]–[105] ('Alfred'); *Bloom* (n 23) [311]–[313]; *Dorothy* (pseudonym, unpublished judgment, Children's Court, September 2019) [73]–[90] ('Dorothy').

children, causing them fear.⁸¹ A mother's depression and 'withdrawal' from family life led to 'failure to protect' the children from the father's abusive behaviours.⁸² In another case it was the father who failed to act protectively, exposing the child to incidents of violence and neglect attributed to his 'lack of insight' into the mother's mental illness.⁸³ A mother threatened suicide while the children were in the car with her,⁸⁴ and another called a helpline stating an intention to kill herself and her children.⁸⁵ In the course of behaving 'erratically' a mother said to her child 'I am going to cut your throat.'⁸⁶ Two cases involved harm to a child via a mother's 'factitious disorder imposed on another'.⁸⁷ Less drastically, mothers' mental health problems are associated with neglect of household hygiene,⁸⁸ children's daily routines,⁸⁹ and children's physical care.⁹⁰

As with domestic violence and substance misuse, few of the judgments mention earlier casework support to manage the mental health concerns. It is impossible to know to what extent this is due to the judicial officer's economical use of words, a lack of detail in the Department's communication of its prior 'alternative action',⁹¹ or—as suggested in existing research—that in many cases adequate efforts to assist the family simply did not occur.⁹²

Of the leading factors in initial decisions to remove a child, the parent's mental health is the sole issue that *increases* its prominence at the stage of the Court's decision on realistic possibility of restoration. It emerges from 'the trifecta' as carrying more influential weight than both domestic violence and substance abuse. The shift is remarkable: mental health issues are cited in 30% of cases as a ground for removal, and in 67% as informing the restoration outcome. Indeed, perhaps the most significant finding of the study is the dominance of mental health, which is exceeded only by the notion of 'insight' in its perceived importance to parenting capacity and the likelihood of the child protection issues being resolved. Apparent reasons for this were touched upon in chapter 5 in relation to the notion

⁸¹ *Borg* (n 25) [11].

⁸² *Oscar* (n 24) [74(c)(i)].

⁸³ *Kim* (n 29) [2], [34]–[51].

⁸⁴ *Arnott-Bloom* (n 8) [52].

⁸⁵ *George* (n 69) [12].

⁸⁶ *Esther* (pseudonym, unpublished judgment, Children's Court, March 2006) [26] ('*Esther*').

⁸⁷ The condition formally known as Munchausen syndrome by proxy: *Grierson children* (pseudonym, unpublished judgments, Children's Court, August 2019); *The Secretary, Department of Family and Community Services and the Harper Children* [2016] NSWChC 3.

⁸⁸ *Arnott-Bloom* (n 8) [52]; *Dorothy* (n 80) [4], [7].

⁸⁹ *Arnott-Bloom* (n 8) [52]; *Lewis* (n 25) [6].

⁹⁰ *Dorothy* (n 80) [7].

⁹¹ *The Act* (n 4) s 63. See further detail on this provision below n 125 and accompanying text.

⁹² *Davis, Family is Culture Report* (n 15) 152–3, 157–8, 192–3, 198–9, 205.

of a ‘tipping point’ in risk assessment,⁹³ and are further explored in chapter 7. Some wider implications of the emphasis on parental mental health are discussed in chapter 10.

(iv) Housing

Housing issues as a contributing cause for removal fall into two groups, the first being homelessness or insecure and transient housing. This is sometimes presented as an immediate issue;⁹⁴ alternatively there are references to the parent’s *history of housing instability*⁹⁵ or, in one case, the mother’s ‘peripatetic lifestyle’.⁹⁶

The other housing category is that of *inadequate living conditions* for those who do have a home. Descriptions of poor living conditions are concerned with odour,⁹⁷ animal faeces,⁹⁸ ‘food scraps’, rotting food or unwashed dishes,⁹⁹ ‘clutter’,¹⁰⁰ mould,¹⁰¹ and general mention of premises being ‘untidy’¹⁰² and ‘unhygienic.’¹⁰³ While there is overlap here with physical neglect of the child,¹⁰⁴ the judgments—or the Department’s documents on which they rely—do not always draw an express connection in this regard.

⁹³ See Chapter 5, part B, section (ii) (b).

⁹⁴ *Borg* (n 25) [15]; *Braidan* (n 10) 3; *Dalton Tomkins children* (n 47) [7], [9]; *Jamzie* (n 25) [152]; *Nicholls children* (n 49) [5].

⁹⁵ *Abbey* (n 47) [34]; *Boyd* (n 27) [12]; *Yarran Taylor children* (n 9) [25].

⁹⁶ *Re M (No 6)* [2016] NSWSC 170, [71]–[72].

⁹⁷ *Arnott-Bloom* (n 8) [52]; *McAlister children* (n 24) [40], [43]; *Sharpe children* (pseudonym, unpublished judgment, Children’s Court, November 2008) [5] (‘*Sharpe children*’); *Vlachos children* (pseudonym, unpublished judgment, Children’s Court, June 2009) [13] (‘*Vlachos children*’).

⁹⁸ *Arnott-Bloom* (n 8) [52]; *McAlister children* (n 24) [43]; *Re Tanya* [2016] NSWSC 794, [22] (‘*Tanya*’); *Waller children* (n 49) [9].

⁹⁹ *Arnott-Bloom* (n 8) [52]; *Dorothy* (n 80) [7]; *McAlister children* (n 24) [43]; *Sharpe children* (n 97) [5]; *Tanya* (n 98) [22]; *Vlachos children* (n 97) [13].

¹⁰⁰ *Arnott-Bloom* (n 8) [52]; *McAlister children* (n 24) [43]; *Vlachos children* (n 97) [13].

¹⁰¹ *David White v The Director-General Department of Human Services* [2011] NSWDC 106, [5] (‘*David White*’).

¹⁰² *Re Jillian and Jacinta* [2008] NSWLC 23, [11] (‘*Jillian & Jacinta*’); *McAlister children* (n 24) [43]; *Sharpe children* (n 97) [5].

¹⁰³ *Jack* (n 33) [3]; *Ezekial* (n 47) 8; *McAlister children* (n 24) [43]; *Ramsay children* (n 24) 9; *Waller children* (n 49) [9].

¹⁰⁴ See part C, section (iii) below.

Child protection literature recognises the structural societal contexts, such as poverty,¹⁰⁵ endemic housing shortages,¹⁰⁶ family violence,¹⁰⁷ and disability,¹⁰⁸ that render homelessness or substandard housing beyond the control of many families. There is very little express acknowledgement of these contexts when the judgments summarise the reasons for the child's removal. An exception appears in just one case, in which the Court noted that the family's small public housing unit was 'totally inadequate' for their needs,¹⁰⁹ and observed that the parents, prior to the children's removal, had been actively seeking a transfer to larger premises.¹¹⁰

The impact of housing issues relative to other factors declines substantially at the determination stage, shifting its significance into a group of 'less influential' factors. As discussed in chapter 9, the Court does not usually rely on housing instability, nor other material security factors such as unemployment and financial strain, as determining factors in and of themselves¹¹¹ – thus at least partially and implicitly recognising the structural social contributors referred to above.

(v) Lack of Engagement, Cooperation and Compliance

The intertwined concepts of engagement, cooperation and compliance can be collectively characterised as concerned with parental 'attitude' – that is, attitude towards the involvement of child protection authorities with the family, and demonstration of commitment to addressing the child protection concerns. The notion of 'insight' is another 'attitudinal' factor; its relatively *limited* influence as a reason for child removal is separately discussed in section (vi).

¹⁰⁵ Davis, *Family is Culture Report* (n 15) 144, 205; Joshua Gupta-Kagan, 'Confronting Indeterminacy and Bias in Child Protection Law' (2022) 33 *Stanford Law and Policy Review* 217, 224–7; Ilana Dodi Luther, "'On the Poverty of Responsibility': a Study of the History of Child Protection Law and Jurisprudence in Nova Scotia" (PhD Thesis, Dalhousie University, 2015) 354, 380, 388; O'Donnell et al (n 15) 9.

¹⁰⁶ Davis, *Family is Culture Report* (n 15) 171–3, 358; Gupta-Kagan (n 105) 255–7; Luther (n 105) 355; BJ Newton, 'Aboriginal Parents' Experiences of Having their Children Removed by Statutory Child Protection Services' (2020) 25 *Child & Family Social Work* 814, 818; O'Donnell et al (n 15) 9.

¹⁰⁷ Davis, *Family is Culture Report* (n 15) 171–3, 358; Luther (n 105) 359; O'Donnell et al (n 15) 9.

¹⁰⁸ A study in Victoria found the risk factor of 'frequent moves or homelessness' to be four times more likely to be attributed (by the statutory authority) to parents with a disability than to other parents: Phillip A Swain and Nadine Cameron, "'Good Enough Parenting": Parental Disability and Child Protection' (2003) 18(2) *Disability and Society* 165, 171. See also Rosemary Sheehan and Greg Levine, 'Parents with Mental Illness: Decision-making in Australian Children's Court Cases Involving Parents with Mental Health Problems' (2005) 27(1) *Journal of Social Welfare and Family Law* 17, 23, in relation to mental illness and housing insecurity.

¹⁰⁹ *Vlachos children* (n 97) [13].

¹¹⁰ *Ibid* [14].

¹¹¹ See Chapter 9, part B, section (i).

Examples of attitudinal issues contributing to child removal include denying caseworkers entry to the home¹¹² or demanding they leave,¹¹³ declining to enter a ‘safety plan’,¹¹⁴ missing appointments or otherwise not engaging with service providers,¹¹⁵ and outright refusal to address specific concerns.¹¹⁶ There are also references to dishonesty¹¹⁷ and lack of transparency¹¹⁸ (candour) in communication with workers. In broader terms, parents are described as unwilling to ‘cooperate’,¹¹⁹ and ‘not respond[ing] adequately’.¹²⁰

Issues of poor engagement and non-compliance appear in 20% of judgments as expressly cited factors in decisions to remove a child. This is a modest number when compared to the strong emphasis on these themes in case outcomes, with engagement and compliance (or lack thereof) affecting the determination on restoration in approximately 60% of the judgments.¹²¹ This disparity is to some extent to be expected. The Court’s deliberation is focused on events that have transpired after the child’s removal, in order to assess the ‘evidence, if any’ of the prospect of the concerns being satisfactorily resolved.¹²² This naturally incorporates examination of whether the parents have been cooperative during the course of the proceedings, rather than at an earlier time.¹²³ The Department’s initiating case documents, or the Court’s observations of these, do not usually dwell on the detail of past interactions between caseworkers and parent.

On the other hand, it might be argued that the Court could more rigorously scrutinise the part played by parental engagement in the decision to commence proceedings. Child removal is, after all, a ‘last resort’ option among the various actions available to the State in response to a child being at risk or in need of care.¹²⁴ The legislation requires that a care application be

¹¹² *GR v The Department of Communities and Justice* [2021] NSWSC 1081, [79], [101] (‘GR’).

¹¹³ *Waller children* (n 49) [9].

¹¹⁴ *Lewis* (n 25) [10].

¹¹⁵ *DHK* (n 42) [17]; *Fiona Farmer* (n 77) [27(11)]; *GR* (n 112) [80]–[81]; *JH* (n 53) [5]; *Lim children* (n 25) 9; *Mario* (n 74) 9; *Esther* (n 86) [22]–[23]; *Yarran Taylor children* (n 9) [25].

¹¹⁶ *JH* (n 53) [5]; *Lewis* (n 25) [8].

¹¹⁷ *Alice* (n 27) [11]; *RC & PK* (n 34) [90].

¹¹⁸ *Alice* (n 27) [8]; *RC & PK* (n 34) [90].

¹¹⁹ *Re: Alison Claire, Lauren Donovan and Victoria Claire* (Children’s Court of New South Wales, 10 July 2009) [23] (‘*Alison Claire*’); *Charlie* (pseudonym, unpublished judgment, Children’s Court, December 2021) 13, 23 (‘*Charlie*’); *GR* (n 112) [79]; *J & T* (n 50) [89].

¹²⁰ *Jack* (n 33) [3].

¹²¹ See Chapter 7, section (i).

¹²² *The Act* (n 4) s 83(1)(b).

¹²³ See *Fiona Farmer* (n 77) [49], [150]–[153]. The limitations on the Court’s role in scrutinising casework events pre-dating proceedings was also raised in interviews: Judicial Officer 21; Lawyer 2.

¹²⁴ While the term ‘last resort’ is not used in the *The Act*, several provisions convey the intention that other options be considered short of removal: see especially s 9 (‘Principles for administration of the Act’) (2)(c) (‘least intrusive

accompanied by evidence of the Department's consideration of 'alternative action'.¹²⁵ This suggests that, in the ordinary course of child protection casework, a parent will have been given reasonable opportunity to cooperate with workers and engage with recommended interventions, prior to the drastic step of child removal—and, therefore, that a failure to adequately engage should be expressly identified. Indeed, insight and cooperation have been described as 'the bottom line' for child protection workers engaged with families prior to legal proceedings.¹²⁶

The statutory requirement, since late 2023, that the Department inform the Court of 'active efforts' implemented before a care order was sought and 'the reasons the active efforts were unsuccessful',¹²⁷ will, presumably, make it more likely that the parents' attitude towards such 'efforts' is detailed in the court application, and hence referred to in the judgments. Any actual impact on Court outcomes of this development is beyond the scope of this thesis, as most of its pool of cases pre-date the active efforts reform.¹²⁸

(vi) Less Prevalent: Lack of Insight

The notion of 'insight', alongside engagement, cooperation, compliance and candour, can be conceptualised as part of a parent's 'attitude'. Very few judgments use the word 'insight' in summarising the reasons for removal. When it does appear, the references are to a parent's lack of insight into the risks posed by the mental health condition¹²⁹ or abusive conduct of *the other* parent,¹³⁰ as well as inadequate acceptance of the child protection concerns generally.¹³¹

Like other attitudinal factors, 'insight' is given far more weight at determination stage than as a ground for removal. The contrast is particularly striking in relation to insight, which is *the*

intervention'), and s 36 ('Principles of intervention') (1)(c) 'Removal of the child or young person from his or her usual caregiver may occur only where it is necessary to protect the child or young person from the risk of serious harm.' See also s 34 ('Taking of action by Secretary'); s 37 ('Alternative dispute resolution by Secretary').

¹²⁵ *The Act* (n 4) s 63. Additionally, pursuant to amendments post-dating most of the judgments in the study sample, the alternatives to commencing care proceedings are now to include 'active efforts' to avoid the child's removal: ss 9A, 63(1)(a).

¹²⁶ David McConnell, Gwynnyth Llewellyn and Luisa Ferronato, *Parents with a Disability and the NSW Children's Court* (Research Report, University of Sydney, 2000) 23. Other studies referring to perceptions of deficient parental engagement and compliance as prevalent contributors to children's removal include Masson, Pearce and Bader (n 15) 20, 21, 29; Kate Alexander et al, 'Why Do Mothers Stay?' (n 11) 3.

¹²⁷ *The Act* (n 4) s 63(1)(a). See also Chapter 2, part D, 'The Evolution of the "Realistic Possibility of Restoration Test"'.

¹²⁸ Four of the judgments post-date the 'active efforts' amendment, but do not directly comment on it.

¹²⁹ *Fiona Farmer* (n 77) [9]; *Kim* (n 29) [2].

¹³⁰ *Charlie* (n 119) 22.

¹³¹ *Abbey* (n 47) [34]; *Charlie* (n 119) 13, 22; *Fiona Farmer* (n 77) [9]; *McAlister children* (n 24) [44].

most influential factor in case outcomes. An absence of insight is cited in around 80% of reasons for there being no realistic possibility of restoration, yet the same concept accounts for just 5% of initial decisions to remove. This raises questions about the degree to which parents are given opportunity, prior to the decision to remove the child, to demonstrate that they *do* possess ‘insight’ – or, in more practical terms, that they accept the legitimacy of the alleged child protection issues and agree that these should be addressed.

As explored in greater depth in chapter 7, interviews with caseworkers indicated that language such as ‘behaviour change’ is preferred to the vagueness of ‘insight’, especially in communicating expectations to parents.¹³² Regardless of terminology, most caseworkers felt it is essential that the parent recognises risks to the child,¹³³ ‘know[s] where they could do something differently’,¹³⁴ and is willing to ‘start their change journey’.¹³⁵ ¹³⁶ What is less clear is whether such insight, however worded, is treated as a priority in order to *prevent* the need to remove the child, or instead becomes a focus only once legal proceedings have commenced.

C. Parent-Child Relationship and Child Maltreatment

This part discusses factors directly pertaining to the parent’s treatment of the particular child, or capacity to provide parental care to that child. As grounds for removal, the leading child maltreatment factors are physical neglect and physical abuse. Each appears in around 30% of the judgments. These are followed in prevalence by references to lack of ‘parenting capacity’, at a little under 20%. Emotional or psychological neglect and abuse appear to be minimally influential, being identified as reasons for initial removal in fewer than 10% of the judgments.

(i) Physical Abuse

Physical abuse, excluding sexual abuse, was a reason for the child’s removal in 30% of the judgments. Many of these cases involve parents assaulting, physically humiliating and terrorising children,¹³⁷ ¹³⁸ typically under the ostensible guise of ‘discipline’. Additionally,

¹³² Caseworkers 3, 4, 5, 12.

¹³³ Caseworkers 5, 6, 7, 12.

¹³⁴ Caseworker 9.

¹³⁵ Caseworker 13.

¹³⁶ See also Chapter 7, section (ii).

¹³⁷ *ASK* (n 26) [49]; *Charlie* (n 119) 13–14; *Lilly, Wade and Caleb* (n 24) [20]; *LZ and QJ v FACS* [2017] NSWDC 414, [27]–[29] (‘*LZ & QJ*’); *Oscar* (n 24) [74(c)(i)], [76]; *Ramsay children* (n 24) 9; *RC & PK* (n 34) [71]; *Re Saunders and Morgan* [2007] NSWDC 5589, [19] (‘*Saunders & Morgan*’); *Y v The Secretary, Department of Communities and Justice* (No. 6) [2021] NSWDC 392, [102]–[106] (‘*Y*’).

¹³⁸ The inherent overlap between physical and psychological abuse is discussed at section (v) below.

close to half of the physical abuse cases are concerned with ‘non-accidental injuries’: that is, deliberate or reckless infliction of physical harm to a baby or young child, for which a parent is believed responsible despite denying such.¹³⁹

The relative prominence of physical abuse in this study is at odds with existing research and data tending to indicate that it is less common than both neglect and emotional (or ‘psychological’) abuse.^{140 141} This disparity may be accounted for by a disproportionate representation, in the sample of judgments, of ‘non-accidental injury’ cases (approximately 15% of the study sample). It can be surmised that the particular complexity and controversy of these cases contributes to their being more likely to proceed to defended hearing, and to be selected for publication, than the more typical cases of neglect enmeshed with issues of socio-economic disadvantage. This produces a distorted picture of the prevalence of physical abuse as a ground for removal.

In evaluating the risk of recurrence of physical abuse, the Court’s reasoning on realistic possibility of restoration becomes primarily concerned with parental insight and acknowledgement of wrongdoing. These factors are, in turn, associated with recognition and prioritisation of the child’s needs, and intrinsic capacity to provide for the child’s psychological wellbeing and sense of security.¹⁴²

¹³⁹ *Department of Family and Community Services (DFaCS) and the Ali Children* [2018] NSWChC 6; *Re Anthony* [2008] NSWLC 21; *Barnett children* (pseudonym, unpublished judgment, Children’s Court, March 2005) (‘*Barnett children*’); *Department of Family and Community Services (NSW) and the Bell-Collins Children* [2014] NSWChC 5; *Depik and Senina* (pseudonym, unpublished judgment, Children’s Court, May 2012); *Department of Communities and Justice (DCJ) and Evie and Grace* [2023] NSWChC 1 (‘*Evie & Grace*’); *In the Matters of Lincoln and Raymond* (Children’s Court of NSW, 9 April 2009); *Department of Communities and Justice (DCJ) and May, June and Roy* [2023] NSWChC 15 (‘*May, June & Roy*’); *Mihar children* (pseudonym, unpublished judgment, Children’s Court, August 2012); *MXS v Department of Family and Human Services (NSW)* [2012] NSWDC; *Re Nellie* [2002] NSWLC 8; *SS v Department of Human Services* [2010] NSWDC 279.

¹⁴⁰ See Australian Institute of Health and Welfare, *Child Protection Australia 2023-24* (Web report, Australian Government, 2025): <<https://www.aihw.gov.au/reports/child-protection/child-protection-australia-2023-24/contents/insights/the-process-of-determining-child-maltreatment - subs>>; Masson, Pearce and Bader (n 15) 37.

¹⁴¹ See Annual Statistical Reports (2024–25) from the Department of Communities and Justice (NSW): ‘Children and young people involved in significant risk of harm reports (ROSH) where actual harm or risk of harm was substantiated from finalised field assessments’, by abuse type, indicating the proportions as sexual abuse 16.6%, physical abuse 16.7%, neglect 32.9%, emotional abuse 33%:<<https://dcj.nsw.gov.au/about-us/families-and-communities-statistics/annual-statistical-reports/asr-landing-page/asr-cft-cp.html>>.

¹⁴² See Chapter 7, sections (ii), (iv).

(ii) Sexual Abuse

Sexual abuse as a ground for removal encompasses actual sexual assault of a child (either the child subject of the proceedings, or a sibling), or risk of sexual abuse and a parent's failure to 'act protectively' in regard to such risk. It appears in 17% of the judgments, a proportion which is almost identical to the Department's figures for substantiated¹⁴³ reports of sexual harm.¹⁴⁴

The surrounding circumstances vary considerably, and include confirmed¹⁴⁵ or suspected¹⁴⁶ sexual abuse by a mother,¹⁴⁷ fathers,¹⁴⁸ step-fathers,¹⁴⁹ siblings,¹⁵⁰ other extended family,¹⁵¹ and a non-related person in the family circle.¹⁵² Risk of abuse pertains to fathers who are alleged to have previously committed sexual assault,¹⁵³ to known sexual offenders living in or visiting the child's household,¹⁵⁴ and to the more generalised concern of children being in the company of adults in unsafe circumstances.¹⁵⁵ Perceptions of failure to protect a child from sexual harm are uniformly levelled at mothers, and usually relate to a parent's disbelief that their partner or other family member has abused the child.¹⁵⁶

¹⁴³ In the context of investigated reports that a child is at risk of significant harm, 'substantiated' has been defined as meaning that an allegation has been found on the balance of probabilities to be true: see Office of the Children's Guardian, *Reporting Obligations and Processes: A Handbook for Child-Related Organisations* (NSW Government, 2022) 7. However, the Court has described the standard of the 'investigation authorities' as lower than the balance of probability – see n 145 below.

¹⁴⁴ See Department of Communities and Justice, *Annual Statistical Reports (2024–25)* (n 141).

¹⁴⁵ While confirmed ('substantiated') allegations/disclosures have a particular meaning at a Departmental casework level, being in the Court's understanding 'closer to a reasonable suspicion...[and] less than the balance of probability': *Department of Communities and Justice (DCJ) and Janet and Xing-fu* [2022] NSWChC 7, [123] ('*Janet & Xing-fu*'), in several cases the Court made its own finding on the balance of probabilities that the sexual abuse did occur: *A v Secretary, Department of Communities and Justice (No. 4)* [2019] NSWSC 1872, [113]–[120] ('*A*'); *Kee children* (pseudonym, unpublished judgment, Children's Court, June 2011) [50], [52]; *Keziah* (pseudonym, unpublished judgment, Children's Court, October 2013) [72] ('*Keziah*').

¹⁴⁶ While the concerns remained a 'suspicion' in some cases, in three judgments the Court made a finding that it is not satisfied on the balance of probabilities that the sexual abuse occurred: *David White* (n 101) [52]; *Hatfield children* (pseudonym, unpublished judgment, Children's Court, April 2018) 41–42, 53, 55–60 ('*Hatfield children*'); *Janet and Xing-fu* (n 145) [120], [126]–[142], [186].

¹⁴⁷ *RC & PK* (n 34).

¹⁴⁸ *Keziah* (n 145); *Prince & Johns children* (n 24).

¹⁴⁹ *A* (n 145); *Janet & Xing-fu* (n 145); *Kee children* (n 145).

¹⁵⁰ *DFaCS (NSW) and the Colt Children* [2013] NSWChC 5 ('*Colt children*'); *Lilly, Wade & Caleb* (n 24).

¹⁵¹ *Colt children* (n 150); *Hatfield children* (n 146).

¹⁵² *Lim children* (n 25).

¹⁵³ *Abbey* (n 47) [34]; *Charlie* (n 119) 13; *J & T* (n 50) [72]–[75], [87].

¹⁵⁴ *Logan* (pseudonym, unpublished judgment, Children's Court, March 2022) 4; *Tanya* (n 98) [16]–[21].

¹⁵⁵ *ASK* (n 26) [48].

¹⁵⁶ *A* (n 145) [14]; *Charlie* (n 119) 22; *Janet & Xing-fu* (n 145) [19], [68]; *Kee children* (n 145) 20; *Keziah* (n 145) [74]–[77]; *Lilly, Wade and Caleb* (n 24) [23]–[25]; *Prince & Johns children* (n 24) [31]–[32].

When determining realistic possibility of restoration, the Court's assessment of risk of sexual harm, including a parent's capacity for protectiveness, becomes predicated—as with other forms of physical abuse—on the factors of insight, acknowledgement, and responsive understanding of the child's needs.

(iii) Physical Neglect

Physical neglect issues are a cited basis for the child's removal in 32% of the judgments. These are most often characterised as domestic squalor: children presenting as 'dirty' or 'unkempt' in appearance or clothing,¹⁵⁷ having poor hygiene,¹⁵⁸ inadequate bedding,¹⁵⁹ and living in unclean, cluttered and potentially hazardous surroundings¹⁶⁰—in some instances with apparently little food in the cupboards or fridge.¹⁶¹

These forms of neglect are usually portrayed as a manifestation of problems attributed to substance abuse or mental illness; the household disorder is in the background rather than being the primary concern. However, there are several judgments in which caseworkers' observations of a physically neglected child, in a squalid environment, appear to be a precipitating cause of removal,¹⁶² or the 'final straw' after prior attempts to work with the family.¹⁶³

Other concerns include inadequate 'supervision',¹⁶⁴ and neglect of medical or dental needs.¹⁶⁵ There are several references to poor nutrition.¹⁶⁶ In relation to babies there are cases of 'failure

¹⁵⁷ *Ahmad* (pseudonym, unpublished judgment, Children's Court, April 2023) 5 ('*Ahmad*'); *Barnett children* (n 139) [6], [14]; *Colt Children* (n 150) [84]; *Dorothy* (n 80) [7]; *Jay* (n 52) [7]; *Jillian and Jacinta* (n 102) [11(iv)] ('*Jillian & Jacinta*'); *McAlister children* (n 24) [40]; *Sharpe children* (n 97) [6]; *Waller children* (n 49) 4.

¹⁵⁸ *Ahmad* (n 157) 4; *ASK* (n 26) [41], [48]; *Barnett children* (n 139) [6]; *Colt children* (n 150) [40]–[44], [84]; *Dupont* (n 32) [12]; *Ramsay children* (n 24) 9; *Vlachos children* (n 97) [4].

¹⁵⁹ *ASK* (n 26) [41]; *Arnott-Bloom* (n 8) [52]; *Colt children* (n 150) [27].

¹⁶⁰ *Colt children* (n 150) [27]–[29], [31]–[32]; *Dorothy* (n 80) [7]; *Ezekial* (n 47) [8]; *Jillian & Jacinta* (n 102) [11(iv)]; *McAlister children* (n 24) [40], [43]; *Sharpe children* (n 97) [5]; *Waller children* (n 49) [9].

¹⁶¹ *Colt children* (n 150) [29]; *Jay* (n 52) [7]; *David White* (n 101) [5]; *Vlachos children* (n 97) [20].

¹⁶² *Colt children* (n 150) [26]–[34] (the circumstances in this case were extreme, involving an incestuous extended family group in which the children had been raised on a rural property largely in isolation from wider society and their essential physical and medical care chronically neglected).

¹⁶³ *Dorothy* (n 80) [7]; *McAlister children* (n 24) [43]–[44]; *Sharpe children* (n 97) [4]–[6]; *Waller children* (n 49) [9].

¹⁶⁴ *Arnott Bloom* (n 8) [52]; *ASK* (n 26) [48]; *Dupont* (n 32) [12]; *JH* (n 53) [5]; *Malakhai* (n 55) [52]; *Prince & Johns children* (n 24) [2]; *Ramsay children* (n 24) 9; *Rogers* (n 24) [6]; *Vlachos children* (n 97) [4]; *Waller children* (n 49) [9].

¹⁶⁵ *Ahmad* (n 157) 4; *Colt children* (n 150) [25], [39]–[40]; *David White* (n 101) [5]; *Jay* (n 52) [7]; *Waller children* (n 49) 4.

¹⁶⁶ *ASK* (n 26) [48]; *Colt Children* (n 150) [48], [51]; *GR* (n 112) [101(2)].

to thrive',¹⁶⁷ insufficient weight gain,¹⁶⁸ inadequate feeding,¹⁶⁹ and one exceptionally serious incident in which neglect of a child's fundamental care placed him at risk of death due to hypothermia.¹⁷⁰ Occasionally the nature of the neglect is not specified in the judgment, beyond broad references to 'the physical care' or 'physical needs' of the children being unmet.¹⁷¹

In the Court's decisions on restoration, physical neglect concerns become implicitly subsumed into considerations of insight, mental health and practical parenting capacity. Overall, however, the emphasis at determination stage shifts from children's *physical* needs to their *psychological* needs, and to the parents' capacity to provide for the child's emotional welfare rather than competence in matters of basic physical care.

(iv) Parenting Capacity

'Inadequate parenting capacity' is a concept closely linked with 'neglect'. A struggle to fulfil parenting tasks may result in neglect of the child, and the two coincide in the identified reasons for removal in some of the judgments. However, the concepts can be distinguished by the difference between experiencing substantial difficulty in performing parental responsibilities (parenting capacity) and an actual omission of care (neglect).

Cited reasons for the child's removal include the very broad 'issues of concern for the father's...parenting capacity',¹⁷² 'overall concern about the mother's capacity to parent the children',¹⁷³ and, simply, 'parenting incapacity'.¹⁷⁴ There are phrases suggesting incapability for the foreseeable future: that the parent has a 'general inability to provide sustained care for the child',¹⁷⁵ and an 'inability to provide for the child's ongoing development'.¹⁷⁶ In other instances the concerns relate to the more immediate, physical care needs of a newborn baby.¹⁷⁷ Sitting somewhere between the respective skills needed to care for a baby and to nurture a child's long-term development is the notion of 'poor coping': whereby parents are perceived

¹⁶⁷ ASK (n 26) [46]; *May, June and Roy* (n 139) [130].

¹⁶⁸ *Barnett children* (n 139) [6].

¹⁶⁹ *Fiona Farmer* (n 77) [27(49)]; *Malakhai* (n 55) [53].

¹⁷⁰ *Nathan* (n 59) [21], [29]–[30].

¹⁷¹ *Alison Claire* (n 119) [23]; *Oscar* (n 24) [74].

¹⁷² *Abbey* (n 47) [34].

¹⁷³ *RC & PK* (n 34) [93].

¹⁷⁴ *Yarran Taylor children* (n 9) [25].

¹⁷⁵ *In the Matter of Spencer* (Children's Court of New South Wales, 26 July 2005) [24] ('*Spencer*').

¹⁷⁶ ASK (n 26) [41].

¹⁷⁷ *Re Jay* (n 52) [7]; *Fiona Farmer* (n 77) [27], [49]; *Department of Communities and Justice (DCJ) and Murphy* [2020] NSWChC 11, [4] ('*Murphy*'); *Malakhai* (n 55) [14]–[15].

as struggling to manage the day-to-day demands of parenting, especially in a context of competing sources of stress.¹⁷⁸ ‘Poor coping’ is additionally associated with a parent’s deficient ‘attachment’¹⁷⁹ relationship with, or ‘empathy’ for,¹⁸⁰ the child.

Combined, these parenting capacity issues appear as reasons for removal in 18% of the judgments. This places parenting capacity well below the emphasis on the ‘adult-focused’ factors of domestic violence, substance misuse and mental health. It can of course be argued that these latter issues are integrally intertwined with parenting capacity, being perceived contributors to deficient parenting in the circumstances. When the Court discusses each of these leading concerns, it is implicit that parenting capacity is also in issue. Nonetheless, it is curious that explicit ‘parenting capacity’ references—to the parent’s inability to competently care for the child, or to demonstrate an empathetic attunement—are not a more dominant feature of the identified reasons for removal. This is, perhaps, suggestive of overlooked opportunity to consider whether the parent *can* adequately care for the child, with sufficient supports in place, despite the risk factors. Or, if these opportunities were thoroughly explored during casework, that the application to the Court did not clearly convey the basis of the Department’s assessment that the parent lacked capacity despite available help.

In contrast, there is an increased emphasis on parenting competence in determinations on realistic possibility of restoration—with generic or practical parenting capacity a moderately influential factor,¹⁸¹ and capacity to meet the child’s emotional needs a leading factor.¹⁸²

(v) Less Prevalent: Emotional and Psychological Neglect and Abuse

The line between ‘neglect’ and ‘abuse’ can be blurry in the context of emotional or psychological harm.¹⁸³ Emotional or psychological abuse has been described in child protection literature as a ‘catch-all’ phrase for multiple, interlocking concerns,¹⁸⁴ and is

¹⁷⁸ *Arnott-Bloom* (n 8) [52]; *ASK* (n 26) [48], [151]; *Carl* (n 27) [8]; *Esther* (n 86) [26]–[29]; *Jillian and Jacinta* (n 102) [11]; *In the Matter of Leonard* [2009] NSWLC 5, [9]–[10] (‘*Leonard*’); *Spencer* (n 175) [24], [38].

¹⁷⁹ *ASK* (n 26) [41]; *Leonard* (n 178) [9]; *SK* (n 1) [34]; *Spencer* (n 175) [24]. See also Chapter 8, section (iv) for analysis of the way in which ‘attachment’ is conceptualised in the judgments.

¹⁸⁰ *ASK* (n 26) [41], [58].

¹⁸¹ Chapter 8, part A, section (iii).

¹⁸² Chapter 7, section (iv).

¹⁸³ Judy Cashmore and Briony Horsfall, ‘Child Maltreatment’ in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd ed, LexisNexis Butterworths, 2017) 103, 111.

¹⁸⁴ Judith Cashmore, ‘“Best Interests” in Care Proceedings: Law, Policy and Practice’ in Elaine E. Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Wellbeing* (Cambridge University Press, 2016) 326, 329; Horsfall (n 15) 110.

sometimes used interchangeably with its ‘neglect’ counterpart.¹⁸⁵ To distinguish between the two, this study categorises emotional neglect as inadequate attention to the child’s (non-physical) needs, and emotional abuse as behaviour actively directed at the child and which causes the child to feel fearful or intimidated.

Emotional/psychological neglect and abuse each appear as a cited reason for removal in under 10%¹⁸⁶ of the judgments—less than one-third the rate of *physical* neglect and abuse. References to emotional neglect include inadequate attunement to the needs of young infants,¹⁸⁷ impacting the infant’s ‘emotional wellbeing’¹⁸⁸ or development of social and communication skills.¹⁸⁹ For older children, grounds for removal include psychological distress caused by a parent’s disbelief and inaction in responding to disclosures of sexual abuse.¹⁹⁰ There are also generalised references to emotional or psychological neglect amid a list of concerns¹⁹¹—implying that this form of neglect flows, partly at least, *from* other circumstances such as physical neglect and exposure to domestic violence.

Emotional or psychological abuse appears to be closely linked to physical abuse, with almost all of the judgments referencing emotional abuse also involving physical abuse. Children are frightened by the violence¹⁹² (‘discipline’)¹⁹³ directed towards them, within a climate of intimidation and control.¹⁹⁴ There are also references to verbal shouting and verbal abuse,¹⁹⁵ and children’s fear of their parent’s ‘anger’.¹⁹⁶

The relatively low incidence of these factors contrasts with the Australian Institute of Health and Welfare’s (‘AIHW’) most recent data on substantiated child protection reports—which records emotional abuse as the most common ‘primary’ category of child maltreatment both

¹⁸⁵ See, eg, Danya Glaser, ‘Emotional Abuse and Neglect (Psychological Maltreatment): A Conceptual Framework’ (2002) 26(6–7) *Child Abuse & Neglect* 697; Sigrid Ness, ‘A Narrow Focus in Research on Emotional Abuse: A Scoping Review of Definitions and Descriptions on Emotional Abuse in Research on Child Welfare and Social Work’ (2023) 28 *Child & Family Social Work* 572.

¹⁸⁶ Approximately 9% in each instance.

¹⁸⁷ *Ahmad* (n 157) [5]; *Spencer* (n 175) [23]–[24].

¹⁸⁸ *Spencer* (n 175) [24].

¹⁸⁹ *Ahmad* (n 157) 5.

¹⁹⁰ *A* (n 145) [14]–[16]; *Lilly, Wade and Caleb* (n 24) [23]–[25], [33]–[34].

¹⁹¹ *Ahmad* (n 157) 3–4; *Alison Claire* (n 119) [23]; *Vlachos children* (n 97) [4].

¹⁹² *LZ & QJ* (n 137) [27]–[28]; *Charlie* (n 119) 14; *McAlister children* (n 24) [39]; *Y* (n 137) [98]–[103], [686].

¹⁹³ *Charlie* (n 119) 14; *LZ & QJ* (n 137) [30]; *Oscar* (n 24) [74]; *Y* (n 137) [101], [125]; *Saunders and Morgan* (n 137) [18]–[19].

¹⁹⁴ *Charlie* (n 119) 14; *Oscar* (n 24) [74]; *Saunders & Morgan* (n 137) [19].

¹⁹⁵ *Borg* (n 25) [11]; *Charlie* (n 119) 14; *RC & PK* (n 34) [91]; *Saunders & Morgan* (n 137) [19].

¹⁹⁶ *Dupont* (n 32) [18]; *Y* (n 137) [103].

in NSW and nationally.¹⁹⁷ The Department's own statistical reports for 2024–25 show the proportional rate of substantiated emotional abuse as 33%, very closely followed by generic 'neglect' at 32.9%.¹⁹⁸ There are several likely reasons for the discrepancy between these figures and the judgments. These include definitional issues (the narratives in the judgments not applying the standardised definitions that inform official statistics); timeframes (the AIHW and Departments figures being annual, whereas the published cases traverse some 20 years); and the distinction between substantiated child protection reports and the subset of cases proceeding to Court.

More widely, Australian and international research suggests that emotional maltreatment is both 'highly prevalent'^{199–200} and, in some respects, more harmful than other types of child maltreatment.²⁰¹ It is probable that the children in many of the judgments *were* subjected to psychologically abusive or emotionally neglectful parental conduct,²⁰² but without this being encapsulated by the Department in its initiating court documentation, or explicitly articulated in the magistrate's recount of the reasons for removal. For example, domestic violence perpetrated between adults is the leading cause of removal as expressly identified in the judgments, and children's experience of domestic violence is highly likely to cause emotional/psychological harm.²⁰³ Emotional harm may be hard to detect in the early stages of a case, particularly prior to any expert assessment being conducted. A further complexity is the association between emotional maltreatment, and 'cumulative harm' arising from an array of events and situations in a child's life. 'Repeated exposure to maltreatment' can have a profound impact on a child's long-term emotional wellbeing and functioning,²⁰⁴ yet this

¹⁹⁷ Australian Institute of Health and Welfare, *Child Protection Australia 2023–24* (Web Report, Australian Government, last updated 11 December 2025).

¹⁹⁸ See above n 141.

¹⁹⁹ Ben Mathews and Shanta Dube, 'Childhood Emotional Abuse is Becoming a Public Health Priority: Evidentiary Support for a Paradigm Change' (2025) 4 *Child Protection and Practice* 100093: 1–11, 2.

²⁰⁰ Ben Mathews et al, 'The Prevalence of Child Maltreatment in Australia: Findings from a National Survey' (2023) 218(S6) *Medical Journal of Australia* S13–S18, S16; Amy J Morgan et al, 'Public Attitudes and Knowledge About the Nature and Impact of Child Emotional Abuse: A Systematic Review' (2025) *Child Maltreatment* 1–15, 1.

²⁰¹ Mathews et al (n 200) 2, 4.

²⁰² See, eg, Sheehan and Levine (n 108) a study of cases in the Children's Court of Victoria, referring to 'the likelihood that where there is a particular type of abuse or neglect the child is likely to have also suffered emotional or psychological harm': at 24.

²⁰³ See, eg, Kate Alexander et al 'The Attitudes and Beliefs of the Child Protection Workforce and Why They Matter to Children Who Live With Violence' (2022) 28 *Child & Family Social Work* 210, 211; De Simone and Heward-Belle (n 15) 404; Nisha Prichard, *Children at Risk: Domestic Violence, Child Protection and The Children's Court of New South Wales Decision-Making Process* (PhD Thesis, UNSW, 2015) 18–19

²⁰⁴ Sheehan, 'Cumulative Harm in Child Protection' (n 11) 435.

harm can be challenging to identify²⁰⁵—especially in comparison to the discrete events or visible evidence that accompany physical forms of abuse and neglect.²⁰⁶

Crucially, despite there being little express attention to emotional wellbeing at the removal stage, parental capacity to recognise and meet the child’s emotional needs is a leading factor in the Court’s decisions on realistic possibility of restoration, relied upon in 58% of the judgments.²⁰⁷

Conclusions

This chapter commenced with the real stories of two mothers, Sarita and Sonya, each based on a judgment. The reasons for the removals of Sarita’s and Sonya’s children align with leading factors identified in this chapter: for both women, domestic violence, mental health concerns, and allegations of physical neglect, as well as drug use for Sonya, and in Sarita’s case a perception that she had deliberately tried to harm her unborn child (physical abuse). Their stories continue in the following chapters, tracing the issues in their cases as the Courts deliberated on whether there was a realistic possibility of restoration.

The chapter introduced the contrasts between an emphasis on particular factors at the ‘removal stage’ and on other factors in the Court’s subsequent determinations on restoration. The prevalent reasons for removal can be described as ‘external’ or ‘extrinsic’ factors—visible or tangible phenomenon, readily able to be identified and described in the evidence supporting the initiating documentation for the Court. Hence caseworkers point to, for example, the parents’ drug-affected behaviour and violent altercations, their apparent physical neglect or abuse of the child, a dirty and hazardous home, a struggle to perform daily parenting tasks.

There are of course some over-simplifications in the characterisation of these issues as externalised. Domestic violence, for instance, has its less ‘visible’, psychological and insidious elements. Mental health is an exception to the extrinsic nature of the leading reasons for removal, the experience of a mental health disorder being internal to the individual, although

²⁰⁵ Cashmore (n 184) 329; Judith Masson, ‘What are Care Proceedings Really Like?’ (2012) 36(1) *Adoption and Fostering* 5, 9.

²⁰⁶ Cashmore (n 184) 329; Sheehan, ‘Cumulative Harm in Child Protection’ (n 11) 435–6, 441; Sheehan and Levine (n 108) 24.

²⁰⁷ See Chapter 7, section (iv).

it may have externalised manifestations. Overall, however, there is a clear contrast between the reasons for removal and, as explored in the following chapters, the dominant reasons for the Court's decision on realistic possibility of restoration. The latter turn to more abstract notions of a parent's intrinsic attitude towards their parenting role—such as 'insight' (barely a blip on the radar at removal stage), capacity to recognise the child's emotional needs, and commitment to a process of self-improvement.

The 'shift' in attention between the two decision-making stages is, arguably, incongruous with the statutory test of the likelihood of the parents *addressing the issues that led to the child's removal*. The Court does not tend to apply this test as a systematic exercise in which each of these original issues is marked off. As discussed in chapter 5, some judicial officers are more methodical than others in this regard; however approximately half of the judgments do not expressly apply this part of the test at all.²⁰⁸ If the decision on restoration is based on factors quite different to the circumstances of the original removal, there is arguably a 'disconnect' between the two, casting doubt on whether the statutory provision is apposite. However, a claim of disconnection is probably an exaggeration. Instead, the focus in evaluating realistic possibility of restoration becomes, to a degree, the circumstances *underlying* the reasons for removal. While the immediate factors justifying a child's removal tend to be obvious manifestations of household dysfunction and risk to the child, the underlying causes are perceived as situated in the parent's state of mind. The parent's psychological state, in turn, may be affected by experiences of maltreatment in childhood, or abuse and chronic stress in adulthood. In this vein it is significant that parental mental health is the only leading child removal factor to increase its apparent weight, relative to other factors, when the Court assesses whether restoration is viable. The perceived connections between a parent's mental wellbeing, capacity for sustainable change, and the child's wellbeing, are explored in the next chapter.

²⁰⁸ See Chapter 5, part D, section (ii).

CHAPTER SEVEN

Reasons for Decision on 'Realistic Possibility of Restoration': The Leading Influential Factors

Case Stories continued: Sarita and Sonya

Sarita's story continued¹

Following baby Sammy's assumption into care, Children's Court orders were made placing Sammy in the parental responsibility of the Minister until the age of 18 years. The case was finalised on a 'no contest' basis, Sarita's solicitor having mistakenly informed the Court that Sarita conceded there was no realistic possibility of restoration. Subsequently, with the benefit of a Punjabi interpreter, Sarita was able to clarify that she intended all along to pursue restoration. Sarita appealed to the District Court.

By the time the appeal reached final hearing, Sammy had been in foster care for two years, with a view to adoption. Sarita's marriage to Sammy's father had ended, and he was in immigration detention awaiting deportation. Sarita had engaged with mental health practitioners and a social worker, and continued to sole parent her 14 and 17 year-old sons. The Department opposed restoration, arguing a failure to be 'attuned' to Sammy's emotional needs; that caseworkers considered Sarita 'difficult to work with' because she was not forthcoming about domestic violence; her mental health remained a concern; and that she lacked insight into the risks these factors posed to Sammy.

Sonya's story continued²

Sonya sought restoration of Merinda and Nate. Several months after the children's removal, Sonya ended her relationship with John (father of Nate), and obtained an apprehended domestic violence order³ against him. She engaged with a domestic violence legal service for help arranging new housing. She was regularly consulting her mental health practitioners, who regarded her 'schizoaffective disorder' as being in remission.

By the time of the hearing, Sonya had been engaged with drug and alcohol and personal counselling for close to 12 months, and was attending a parenting group at an Aboriginal Medical Service. Contact reports indicated a 'warm and responsive' relationship with the children. The Department opposed restoration for reasons including Sonya's 'failure to properly manage her mental health', 'inability' to

¹ Based on *SK v Secretary, Department of Family and Community Services* [2016] NSWDC 273 ('SK'). See part 1 of Sarita's story in Chapter 6.

² Based on an unpublished judgment of the Children's Court, 2009. See part 1 of Sonya's story in Chapter 6.

³ Apprehended Domestic Violence Order is the term in New South Wales for what is known in other jurisdictions as, for example, a 'restraining order' or 'intervention order'.

recognise the children's needs, her historic pattern of being subjected to domestic violence, and lack of insight into domestic violence.

Sarita's and Sonya's stories continue in chapter 8.

Chapter Overview

This chapter presents findings on the thematic factors that are the most influential in the Court's determinations on realistic possibility of restoration. Four factors emerged as the 'leading' issues in the Court's reasons for decision, each appearing in more than 50% of the judgments in the study sample. These are *insight* (relied upon in 72% of judgments); the parent's *mental health* (67% of judgments); *engagement, cooperation and compliance* (59%); and *capacity to meet the child's emotional needs* (58%).

The discussion commences in section (i) not with the *most* influential factor (*insight*), but with 'engagement, cooperation and compliance' (shortened to 'engagement'). This theme sets an important context for the entire analysis, because it is a positive attribute shared not only by 85% of the parents found to have a realistic possibility of restoration, but also by a majority (55%) of the parents who do not achieve restoration. It is thus a prevalent 'non-determinative' strength⁴ for the latter group of parents—in their cases not enough to get across the line. Sections (ii), (iii) and (iv) discuss *insight*, *mental health* and *children's emotional needs* respectively. The chapter analyses the nature of each theme as characterised in the judgments, the apparent reasons for its significance, and the inter-relationships between all four factors.

As foreshadowed in chapter 6, these leading factors can be collectively described as 'attitudinal', being focused on the parent's mindset (as this is perceived by others), and its manifestation in reflective understanding of the child protection concerns and a capacity to sustainably provide for the child's emotional security. The chapter also introduces one of the most significant findings of the thesis, which is the pivotal influence of the theme of parental mental health—not only in its prevalence as a direct reason for the Court's decisions, but also as an *underlying* issue informing the Court's reasoning on other, interwoven factors.

⁴ See Notes on Terminology, and Chapter 3, part C, section (i).

Leading factors

(i) Engagement, Cooperation and Compliance

[T]he mother seemed to have worked as hard on herself as she could...‘she will do any programme or anything that you ask of her...she’s compliant – she demonstrates that she is caring about her children and wanting her children with her’. (Magistrate in *Lilly, Wade & Caleb*, quoting the mother’s psychologist)⁵

The large majority – approximately 85% – of judgments in *favour of* restoration emphasise the parents’ positive efforts to remedy their circumstances, captured in the notion of ‘engagement’. This engagement is demonstrated by cooperation with the Department or other service providers, and by practical activity. The notion of cooperation implies a voluntary action, and in this respect the language of the judgments refers to the parents’ ‘willingness’⁶ to engage, and their being ‘motivated’⁷ and ‘committed’⁸ – terms which suggests a self-directed impetus for personal change. However, the context of child removal and court-determined restoration carries an inherent element of compulsion: to secure a successful court outcome the parent has little choice but to adhere to the system and its decrees. Thus ‘cooperation’ becomes virtually inter-changeable with ‘compliance’, a fine line reflected in terminology such as being ‘coachable’,⁹ ‘listen[ing] and follow[ing] directions’,¹⁰ participating in therapy ‘to the full extent required’,¹¹ and ‘complying with any reasonable directions of [the

⁵ DFaCS re *Lilly, Wade and Caleb* [2012] NSWChC 21, [68] (*‘Lilly, Wade & Caleb’*).

⁶ *Department of Family and Community Services (DFaCS) and the Ali Children* [2018] NSWChC 6, [7], [96] (*‘Ali children’*); *Department of Family and Community Services v Borg* [2011] NSWChC 4, [29] (*‘Borg’*); *The Secretary of the Department of Communities and Justice (DCJ) and Fiona Farmer* [2019] NSWChC 5, [48] (*‘Fiona Farmer’*); *The Department of Community Services and Rachel Grant, Tracy Reid, Sharon Reid and Frank Reid* (Children’s Court of New South Wales, August 2009) [43], [48] (*‘Grant & Reid’*); *Re Jillian and Jacinta* [2008] NSWLC 23, [26] (*‘Jillian & Jacinta’*); *Lim children* (pseudonym, unpublished judgment, Children’s Court, July 2022) 19 (*‘Lim children’*); *Re Nellie* [2002] NSWLC 8 (no page or paragraph numbers) (*‘Nellie’*); *Yarran Taylor children* [2024] NSWChC 3, [125(9)] (*‘Yarran Taylor children’*).

⁷ *FaCS v AH and AN* [2017] NSWDC 412, [104] (*‘AH & AN’*); *Ali children* (n 6) [94]; *Borg* (n 6) [19]; *Grant and Reid* (n 6) [48]; *O’Connor v The Minister for Family and Community Services* [2020] NSWDC 453, [30] (*‘O’Connor’*); *Ramsay children* (pseudonym, unpublished judgment, Children’s Court, April 2021) 26 (*‘Ramsay children’*).

⁸ *Alfred* (pseudonym, Children’s Court, 13 October 2020) [110] (*‘Alfred’*); *Ali children* (n 6) [94]; *Borg* (n 6) [50]; *David White v The Director-General Department of Human Services* [2011] NSWDC 106, [91] (*‘David White’*); *DHK & Anor v Secretary, Department of Family and Community Services & Ors* [2018] NSWDC 221, [384] (*‘DHK’*); *Grant and Reid* (n 6) [42], [72]; *Department of Communities and Justice (DCJ) and Jamzie* [2022] NSWChC 1, [123], [162] (*‘Jamzie’*); *Jillian & Jacinta* (n 6) [26]; *Lim children* (n 6) 19; *Mario* (pseudonym, unpublished judgment, Children’s Court, October 2022) [40] (*‘Mario’*); *Naunton children* (pseudonym, unpublished judgment, Children’s Court, August 2023) 29–30 (*‘Naunton children’*); *Nellie* (n 6); *Ramsay children* (n 7) 19; *Yarran Taylor children* (n 6) [125(11)].

⁹ *Lim children* (n 6) 13, 15, 19.

¹⁰ *Ibid* 16.

¹¹ *Borg* (n 6) [48].

Department’].¹² The emphasis on compliance reflects previous Australian studies that have found this factor to be strongly influential in care and protection court outcomes.¹³

Typical activities include ‘parenting’ courses,¹⁴ as well as domestic violence education,¹⁵ drug and alcohol treatment,¹⁶ mental health counselling,¹⁷ and programs associated with addressing emotional regulation.¹⁸ Prompt¹⁹ and consistent²⁰ engagement is applauded, as is ‘successful’ completion,²¹ or the receipt of ‘a glowing report’²² from course facilitators. Learning gains are sometimes noted: for example that parents have ‘learnt and applied new parenting skills’,²³ ‘learnt strategies for child management’,²⁴ or were ‘very reflective on the course content’.²⁵

Insufficient engagement is a reason for decision in approximately half of the ‘no realistic possibility’ decisions. In these judgments the parents’ level of cooperation, with either the Department²⁶ or other service providers,²⁷ is variably perceived as lacklustre, inconsistent,

¹² *Jamzie* (n 8) [161].

¹³ Lillian De Bortoli, Jan Coles and Mairead Dolan, ‘Parental Substance Misuse and Compliance as Factors Determining Child Removal: A Sample from the Victorian Children’s Court in Australia’ (2013) 35 *Children and Youth Services Review* 1319, 1322–1325; Lillian De Bortoli et al, ‘Preliminary Evaluation of Structured Professional Judgment to Assess Removal in Child Protection Practice’ (2015) 5 *Journal of Forensic Social Work* 29, 41–2; David McConnell, Gwynnyth Llewellyn and Luisa Ferronato, *Parents with a Disability and the NSW Children’s Court* (Research Report, University of Sydney, 2000) 73.

¹⁴ *Ali children* (n 6) [71]; *Borg* (n 6) [48]; *David White* (n 8) [86], [89], [100]; *Depik and Senina* (pseudonym, unpublished judgment, Children’s Court, May 2012) [17] (‘*Depik & Senina*’); *Fiona Farmer* (n 6) [27(8), (64), (68)]; *Grant and Reid* (n 6) [38]–[39]; *Jamzie* (n 8) [191]; *Lim children* (n 6) 15; *Nellie* (n 6); *Ramsay children* (n 7) 22; *Yarran Taylor children* (n 6) [143].

¹⁵ *Borg* (n 6) [48]; *DHK* (n 8) [378]; *Grant and Reid* (n 6) [40]–[41].

¹⁶ *Borg* (n 6) [48]; *DHK* (n 8) [378]; *Grant and Reid* (n 6) [48]; *JMS v Department of Family and Community Services & Ors* [2018] NSWDC 25, [66] (‘*JMS*’); *Yarran Taylor children* (n 6) [133].

¹⁷ See the discussion of mental health and therapy at section (iii).

¹⁸ *David White* (n 8) [100]; *Jamzie* (n 8) [191]; *Jillian & Jacinta* (n 6) [16], [18]; *Yarran Taylor children* (n 6) [112].

¹⁹ *Borg* (n 6) [48]; *David White* (n 8) [86].

²⁰ *Borg* (n 6) [48]; *Mario* (n 8) [34]; *O’Connor* (n 7) [25], [37]; *DFaCS (NSW) re Oscar* [2013] NSWChC 1, [126] (‘*Oscar*’).

²¹ *Ali children* (n 6) [71].

²² *David White* (n 8) [86].

²³ *Nellie* (n 6).

²⁴ *Grant and Reid* (n 6) [39].

²⁵ *Fiona Farmer* (n 6) [64].

²⁶ See, eg, *GR v The Department of Communities and Justice* [2021] NSWSC 1081, [847], [865] (‘*GR*’); *In the Matter of Jay* [2007] NSWChC 343, [14] (‘*Jay*’); *JH v Secretary, Department of Communities & Justice & Ors* (No.3) [2023] NSWDC 517, [254] (‘*JH*’); *JMS* (n 16) [79]; *DFaCS (NSW) re Kim* [2013] NSWChC 6, [52]–[58] (‘*Kim*’); *In the Matter of Melanie* (Children’s Court of New South Wales, 15 September 2008) [9] (‘*Melanie*’); *Oscar* (n 20) [110], [111]; *RC and PK v The Secretary, Department of Communities and Justice* [2024] NSWDC 196, [181] (‘*RC & PK*’); *Rogers v The Secretary, Department of Family and Community Services NSW* [2019] NSWDC 194, [127], [152] (‘*Rogers*’); *VC v Secretary, Department of Communities and Justice & Ors* (No. 2) [2024] NSWDC 192, [345] (‘*VC*’); *Waller children* (pseudonym, unpublished judgment, Children’s Court, September 2022) [168] (‘*Waller children*’).

²⁷ See, eg, *DCJ and Alice* [2024] NSWChC 12, [84] (‘*Alice*’); *ASK v Secretary DFaCS* [2014] NSWDC 247, [167] (‘*ASK*’); *Jay* (n 26) [11], [12], [15]; *Department of Communities and Justice (DCJ) and Lewis* [2018] NSWChC 5, [237] (‘*Lewis*’);

resistant, or outrightly antagonistic. Less commonly the non-compliance is with a specific element of the legal process: attending court,²⁸ signing court-ordered undertakings,²⁹ or respecting the confidentiality of the proceedings.³⁰ Some judgments expressly equate deficient compliance with a parent's resentment and hostility towards the very fact of child protection intervention,³¹ while in other cases the causes of the parent's deficient cooperation are unclear. Based on well-established themes in research literature, it can be surmised that an apparently poor motivation on the part of many parents stems from a complex interplay of factors, relating to their social circumstances, the distress and trauma brought about by the removal itself, a sense of disempowerment in dealing with caseworkers, a lack of ease in interacting with the legal process, and confusion as to what the system expects of them.³² The judgments in the main do not examine these causes. Occasionally a judicial officer suggests that a parent's resistant or equivocal approach to engagement is understandable, acknowledging contexts such as distressing, insensitive, inconsistent or 'peremptory'³³ decisions and communications by the Department.³⁴ However, the judicial officer is usually nonetheless mindful to express confidence in the parent's willingness to cooperate with a forthcoming restoration process.³⁵

Melanie (n 26) [9]; *Department of Communities and Justice (DCJ) and Murphy* [2020] NSWChC 1, [16], [107]–[108] ('*Murphy*'); *Department of Communities and Justice (DCJ) and the Prince and Johns Children* [2023] NSWChC 8, [48] ('*Prince & Johns children*'); *RC & PK* (n 26) [181]; *VC* (n 26) [345].

²⁸ *Melanie* (n 26) [9].

²⁹ *JMS* (n 16) [80]–[81].

³⁰ *Kim* (n 26) [53]–[57]; *Oscar* (n 20) [45]–[46].

³¹ See, eg, *Charlie* (pseudonym, unpublished judgment, Children's Court, December 2021) 26–7, 32–3 ('*Charlie*'); *GR* (n 26) [845]–[852]; *Lewis* (n 27) [236]–[237]; *Oscar* (n 20) [90]–[121]; *In the Matter of Samantha* (Children's Court, 21 July 2008) [37] ('*Samantha*'); *VC* (n 26) [365].

³² Themes including disempowerment, misunderstanding, surveillance and resistance in relation to parental cooperation and compliance in child protection are explored in, eg, Kate Alexander et al, 'Why Do Mothers Stay? Challenging Attitudes in Decision Making About Children at Risk Because of Domestic Violence' (2023) 146 *Child Abuse & Neglect* 106511: 1–11, 3; Daryl Higgins et al, *Experiences of People with Mental Ill-Health Involved in Family Court or Child Protection Processes: a Rapid Evidence Review* (Report, Institute of Child Protection Studies, Australian Catholic University, 2021) 18; Mary Ivec, Valerie Braithwaite and Nathan Harris, "'Resetting the Relationship" in Indigenous Child Protection: Public Hope and Private Reality' (2012) 34(1) *Law and Policy* 80, 90–91; McConnell, Llewellyn and Ferronato (n 13) 23–5; Claire Mason, Danny Taggart and Karen Broadhurst, 'Parental Non-Engagement within Child Protection Services: How Can Understandings of Complex Trauma and Epistemic Trust Help?' (2020) 10(4) *Societies* 93; BJ Newton et al, 'Restoring Children From Out-of-Home Care: Insights From an Aboriginal-Led Community Forum' [2024] *Child & Family Social Work* 1, 5–6; Munazza Tahir and Virginie Cobigo, 'Accessibility of Child Protection Investigations During Pandemic: A Qualitative Analysis of Court Proceedings' (2023) 36 *Journal of Applied Research in Intellectual Disabilities* 343, 347; Sebastian Trew et al, 'Parents' Experiences with Child Protection During Pregnancy and Post-Birth' (2023) 28 *Child & Family Social Work* 549, 556–7.

³³ *Fiona Farmer* (n 6) [163]; *KH v Secretary, Department of Communities and Justice* [2021] NSWDC 498, [318] ('*KH*').

³⁴ *Fiona Farmer* (n 6) [49], [153], [163]; *J & T v Department of Communities and Justice* [2023] NSWDC 78, [30]–[32], [500], [502] ('*J & T*'); *KH* (n 33) [318]–[320]; *Nellie* (n 6); *SK* (n 1) [139], [141]–[142], [191]–[195], [199].

³⁵ *Fiona Farmer* (n 6) [151]–[154]; *J & T* (n 34) [500]; *KH* (n 33) [644]–[646]; *Nellie* (n 6). In *SK* (n 1) this confidence is implicit in findings regarding the mother's 'remorse', improved mental health and her network of community supports: at [230], [242].

The magistrates and caseworkers who were interviewed shared a view that cooperation and compliance are important in principle. Magistrates need to have confidence in a parent's commitment to making progress on what are 'very serious'³⁶ child protection concerns.³⁷ Similarly, caseworkers look to parents' acceptance of 'support and guidance'³⁸ as an essential indicator of the prospect of restoration.³⁹ Indeed, this premise was built in to the Department's (former) structured decision-making restoration tool,⁴⁰ described by a caseworker as 'very much a scoring system', which measured a parent's completion of 'tasks' via indicators such as "'rarely" or "never", "occasionally", "consistently", and "always"'.⁴¹ (This system has since been replaced by a new 'restoration assessment approach', which removes scoring and allows for a more dynamic and holistic consideration of parents' motivation and 'meaningful' progress towards restoration goals.)⁴²

Despite broad concurrence in the need for parents to cooperate with statutory intervention, the significance of engagement was cautiously qualified by most participants. They expressed reservations about the utility of 'compliance' in particular contexts—for example, that 'box-ticking'⁴³ tasks may be irrelevant to the actual child protection issues;⁴⁴ ⁴⁵ that a saturation of obligations can be overwhelming for the parent and counterproductive;⁴⁶ and that the services needed to help achieve prescribed goals may be unsuitable or unavailable.⁴⁷ ⁴⁸ A registrar spoke of the 'misleading' nature of the 'Summary of Proposed Plan'⁴⁹ issued at the start of proceedings:

³⁶ Judicial Officer 17.

³⁷ Judicial Officers 2, 3, 7, 14, 16, 17, 21.

³⁸ Caseworker 12.

³⁹ Caseworkers 3, 4, 5, 6, 7, 8, 9, 11, 12, 13.

⁴⁰ Caseworker 4; Lawyer 5.

⁴¹ Caseworker 4.

⁴² Department of Communities and Justice, *Interim Restoration Assessment Approach* (Practice Manual, November 2024). See also Chapter 2, part E 'Recent Policy Developments'.

⁴³ Judicial Officers 2, 4, 22; Registrar 2; Caseworker 11; Lawyer 5.

⁴⁴ Judicial Officer 9; Lawyers 2, 6.

⁴⁵ The problem of case plan requirements being unrelated to the specific neglect or abuse is discussed in Joshua Gupta-Kagan, 'Confronting Indeterminacy and Bias in Child Protection Law' (2022) 33 *Stanford Law and Policy Review* 217, 245–6.

⁴⁶ Judicial Officer 13; Caseworkers 1, 8, 11.

⁴⁷ Judicial Officers 13, 22, 23; Registrar 1; Caseworker 11; Lawyer 1.

⁴⁸ Existing research discusses inadequate practical supports for families, and failure to properly assess their support needs: see, eg, Megan Davis, Independent Review of Aboriginal and Torres Strait Islander Children in Out-of-Home Care in New South Wales, *Family Is Culture* (Review Report, 2019) 347–359 ('*Family is Culture Report*'); Vicki Lens, 'Engaging Parents in Family Court: Lessons from an Observational Study of Child Protection Cases' (2017) 17(2) *Journal of Social Work* 129, 142–3; McConnell, Llewellyn and Ferronato (n 13) 76–7, 79.

⁴⁹ See Chapter 2, part C 'The Legal Process'.

[it] sets parents up with unrealistic expectations. It says, 'is there a realistic possibility of restoration?' with a tick-box 'yes or no'. Then it lists the things the parents have to do. I think for some parents, they think that if they've done all that, then restoration is automatic. It does provide a list of the things that led the Department to bring the matter to court, then it lists the things the parents would have to do to address those issues. So that's a good starting point, but it's not 'the be all and end all'. (Registrar 2)

A strong thematic thread running through the interviews is a distinction between passive, reactive compliance in which a parent goes through the motions ('jumping through hoops'),⁵⁰ and a 'genuine', 'meaningful' engagement in which the parent is proactive – or is at least able to demonstrate and apply learning gains.⁵¹ Two participants suggested it is futile to set restoration tasks for parents who are not feasibly in a position to achieve restoration;⁵² but overall there was optimism about 'capacity for change'⁵³ with appropriate support. Reflecting on the distinction between a realistic and a non-realistic possibility of restoration, a caseworker stated with conviction that 'what we are looking for [is] intrinsic motivation'.⁵⁴

Participants recognised the difficulties flowing from poor working relationships and entrenched mistrust between parents and the Department,⁵⁵ and the distress, disadvantage and despair of parents in crisis:⁵⁶

These are parents who have no money. These are parents with significant mental health. Their circumstances are, you know, we have removed their children. It's like cutting off their hands. So how do we expect them to move and then function and attend court? (Caseworker 8)

Several caseworkers and lawyers emphasised the need for a respectful and 'dignity driven'⁵⁷ approach: in which caseworkers 'build people up rather than tell them what to do',⁵⁸ 'encourage...their achievements and small steps',⁵⁹ and 'meet them where they are' (both literally and metaphorically).⁶⁰ As mused by a judicial officer, 'I don't know that human

⁵⁰ Judicial Officer 23; Registrar 1; Lawyer 4.

⁵¹ Judicial Officers 4, 16; Registrar 2; Caseworkers 2, 7, 11; Lawyer 5.

⁵² Judicial Officer 23; Lawyer 1. This view has been posited in existing literature: Karen Broadley, 'Making the Decision to Remove a Child from Parental Care: Twelve Decision-Making Criteria' (2015) 41(2) *Children Australia* 90, 93–4.

⁵³ Caseworker 7.

⁵⁴ Caseworker 11.

⁵⁵ Judicial Officers 9, 13, 16, 22; Registrars 1, 2; Caseworker 13; Lawyers 5, 6, 8.

⁵⁶ Registrar 2; Caseworkers 1, 8; Lawyers 6, 8, 9.

⁵⁷ Lawyers 3, 8.

⁵⁸ Caseworker 2.

⁵⁹ Caseworker 11.

⁶⁰ Caseworkers 1, 8.

beings are naturally compliant. Humans make their own risk assessments, and make their own decisions based on their intuition and experience'.⁶¹ While one caseworker referred to parents needing to 'snap to', telling them 'we need to see you do "XYZ" immediately, you can't wait another week',⁶² others accept that the necessary changes usually take time, and that progress towards restoration 'doesn't mean that you have to have everything hunky dory and all your ducks in a row'.⁶³ An experienced manager spoke about educating new caseworkers that it is not '[the parent's] job to engage with you', but vice versa.⁶⁴ This theme was echoed by a lawyer:

I think our literacy around lack of engagement is slowly improving in terms of having an appreciation of what's behind a lack of engagement, and that an aggressive interface with the Department is not in and of itself a child protection issue...there's this issue of the ability to work with the Department and construing it simply as something that's about a parent needing to suck it up and find a way to be compliant and to be cooperative...it's not just on them, it's very much on us.
(Lawyer 8)

Significantly, and despite all the challenges linked to the ideal of 'engagement', analysis of the judgments revealed that the parents in over half⁶⁵ of the 'no realistic possibility' outcomes *did* engage, and often in a substantial, concerted way. These parents are acknowledged to have made progress in responding to the issues surrounding the removal of their children, by engaging with casework, parenting courses, counselling or other therapeutic programs. The proportion of parents noted to have engaged in *parenting* courses specifically, is very similar across the judgments in which there was, and was not, a realistic possibility of restoration than.⁶⁶ ⁶⁷ Several are further credited for their positive approach to personal interactions with

⁶¹ Judicial Officer 21.

⁶² Caseworker 12.

⁶³ Caseworker 5.

⁶⁴ Caseworker 1.

⁶⁵ Approximately 55%.

⁶⁶ 34% and 30% respectively.

⁶⁷ A lack of comprehensive Australian data on the efficacy of parenting programs in child protection is mentioned in Higgins et al (n 32) 18. Scholars have also queried the utility of parenting courses when structural, socio-economic circumstances of family disadvantage remain unchanged: Ilana Dodi Luther, "'On the Poverty of Responsibility': a Study of the History of Child Protection Law and Jurisprudence in Nova Scotia' (PhD Thesis, Dalhousie University, 2015) 399–400; Natalie Parmenter, 'Parent Responsibility Contracts: The Evidence' (2014) 39 *Developing Practice* 32, 38.

the Department or other service providers, or for their conduct in court. These interactions are portrayed as compliant,⁶⁸ cooperative,⁶⁹ courteous, polite and respectful.⁷⁰

Hence parents in care proceedings are not situated in two neatly delineated and polarised camps in respect of their engagement and compliance. In some ‘no realistic possibility’ cases the parents’ engagement is regarded as modest, fleeting, or in its early stages, but conversely it is not uncommon for the efforts to be perceived as committed and consistent,⁷¹ and for the judicial officer or witnesses to praise the parents’ motivation and achievements in striving to improve parenting capacity or make wider life changes.⁷²

At first glance, therefore, there can appear little to distinguish between the parents whose cases for restoration are successful and, among those who are refused restoration, the large subset who make a concerted effort to cooperate with restoration requirements. The likely bewilderment of this latter group of parents can be imagined – having done what they were told, or at least attempted to commence a process of change, the system nonetheless declares, in effect, that this is not good enough. In what ways, then, does their demonstrated commitment fall short?

The Court’s reservations about parental engagement in ‘no realistic possibility’ outcomes are sometimes centred on the notion that the efforts are *superficial*, in that the parent is unable to articulate or implement any clear learning from courses and counselling.⁷³ A striking example

⁶⁸ *DFaCS (NSW) and Abbey* [2013] NSWChC 3, [69] (*‘Abbey’*); *ASK* (n 27) [100]; *Alfred* (n 8) [62]; *Re Lincoln and Raymond* (Children’s Court of New South Wales, 9 April 2008) [57] (*‘Lincoln & Raymond’*).

⁶⁹ *Re: Alison Claire, Lauren Donovan and Victoria Claire* (Children’s Court of New South Wales, 10 July 2009) [26] (*‘Alison Claire’*); *Re Anthony* [2008] NSWLC 21, [25], [26], [37] (*‘Anthony’*); *Jonah* (pseudonym, unpublished judgment, Children’s Court, May 2023) [17]–[18] (*‘Jonah’*); *LZ & QJ* [2017] NSWDC 414, [207] (*‘LZ & QJ’*); *Re M* [2016] NSWSC 170, [82] (*‘Re M’*).

⁷⁰ *Abbey* (n 68) [69]; *Alfred* (n 8) [57]; *Anthony* (n 69) [25]; *ASK* (n 27) [100]; *Lewis* (n 27) [62]; *Lim children* (n 6) 5; *Re M* (n 69) [82].

⁷¹ *Alfred* (n 8) [52], [62]; *Alison Claire* (n 69) [45] (*‘Alison Claire’*); *DFaCS re Arnott Bloom* [2015] NSWChC 6, [56], [80] (*‘Arnott Bloom’*); *Harris children* [2012] NSWChC 9, [20]–[24] (*‘Harris children’*); *Jonah* (n 69) 18; *LZ & QJ* (n 69) [266]; *Re M* (n 69) [134]–[137]; *DFaCS and Nathan* [2018] NSWChC 1, [17] (*‘Nathan’*); *Saunders and Morgan* [2007] NSWDC 5589, [54] (*‘Saunders & Morgan’*); *Grierson children* (pseudonym, unpublished judgment, Children’s Court, August 2010) [155]–[156], [200], [264] (*‘Grierson children’*).

⁷² *Alfred* (n 8) [62]; *Alison Claire* (n 69) [31]; *Re Elizabeth* [2011] NSWDC 245, [79], [140] (*‘Elizabeth’*); *Ezekial* (pseudonym, unpublished judgment, Children’s Court, May 2021) 12, 14 (*‘Ezekial’*); *Harris children* (n 71) [13]; *Jonah* (n 69) 17–18; *LZ & QJ* (n 71) [266]; *Nerayah and Kalista* (pseudonym, unpublished judgment, Children’s Court, March 2009) [40] (*‘Nerayah & Kalista’*); *In the Matter of Spencer* (Children’s Court of New South Wales, 26 July 2005) [22], [46] (*‘Spencer’*).

⁷³ *DFaCS (NSW) re Amanda & Tony* [2012] NSWChC 13, [82] (*‘Amanda & Tony’*); *ASK* (n 27) [168]; *Bradford children* (pseudonym, unpublished judgment, Children’s Court, July 2011) [27] (*‘Bradford children’*); *Ezekial* (n 72) 12; *In the Matter of Leonard* [2009] NSWLC 5, [31] (*‘Leonard’*); *Department of Communities and Justice (DCJ) and the McAlister Children* [2020] NSWChC 4, [52] (*‘McAlister children’*); *Department of Communities and Justice (DCJ) and May, June and*

of a large volume of activity deemed unconstructive appears in the case of *May, June and Roy*, in which the magistrate observed:

The mother has completed nine parenting courses, two domestic violence courses, an Aboriginal awareness course⁷⁴ and a First-Aid course. There is no evidence to indicate what the mother had meaningfully learnt from such courses. There is no acknowledgment by the mother as to what led the children coming into care. (Magistrate in *May, June & Roy*)⁷⁵

In contrast, the progress of some parents is perceived as either wholly or partly genuine—including the Court’s recognition that a parent has been able to show specific areas of learning from educational or therapeutic interventions.⁷⁶ However, even where real achievements are noted, the Court tends to lack confidence that the gains can be *maintained*,⁷⁷ especially in the practical context of the demands and stressors that would accompany the child’s restoration.⁷⁸

Linked to this notion of unsustainable gains is a perception that the particular programs attended by the parent, or the nature of counselling received, were not sufficiently directed at addressing the child protection issues.⁷⁹ This reservation arises regardless of whether the parent’s engagement is perceived as illusory or sincere. Courses in generic parenting skills,⁸⁰ or counselling relating broadly to life stressors,⁸¹ or to distress brought about by the child’s removal,⁸² are unlikely—in the eyes of the Court—to address the underlying causes of the circumstances that manifested in neglect or abuse of the child.

Roy [2023] NSWChC 15, [140]–[141] (*‘May, June & Roy’*); *Mihar children* (pseudonym, unpublished judgment, Children’s Court, August 2012) [63] (*‘Mihar children’*); *Keziah* (pseudonym, unpublished judgment, Children’s Court, October 2013) [98] (*‘Keziah’*); *Prince & Johns children* (n 27) [46], [49].

⁷⁴ It was identified in the judgment that the children ‘are Aboriginal through their father. The mother is not Aboriginal’: at [113].

⁷⁵ *May, June & Roy* (n 73) [140]–[142]. (The reasons for the children’s removal were a series of ‘non-accidental’ injuries to a baby, including multiple fractures, which were unexplained).

⁷⁶ *Abbey* (n 68) [69]; *Lim children* (n 6) 11; *Lincoln and Raymond* (n 68) 11; *LZ & QJ* (n 71) [108], [266]–[267]; *Nathan* (n 71) [17]; *Nerayah & Kalista* (n 72) [40]; *RC & PK* (n 26) [149].

⁷⁷ *Alison Claire* (n 69) [45]; *Charlie* (n 31) 9–10; *Ezekial* (n 72) 14; *Harris children* (n 71) [70]; *LZ & QJ* (n 71) [267]–[268]; *Sharpe children* (pseudonym, unpublished judgment, Children’s Court, November 2008), [40]–[41] (*‘Sharpe children’*).

⁷⁸ *Alison Claire* (n 69) [43]; *Arnott Bloom* (n 71) [56], [85]; *Charlie* (n 31) 5; *The Secretary, Department of Family and Community Services and the Harper Children* [2016] NSWChC 3 [94]–[95] (*‘Harper children’*); *LZ & QJ* (n 71) [267]–[268], [272]; *Nerayah & Kalista* (n 72) [25]–[29]; *Spencer* (n 72) [22]; *Grierson children* (n 71) [247].

⁷⁹ See, eg, *Alfred* (n 8) [101]–[105]; *Amanda & Tony* (n 73) [83]; *DFaCS and Boyd* [2013] NSWChC 9, [15]–[24] (*‘Boyd’*); *Ezekial* (n 72) 14; *Grierson children* (n 71) [151]–[152]; *Kee children* (pseudonym, unpublished judgment, Children’s Court, June 2011) [65]–[66] (*‘Kee children’*); *Leonard* (n 73) [25], [31]; *Lim children* (n 6) 11; *LZ & QJ* (n 71) [267]; *Nerayah & Kalista* (n 72) [25]–[26]; *Prince & Johns children* (n 27) [44]–[49]; *RC & PK* (n 26) [154]–[158], [167]; *Spencer* (n 72) [30].

⁸⁰ *Leonard* (n 73) [25]; *Nerayah & Kalista* (n 72) [25]–[26].

⁸¹ *Prince & Johns children* (n 27) [44]–[47].

⁸² *Kee children* (n 79) [66]; *Spencer* (n 72) [30].

The notion of ‘underlying’ issues, in turn, is frequently associated with the parent having unresolved mental health issues, and being deficient in ‘insight’ into the child protection concerns and the child’s needs. These themes are explored in the following sections of the chapter, shedding further light on the reasons that the efforts of seemingly motivated and well-intentioned parents are so often regarded as insufficient for a finding that there is a realistic possibility of restoration.

(ii) Insight

... there are issues of lack of insight: what I have already referred to as the mother's reluctance to take full responsibility for the incidents on the night in question...the closest she seemed to get to was an acknowledgement that she made a mistake about taking Nathan out and keeping him out so late. She never once conceded, however, without pushing, that the deterioration in Nathan’s condition should have been addressed much earlier in the night, and I still do not know how someone can spend 81 minutes on the phone to her girlfriend, with a baby nearby turning blue. (Judge in *Nathan*)⁸³

The mother in *Nathan* had previously had two other children placed in care. Against this backdrop she was determined to keep her new baby. There was no question that she had made concerted efforts⁸⁴ towards this goal. During pregnancy and in the months following Nathan’s birth she was intensively involved with a wide range of services, encompassing pre-natal care, mental health treatment, domestic violence education, drug and alcohol abstinence, parenting courses, and several support groups.⁸⁵ However, in the fall-out from a critical incident which resulted in the baby’s removal at the age of three months, the mother was ultimately determined to lack insight—a finding which is almost invariably fatal to a case for restoration.

The quoted extract from *Nathan* connects the notions of ‘insight’, ‘acknowledgement’ and taking of ‘responsibility’—an association which consistently appears throughout the body of judgments. Hence these concepts have been combined in this analysis under the overarching theme of insight. In judgments determining that there is *no* realistic possibility of restoration, (lack of) insight is overwhelmingly the leading concern—appearing as a reason for the decision in 80% of these cases.

⁸³ *Nathan* (n 71) [63].

⁸⁴ *Ibid* [11], [17].

⁸⁵ *Ibid* [17]–[38].

Curiously, the *presence* of insight does not consume the Court's attention to the same degree as its absence, being relied upon in a little over 50% of the decisions in favour of restoration.⁸⁶ This striking disparity between the two groups of judgments suggests that the concept of insight functions, to some extent, as a broad descriptor for a multitude of perceived deficiencies attached to parents who have no realistic possibility of restoration. A children's registrar took this perspective, commenting that insight is often a 'euphemism', 'used as a catch all...for those matters where it's just too hard to pinpoint exactly what it is'.⁸⁷ To coin a phrase or two, it might be said that insight is conspicuous in its absence, and compelling in the breach rather than the observance.

Any attempt to define 'insight' as a parental attribute is partly contingent on whether the context is one of responding to child maltreatment, or alternatively a more generic perspective on the nature of 'parenting'. The former, narrower context has a particular concern with the parent's acceptance of accountability for neglect or abuse of the child,⁸⁸ and consequent 'capacity to change';⁸⁹ whereas in the wider realm, insight has been defined as the 'ability to see things from the child's point of view and to empathetically try to [understand] the motives underlying the child's behaviour'.⁹⁰ Both aspects converge in child protection: an empathetic awareness of the child's experiences is, arguably, an essential pre-requisite to taking responsibility for harm caused to the child.⁹¹ In an Australian study of child protection professionals' views on 'good parenting', insight was conceptualised as having the *dual* components of acknowledging one's own 'limitations as parent' and 'knowing the individual child'.⁹²

The judgments deploy the term 'insight' widely and – it is fair to say – ubiquitously. However, there is a reasonably cohesive logic in its use overall. 'Lack of insight' is equated with the failure of the parent to recognise and take responsibility for the circumstances of the child's

⁸⁶ Approximately 53%.

⁸⁷ Registrar 2.

⁸⁸ See Broadley (n 52) 93; Cashmore, Judith, "'Best Interests" in Care Proceedings: Law, Policy and Practice' in Elaine E. Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Wellbeing* (Cambridge University Press, 2016) 326, 332; Sheila Gray, 'Parenting Capacity: An Analysis of Parenting Capacity Assessment in the Children's Court of New South Wales' (PhD Thesis, University of Sydney, 2014) 177–181.

⁸⁹ Gray (n 88) 177–181.

⁹⁰ David Oppenheim and Nina Koren-Karie, 'Parents' Insightfulness: The Importance of Keeping the Inner World of the Child in Mind for Parenting Plan Evaluations', in Leslie Drozd, Michael Saini and Nancy Olsen (eds), *Parenting Plan Evaluations: Applied Research for the Family Court* (Oxford University Press, 2nd ed, 2016) 47, 48.

⁹¹ See section (iv) below.

⁹² Philippa M Eve, Mitchell K Byrne and Cinzia R Gagliardi, 'What is Good Parenting? The Perspectives of Different Professionals' (2014) 52(1) *Family Court Review* 114, 118.

removal into care, and accordingly for the changes needed to demonstrate capacity to have the child restored. The evidentiary bases upon which the Court concludes that insight is lacking include clinical assessments; the omissions, prevarications or denials within the parent's own evidence; and findings drawn on a circumstantial basis from inter-connected aspects of the total evidence.⁹³ A parent's minimising of personal responsibility is couched in various ways: often as a tendency to blame others (the Department, other agencies, partners and family members) for the parent's own problems or situation,⁹⁴ but also as downplaying the severity of the child protection concerns,⁹⁵ neglecting to take proactive steps to make changes,⁹⁶ claiming to have been victimised and conspired against by caseworkers or other people,⁹⁷ or refuting that there were any legitimate grounds for intervention.⁹⁸

While insight is thus broadly conceptualised to represent the parent's overall attitude, it also attaches to specific issues. Parents may be perceived as lacking insight into their own mental health⁹⁹ or that of their partner¹⁰⁰ – manifesting as either denial of the presence of a mental health condition and its associated behaviours,¹⁰¹ or insufficient appreciation of the nature and severity of the condition.¹⁰² Other contexts include lack of insight into domestic violence¹⁰³

⁹³ See Chapter 8, section (i) 'Candour and Credibility'.

⁹⁴ See, eg, *Abbey* (n 68) [55]; *Adriana* (pseudonym, unpublished judgment, Children's Court, July 2022) 7, 11 ('*Adriana*'); *ASK* (n 27) [231], [243]–[234]; *Amanda and Tony* (n 73) [71]; *Barnett children* (pseudonym, unpublished judgment, Children's Court, March 2005) [46], [50] ('*Barnett children*'); *Department of Family and Community Services (NSW) and the Bell-Collins Children* [2014] NSWChC 5, [120] ('*Bell-Collins*'); *Department of Communities and Justice (DCJ) and Bloom* [2021] NSWChC 2, [303] ('*Bloom*'); *Boyd* (n 79) [23]; *Alison Claire* (n 69) [42]; *Dalton Tomkins children* [2023] NSWChC 10, [234], [249], [252], [256] ('*Dalton Tomkins children*'); *GR* (n 26) [805]; *Jay* (n 26) [15]; *Re M* (n 69) [140]; *McAlister children* (n 73) [170]; *May, June & Roy* (n 73) [132], [137]; *MXS v Department of Family and Human Services (NSW)* [2012] NSWDC 63 [77] ('*MXS*'); *Oscar* (n 20) [109], [114]; *Saunders and Morgan* (n 71) [54]; *Re Tanya* [2016] NSWSC 794, [39(14), (15)] ('*Tanya*'); *Waller children* (n 26) [161]–[164].

⁹⁵ *Abbey* (n 68) [112]–[113]; *Amanda and Tony* (n 73) [69]; *Bloom* (n 94) [309], [311]; *Boyd* (n 79) [23]; *Re M* (n 69) [140]; *Nathan* (n 71) [41], [43], [58], [63], [65]; *Rogers* (n 26) [77], [84]; *Saunders and Morgan* (n 71) [54], [57].

⁹⁶ *ASK* (n 27) [167], [172]; *Mihar children* (n 73) [61]; *MXS* (n 94) [75]; *Rogers* (n 26) [72], [129].

⁹⁷ *Arnott-Bloom* (n 71) [87]; *ASK* (n 27) [243]; *McAlister* (n 73) [170]; *RC & PK* (n 26) [167]–[168]; *Tanya* (n 94) [39].

⁹⁸ See, eg, *A v Secretary, Department of Communities and Justice* (No. 4) [2019] NSWSC 1872, [122] ('*A*'); *Alison Claire* (n 69) [42]; *DFaCS (NSW) v Carl* [2013] NSWChC 2, [38] ('*Carl*'); *Charlie* (n 31) 26–7, 30; *Lewis* (n 27) [2], [236], [242]; *Lucy* (pseudonym, unpublished judgment, Children's Court, October 2012) [74], [77] ('*Lucy*'); *MXS* (n 94) [63]; *Oscar* (n 20) [112]; *Rogers* (n 26) [152]; *SS v Department of Human Services (NSW)* [2010] NSWDC 279, [112], [119] ('*SS*'); *Waller children* (n 26) [22], [157]; *Y v The Secretary, Department of Communities and Justice* (No. 6) [2021] NSWDC 392, [902] ('*Y*').

⁹⁹ *Bloom* (n 94) [71]; *Boyd* (n 79) [23]; *Lewis* (n 27) [180]; *Murphy* (n 27) [103]–[104]; *Tanya* (n 94) [70(7)].

¹⁰⁰ *Boyd* (n 79) [23]; *Kim* (n 26) [10]–[15].

¹⁰¹ *Charlie* (n 31) 27; *Lewis* (n 27) [180]; *Murphy* (n 27) [103]–[104].

¹⁰² *Boyd* (n 79) [23]; *JH* (n 26) [247]; *Kim* (n 26) [10]–[15]; *Nicholls children* (pseudonym, unpublished judgment, Children's Court, March 2023) [32] ('*Nicholls children*'); *Prince & Johns children* (n 73) [28]; *Tanya* (n 94) [70] (7).

¹⁰³ See, eg, *Amanda and Tony* (n 73) [66]–[71]; *ASK* (n 27) [52]; *Bloom* (n 94) [311]; *Braidan* (pseudonym, unpublished judgment, Children's Court, August 2022) 14–15 ('*Braidan*'); *Dorothy* (pseudonym, unpublished judgments, Children's Court, September 2019) [98] ('*Dorothy*'); *Harris children* (n 71) [36], [39]; *JH* (n 26) [176]; *Lewis* (n 27) [166]; *Rogers* (n 26) [121], [153], [167]; *VC* (n 26) [279], [355], [382].

and substance abuse.¹⁰⁴

Although insight in the judgments is essentially an adult-focused notion, it is sometimes expressed more directly in connection with the child. Examples are lack of insight into the *impact on* the child of exposure to age-inappropriate conversations;¹⁰⁵ verbal denigration of one adult by another;¹⁰⁶ the parent's aggressive,¹⁰⁷ agitated or erratic,¹⁰⁸ violent,¹⁰⁹ manipulative¹¹⁰ or self-interested¹¹¹ behaviours; and the very experience of neglect or abuse.¹¹² There may also be lack of appreciation of the developmental or day-to-day needs of children,¹¹³ including children with special needs.¹¹⁴

In contrast to the cooperative engagement attributed to many parents, insight does not often appear as a 'non-determinative strength'. There are scattered exceptions, in which a 'no realistic possibility' judgment concedes that a parent possesses some degree of insight or understanding. Several parents are credited with gaining insight into the impact of drugs;¹¹⁵ however, as seen in chapter 8, achievements in tackling substance abuse tend not to be, in isolation, pivotal to the restoration decision. In other contexts the insight is regarded as partial only, or compromised in some way. Parents in two judgments had shown some insight into their own mental health in the context of 'factitious disorder imposed on another', but in both instances were found not to have fully accepted responsibility for harm to the child.¹¹⁶ In another judgment, physical abuse of a child in the name of 'discipline' was acknowledged by

¹⁰⁴ See, eg, *Adriana* (n 94) 11; *Bloom* (n 94) [311]; *Boyd* (n 79) [23]; *Harris children* (n 71) [35]–[39]; *Re Malakhai* [2022] NSWChC 6, [146]–[147], [150], [188(8)] ('*Malakhai*'); *Nicholls children* (n 102) [40]; *Rogers* (n 26) [153]; *Spencer* (n 72) [30].

¹⁰⁵ *Dalton Tomkins children* (n 94) [125]; *Hatfield children* (pseudonym, unpublished judgment, Children's Court, April 2018) 82–5, 89–90 ('*Hatfield children*').

¹⁰⁶ *Hatfield children* (n 105) 85, 90; *Oscar* (n 20) [104]–[105].

¹⁰⁷ *Dupont v The Secretary, Department of Family and Community Services* [2014] NSWDC 240, [113] ('*Dupont*').

¹⁰⁸ *ASK* (n 27) [224]; *Dorothy* (n 103) [63]–[71].

¹⁰⁹ *Bloom* (n 94) [308–9]; *Harris children* (n 71) [36], [39], [70].

¹¹⁰ *Oscar* (n 20) [104]–[105], [108].

¹¹¹ *Alison Claire* (n 69) [40]; *Hatfield children* (n 105) 91; *RC & PK* (n 26) [161]–[170].

¹¹² See, eg, *Ahmad* (pseudonym, unpublished judgment, Children's Court, April 2023) 6 ('*Ahmad*'); *Barnett children* (n 94) [45]–[50]; *Braidan* (n 103) 21; *Charlie* (n 31) 34; *Dalton Tomkins children* (n 94) [125]; *Lucy* (n 98) [35]; *Prince & Johns children* (n 73) [65]; *Waller children* (n 26) [157].

¹¹³ *Alison Claire* (n 69) [29]; *Jay* (n 26) [15]; *Lucy* (n 98) [35]; *Malakhai* (n 104) [147]; *Murphy* (n 27) [91], [107]; *MXS* (n 94) [75]; *Rogers* (n 26) [117]; *Tanya* (n 94) [50].

¹¹⁴ *Braidan* (n 103) 14, 15, 20; *In the Matter of Chanlina* (Children's Court of New South Wales, 1 May 2009), [23] ('*Chanlina*'); *DFaCS (NSW) and the Colt Children* [2013] NSWChC 5, [329] ('*Colt children*'); *GR* (n 26) [805]; *Harris children* (n 71) [70]; *Lucy* (n 98) [41]–[42]; *Rogers* (n 26) [71]; *SS* (n 98) [119]; *Waller children* (n 26) [168].

¹¹⁵ *Harris children* (n 71) [29]; *Lim children* (n 6) 10; *Nerayah & Kalista* (n 72) [40]; *Spencer* (n 72) [46].

¹¹⁶ *Grierson children* (n 71) [138], [139]–[147]; *Harper children* (n 78) [177]–[180].

the parents as wrongful,¹¹⁷ but this insight was deemed ‘theoretical’¹¹⁸ and insufficient to mitigate risk of reoccurrence of harsh parenting practices.¹¹⁹ A mother’s ‘in principle’¹²⁰ insight into her children’s needs was undermined by her ongoing denial of the validity of the grounds for removal,¹²¹ while the partial insight of fathers in two cases remained compromised by inadequate understanding of the impact of domestic violence.¹²²

The notion of insight was discussed in interviews with considerable scepticism, at odds with its status as ‘a given’ factor of significance within the judgments. The term is perceived as vague and subjective,¹²³ with two Departmental participants ‘hat[ing]’ it,¹²⁴ and others describing it as ‘dodgy’¹²⁵ and ‘non-measurable.’¹²⁶ Insight is seen as a term that is meaningless¹²⁷ to parents, or at least difficult to impart to them.¹²⁸ Judicial officers¹²⁹ were more inclined than caseworkers¹³⁰ to regard the concept as bearing some legitimacy and utility, but were wary of accepting its use by caseworkers at face value.¹³¹ An emotional reaction to the child’s removal, for instance, may be wrongly construed by caseworkers as lack of insight.¹³² A magistrate stated ‘I’m always on the lookout for whether the Department is just not liking someone versus what is a real risk to the future psychological wellbeing of the child’.¹³³ Others referred to ‘drilling down’¹³⁴ into assertions of a parent’s lack of insight – or, conversely, claims that a parent has *gained* insight in ‘a lightbulb moment’¹³⁵ – to ascertain whether these can be ‘justified’ on the evidence.¹³⁶

¹¹⁷ *LZ & QJ* (n 71) [108], [256], [267].

¹¹⁸ *Ibid* [108], [267].

¹¹⁹ *Ibid* [256], [267]–[268].

¹²⁰ *Re M* (n 69) [137].

¹²¹ *Ibid* [137]–[143], [171].

¹²² *Alfred* (n 8) [99], [104]–[105]; *Harris children* (n 71) [31], [36], [39], [70].

¹²³ Judicial Officers 4, 23; Registrar 1; Caseworkers 3, 4, 8, 9; Lawyer 9.

¹²⁴ Caseworker 4; Lawyer 4.

¹²⁵ Lawyer 9.

¹²⁶ Caseworker 9; Caseworker 12.

¹²⁷ Caseworker 12; Lawyer 2.

¹²⁸ Registrars 1, 2; Caseworkers 6, 9, 11.

¹²⁹ Judicial Officers 3, 4, 5, 6, 8, 13, 20, 21, 22.

¹³⁰ Caseworkers 7, 9, 11, 12.

¹³¹ Judicial Officers 4, 6, 17; Registrar 2.

¹³² Judicial Officers 17, 23.

¹³³ Judicial Officer 6.

¹³⁴ Judicial Officers 4, 22.

¹³⁵ Judicial Officer 4.

¹³⁶ Judicial Officer 22.

A registrar described insight as being ‘a Department word’.¹³⁷ In contrast, caseworkers did not perceive themselves as perpetuating the concept. One caseworker attributed its use to the court process¹³⁸ and to clinicians,¹³⁹ while another regarded *other* ‘casework teams’ within the Department—but not her own—as being overly reliant on the term.¹⁴⁰ There was a strong inclination across both participant groups to construe and re-phrase ‘insight’ in practical terms.¹⁴¹ Departmental participants advised that their practice framework has deliberately moved away from referring to insight,¹⁴² ‘re-framing’¹⁴³ it along the lines of *understanding* the child protection concerns, and *willingness* to do things differently.¹⁴⁴

Several participants argued that the absence of insight might not matter at all, depending on the circumstances of the case and whether the desired acknowledgement or understanding is directly relevant to a risk to the child.¹⁴⁵ There was a connected view that insight is inherently personal to the individual and their life experiences,¹⁴⁶ and therefore cannot be readily imparted or ‘taught’.¹⁴⁷ Even without demonstrating the version of insight conceived by an onlooker, a person may be ‘good enough’ in their own parenting skills,¹⁴⁸ especially if compliant with casework requirements¹⁴⁹ and putting professional guidance into practice.¹⁵⁰ In the process the parent *might* adapt to having insight that aligns with the views of child protection professionals, but this is not essential.¹⁵¹ Although this perspective seems inconsistent with the dominance of ‘lack of insight’ in the Court’s findings of no realistic possibility of restoration, it is perhaps more synchronous with the *lesser* reliance on insight in judgments in favour of restoration. In decisions that there *is* a realistic possibility of restoration, there is far more emphasis on the parent’s constructive engagement with a process of change than there is on an abstract presence of insight.¹⁵²

¹³⁷ Registrar 1.

¹³⁸ Caseworker 6.

¹³⁹ Ibid.

¹⁴⁰ Caseworker 9.

¹⁴¹ Judicial Officers 5, 7, 9, 15, 16, 17, 18, 20, 22; Caseworkers 4, 5, 6, 11, 12; Lawyer 2.

¹⁴² Caseworker 12; Lawyer 2.

¹⁴³ Caseworker 9.

¹⁴⁴ Ibid.

¹⁴⁵ Judicial Officers 7, 12, 23; Caseworker 8.

¹⁴⁶ Judicial Officer 21; Registrar 2.

¹⁴⁷ Registrar 2.

¹⁴⁸ Judicial Officer 23; Caseworker 8.

¹⁴⁹ Judicial Officers 7, 23.

¹⁵⁰ Judicial Officer 7.

¹⁵¹ Caseworkers 8, 12; Judicial Officer 7.

¹⁵² 85% of decisions finding in favour of restoration refer to engagement, cooperation and compliance (see section (i) above), and 53% refer to insight.

While the ‘realistic possibility’ and ‘no realistic possibility’ outcomes diverge in relative emphasis on insight, both groups of judgments converge in the importance placed on parents’ mental health and on capacity to meet the child’s emotional needs. These remaining ‘leading’ factors are explored in the following sections.

(iii) Mental Health

There is little more that needs to be said about restoration to the mother...[she] has acknowledged her past inadequacies as a parent. She has undergone extensive counselling, which is continuing, and has made considerable progress towards acquiring insight and appropriate empathy for the children, and to deal with her anxiety and depression. (Judge in *Oscar*)¹⁵³

You can treat the symptoms – the drug use, the alcohol use – but it’s that underlying mental health issue that I don’t think we deal with well in matters once they get to court. (Lawyer 7)

Existing studies affirm that mental health concerns are a common basis for families’ involvement with child protection services generally.¹⁵⁴ There is, however, less research on the weight attached to mental health in court decisions.¹⁵⁵ This study reveals that parental

¹⁵³ *Oscar* (n 20) [126].

¹⁵⁴ Fiona Arney, Carole Zufferey and Ruth Lange, ‘“Mental Health is One Issue. The Child is Another Issue. Issues Bounce Back and Clash Against Each Other”: Facilitating Collaboration Between Child Protection and Mental Health Services’ (2010) 5(1) *Communities, Children and Families Australia* 21, 22; Dominiek Coates, ‘Working with Families with Parental Mental Health and/or Drug and Alcohol Issues where there are Child Protection Concerns: Inter-Agency Collaboration’ (2017) 22 *Child & Family Social Work* 1, 1–2; Davis, *Family Is Culture Report* (n 48) 40; Briony Horsfall, ‘Children’s Participation Rights During Child Protection Hearings: Recognition, Legal Representation and Redistribution of Care in Victoria’s Children’s Court’ (PhD Thesis, Swinburne University of Technology, 2016) 109–10; Emily Keddell, ‘Reasoning Processes in Child Protection Decision Making: Negotiating Moral Minefields and Risky Relationships’ (2011) 41 *British Journal of Social Work* 1251, 1260–61; Ruth Lange and Anne Sved Williams, ‘Linking Adults’ Problems with Children’s Legal Pain: Legal, Ethical and Clinical Issues’ (2011) 18(2) *Psychiatry, Psychology and Law* 232, 232–3; Joseph N Roscoe, Bridgette Lery and Doug Thompson, ‘Child Safety Decisions and Parental Mental Health Problems: A New Analysis of Mediating Factors’ (2021) 120 *Child Abuse & Neglect* 105202, 1–14, 2; Rosemary Sheehan and Greg Levine, ‘Parents with Mental Illness: Decision-making in Australian Children’s Court Cases Involving Parents with Mental Health Problems’ (2005) 27(1) *Journal of Social Welfare and Family Law* 17, 18–19; Ain Suomi, Annales Bolton and Dave Pasalich, ‘The Prevalence of Post-Traumatic Stress Disorder in Birth Parents in Child Protection Services: Systematic Review and Meta-analysis’ (2023) 24(2) *Trauma, Violence and Abuse* 1032, 1032, 1040.

¹⁵⁵ Relevant studies specific to court outcomes include Jenny Krutzinna and Marit Skivenes, ‘Judging Parental Competence: a Cross Country Analysis of Judicial Decision Makers’ Written Assessment of Mothers’ Parenting Capacity in Newborn Removal Cases’ (2021) 26 *Child and Family Social Work* 50, a cross-jurisdiction study of care orders made for newborn babies in three European countries, which found inter alia that mental illness was ‘the third most frequent risk factor overall’, referred to in 58% of the sampled judgments: at 56; Vered Ben-David, ‘Study of Termination of Parental Rights: An Analysis of Israeli Court Decisions in Favor or Against Termination of Parental Rights’ (2015) 18 *Journal of Family Social Work* 225, which found the mother’s mental health to be ‘the second most influential variable’ related to parental characteristics: at 236; De Bortoli et al (n 13) 29, a study in the Children’s Court of Victoria, which found parental mental illness as a ‘static’ risk factor not to be significantly

mental health is highly influential in this regard. It is second only to ‘insight’ as a leading factor in determining whether there is a realistic possibility of restoration, appearing in 67% of judgments overall.¹⁵⁶

As noted in chapter 6, this is a striking increase from the 30% of judgments citing mental health as a reason for the Department’s removal of the child and commencement of care proceedings. Of course, this contrast does not necessarily mean the parents’ mental health struggles were not present from the outset; rather, that this issue, including its interaction with other factors, becomes a greater focus *during* the legal proceedings. The Court’s reasoning is synthesising issues that have emerged and been brought to light during the course of proceedings: it is often only once the matter is in Court that the parent obtains a diagnosis and/or engages in mental health treatment. However, this does not, of itself, account for the weight placed on mental health in determining whether restoration is viable—a question which this section seeks to explore. Given the widely acknowledged reality that most parents in the community experiencing a mental health condition are able to, and do, care for their children,¹⁵⁷ it is important to uncover *how* and *why* the status of a parent’s mental health is so frequently perceived by the Court as integral to prospects of restoration.¹⁵⁸

Around half of the judgments specify a particular condition when citing mental health as an issue. Depression,¹⁵⁹ anxiety,¹⁶⁰ post-traumatic stress disorder,¹⁶¹ and personality disorders¹⁶² prevail. Occasionally the Court distinguishes mental health ‘issues’ – in the sense of common

associated with court decisions for child removal: at 41, 43. (See further reference to this study in the conclusion to this chapter.)

¹⁵⁶ The combined figure represents 78% of judgments finding a realistic possibility of restoration, and 62% of ‘no realistic possibility’ judgments.

¹⁵⁷ Peter W Choate and Sandra Engstrom, ‘The “Good Enough” Parent: Implications for Child Protection’ (2014) 20(4) *Child Care in Practice* 368, 377; Robyn M Powell et al, ‘Responding to the Legal Needs of Parents With Psychiatric Disabilities: Insights From Parent Interviews’ (2020) 38(1) *Law & Inequality: A Journal of Theory and Practice* 69, 78; Suomi, Bolton and Pasalich (n 154) 1040–41; Judicial Officer 7; Lawyer 2.

¹⁵⁸ See Rosemary Sheehan, ‘Partnership in Mental Health and Child Welfare’ (2005) 39(3)–(4) *Social Work in Health Care* 309, 310–311.

¹⁵⁹ *Abbey* (n 68) [73]; *Ali children* (n 6) [57], [70]–[71]; *Alison Claire* (n 69) [32]; *Arnott-Bloom* (n 71) [56], [57]; *Braidan* (n 103) 18; *Colt children* (n 114) [348]; *DHK* (n 8) [139(6)], [157(e)], [213]; *Harper children* (n 78) [52], [125], [168]; *Jay* (n 26) [6], [10], [12]; *JMS* (n 16) [52]; *KH* (n 33) [27]; *Leonard* (n 73) [25]; *Lilly, Wade and Caleb* (n 5) [67]; *Mario* (n 8) [47]; *Murphy* (n 27) [30], [31]; *Nellie* (n 6); *Nicholls children* (n 102) [16]; *Oscar* (n 20) [126]; *Sharpe children* (n 77) [8]; *SK* (n 1) [112]; *Spencer* (n 72) [4]; *Tanya* (n 94) [13], [53].

¹⁶⁰ *Alison Claire* (n 69) [32]; *Braidan* (n 103) 18; *DHK* (n 94) [139(6)], [157(e)], [213]; *Harper children* (n 78) [139], [167]; *Jamzie* (n 8) [48]; *JMS* (n 16) [53]; *Leonard* (n 73) [19] [25]; *Lilly, Wade and Caleb* (n 5) [67]; *Mario* (n 8) [47]; *Murphy* (n 27) [31]; *Oscar* (n 20) [126].

¹⁶¹ *Braidan* (n 103) 18; *J & T* (n 34) [410]; *Jamzie* (n 8) [48]; *Jillian & Jacinta* (n 6) [18(ix)]; *JMS* (n 16) [53]; *KH* (n 33) [27]; *Sharpe children* (n 33) [8].

¹⁶² *Alice* (n 27) [87]; *Barnett children* (n 94) [49]; *Bloom* (n 94) [238]; *Borg* (n 6) [19(c)]; *Boyd* (n 79) [21], [23], [26]; *Braidan* (n 103) 18; *JH* (n 26) [88], [103], [246]; *JMS* (n 16) [52]–[53]; *Kim* (n 26) [5], [8], [9]; *Murphy* (n 27) [25].

conditions such as reactive depression that many people experience from time to time – from the status of having ‘a mental illness’, commenting that the parent does not suffer from the latter.¹⁶³ Similarly, in some instances (primarily in ‘realistic possibility’ outcomes), it can be inferred that a diagnosis is not applicable or relevant. The concern is not that the parent has an organic or psychiatric illness; rather the intention of counselling is to address situational issues surrounding the child’s removal, such as domestic violence,¹⁶⁴ an unexplained injury to a child,¹⁶⁵ the effects of the parent’s own childhood experience of abuse,¹⁶⁶ and/or broader family dynamics contributing to the child’s maltreatment.¹⁶⁷

In contrast, a lack of diagnosis in ‘no realistic possibility’ cases is typically regarded as problematic. In many cases the status of the parent’s mental health remains unknown or speculative, despite their participation in counselling. This may be because the parent is not forthcoming with evidence from their counsellor,¹⁶⁸ or the clinical approach of the psychologist is deemed by the Court to be flawed.¹⁶⁹ In other cases there is simply insufficient or inconclusive material presented,¹⁷⁰ often because the parent has resisted seeking a mental health assessment despite expectations to do so,¹⁷¹ and/or persists in denying that there are any mental health issues at all.¹⁷² In these circumstances, it is the very *uncertainty* regarding the parent’s mental health that is seen as posing an unacceptable risk to the child.¹⁷³ The phrase ‘mental health issues’¹⁷⁴ is commonly resorted to in these circumstances. Alternatively, there is recourse to the vague notion of emotional instability – using terms such as ‘volatility’,¹⁷⁵ ‘vulnerability’,¹⁷⁶ ‘fragility’¹⁷⁷ and ‘dysregulation’.¹⁷⁸

¹⁶³ *Lilly, Wade and Caleb* (n 5) [44], [45], [67]; *Nellie* (n 6).

¹⁶⁴ *Grant & Reid* (n 6) [40]–[43], [72]; *Ramsay children* (n 7) 22; *VC* (n 26) [313].

¹⁶⁵ *Depik & Senina* (n 14) [5], [16]–[17], [23].

¹⁶⁶ *Lilly, Wade and Caleb* (n 5) [39(2)], [62]; *O’Connor* (n 7) [12], [25(7)]

¹⁶⁷ *Depik & Senina* (n 14) [5], [16]–[17], [23]; *Fiona Farmer* (n 6) [57], [149]–[151]; *Vlachos children* (pseudonym, unpublished judgment, Children’s Court, June 2009) [73]–[74] (‘*Vlachos children*’).

¹⁶⁸ *Alfred* (n 8) [103]; *Y* (n 98) [896].

¹⁶⁹ *Bloom* (n 94) [242], [313]; *GR* (n 26) [338]–[341], [859]–[861]; *McAlister children* (n 73) [168]–[169].

¹⁷⁰ *Nathan* (n 71) [53]–[54]; *RC & PK* (n 26) [177]–[178]; *Tanya* (n 94) [53].

¹⁷¹ *Colt children* (n 114) [348]; *Dorothy* (n 103) [90]; *Jay* (n 26) [10]; *Lewis* (n 27) [171]–[172]; *Murphy* (n 27) [103]; *Oscar* (n 20) [89]; *VC* (n 26) [345].

¹⁷² *Dorothy* (n 103) [88]; *Lewis* (n 27) [171]–[172]; *Murphy* (n 27) [103]; *Oscar* (n 20) [114].

¹⁷³ See, eg, *Lewis* (n 27) [180]; *McAlister children* (n 73) [168]; *Nathan* (n 71) [60].

¹⁷⁴ *Bloom* (n 94) [71]; *Dorothy* (n 103) [90]; *Dupont* (n 107) [97]; *Lewis* (n 27) [169], [172], [180]; *McAlister* (n 73) [47]; *Nathan* (n 71) [53], [58], [60].

¹⁷⁵ *Alison Claire* (n 69) [23], [30], *Arnott-Bloom* (n 71) [81]; *JH* (n 26) [85(c)], [86], [199]; *Kim* (n 26) [131].

¹⁷⁶ *Leonard* (n 73) [24].

¹⁷⁷ *Arnott-Bloom* (n 71) [82], [85], [87].

¹⁷⁸ *Dalton Tomkins children* (n 94) [271], [335]; *Lim children* (n 6) 10, 19; *Malakhai* (n 104) [149]; *Nicholls children* (n 102) [33], [82].

Many of the judgments do not particularise the ways in which the parent's mental health condition affects the child, nor do they connect the desired outcomes of the parent's therapy with a specific benefit to the particular child. A link between mental health and parenting capacity tends to be more generically or hypothetically expressed. Based on these broad references, as well as the judgments that *do* provide case-specific illustrations of an impact on the child, several themes are indicated. Each of these aligns with existing research on the relevance of parental mental health to parenting capacity:

- The parent who is mentally unwell may struggle to attend to and cope with the child's day-to-day basic care, physical needs and safety.^{179 180}
- Parental mental illness is sometimes associated with children's exposure to domestic violence^{181 182} and other volatile, aggressive, chaotic or confrontational behaviours.^{183 184}
- Poor mental health may impair the parent's ability to recognise, empathise with and adaptably respond to children's emotional needs and sense of security and stability.^{185 186}
- Mental health concerns are frequently associated with lack of 'insight': encompassing insight into the child's needs,¹⁸⁷ the child maltreatment concerns,^{188 189} and the nature and impact of the mental health condition itself.^{190 191} The connection with insight was

¹⁷⁹ *Alison Claire* (n 69) [34], [44]; *Arnott-Bloom* (n 71) [80]; *DHK* (n 8) [487], [538]; *George* (pseudonym, unpublished judgment, Children's Court, November 2022) [61], [63] ('*George*'); *JH* (n 26) [85], [86]; *Kim* (n 26) [13], [45]–[47], [102]; *Jillian & Jacinta* (n 6) [11(iii)–(iv)]; *Lewis* (n 27) [5]–[6]; *Murphy* (n 27) [4]; *Nicholls children* (n 102) [16].

¹⁸⁰ Existing studies referring to a link between parental mental health issues and children's immediate and basic needs include Roscoe, Lery and Thompson (n 154) 9, 11–12; Sheehan (n 158) [314]–[315].

¹⁸¹ *Bloom* (n 94) [11]–[65], [71], [313]; *JH* (n 26) [85]; *Kim* (n 26) [16]–[31]; *Nerayah & Kalista* (n 72) [62]; *Oscar* (n 20) [89]; *SK* (n 1) [28].

¹⁸² See Rhys Price-Robertson, 'Fatherhood and Mental Illness: a Review of Key Issues' (Child Family Community Australia Policy and Practice Paper No 30, Australian Institute of Family Studies, 2015) 9; Sheehan (n 158) 313–14, 316.

¹⁸³ *JH* (n 26) [85]; *Kim* (n 26) [34]–[42]; *Oscar* (n 20) [89]; *Spencer* (n 72) [58].

¹⁸⁴ Sheehan (n 158) 316.

¹⁸⁵ *Ali children* (n 6) [44], [72]; *Alice* (n 27) [61], [63], [93]; *Alison Claire* (n 69) [44]; *Arnott-Bloom* (n 71) [56]; *Barnett children* (n 94) [47]; *DHK* (n 8) [599]; *George* (n 179) [61], [63]; *Harper children* (n 78) [95], [167]; *JH* (n 26) [87]; *Nerayah & Kalista* (n 72) [62]; *SK* (n 1) [28], [178]; *Oscar* (n 20) [89], [126].

¹⁸⁶ See Arney, Zufferey and Lange (n 154) 22; Choate and Engstrom (n 157) 373.

¹⁸⁷ *Ali children* (n 6) [72].

¹⁸⁸ *Ali children* (n 6) [41]–[42]; *Barnett children* (n 94) [50]; *Charlie* (n 31) 26–7; *Grant & Reid* (n 6) [47], [72]; *Lilly, Wade & Caleb* (n 5) [59]; *Oscar* (n 20) [126].

¹⁸⁹ Sheehan (n 158) 316.

¹⁹⁰ *George* (n 179) [82]–[84]; *Grierson children* (n 71) [178], [184]; *JH* (n 26) [87]; *Jillian & Jacinta* (n 6) [11(viii)], [26]; *Lewis* (n 27) [180]; *Murphy* (n 27) [102]–[108]; *Nicholls children* (n 103) [32].

¹⁹¹ See McConnell, Llewellyn and Ferronato (n 13) 35; Sheehan (n 158) 316.

raised in several interviews,¹⁹² and seen as a vicious circle¹⁹³ in which ‘the worst part about mental health is acknowledging that you have a mental health issue’.¹⁹⁴

- Lastly, but very infrequently, a mental health condition is associated with risk of physical abuse or injury to a child, especially if accompanied by impaired capacity to deal with pressure and stress.^{195 196}

In findings in favour of restoration the Court is satisfied that the parent is either well on the road to resolving their mental health difficulties,¹⁹⁷ or has essentially overcome them.¹⁹⁸ Occasionally the Court finds that, although the parent is at an early stage in addressing mental health, there is adequate *potential* for progress.¹⁹⁹ Resolution of mental health concerns in most cases is achieved via psychological therapy, usually involving the parent’s sustained engagement in counselling sessions.²⁰⁰ Compliance with a medication regime is referenced several times.²⁰¹ In contrast there are several cases in which the parent’s mental health issue is seen as mild, historic or otherwise of little consequence,²⁰² and the judicial officer is satisfied that counselling will be sought if the need arises.²⁰³

In keeping with the presence of engagement and compliance as non-determinative strengths, the parents in around one-third of all ‘no realistic possibility’ judgments had made some attempt at mental health therapy. However, any therapeutic gains in these cases are regarded, usually, as tenuous, unsettled, or otherwise insufficient to enable ‘insight’ and to resolve the

¹⁹² Judicial Officers 6, 7, 13, 15; Registrar 1.

¹⁹³ Registrar 1.

¹⁹⁴ Judicial Officer 15.

¹⁹⁵ *Ali children* (n 6) [42]–[43], [70]; *Grierson children* (n 71) (in the context of ‘factitious disorder imposed on another’); [31], [66]–[69], [75], [92]–[101], [115]; *SK* (n 1) [106] (although the perceived association argued by the Department in this case was rejected by the Court on the facts and expert evidence).

¹⁹⁶ A quantitative study in the USA of variables affecting structured decision-making assessments by child protection caseworkers found no evidence of an association between physical abuse and parental mental problems, while noting this finding ‘appears to be a counterpoint to other studies’: Roscoe, Lery and Thompson (n 154) 12.

¹⁹⁷ *AH & AN* (n 7) [106], [118(k)]; *Borg* (n 6) [48]–[50]; *DHK* (n 8) [312], [378], [382(d)], [522]; *Grant & Reid* (n 6) [40]–[50], [72]; *Jillian & Jacinta* (n 6) [26]; *Lilly, Wade & Caleb* (n 5) [58]–[69]; *Oscar* (n 20) [126]; *Ramsay children* (n 7) 22, 26; *Vlachos children* (n 167) [74].

¹⁹⁸ *Ali children* (n 6) [71]; *Nellie* (n 6); *O’Connor* (n 7) [31]–[32]; *SK* (n 1) [241].

¹⁹⁹ *Depik & Senina* (n 14) [17]; *Jamzie* (n 8) [163]–[167]; *KH* (n 33) [35], [281], [290]–[291], [326]–[327], [328], [625]–[641].

²⁰⁰ *Ali children* (n 6) [71]; *Borg* (n 6) [25], [48]; *DHK* (n 8) [466]; *Grant & Reid* (n 6) [47], [72]; *Jillian & Jacinta* (n 8) [18], [26]; *Lilly, Wade & Caleb* (n 5) [58]; *O’Connor* (n 7) [24]; *Oscar* (n 20) [126]; *Ramsay children* (n 7) 26.

²⁰¹ *DHK* (n 8) [382(d)], [522]; *Jamzie* (n 8) [48], [73], [166]; *Jillian & Jacinta* (n 8) [18]; *KH* (n 33) [290], [327]; *SK* (n 1) [112], [219].

²⁰² *Fiona Farmer* (n 6) [57]; *J & T* (n 34) [496]–[497]; *Mario* (n 8) [47]–[48]; *Naunton children* (n 8) 25, 26, 28.

²⁰³ *Fiona Farmer* (n 6) [57]; *J & T* (n 34) [497]; *Naunton children* (n 8) 28, 39.

‘root cause’²⁰⁴ of risk of child maltreatment.²⁰⁵ There are various reasons for this perceived inadequacy. Some parents are regarded as unreliable or inconsistent in engaging with treatment,²⁰⁶ to be merely ‘going through the motions’²⁰⁷ to ‘tick the box’,²⁰⁸ and generally demonstrating insufficient commitment.²⁰⁹ Their purported engagement might be regarded as superficial, because they were not frank with the counsellor,²¹⁰ or did not follow clinical recommendations.²¹¹ Others are perceived as genuinely engaged with counselling, but not to an extent or duration enabling sufficient progress and stability in mental wellbeing.²¹² In some instances the deficiency lies not in the approach of the parent but in the nature of the therapy itself – being insufficiently ‘intensive’,²¹³ or focused on issues peripheral to the core child protection concerns.²¹⁴

The need for psychological therapy in order to gain insight is associated, in many judgments, with the parent having unresolved ‘trauma’ from past experiences. This trauma may relate to domestic violence²¹⁵ or sexual assault²¹⁶ as an adult, but is most commonly assumed to flow from the parent’s abusive or neglectful childhood.²¹⁷ ²¹⁸ In these cases the perceived link

²⁰⁴ *JH* (n 26) [234].

²⁰⁵ *Alice* (n 27) [84]; *Alison Claire* (n 69) [34], [45]; *Arnott Bloom* (n 71) [56]; *Charlie* (n 31) 30; *Bradford children* (n 73) [28]–[29]; *Dorothy* (n 103) [88]–[90]; *Dalton Tomkins children* (n 94) [253]; *Ezekial* (n 72) 14; *Grierson children* (n 71) [151]–[152], [155]–[156], [182]–[196], [239]–[243]; *Harper Children* (n 78) [94], [102]–[105], [186]–[189]; *JH* (n 26) [176], [234], [253]; *LZ & QJ* (n 71) [267]; *Leonard* (n 73) [25], [31]; *Lim children* (n 6) 11; *McAlister Children* (n 73) [52]; *Keziah* (n 73) [98]–[101]; *Nerayah and Kalista* (n 72) [62]; *RC & PK* (n 26) [154]–[155]; *Spencer* (n 72) [30], [46].

²⁰⁶ *Nicholls children* (n 102) [32], [81]; *Prince & Johns children* (n 73) [26].

²⁰⁷ *JH* (n 26) [253]

²⁰⁸ *Prince & Johns children* (n 73) [44].

²⁰⁹ *Dalton Tomkins children* (n 94) [267]–[269]; *Esther* (pseudonym, unpublished judgment, Children’s Court, March 2006) [47] (*‘Esther’*); *JH* (n 26) [253]; *Nerayah & Kalista* (n 72) [38]; *Prince & Johns children* (n 73) [27].

²¹⁰ *Alice* (n 27) [39], [42]; *Bloom* (n 94) [242]–[244], [313]; *Grierson children* (n 71) [259]; *Prince & Johns children* (n 73) [27]; *Tanya* (n 94) [39(8)–(9)], [70(1)].

²¹¹ *Boyd* (n 79) [24]; *Grierson children* (n 71) [258]–[260]; *JH* (n 26) [234]; *Leonard* (n 73) [20], [31]; *RC & PK* (n 26) [155], [157]; *Tanya* (n 94) [70(1)–(3)].

²¹² *Alice* (n 27) [84], [146]; *Alison Claire* (n 69) [24], [29], [43], [45]; *Arnott-Bloom* (n 71) [56], [85]; *Grierson children* (n 71) [247]; *Harper children* (n 78) [94]–[95], [102], [168]; *Harris children* (n 71) [70]; *Keziah* (n 73) [100]–[101]; *LZ & QJ* (n 71) [267]–[268], [272]; *Sharpe children* (n 77) [40]–[41]; *Spencer* (n 72) [22], [30].

²¹³ *Dalton Tomkins* (n 94) [250]; *Lim children* (n 6) 11.

²¹⁴ *Alice* (n 27) [84]; *Ezekial* (n 72) 14; *Harper children* (n 78) [103]; *Grierson children* (n 71) [151]–[152]; *Kee children* (n 79) [65]–[66]; *Leonard* (n 73) [31]; *LZ & QJ* (n 71) [267]; *Prince & Johns children* (n 73) [45]–[49]; *Spencer* (n 72) [30]; *Tanya* (n 94) [70(1)]. See also above 81–82 and accompanying text.

²¹⁵ *Alice* (n 27) [19], [28], [33], [46]; *Dalton Tomkins children* (n 94) [248]; *DHK* (n 8) [431]; *Prince & Johns children* (n 73) [45], [63]; *SK* (n 1) [187]–[188], [203], [219(6)].

²¹⁶ *Jamzie* (n 8) [73]–[74], [147], [163].

²¹⁷ *Alice* (n 27) [19], [21]; *Alison Claire* (n 69) [34], [36]; *Boyd* (n 79) [23]–[27]; *Braidan* (n 103) 21, 25, 26; *Colt children* (n 114) [201]–[205]; *DHK* (n 8) [216(17)], [431]; *J & T* (n 34) [497]; *Jamzie* (n 8) [163]; *KH* (n 33) [27], [35]; *LZ & QJ* (n 71) [263], [266]; *Malakhai* (n 104) [97], [114], [121], [134]; *Nerayah & Kalista* (n 72) [53]; *O’Connor* (n 7) [12]; *Yarran Taylor children* (n 6) [124], [130], [136].

²¹⁸ The connection with past trauma was also raised in interviews: Judicial Officers 2, 6; Caseworkers 3, 7; Lawyer 7.

between trauma, therapy and gaining ‘insight’ is suggestive of mental health being the *underlying* cause of the child protection issues,²¹⁹ rather than just part of ‘the mix’ of risk factors – a notion expressly articulated in the case of *DHK*:

[The mother] has achieved significant improvement of function and self-regulation whilst complying with a mental health treatment plan under the care of [a] specialist psychiatrist... This treatment addresses the behavioural traits which on the common expert medical evidence are identified as the underlying cause of the issues which led to the removal of [her child] including all of lack of insight and tolerance of domestic violence, inappropriate attachment to and reliance upon authoritative persons, compensatory use of cannabis and difficulty with responsibility and coping skills including in times of stress. (Judge in *DHK*)²²⁰

There appears to be a gendered element to this theme of trauma and parenting incapacity. Mental health as a circumstance of child removal has been described in scholarly literature as overwhelmingly affecting or targeting mothers.²²¹ The current analysis is not entirely reflective of this – 30% of the parents required to address their ‘mental health issues’ were fathers. While slanted towards mothers (the ratio of fathers to mothers in the pool of judgments overall is 40:60), the disparity is not as disproportionate as might be envisaged. But in relation to therapy for *trauma* specifically, the gender imbalance becomes more marked, with around 85% of the affected parents being mothers.

There is ample literature advocating for trauma-informed approaches to service provision in child protection,²²² including in recognition of intergenerational trauma in Aboriginal families.²²³ In the current study Aboriginal women are over-represented in the group of mothers deemed psychologically unwell due to personal trauma, in comparison to the overall

²¹⁹ *Alison Claire* (n 69) [29]–[33]; *DHK* (n 8) [382(d)], [521], [549]; *JH* (n 26) [85(a), (c)].

²²⁰ *DHK* (n 8) [382(d)].

²²¹ Sheehan (n 158) 316; Tracey De Simone and Susan Heward-Belle, ‘Evidencing Better Child Protection Practice: Why Representations of Domestic Violence Matter’ (2020) 32(4) *Current Issues in Criminal Justice* 403, 405, 406.

²²² See, eg, Samuel Carpenter and Agnik Sarkar, ‘Narrative Exposure Therapy in a Child Protection Context: Breaking Intergenerational Cycles by Providing a Pathway Through Trauma’ (2024) 45 *Australian and New Zealand Journal of Family Therapy* 464, 467; Higgins et al (n 32) 12–13, 20; Mason, Taggart and Broadhurst (n 32); Judge Robin D Sage and Tara Grigg Green, ‘Improving Hearing Quality in Child Welfare Cases’ (2022) 73 *Juvenile and Family Court Journal* 17, 20–21; Lori L Sifacuse et al, ‘Evaluating the Child Abuse and Neglect Institute: Does Training Affect Decision-Making?’ (2015) 66(1) *Juvenile and Family Court Journal* 1, 2; 2; Suomi, Bolton and Pasalich (n 154) 1041; Liz Wall, Daryl Higgins and Cathryn Hunter, ‘Trauma-informed Care in Child/Family Welfare Services’ (Child Family Community Australia Paper No. 37, Australian Institute of Family Studies, 2016).

²²³ Davis, *Family is Culture Report* (n 48) 21–24; Higgins et al (n 32) 17–18; BJ Newton, ‘Understanding Child Neglect in Aboriginal Families and Communities in the Context of Trauma’ (2019) 24 *Child & Family Social Work* 218, 223–4.

number of Aboriginal families in the judgments.²²⁴ However, some commentators are cautious or even cynical about a ubiquitous embrace of ‘trauma’ discourse—implicating it in the medicalisation of the child protection field, in which women survivors of violence are pathologised as traumatised and mentally unwell, and hence as incapable and unfit mothers.²²⁵ This phenomenon has been described as ‘weaponising’ the label of trauma against the very people purported to be in need of therapeutic help.²²⁶ From a feminist and a decolonialist perspective, the clinical focus on learning to regulate one’s emotions, in order to conquer the effects of past trauma, ignores the contexts and complexity of inequality and structural oppression.²²⁷ ²²⁸ Although the inter-generational nature of child maltreatment and involvement in the child protection system is a recurring theme in the judgments,²²⁹ it tends to be mentioned as an aside, or integrated into a line of reasoning that the parent has not done enough to address the psychological impact of their own victimhood.²³⁰ While this is occasionally accompanied by an expression of sympathy for the parent,²³¹ rarely do the judgments draw attention to systemic failures to arrest the cycle by which parents, themselves once children in need of care and protection, are facing circumstances substantially beyond their own control.²³²

In interviews, however, there was a stronger sense of the importance of recognising and making allowance for the parent’s own history.²³³ For example, a magistrate spoke about ‘being mindful’ of the legitimate reasons for Aboriginal families’ mistrust of the system, in

²²⁴ Of the 23 parents expected to address their traumatic background through therapy, 10 were Aboriginal (43%), including one father and nine mothers. The total proportion of Aboriginal families in the study’s sample of judgments is 22%.

²²⁵ See De Simone and Heward-Belle (n 221) 405, 407; Teresa Hinton, *Rebalancing the Scales: Access to Justice for Parents in the Tasmanian Child Safety System* (Report, Anglicare Tasmania, 2020) 71; Horsfall (n 154) 26–7.

²²⁶ Bree Carlton and Emma K Russell, ‘The Weaponisation of “Trauma-Informed” Discourse in Prison Policy: An Abolition Feminist Critique’ (2023) 4 *Incarceration* 1; Cara Samuel, ‘“How do you actually break the cycle?”: A Critical-Decolonial Analysis of Intergenerational Trauma and Cultural Relevancy in Nunavut’s Child Abuse Response’ (PhD thesis, University of Toronto, 2024) 43.

²²⁷ Thalia Anthony, Gemma Sentence and Lorana Bartles, ‘Transcending Colonial Legacies: From Criminal Justice to Indigenous Women’s Healing’, in L George et al (eds) *Neo-Colonial Injustice and the Mass Imprisonment of Indigenous Women* (Palgrave Macmillan, 2020) 103; Carlton and Russell (n 226); Krista Maxwell, ‘Historicizing Historical Trauma Theory: Troubling the Trans-Generational Transmission Paradigm’ (2014) 51(3) *Transcultural Psychology* 407; Vikki Reynolds, ‘Hang Time’ and Other Innovative Responses to Oppression, Violence and Suffering’ (2020) 42 *Journal of Family Therapy* 347; Emma Tseris, ‘Diagnosing Distress? Psychiatric and Therapeutic Constructions of “Traumatised” Young Women’ (PhD Thesis, University of Sydney, 2014).

²²⁸ See also Chapter 8, section (ii), in relation to gendered ‘mental health coercion’.

²²⁹ See above n 217. See also ASK (n 27) [228]; *Barnett children* (n 94) [56]; *Jonah* (n 69) 17–18, 23.

²³⁰ See, eg, *Barnett children* (n 94) [56]–[60]; *Nerayah & Kalista* (n 72) [53]; *Prince & Johns children* (n 73) [63].

²³¹ *Alison Claire* (n 69) [39]; ASK (n 27) [229]; *Jonah* (n 69) 17–18.

²³² A notable exception is *Malakhai* (n 104): [61]–[89], [197]–[199].

²³³ Judicial Officers 1, 14, 17, 19, 23; Registrar 1; Caseworkers 7, 8; Lawyers 6, 8, 9.

order not to ‘misinterpret the way people are reacting’.²³⁴ Two lawyers referred to the need to avoid ‘weaponising’ intergenerational trauma against the parents affected by it,²³⁵ and a caseworker described efforts at cultural change within the Department in relation to perceptions of mothers and mental illness:

...we did actually a whole group supervision around women who are seen to be assertive or aggressive, and ourselves as practitioners around this view that women are crazy. And even when they’re just trying to advocate for their rights or their children’s rights, and how we see that ourselves. (Caseworker 2)

The interviews overall reveal a nuanced mix of views on the relevance of parental mental health as a child protection concern. While none of the participants indicated a preconception that mental health is *more* prevalent in the Court’s decisions than other factors such as drugs and domestic violence, they appeared unsurprised by the finding, and concurred on the frequent incidence and significance of mental health in care proceedings in their experience.²³⁶ Many regard drug addiction and mental health issues as going hand in hand;²³⁷ but of the two, mental health appears more likely to be perceived as an ‘underpinning’²³⁸ factor, upon which the resolution of other child protection concerns relies. This was observed in comments such as ‘mental health is primary in terms of the Department’s view...I think that if you haven’t got your mental health right, you’re going to self-medicate’;²³⁹ ‘if their mental health isn’t right, everything falls apart generally’;²⁴⁰ and ‘[treatment] is probably going to help you get your child back more than anything else, because so much flows from mental ill health’.²⁴¹ Personality disorders, particularly, are viewed by magistrates as deeply problematic: perceived as difficult to treat,²⁴² and manifesting in rigid or obsessive²⁴³ behaviours that can be deeply damaging to children’s psychological welfare.²⁴⁴

²³⁴ Judicial Officer 14.

²³⁵ Lawyers 8, 9.

²³⁶ Judicial Officers 2, 3, 4, 5, 8, 10, 13, 14, 21; Registrars 1, 2; Caseworkers 3, 4, 6, 7, 9, 11, 12, 13; Lawyers 1, 3, 4, 5, 7, 8.

²³⁷ Judicial Officers 2, 8, 21; Caseworkers 1, 3, 6, 7, 8, 12; Lawyers 3, 4, 5.

²³⁸ Caseworker 1.

²³⁹ Judicial Officer 2.

²⁴⁰ Lawyer 1.

²⁴¹ Registrar 1.

²⁴² Judicial Officers 6, 23.

²⁴³ Judicial Officer 13.

²⁴⁴ Judicial Officers 7, 9.

However, participants expressed considerable scepticism about reliance on generic or vague ‘mental health concerns’,²⁴⁵ absent a clearly evidenced link to risk to the child.²⁴⁶ They noted that the broad spectrum of mental health issues varies widely in degrees of severity,²⁴⁷ and emphasised that most people with a mental health condition satisfactorily manage their condition.²⁴⁸

The statistics tell us that by and large most people are compliant with their medication, and if they’re integrated into services then there will be some warning signs and they can be dealt with, rather than the much greater insult of removing the child from the care of the parent. (Judicial Officer 7)

You need to show that nexus between a mental health diagnosis and risk in the parenting. I don’t think in the last couple of decades we’ve drawn that out...that assumption: if there’s a mental health diagnosis, then you can’t parent – which is at odds to the general population. (Lawyer 2)

Accordingly, magistrates do not perceive mental health issues as being necessarily a hurdle for restoration, although this view was qualified by distinguishing cases of relatively mild ‘depression and anxiety’²⁴⁹ from the major²⁵⁰ and acute²⁵¹ illnesses that some of the parents present with. A children’s registrar stated ‘I’m firm in this belief – the magistrates don’t use mental health as a risk issue if it’s being addressed’.²⁵² The same registrar regards the Department as ‘generally’ trying to help parents tackle the issue: by ‘constantly’ telling parents “you need to get a mental health assessment, go to your GP, get the plan”.

Nonetheless, a fundamental problem identified by many participants is a lack of accessible mental health services in the community.²⁵³ There are lengthy waiting lists to see a psychologist,²⁵⁴ and even less hope of timely access to a psychiatrist²⁵⁵ – this problem being yet more profound in rural and remote parts of the State.²⁵⁶ A caseworker described frustration at a case in which the mother was compliant with everything expected of her, ‘very much intrinsically motivated’, and making progress in mental health stability through regular

²⁴⁵ Judicial Officers 7, 13, 22, 23.

²⁴⁶ Judicial Officers 7, 21; Lawyers 2, 8, 9.

²⁴⁷ Judicial Officer 6.

²⁴⁸ Judicial Officer 7; Caseworker 13; Lawyer 2.

²⁴⁹ Judicial Officers 6, 13.

²⁵⁰ Judicial Officer 13.

²⁵¹ Judicial Officer 21.

²⁵² Registrar 1.

²⁵³ Judicial Officers 7, 17; Caseworker 3; Lawyers 4, 7.

²⁵⁴ Registrar 1; Caseworkers 2, 4; Lawyer 8.

²⁵⁵ Judicial Officer 13; Caseworker 11; Lawyer 5.

²⁵⁶ Judicial Officers 13, 14, 17; Caseworkers 2, 13; Lawyer 5.

sessions with a psychologist, yet prospects of restoration were stalled by difficulty accessing a psychiatrist:

...for the purpose of assessing whether she needs medication. And I'm sitting here thinking 'but that's a systemic issue. Why are we putting that against her?' (Caseworker 11).

Caseworkers raised a detailed range of barriers to parents gaining help. They argued that the public mental health system responds to crisis,²⁵⁷ rather than prevention²⁵⁸ or continuing care.²⁵⁹ It does not accommodate normal 'lapses' and their management.²⁶⁰ The free services offered by local community health centres were described as 'typically not what our clients need',²⁶¹ whereas sufficient sessions with a psychologist under a mental health plan often involve some financial cost to the parent;²⁶² there may also be an upfront fee for visiting a General Practitioner to obtain a referral.²⁶³ Mental health services are regarded as overly rigid in adapting to the needs of vulnerable people, for instance refusing to re-schedule missed appointments.²⁶⁴ Health agencies are resistant to sharing information with child protection;²⁶⁵ and there is a lack of integration in meeting parents' multiple, interlocking needs—for instance, when mental health issues co-exist with drug or alcohol addiction.²⁶⁶ ²⁶⁷ Dedicated, holistic mental health programs for families involved in the child protection system (such as 'Functional Family Therapy')²⁶⁸ were seen as limited in geographic reach,²⁶⁹ struggling to retain staff,²⁷⁰ or having restrictive eligibility criteria.²⁷¹ ²⁷²

²⁵⁷ Caseworker 6; Lawyers 6, 8.

²⁵⁸ Lawyer 6.

²⁵⁹ Ibid.

²⁶⁰ Ibid.

²⁶¹ Caseworker 12.

²⁶² Caseworker 12.

²⁶³ Caseworker 13.

²⁶⁴ Caseworker 2.

²⁶⁵ Lawyer 5.

²⁶⁶ Caseworker 6.

²⁶⁷ A need for a multi-disciplinary approach, including better coordination or integration of mental health services with child protection and other assistance for families, is widely argued in the literature: see, eg, Arney, Zufferey and Lange (n 154); Carpenter and Sarkar (n 222) 466, 467–8; Yvonne Darlington and Judith A Feeney, 'Collaboration Between Mental Health and Child Protection Services: Professionals' Perceptions of Best Practice' (2008) 30 *Children and Youth Services Review* 187; Higgins et al (n 32); Powell et al (n 157) 113; Price-Robertson (n 182) 15–18; Sheehan (n 158) 318–21. See also Chapter 10, part B, section (ii) 'Lack of integrated mental health service provision'.

²⁶⁸ See Chapter 10, part B, section (ii).

²⁶⁹ Caseworkers 2, 12.

²⁷⁰ Caseworker 6.

²⁷¹ Caseworker 7.

²⁷² See Chapter 10, part B, section (ii) for a more detailed discussion of the limited availability of targeted therapeutic programs in child protection.

There were suggestions by magistrates that the Department could do more to facilitate mental health assistance for parents:²⁷³ that it ‘has the resources’,²⁷⁴ and the obligation, pursuant to the new ‘active efforts’ provisions.²⁷⁵ Lawyers and caseworkers mentioned that the Department *is* funding psychologist sessions and psychiatric assessments, but only in select cases, dependent on the circumstances.²⁷⁶ The Department is otherwise limited in its ability to craft the right ‘sort’ of therapy for parents,²⁷⁷ despite the common theme in the judgments that counselling or courses attended by parents were not targeted to the matters at hand:²⁷⁸

...there’s only so much [the Department] can do. We can say to a parent ‘you need to do this sort of counselling, go to your doctor and get a mental health plan’...but we can’t go to the doctor with the parent and say ‘the referral has to include this aspect as well as that aspect’. You can only go so far. (Lawyer 5)

The Court is even more limited than the Department in any scope to influence service provision.²⁷⁹ The judgments occasionally acknowledge that mental health service availability is generally limited.²⁸⁰ The judicial officer in one case queried more pointedly why it was that particular intervention programs publicly promoted by the Department were not available to the parent;²⁸¹ in another case the magistrate remarked that it was ‘unfortunate’ that ‘no-one assisted [the mother] to find a...suitable therapist’.²⁸²

Another critical issue, perhaps the metaphorical ‘elephant in the room’, is the very fact of child removal as *causing*, contributing to, or exacerbating the parent’s poor mental health.²⁸³ The

²⁷³ Judicial Officers 13, 17.

²⁷⁴ Judicial Officer 17.

²⁷⁵ Ibid.

²⁷⁶ Caseworkers 5, 12; Lawyers 7, 8.

²⁷⁷ Lawyer 5.

²⁷⁸ See above nn 213–214 and accompanying text.

²⁷⁹ See Chapter 4, part C, section (iii) for discussion of limitations and tensions in the Court’s capacity to influence the direction of Departmental casework.

²⁸⁰ *Barnett children* (n 94) [62]; *Grierson children* (n 71) [241]; *Lim children* (n 6) 11.

²⁸¹ *Nathan* (n 71) [67]–[70]. See further commentary on this case in Chapter 10, part B.

²⁸² *Lim children* (n 6) 11. See also *Braidan* (n 103), in which the clinician and the magistrate were critical of an outsourced agency, and its oversight by the Department, for providing ‘behaviour management’ therapy rather than trauma-based therapy and sexual assault counselling to the child: at 18, 24–5, 28, 29, 31.

²⁸³ See, eg, Susan Collings et al, ‘“She was there if I needed to talk or to try and get my point across”: Specialist Advocacy for Parents with Intellectual Disability in the Australian Child Protection System’ (2018) 24(2) *Australian Journal of Human Rights* 162, 172–3; Kelly Jane Cramp and Carole Zufferey, ‘The Removal of Children in Domestic Violence: Widening Service Provider Perspectives’ (2021) 26(3) *Affilia: Journal of Women and Social Work* 406, 414, 418; Hinton (n 225) 38, 47; Michael S King and C L Tatasciore, ‘Promoting Healing in the Family: Taking a Therapeutic Jurisprudence Based Approach in Care and Protection Applications’ [2007] (1) *eLaw Journal: Murdoch University Electronic Journal of Law* 78, 87–8; Suomi, Bolton and Pasalich (n 154) 1033; Alana Thompson, ‘Therapeutic Jurisprudence and the Children’s Court: Creating a More Relational Approach to Protection and Care Proceedings’ (PhD Thesis, University of Western Australia, 2011) 140–143.

experience of having one's child taken by the State has been described as 'one of the most traumatic experiences that a human being can endure'.²⁸⁴ The devastating impact of the separation is then compounded by the stress of the legal proceedings. Although rarely acknowledged in the judgments,²⁸⁵ this fundamental context was raised by several interview participants, and seen as a major obstacle to parents' sense of hope,²⁸⁶ to their relationships with caseworkers,²⁸⁷ and their capacity to 'engage' in the legal process.²⁸⁸ A vicious cycle then ensues, of psychological distress, perceived resistance to engagement, and a deemed lack of insight.

Several caseworkers feel that the child protection system unrealistically expects mental health problems to be 'cured'. They argued that for many people a mental health struggle is a perpetual but fluctuating issue, which should not usually require the separation of parent and child.²⁸⁹ Instead the focus should be on 'planning ahead' for the times when the parent is particularly unwell, so that supports can be put in place to mitigate any risks to the child.²⁹⁰ One caseworker spoke about a particular parent, 'living with mental health', who would confide in having bad days when getting out of bed to attend parenting groups and fulfil other obligations is just 'too hard'. For this caseworker, the parent's willingness to communicate these challenges and admit vulnerability *is* 'showing insight', although likely to be more typically interpreted as deficient engagement.²⁹¹

The barriers identified in the interviews, coupled with the emphasis on parental mental health in restoration decisions, raise questions about the extent to which the child protection system might better equip parents to address their mental health – not only during legal proceedings, but as a preventative measure prior to a decision to remove the child. It appears that many of the parents who fail to persuade the Court of a realistic possibility of restoration have fallen through the cracks of an under-resourced and fragmented mental health system, which is not adapted to the special context of care and protection. This dilemma and its implications are expanded upon in chapter 10.

²⁸⁴ Suomi, Bolton and Pasalich (n 154) 1033.

²⁸⁵ Exceptions include *Jillian & Jacinta* (n 6) [18(iv)], [26(i)]; *J & T* (n 34) [502]–[503]; *SK* (n 1) [139(d), (e)].

²⁸⁶ Caseworker 10; Lawyer 6.

²⁸⁷ Caseworkers 10, 13; Lawyer 8.

²⁸⁸ Caseworkers 8, 13; Lawyer 8.

²⁸⁹ Caseworkers 8, 10.

²⁹⁰ Caseworkers 8, 10, 13.

²⁹¹ Caseworker 8.

(iv) Capacity to Meet the Child's Emotional Needs

The children were observed to be healthy looking, bright eyed, outgoing, energetic, noisy, attention seeking within normal bounds, and able to be calmed, able to spend time in positive interactions and able to concentrate for reasonably long periods of time with particular activities, interacting with parents or with each other or on their own, all behaviours which show a normal range of emotional maturity for their ages. It appears that these children have had their emotional needs met which can safely be assumed to be by their parents as they have been in care for too short a period to undo any deficits in their emotional wellbeing. (Judge in *David White*, quoting the Children's Court Clinician)²⁹²

The parent's capacity to 'meet the child's needs' is mentioned in most of the judgments. What is meant by 'needs' is not always specified, and by default can be assumed to encompass all the normal care responsibilities a parent fulfils for a child, in respect of both practical and emotional wellbeing. The predominant emphasis is, however, on the latter. 'Emotional' (or 'psychological') needs have been defined broadly for the purpose of this analysis: encompassing concepts such as *attunement*, *responsiveness* and *empathy* in immediate parent-child interactions, engaged *interest* in the child's wider life, *reflective understanding* of the child's experiences, *prioritising* the child, and long-term capacity to provide the child with a sense of *stability* and *security*. Judicial findings on these matters are based on a mix of sources, including clinician assessments, caseworker opinion and contact²⁹³ reports, and by drawing inferences from the evidence as a whole.

The theme of meeting the child's emotional needs is a reason for decision on realistic possibility of restoration in just under 60% of the judgments,²⁹⁴ making this the fourth most influential factor after insight, mental health and engagement. The significance placed by the Court on empathetic attunement to the child's needs is consistent with existing literature on decision-making in care jurisdictions.²⁹⁵ It also aligns with wider social sciences literature on what is important for a child's wellbeing within the parenting relationship.²⁹⁶

²⁹² *David White* (n 8) [98].

²⁹³ Also known as 'family time'.

²⁹⁴ 58% in total, representing 63% of 'realistic possibility' outcomes, and 56% of 'no realistic possibility' outcomes.

²⁹⁵ Cashmore (n 88) 338; De Bortoli et al (n 13) 41-2; Horsfall (n 154) 201-203; Krutzinna and Skivenes (n 155) 7, 8.

²⁹⁶ See, eg, Choate and Engstrom (n 157) 373; Tommie Forslund et al, 'Attachment Goes to Court: Child Protection and Custody Issues' (2022) 24(1) *Attachment and Human Development* 1, 31; David Oppenheim and Nina Koren-Karie, 'Parents' Insightfulness: The Importance of Keeping the Inner World of the Child in Mind for Parenting Plan Evaluations' in Leslie Drozd, Michael Saini and Nancy Olsen (eds), *Parenting Plan Evaluations: Applied Research for the Family Court* (Oxford University Press, 2nd ed, 2016) 47.

As seen below, a large number of the parents in ‘no realistic possibility’ judgments are acknowledged to love and be ‘committed’ to their child, and had clearly made efforts to meet the child’s needs. Like ‘engagement and compliance’, the theme of ‘love and commitment’ is a frequently recurring non-determinative strength. It is accompanied, sometimes, by indications that the parent *does* provide for the child’s immediate emotional needs. However, these positive elements of the relationship are not considered sufficient evidence that the parent will provide for the child’s longer-term emotional welfare. The reasons for this are explored in this section. It starts with a discussion of love and commitment as being elemental attributes common to most parents in the judgments, before turning to ‘reflection, empathy and consistency’ as the distinguishing themes.

(a) *Love and commitment*

I want to acknowledge the parents’ circumstances, that they have done, in their words, the very best to have Ezekial returned to them. It is a sad set of circumstances that it is not because of lack of effort, desire or love that Ezekial’s needs could not be met in their care. (Magistrate in *Ezekial*)²⁹⁷

There is no doubt that there is a loving and affectionate relationship between the parents and each of their children. This is a strength that any court would be reluctant to interfere with. The problem that I identify with the relationship between the children and their parents is that it appears to be a relationship between peers rather than a relationship between people who are there to protect them and provide appropriate guidance. (Magistrate in *Sharpe children*)²⁹⁸

In commenting on efforts to comply with casework expectations, most of the same judgments make some express reference to the impetus for this being the parent’s love for the child,²⁹⁹ reflected in a sincere desire to provide the child’s care.³⁰⁰ In many cases this notional desire is translated into tangible action, commonly in the form of reliable, committed attendance at scheduled contact visits.³⁰¹

²⁹⁷ *Ezekial* (n 72) 16.

²⁹⁸ *Sharpe children* (n 77) [30]–[31].

²⁹⁹ See, eg, *Abbey* (n 68) [68]; *Alfred* (n 8) [105]; *Alison Claire* (n 69) [29], [45]; *Anthony* (n 69) [25]; *Charlie* (n 31) 28; *DHK* (n 8) [88]; *Elizabeth* (n 72) [95]; *Ezekial* (n 72) 13, 16; *Grierson children* (n 71) [264]; *Hatfield children* (n 105) 69; *Jay* (n 26) [15]; *JH* (n 26) [195]; *Leonard* (n 73) [31]; *Lilly, Wade & Caleb* (n 5) [68]; *Lim children* (n 6) 12; *Lincoln and Raymond* (n 68) [34]; *O’Connor children* (n 7) [30]; *Spencer* (n 72) [63].

³⁰⁰ See, eg, *Abbey* (n 68) [68], [117]; *Alfred* (n 8) [105]; *Anthony* (n 69) [25], [26]; *Arnott Bloom* (n 71) [57]; *Charlie* (n 31) 24, 28; *DHK* (n 8) [389]; *Ezekial* (n 72) 13; *Fiona Farmer* (n 6) [49]; *Grierson children* (n 71) [264]; *JH* (n 26) [195]; *Lincoln and Raymond* (n 68) [34]; *O’Connor children* (n 7) [30]; *Samantha* (n 31) [26]; *Spencer* (n 72) [45]; *Vlachos children* (n 167) [83].

³⁰¹ See, eg, *Abbey* (n 68) [69]; *Alfred* (n 8) [52]; *Dorothy* (n 103) [99]; *Ezekial* (n 72) 16; *Fiona Farmer* (n 6) [57]; *Grierson children* (n 71) [264]; *Hatfield children* (n 105) 69; *Jamzie* (n 8) [133]; *LZ & QJ* (n 71) [207]; *Naunton children* (n 8) 11; *Tanya* (n 94) [70]; *Waller children* (n 26) [171]–[172]; *Yarran Taylor children* (n 6) [267].

Beyond the fact of attendance, professional observations of parenting capacity during contact are frequently cited – ranging from the general statement that contact is ‘positive’,³⁰² to more specific references to the parents’ conduct and their interactions with the child.³⁰³ The praise may adopt a practical perspective:³⁰⁴ parents are noted to have ‘come prepared’³⁰⁵ (for example, by bringing food),³⁰⁶ to cooperate with the directions or guidance of supervisors,³⁰⁷ and to attend to the child’s physical care.³⁰⁸ More often, however, the focus is on the emotional element of the parent’s engagement with the child, with references to ‘affection’ being demonstrated by the parent,³⁰⁹ and reciprocated by the child.³¹⁰ Straddling the naturally fine line between emotional and physical nurture are references to parents being ‘attuned’,³¹¹ ‘responsive’³¹² and ‘attentive’³¹³ to the child.³¹⁴ For instance, the magistrate in *Charlie*, summarising a clinician’s observations, noted that the father ‘responded to his son’s cues’ in providing both physical care and ‘demonstrating affection’.³¹⁵ In the case of *Alfred* a worker from an intensive parenting program gave evidence of a young child’s trusting reliance on the father for simultaneous physical and emotional comfort:

... when he does need something, he has sought dad out. When he is tired or hungry or just about miserable, he will go for dad. He will look for dad who is not far away, but he will go to him. So for us in terms of attachment, that’s what we would be looking for, for Alfred to be looking to dad to know if he’s safe or to have his needs met and he does.³¹⁶

³⁰² *Ali children* (n 6) [33]; *ASK* (n 27) [104]; *Dorothy* (n 103) [99], [104]; *DFaCS re Eggleton* [2016] NSWChC 4, [42.2]; *Ezekial* (n 72) 13, 14; *Grierson children* (n 71) [264]; *Harris children* (n 71) [31]; *J & T* (n 34) [463]; *In the Matter of Julian and Allan* (Children’s Court of New South Wales, 28 April 2006) [51], [55]; *KH* (n 33) [213], [215], [228], [247], [264]; *Lim children* (n 6) 16; *Malakhai* (n 104) [108], [110], [111], [188]; *Mihar children* (n 73) [43], [44]; *Nathan* (n 71) [45]; *Rogers* (n 26) [57]; *SS* (n 98) [9]; *Spencer* (n 72) [6], [44]; *Waller children* (n 26) [171]; *Yarran Taylor children* (n 6) [267].

³⁰³ See Chapter 8, section (iv), in relation to cultural variations in the norms associated with parenting and family relationships, and contentious aspects of westernised theories of attachment.

³⁰⁴ Issues of generic parenting capacity and practical skills are a moderately influential factor in the Court’s decisions, discussed in more detail in Chapter 9, part A, section (iii).

³⁰⁵ *ASK* (n 27) [100].

³⁰⁶ *ASK* (n 27) [169]; *Tanya* (n 94) [62].

³⁰⁷ *Abbey* (n 68) [69]; *ASK* (n 27) [100], [102].

³⁰⁸ *Abbey* (n 68) [76]; *Anthony* (n 69) [23]; *Charlie* (n 31) 24; *SK* (n 1) [184].

³⁰⁹ *ASK* (n 27) [102]; *Charlie* (n 31) 24, 29; *KH* (n 33) [428]; *Nathan* (n 71) [45]; *SK* (n 1) [184]; *Spencer* (n 72) 44.

³¹⁰ *ASK* (n 27) [102]; *Grierson children* (n 71) [264]; *KH* (n 33) [428]; *Logan* (pseudonym, unpublished judgment, Children’s Court, March 2022) 15 (‘*Logan*’); *Mihar children* (n 73) 12; *Nerayah and Kalista* (n 72) [17]; *SK* (n 1) [184]; *Sharpe children* (n 77) [30]; *Spencer* (n 72) [6], [44].

³¹¹ *Alfred* (n 8) [44], [45]; *Nathan* (n 71) [45]; *Spencer* (n 72) [45].

³¹² *Alfred* (n 8) [110]; *ASK* (n 27) [102]; *Charlie* (n 31) 24; *Nathan* (n 71) [45].

³¹³ *Charlie* (n 31) 29; *Jamzie* (n 8) [188]; *Malakhai* (n 104) [108]; *SK* (n 1) [238(n)].

³¹⁴ *Alfred* (n 8) [44]; *Nathan* (n 71) [45].

³¹⁵ *Charlie* (n 31) 24.

³¹⁶ *Alfred* (n 8) [59].

While most evidence of parent-child interactions derives from contact sessions occurring after the child's removal, several cases refer to the parent's pre-existing parenting capacity. That is, prior to the event triggering the removal, the parent had competently or adequately provided for the child's physical, health or educational needs.³¹⁷ Recognition of established parenting skills encompasses the emotional element also, with the Court expressly acknowledging that a loving relationship between parent and child existed prior to removal and has persisted.³¹⁸ In exceptional cases the parent's care of the child is regarded as having been exemplary, or at least without any noted deficiency, were it not for the specific critical incident (such as an unexplained injury) resulting in removal.³¹⁹

Many of the above examples are from judgments in which there was ultimately no realistic possibility of restoration, despite these seemingly glowing affirmations of the parent meeting the child's needs. To a substantial extent, the portrayals of loving parent-child interactions in many of the 'no realistic possibility' judgments bear little difference to the relationships described in decisions in favour of restoration. Both groups of cases refer to parents' commitment to their children and motivation to strive for restoration, which may be acknowledged by the Court in generic terms, or apparent in specific evidence of attention to the child's needs. Both cite mutual affection and love. However, the overarching difference lies in whether these ostensibly positive signs are enough to give the Court confidence of an appropriately safe, nurturing and stable relationship into the future. While parent-child interactions in the 'no realistic possibility' cases may be 'positive', and 'enjoyed'³²⁰ by the child, the capacity to meet the child's *immediate* needs, within the time-limited confines of a supervised contact session, is typically regarded as insufficient evidence of an emotionally secure relationship and durable parenting capacity. Nor is a pre-existing bond, or the parent's past competence, treated as assurance that the child's future emotional wellbeing will be met by restoration.

³¹⁷ *Alison Claire* (n 69) [36]; *Depik & Senina* (n 14) [16]; *Elizabeth* (n 72) [139]–[140]; *Hatfield children* (n 105) 90; *Director of Family and Community Services v Jack* [2012] NSWChC 7, [13], [26]; *Spencer* (n 72) [6], [31].

³¹⁸ *Anthony* (n 69) [25], [26]; *Dorothy* (n 103) [99]; *Nerayah and Kalista* (n 72) [17]; *Rogers* (n 26) [168]; *Sharpe children* (n 72) [30].

³¹⁹ *Anthony* (n 69) [26], [37]; *Grierson children* (n 71) [80], [223], [264]; *Lincoln and Raymond* (n 68) [34]; *SS* (n 98) [82].

³²⁰ *ASK* (n 27) [67], [162]; *Elizabeth* (n 72) [92]; *Leonard* (n 73) [34]; *McAlister Children* (n 73) [47]; *Spencer* (n 72) [44]; *Esther* (n 209) [38].

(b) *Reflection, empathy and consistency*

What [the clinician] sees is inconsistent engagement; if it happens, it is lovely but it is fleeting. (Magistrate in *Braidan*)³²¹

Bound up with notions of insight and acceptance of responsibility, judgments in favour of restoration often reference the parents' reflection on their past conduct and its impact on the child.³²² In 'no realistic possibility' cases, this reflective understanding is deemed lacking.³²³ This concern tends to exist independently of, or to transcend, otherwise favourable evidence of a loving parent-child relationship; an affinity may be unquestionably present, but a 'strong' relationship is not necessarily a 'healthy' one.³²⁴

Domestic violence is prevalent among the various issues for which parents had failed to show depth of reflection.³²⁵ The case of *Alfred* is illustrative: its previously quoted observation of a child seeking out his father when 'tired or hungry or miserable'³²⁶ is a rare instance, within the 'no realistic possibility' judgments, of professional evidence explicitly asserting the presence of a strong attachment relationship. Although the magistrate accepted that the child 'has a positive relationship with' his father,³²⁷ the probative weight of this concession was countered by a litany of evidence of the father's repeated perpetration of violence and intimidation against the child's mother and against other women (including the child's carer),³²⁸ and violent and psychologically abusive conduct towards his older children and step-children.³²⁹ Witnesses representing the intensive parenting service, 'Newpin', strongly advocated for restoration to the father. Although this view was based on 'hundreds of hours' of observation of father and child,³³⁰ the Court found it was formed without knowledge of the history of domestic violence, this not having been disclosed to the workers by the father.³³¹ The father had not taken steps to address his propensity for violence, and thus had not

³²¹ *Braidan* (n 103) 27.

³²² See, eg, *Ali children* (n 6) [44]; *Hatfield children* (n 105) 65–6; *KH* (n 33) [17]; *Lilly, Wade & Caleb* (n 5) [57]–[63]; *Oscar* (n 20) [126]; *Ramsay children* (n 7) 22; *VC* (n 26) [172], [313(2)], [323].

³²³ See, eg, *A* (n 98) [117]; *Charlie* (n 31) 4, 9, 34; *Dorothy* (n 103) [44]–[45]; *Grierson children* (n 71) [130], [145]; *Harris children* (n 71) [36], [39]; *Keziah* (n 73) [99]; *Prince & Johns* (n 73) [29], [31]; *Rogers* (n 26) [121], [161]; *Barnett children* (n 94) [45]–[46]; *Y* (n 98) [117], [870].

³²⁴ *Keziah* (n 73) [115].

³²⁵ Domestic violence is a 'substantially' influential factor in the Court's decisions: see Chapter 8, section (ii).

³²⁶ See above n 316.

³²⁷ *Alfred* (n 8) [44].

³²⁸ *Ibid* [66]–[73], [80]–[85], [101].

³²⁹ *Ibid* [74]–[79], [84]–[85], [101].

³³⁰ *Ibid* [44], [50].

³³¹ *Ibid* [102].

mitigated the risks of the child being either exposed or directly subjected to physical and psychological aggression.³³²

As well as this key notion of taking responsibility for the causes of the child's removal, the judgments sometimes critique the parent's recognition of the child's *current* experiences and needs,³³³ and hence the ability to connect empathetically with the child.³³⁴ This issue of relating to the child in the present is conceptualised in several, interconnected ways. One recurring theme is that of 'parentification':³³⁵ family dynamics that normalise the child taking care of the parent's emotional wellbeing.³³⁶ The need to 'prioritise'³³⁷ the child is also a frequent refrain, with parents in 'realistic possibility' outcomes credited with doing so,³³⁸ while a parent preferencing their own interests ahead of the child's needs is a common reason for finding no realistic possibility of restoration.³³⁹ Although a rather loose notion, this 'failure to prioritise' tends to be associated with one of three sets of circumstances: the parent persisting with unhealthy or violent relationships;³⁴⁰ the child's exposure to the parent's erratic behaviour and lack of emotional restraint;³⁴¹ or the parent being incapable of perceiving the child's needs other than through the prism of their own rigid and dogmatic views.³⁴²

Other examples of a parent's compromised capacity for empathy include an apparent lack of engaged interest in the children as individuals with active lives outside the parent's realm,³⁴³ and difficulty allocating attention to individual children within a group of siblings.³⁴⁴ There

³³² Ibid [103]-[105].

³³³ ASK (n 27) [172], [224], [255]; *Charlie* (n 31) 9, 34; *Hatfield children* (n 105) 91; *JH* (n 26) [87]; *Logan* (n 310) 9, 10-11; *Oscar* (n 20) [104]; *RC & PK* (n 26) [165].

³³⁴ ASK (n 27) [166], [224]; *Charlie* (n 31) 9, 34; *DHK* (n 8) [518]-[519]; *Esther* (n 209) [46]; *JH* (n 26) [87]; *Oscar* (n 20) [104]; *RC & PK* (n 26) [140].

³³⁵ *Alison Claire* (n 69) [41]; *Dalton Tomkins children* (n 94) [125]; *Oscar* (n 20) [89], [104], [106]; *Sharpe children* (n 77) [27]-[29].

³³⁶ The 'parentification' or 'role reversal' theme is referred to in literature including Choate and Engstrom (n 157) 373; Sheehan and Levine (n 154) 21.

³³⁷ Existing studies referring to the 'prioritisation' theme include Eve, Byrne and Gagliardi (n 92) 119; Horsfall (n 154) 251; Krutzinna and Skivenes (n 155) 7.

³³⁸ *Alfred* (n 8) [109]; *DHK* (n 8) [519]; *Hatfield children* (n 105) 66; *Department of Communities and Justice (DCJ) and Janet and Xing-fu* [2022] NSWChC 7, [82] ('*Janet & Xing-fu*'); *SK* (n 1) [238(l)]; *VC* (n 26) [115]; *Vlachos children* (n 26) [83].

³³⁹ See, eg, *Alfred* (n 8) [99]; *Dorothy* (n 103) [44], [45]; *Esther* (n 209) [38]; *Hatfield children* (n 105) 80, 85, 91; *JH* (n 26) [86], [249]; *Jay* (n 26) [15]; *Mihar children* (n 73) [43]; *RC & PK* (n 26) [169], [170], [195]; *Rogers* (n 26) [114], [129]; *Tanya* (n 94) [70]; *Waller children* (n 26) [153].

³⁴⁰ *Alice* (n 27) [59]; *JH* (n 26) [86], [249]; *Nerayah & Kalista* (n 72) [54]; *RC & PK* (n 26) [170], [195].

³⁴¹ *Alfred* (n 8) [104]; *Dorothy* (n 103) [84]-[87]; *Esther* (n 209) [29], [38]; *Mihar children* (n 73) [43]; *Oscar* (n 20) [106].

³⁴² ASK (n 27) [224]; *GR* (n 26) [849]; *Hatfield children* (n 105) 80, 91; *JH* (n 26) [247]; *Re M* (n 69) [78], [168]; *Oscar* (n 20) [104], [106], [114]; *Rogers* (n 26) [158], [167]; *VC* (n 26) [284], [329]; *Waller children* (n 26) [152]-[154].

³⁴³ ASK (n 27) [255]; *Mihar children* (n 73) [40]; *VC* (n 26) [358].

³⁴⁴ ASK (n 27) [224].

are references to fathers being 'perfunctory'³⁴⁵ and 'passive'³⁴⁶ in their interactions with children during contact sessions, and a mother opting 'to make telephone calls or discuss her personal concerns with the contact supervisor', rather than 'maintaining a focus on [the child's] needs'.³⁴⁷

Counterpoint illustrations of empathy are provided in judgments in favour of restoration. Observations include, for instance, a father's focus on 'meeting all three children's needs appropriately as individuals',³⁴⁸ and a mother managing the behaviours of her four children in a way that demonstrated her 'good ability', developed in the course of therapy, 'to reflect on her children's thoughts and feelings'.³⁴⁹ Her capacity for empathy was further apparent in her delivery of evidence, in which she 'exhibited a warmth of affection and manner in talking about her children, their interests, needs and progress, and demonstrated an awareness of their individual needs'.³⁵⁰ A mother's engagement with her child in another 'realistic possibility' outcome was described as "'encouraging normative development (e.g. turn taking, eye-contact, sharing)'"'.³⁵¹ This child was experiencing developmental delay; his mother was "'able to recognise"' the approximate age level at which he was developmentally functioning, "'and thus met him appropriately.'"'³⁵²

Observations in the case of *Jamzie* show that a parent's capacity for emotional nurture does not require a contact visit to run perfectly smoothly, nor the parent to avoid showing vulnerability:

The family time reports are very assuring. For example...it is recorded Jamzie began to cry loudly.

'The mother was observed to kiss Jamzie's forehead, gently rocking him. The mother said Jamzie seems really tired. She continued to try and rock him to sleep. The grandmother came over with a musical teddy bear. The grandmother asked Jamzie in soft tones what's up darling and the mother said I think he's just distressed. The worker said to the mother you are doing a great job mum. Later, the mother said "too much sensory for him." The mother gently rocked Jamzie to sleep. The mother had tears running down her face and told Jamzie she missed him so much. The mother

³⁴⁵ VC (n 26) [358].

³⁴⁶ *Barnett children* (n 94) [55].

³⁴⁷ *Esther* (n 209) [38].

³⁴⁸ *Naunton children* (n 8) 11.

³⁴⁹ *Oscar* (n 20) [89].

³⁵⁰ *Ibid* [127].

³⁵¹ *Alfred* (n 8) [110], quoting the Clinician.

³⁵² *Ibid*.

wrapped Jamzie in a swaddle. The mother was observed to be very loving and nurturing’.

At later contacts Jamzie was observed to be clingy to the mother; and was settled and relaxed with her. (Magistrate in *Jamzie*)³⁵³

An issue appearing in several judgments is that of a parent’s lack of appreciation of the significance of the child’s relationships with other adults,³⁵⁴ including the child’s carers, the other parent, and extended family members. For example, the judgment in *Hatfield children* is deeply scathing of the mother’s repudiation of the value of the children’s relationship with their father. In a detailed evaluation of the evidence, the magistrate determined that a range of abuse allegations against the father and his extended family were without foundation, and had been contrived by the mother using false and misleading information.³⁵⁵ Despite her general competence in providing for the children’s day-to-day needs,³⁵⁶ and the children’s strong attachment to her,³⁵⁷ the mother’s undermining of the father, and attempts to hinder the children’s relationships with their extended paternal family,³⁵⁸ amounted to a failure to provide the children with ‘appropriate emotional nurturance or protection’.³⁵⁹

In several cases parents are observed to have compromised the child’s psychological wellbeing by making remarks in the presence of the child that undermine the carers³⁶⁰ and/or suggest the child will or should be coming home.³⁶¹ These practices tend to be associated with the parent being emotionally unstable or ‘dysregulated’.³⁶² In the case of *Mihar*, the mother was criticised for denigrating the carers (the maternal grandparents) in front of the children, and crying about imagined, persistent injuries to the children as ‘the children sat staring’.³⁶³

³⁵³ *Jamzie* (n 8) [134]–[135].

³⁵⁴ *Hatfield children* (n 105) 52, 70–73, 80, 90–2; *JH* (n 26) [187], [245]; *Logan* (n 310) 10–11; *Re M* (n 69) [71], [73], [128]; *Mihar children* (n 73) [43]; *Nerayah & Kalista* (n 72) [20], [22], [23].

³⁵⁵ *Hatfield children* (n 105) 52, 70–73, 80, 90–92.

³⁵⁶ *Ibid* 90.

³⁵⁷ *Ibid*.

³⁵⁸ *Ibid* 82.

³⁵⁹ *Ibid*.

³⁶⁰ *ASK* (n 27) [225]; *Dalton Tomkins children* (n 94) [125], [149]; *Logan* (n 310) 10; *McAlister Children* (n 73) [167].

³⁶¹ *Alison Claire* (n 69) [41]; *ASK* (n 27) [131], [235]; *McAlister Children* (n 73) [167].

³⁶² See *ASK* (n 27) [237]–[240]; *Dalton Tomkins children* (n 94) [122]–[123]; *JH* (n 26) [245]; *McAlister Children* (n 73) [167]–[170].

³⁶³ *Mihar children* (n 73) [43].

There was in fact no evidence of regular injury on any of the children. Any injuries were consistent with the usual scrapes and bumps that children suffer. This is a clear example of [the mother] not being able to prioritise the children's needs. She placed greater priority on her own resentment against her parents than the need for the children to have positive contact with their mother and not to have the current relationship with their grandparents destabilised. Even when warned about her behaviour by the supervisor and the impact that it may have she continued. (Magistrate in *Mihar children*)³⁶⁴

Mirroring these concerns are references in 'realistic possibility' outcomes to parents appreciating and accommodating their children's psychological bonds with other adults. The magistrate in *Naunton children* was 'impressed' by the father's willingness to acknowledge the high quality of care his children were receiving in their out-of-home care placement, and his stated intention to strive towards a similar standard.³⁶⁵ The father in *Ramsay children* was prepared to support the children's relationship with their maternal grandparents despite a strained history between the adults.³⁶⁶ In *SK* the mother was viewed favourably for facilitating the continuing relationship between her sons and their father (her estranged ex-husband), thus showing 'her insight into the importance of parental influences and family identity in the lives of her children'.^{367 368}

Underpinning these various conceptualisations of responsiveness and attunement is the notion that children's psychological wellbeing requires a *consistent* style of parenting,³⁶⁹ from a caregiver who offers *stability*.^{370 371} An inconsistent or unpredictable parenting style is associated, in turn, with the 'emotional volatility' and unresolved mental health issues discussed earlier in this chapter, and with a poor capacity to manage stress. For example, the

³⁶⁴ Ibid.

³⁶⁵ *Naunton children* (n 8) 27.

³⁶⁶ *Ramsay children* (n 7) 23.

³⁶⁷ *SK* (n 1) [45].

³⁶⁸ In the case of *SK* the marriage with the older children's father had been abusive. It is evident that there exists an apparently fine and tenuous line, in cases involving domestic violence, between a parent being applauded for encouraging ongoing connection between the children and a perpetrator of abuse, and conversely being denounced for doing so and hence failing to 'act protectively'. Indeed, in some 'realistic possibility' outcomes the parent's crucial 'reflective' capacity lies in acceptance of the need to limit, rather than promote, the children's contact with the abuser. See Chapter 8, section (ii) 'Domestic Violence'.

³⁶⁹ *Alison Claire* (n 69) [29]; *ASK* (n 27) [214], [247], [268]; *Dalton Tomkins children* (n 94) [307]; *Dorothy* (n 103) [44], [45], [101]; *JH* (n 26) [175]; *Lewis* (n 27) [108]; *SK* (n 1) [172]; *Spencer* (n 72) [21], [56], [63]; *VC* (n 26) [387(1)].

³⁷⁰ *Alice* (n 27) [91]–[93]; *Alison Claire* (n 69) [55]; *ASK* (n 27) [214]; *Dalton Tomkins children* (n 94) [307]; *Department of Communities and Justice (DCJ) and Evie and Grace* [2023] NSWChC 1, [54(4)]; *Jamzie* (n 8) [131]; *JH* (n 26) [245]; *Leonard* (n 73) [11], [18]; *Lewis* (n 27) [108], [181]–[195]; *Lilly, Wade & Caleb* (n 5) [69]; *MXS* (n 94) [74]; *O'Connor* (n 7) [32]; *VC* (n 26) [323], [387(1)]. See also Chapter 8, section (iii) 'Child's Stability and Development'.

³⁷¹ The significance of 'consistency', 'stability' and 'security' in caregiving is referred to in existing studies including Cashmore (n 88) 338; Eve, Byrne and Gagliardi (n 92) 120; Sheehan and Levine (n 154) 25–6.

mother in *Alison Claire*, despite being praised for substantial progress in many aspects of her case for restoration, reacted to the emotional strain she experienced during contact by ‘cutting short’ the visits, allegedly without insight into how this would affect the children.³⁷² The magistrate in *Mihar* found that contact was usually ‘positive’,³⁷³ and that evidence of the children’s affection towards the mother was ‘a significant factor in favour of restoration’.³⁷⁴ The aforementioned incident, involving the mother’s spurious allegations against the grandparents, was accepted as being atypical. However, this concession was immediately countered with the statement that: ‘[n]evertheless, how a parent behaves at stressful times is one indicator of their capacity to care for a child’.³⁷⁵

The case of *Dorothy* illustrates the potential for a gap, even a gulf, to exist between a parent’s loving bond with the child and a demonstrated ability to translate that love into provision of security. The Court accepted that the father³⁷⁶ loved Dorothy and that he sincerely believed placement in his care to be in her best interests.³⁷⁷ The Court further noted that contact reports showed ‘a lovely and positive relationship’ between the child, the father and her siblings.³⁷⁸ However, the father had engaged in an array of emotionally volatile actions during the course of proceedings, including reacting to his frustration with the legal process by intermittently declaring and then retracting his intentions to abandon the case, discontinue contact with Dorothy, and ‘relinquish’ the care of his older children.³⁷⁹ This was perceived as particularly illogical in light of the fact that the Department had given serious consideration to placing Dorothy with him, and that case planning was occurring accordingly.³⁸⁰ There were also recent incidents of the father emotionally abusing the older siblings,³⁸¹ and various unresolved concerns regarding drug use, mental health and domestic violence.³⁸² The magistrate commented that:

³⁷² *Alison Claire* (n 69) [40].

³⁷³ *Mihar children* (n 73) [44].

³⁷⁴ *Ibid.*

³⁷⁵ *Ibid* [45].

³⁷⁶ The ‘father’ pursuing restoration in this case was not Dorothy’s biological parent, nor her ‘step-father’ in the conventional understanding of the term, but had been her primary carer for most of her life, and was the biological father of her older half-siblings: at [2].

³⁷⁷ *Dorothy* (n 103) [99].

³⁷⁸ *Ibid.*

³⁷⁹ *Ibid* [29]–[40].

³⁸⁰ *Ibid* [43]–[44].

³⁸¹ *Ibid* [63]–[71].

³⁸² *Ibid* [49]–[98]; [101]–[102].

Mr Green was not able to provide any rational or cogent explanation for his actions nor was he able to recognise that there should be any concern about his actions. I find that Mr Green does not have the capacity to recognise and prioritise the emotional needs of his children over his own emotional needs, nor is he able to consistently make rational and reliable decisions in relation to them and that puts them at risk. (Magistrate in *Dorothy*)³⁸³

The theme of parents' capacity to meet their children's emotional needs was not particularly prevalent in the interviews. Caseworkers, when asked about 'good enough parenting', or what makes restoration realistic, tended to refer to physical safety and practical, daily care³⁸⁴ more often than emotional nurture.³⁸⁵ Magistrates' responses focused on parents *making effort* to address their problems,³⁸⁶ rather than on substantive aspects of parental responsibilities. It may be that love, nurture and emotional wellbeing are regarded as so fundamental that these, in effect, 'go without saying'.

To the extent that participants did discuss children's emotional needs being met by the parents, there were differences in perspective – revealing nuances in the broad concept. For example, two magistrates expressed their concern at the issue of 'parentification': one referred to 'the [hypothetical] child trying to save a parent who is not doing enough to save themselves';³⁸⁷ the other lamented 'it's not unusual for the eldest siblings to take on the role of parent and look after the younger siblings. The oldest sibling loses a childhood. It's terrible, terrible'.³⁸⁸ In contrast, several participants referred to complexities with the notion of parentification: that there are many children in the community, not removed into care, who provide a caring role for parents with disabilities,³⁸⁹ and that differing cultural norms apply to the practice of children looking after their younger siblings.³⁹⁰ In another vein, questioning the assumptive norm that emotional security requires *consistently* competent parenting, two lawyers (one a former caseworker) suggested that a struggling and 'dysfunctional' parent may still provide 'emotional safety',³⁹¹ and do so in spite of elements of parentification:

...the eldest child had developed a lot of the parenting of the younger child...but that eldest child talked about that she understood that mum and dad were drug takers. She understood that they're currently clean. She understood what it looks like when

³⁸³ Ibid [45].

³⁸⁴ Caseworkers 4, 5, 7, 8, 9, 10, 12.

³⁸⁵ Caseworkers 1, 7, 10, 11.

³⁸⁶ Judicial Officers 2, 3, 5, 7, 8, 16, 17, 18, 23.

³⁸⁷ Judicial Officer 7.

³⁸⁸ Judicial Officer 15.

³⁸⁹ Lawyer 6.

³⁹⁰ Registrar 1, in reference to Pacific Islander culture.

³⁹¹ Lawyer 8.

mum's using drugs as opposed to when she's good...her view was 'that's them. It's not okay and I understand that it makes me unsafe, but I still want to go home because I love them, they love me and when it's important they do turn up, they come to the school events, they go to the soccer on the Saturday. They can do the things that matter to me'. (Lawyer 3)

There were several references to the limitations of contact reports in providing any true semblance of the relationship, given the intermittent frequency³⁹² and short duration³⁹³ of the visits, the artificial environment,³⁹⁴ the superficiality of many of the observations,³⁹⁵ and the strain on both parent and child of knowing they are being watched and their relationship judged.³⁹⁶ These concerns are similar to reservations about clinical parenting capacity assessments, noted in chapter 4.³⁹⁷

Conclusions

The start of this chapter continued the case-based stories of Sarita and Sonya. Although their stories differ in many respects, Sarita and Sonya faced broadly similar arguments mounted by the Department to oppose restoration of their children. These arguments were based on mental health issues, purported lack of insight into domestic violence, and allegedly inadequate insight into the children's emotional welfare. Both women had made consistent efforts in engaging with counselling and other sources of help. Their stories continue in chapters 8 and 9, with their Court outcomes revealed in chapter 10. In the meantime, it is clear that the issues arising in Sarita's and Sonya's cases are reflective of the factors that typically dominate the Court's assessment of realistic possibility of restoration.

The four leading influential factors identified in this chapter—insight, mental health, engagement, and capacity to provide for the child's emotional wellbeing—can all be described as *attitudinal* issues. Insight, mental health and recognition of the child's emotional needs are associated with the parent's state of mind (intrinsic attitude), which is then extrinsically demonstrated by the extent of compliant engagement with services and empathetic interactions with the child. These attitudinal themes are a distinct departure from the leading reasons for the Department's initial decision to remove the child, which are dominated by the

³⁹² Judicial Officer 15; Caseworker 12.

³⁹³ Caseworker 12.

³⁹⁴ Judicial Officer 15.

³⁹⁵ Judicial Officers 7, 19; Caseworker 4.

³⁹⁶ Judicial Officer 23.

³⁹⁷ See Chapter 4, part D, section (iii).

more concrete, substantive issues of domestic violence, drug and alcohol abuse, physical neglect and physical abuse. Parental mental health remains consistent as a leading concern at both stages – although substantially increasing its relative emphasis at the restoration stage.

These findings have some resonance with previous research in the Children’s Court of Victoria, which quantitatively analysed the accuracy of risk prediction models retrospectively applied to court outcomes. The Victorian study found that magistrates’ decisions were more strongly influenced by ‘dynamic’ factors – being variables indicating the current situation, such as parents’ attitudes and compliance, and subject to potential change – than by the ‘static’ factors of pre-existing or historical parental circumstances.³⁹⁸

This chapter has also shown that the four leading factors are intertwined, each interacting with the others in an almost symbiotic way. Lack of insight is associated with unresolved mental health concerns, both of which are perceived to impede a reflective understanding of the child’s needs, and all of which may limit a parent’s engagement with service interventions.

This is not for want of trying on the part of most of the parents involved. The judgments recognise various positive attributes of the parents who were nonetheless unsuccessful in arguing for restoration. More than half had made efforts to engage and cooperate with services, including counselling; many showed commitment to the child and overall motivation to achieve change; and some were acknowledged to be competent in various aspects of parenting. Subsequent chapters, on the substantially, moderately and less influential factors in the Court’s decisions, refer to other areas in which non-determinative strengths were present. In total, parental strengths were acknowledged in around 85% of the ‘no realistic possibility’ cases. These strengths were not in tangential or trivial areas, immaterial to the child protection issues – to the contrary, they tend to mirror the achievements of the parents in ‘realistic possibility’ outcomes, not only in engagement, but in areas such as adequate housing, presence of informal supports, and addressing substance misuse. To varying degrees there was, therefore, some *potential* for a happier outcome in these cases, but this was impeded by findings that the positive features did not resolve the root causes of the child protection issues.

³⁹⁸ De Bortoli et al (n 13) 41–43. The study compared a ‘structured decision-making’ model with a ‘structured professional judgment’ model: 31–34. These were retrospectively applied to risk factors identified in reports and other documentary information contained in court files in completed cases.

The focus on parental attitude, accompanied by expectations to engage in therapy, reflect arguments in the scholarly literature of a ‘medicalised’, ‘forensic’ approach to child protection, which places responsibility for child maltreatment squarely on the individual parent, rather than on their environment, structural inequality, or systemic flaws within child protection and related institutions.³⁹⁹ However, in an essentially adversarial legal process, it is unsurprising and no criticism of judicial officers that their assessment of the viability of restoration applies a fairly narrow lens, dependent on the way the issues are presented on the evidence in the immediate case before them. It is not the Court’s role—or at least not in isolation—to ‘fix’ social problems.⁴⁰⁰ Nonetheless, interview participants across the board raised systemic issues and nuanced understandings of barriers faced by parents striving for restoration. Most agreed that a parent’s constructive engagement is important, but are wary of ‘check-lists’ and non-meaningful tasks, and conscious of various reasons why parents may struggle to be compliant. The notion of insight is viewed sceptically, unless its abstract nature is translated or demonstrated in practical terms. There was general consensus on the significance of parental mental health, but an aversion to a labelling approach whereby any mental health condition is too readily assumed to equate to impaired parenting capacity. Barriers to accessible and appropriate help with mental health were comprehensively identified and strongly emphasised by the study’s participants. Potential policy implications of these findings are discussed in chapter 10.

³⁹⁹ See, eg, Horsfall (n 154) 26–7; Keddeh (n 154) 1254–5; Luther (n 67) 308, 383, 397; Kate Morris et al, ‘Social Work, Poverty and Child Welfare Interventions’ (2018) 23 *Child & Family Social Work* 364, 368–9; Yuval Saar-Heiman, Anna Gupta and Griet Roets, ‘Parenting Through the Lenses of Risk and Othering: Constructions of Parenting Cannabis Use in Child Protection Court Proceedings’ (2023) 28 *Child and Family Social Work* 690, 692.

⁴⁰⁰ This point was explicitly observed by the Judge in the case of VC (n 26): ‘My role is not to redress societal wrongs’: at [184]. But see also Chapter 4, part C, section (iii), in relation to tensions in the respective roles and boundaries of the Court and statutory authority.

CHAPTER EIGHT

Reasons for Decision on ‘Realistic Possibility of Restoration’: Substantially Influential Factors

Case Stories continued: Sarita and Sonya

Sarita’s story continued¹

After a series of violent assaults on Sarita, her husband was imprisoned and later placed in immigration detention. The Department perceived Sarita as ‘reluctant to disclose’ the violence, and used evidence of her phone calls and visits to the detention centre to argue that she minimised and lacked insight into domestic violence and its risk to the child, Sammy. The Children’s Court Clinician recommended against restoration—asserting that cultural beliefs involving ‘tolerance’ of domestic violence and a stigma attached to divorce meant that Sarita was unable to ‘acknowledge her victimisation’ and this jeopardised her ability to prioritise Sammy’s safety.

Evidence from Sarita’s psychologist and social worker, both persons of ethnic and cultural origin aligned to Sarita’s own, indicated that Sarita did have awareness of the harm of domestic violence and the risk it posed to her children. Based on ‘careful observation’ of Sarita’s oral evidence under cross-examination, the judge agreed with these opinions.

The Department maintained that Sarita had intended to harm the baby in utero, and that she ‘displayed a lack of bonding and attachment’ to Sammy in the days after his birth. The judge found these claims to be unsupported by medical records and psychiatrist opinion, and that to the contrary Sarita had always shown ‘affection, attentiveness, doting and appropriate interest in the health, welfare and development’ of Sammy. The Clinician observed the relationship between Sarita and her older sons to be affectionate, convivial and respectful.

The Clinician relied on Sammy’s primary attachment with his foster carers as a reason to oppose restoration—although the judge noted that since that assessment Sammy had been moved to new, proposed adoptive carers, presumably disrupting his former attachment relationship.

Sonya’s story continued²

Based on contact reports and the opinion of the Children’s Court Clinician, the magistrate found there was a ‘good’ relationship and ‘loving bond’ between Sonya and her older child, Merinda. Acknowledging that Sonya had been Merinda’s primary carer for most of her life, the magistrate commented that ‘any court should

¹ Based on *SK v Secretary, Department of Family and Community Services* [2016] NSWDC 273 (‘SK’). See parts 1 and 2 of Sarita’s story in chapters 6 and 7.

² Based on an unpublished judgment of the Children’s Court, 2009. See parts 1 and 2 of Sonya’s story in Chapters 6 and 7.

be very careful before making orders that would disrupt the most significant relationship in a child's life'. However, Merinda and Nate were noted to have settled well into their placement with Merinda's father and his new partner.

Although Sonya had ended the relationship with Nate's father, the magistrate was concerned that she had not been honest with her counsellor in relation to the timing of this; nor had she engaged in any programs specific to domestic violence, in order to 'avoid falling into another abusive relationship'.

Sarita's and Sonya's stories continue in chapter 9.

Chapter Overview

This chapter discusses four thematic factors that are less prevalent than the leading factors discussed in chapter 7, but still have a substantial influence on the Court's decisions on realistic possibility of restoration.

Each of the substantially influential factors is a reason for decision in the range of 40–50% of the judgments. The chapter starts with the adult-focused factors of (i) *candour and credibility* (appearing in 50% of decisions) and (ii) *domestic violence* (appearing in 45% of decisions). The theme of parents' candour and credibility adds yet another thread to the 'attitudinal', 'intrinsic' concepts prevalent in the Court's decisions, the others being the leading factors discussed in chapter 1. Meanwhile, domestic violence, while ostensibly an *extrinsic* issue, is enmeshed in the judgments with intrinsic factors—the Court's reasoning linking domestic violence with deficient insight, poor mental health, and inadequate capacity to meet the child's emotional needs. These associations are applied to both perpetrators and victims of violence, and include, contentiously, a perceived causal link between women's mental illness and a 'propensity' to engage in abusive relationships.

The analysis then turns to the child-focused themes of (iii) the *child's stability and development* (in 47% of decisions), and (iv) the *child's relationships* (in 42%). The former factor relates mainly to the structure of children's lives in out-of-home care, while the latter—encompassing attachments, loving bonds and connections to significant people—is strongly linked to decisions to restore children to their family. The discussion considers the problematic implications of these contrasts for children whose particular experiences in out-of-home care provides neither stability nor connectedness.

Substantially Influential Factors

(i) Candour and Credibility

Truthfulness was something [the mother] appeared to judge as entirely unnecessary in these proceedings and accordingly her assertions of learning and attaining an increased understanding of her obligations carry little weight. (Judge in *Carl*)³

Everyone who walks into a court is affected by the location and the circumstance of the solemnity and the ceremony and all of that, in a way that you don't get a true representation of the person. I don't like to draw too many conclusions from what I see in court, because I think that's false reasoning. (Judicial Officer 6)

The theme of 'credibility' refers to the Court's assessment of the parent's evidence in the proceedings, while 'candour' relates to whether the parent has been honest and forthcoming in interactions with the child protection system more generally. The two are closely connected, as judicial officers often rely on a person's presentation in the witness box in assessing their honesty – although they also draw inferences from 'the totality of the evidence'⁴ that a version of events other than the parent's is to be preferred. The magistrate in *Jamzie* described this two-pronged approach to determining credibility:

The first [aspect] is the demeanour of the witnesses. The Court observes the evidence as given and uses those observations to determine whether the witnesses gave evidence in a forthright and knowledgeable manner. This influences whether the witness's evidence is convincing or not.

The second aspect is the extent to which separate evidence may be admitted that has the specific function of either enhancing or destroying the credibility of a witness, whether by way of showing capacity or incapacity, consistency or inconsistency or evidence impacting character – positive or negative. (Magistrate in *Jamzie*)⁵

Combined, parents' candour and credibility, or lack thereof, are reasons for decision in 50% of the judgments. Their influence appears on the face of it to be stronger in 'no realistic possibility' outcomes (appearing in 58% of these decisions) than in 'realistic possibility' outcomes (40%) – although a finding in favour of credibility is broadly implicit in the other 60% of 'realistic possibility' judgments. It seems unlikely that the Court would trust a parent with restoration if unconvinced of their reliability in relation to essential issues; hence it is usually an unspoken assumption that the parent is deemed an honest witness if their assertions and plans are accepted as 'realistic'. The reverse logic, however, does not

³ *DFaCS (NSW) v Carl* [2013] NSWChC 2, [52] ('*Carl*').

⁴ *Saunders and Morgan* [2007] NSWDC 5589, [58] ('*Saunders & Morgan*').

⁵ *Department of Communities and Justice (DCJ) and Jamzie* [2022] NSWChC 1, [103]–[104] ('*Jamzie*').

necessarily apply to ‘no realistic possibility’ decisions. A parent may be found to have unrealistic plans and to lack adequate parenting capacity, despite being truthful in their evidence.

In decisions in favour of restoration, aspects of parents’ evidence contributing to positive findings on credit include direct, focused and ‘forthright’⁶ answers to questions under cross-examination,⁷ delivered in a manner that is calm and thoughtful without appearing ‘rehearsed’^{8,9} and – of particular importance – a willingness to concede their own failings.¹⁰ The commentary is largely concerned with the parents’ reflection on past events and their acceptance of responsibility, or ‘insight’. Less often, a parent’s evidence is noted as indicating specific parenting knowledge or skills.¹¹

Candour and credibility are not entirely limited to those who succeed in their case for restoration: the Court commented favourably on parents’ performance as witnesses in approximately 13% of ‘no realistic possibility’ judgments. This included recognition of the frankness of their testimony,¹² or affirmation that the evidence showed progress in addressing some of the child protection issues.¹³ There are further references to intelligence,¹⁴ articulateness (in either oral or written evidence),¹⁵ and capable management of litigation, especially when self-represented.¹⁶ The factors outweighing these positive observations are

⁶ *J & T v Department of Communities and Justice* [2023] NSWDC 78, [185] (‘J & T’); *Re Jillian and Jacinta* [2008] NSWLC 23, [16] (‘Jillian & Jacinta’); *Mario* (pseudonym, unpublished judgment, Children’s Court, October 2022) 22 (‘Mario’).

⁷ *J & T* (n 6) [184]–[185]; *Jamzie* (n 5) [105]; *Jillian and Jacinta* (n 6) [16]; *VC v Secretary, Department of Communities and Justice & Ors* (No. 2) [2024] NSWDC 192, [172] (‘VC’).

⁸ *Jamzie* (n 5) [105]; *VC* (n 7) [172].

⁹ *Jamzie* (n 5) [105]; *Department of Communities and Justice (DCJ) and Janet and Xing-fu* [2022] NSWChC 7, [82] (‘Janet & Xing-fu’); *Jillian and Jacinta* (n 6) [16]; *VC* (n 7) [172].

¹⁰ *Hatfield children* (pseudonym, unpublished judgment, Children’s Court, April 2018) 75 (‘Hatfield children’); *Jamzie* (n 5) [105], [113], [120]; *Jillian and Jacinta* (n 6) [16]; *Lim children* (pseudonym, unpublished judgment, Children’s Court, July 2022) 15 (‘Lim children’); *Mario* (n 6) 22; *Naunton children* (pseudonym, unpublished judgment, Children’s Court, August 2023) 28 (‘Naunton children’); *DFaCS (NSW) re Oscar* [2013] NSWChC 1, [126] (‘Oscar’); *Ramsay children* (pseudonym, unpublished judgment, Children’s Court, April 2021) 22 (‘Ramsay children’); *SK* (n 1) [157]–[159]; *VC* (n 7) [172].

¹¹ *Janet & Xing-fu* (n 9) [87]; *Naunton children* (n 10) 28; *Oscar* (n 10) [127].

¹² *Re Anthony* [2008] NSWLC 21, [25], [26] (‘Anthony’); *Ezekial* (pseudonym, unpublished judgment, Children’s Court, May 2021) 14 (‘Ezekial’); *Lim children* (n 10) 9; *Logan* (pseudonym, unpublished judgment, Children’s Court, March 2022) 8 (‘Logan’); *RC and PK v The Secretary, Department of Communities and Justice* [2024] NSWDC 196, [126], [130] (‘RC & PK’).

¹³ *ASK v Secretary DFaCS* [2014] NSWDC 247, [150] (‘ASK’); *Re Elizabeth* [2011] NSWDC 245, [85] (‘Elizabeth’); *FaCS v the Harris children* [2012] NSWChC 9, [13] (‘Harris children’);

¹⁴ *Anthony* (n 12) [25]; *JH v Secretary, Department of Communities & Justice & Ors* (No.3) [2023] NSWDC 517, [195] (‘JH’); *Lim children* (n 10) 9.

¹⁵ *ASK* (n 13) [144] (‘ASK’).

¹⁶ *Harris children* (n 13) [13]; *Lim children* (n 10) 9.

diverse, but include the child's stability and progress in care,¹⁷ or the presence of ongoing parental risk issues such as drug use,¹⁸ domestic violence,¹⁹ and inadequate parenting skills.²⁰

Observations of *lack of credibility* are usually couched in relatively mild terms, such as 'unsatisfactory',²¹ 'misleading',²² 'not forthcoming',²³ 'less than frank'²⁴ and 'less than candid'.²⁵ These remarks tend to be specific to the evidence itself, rather than to *the person*. However, stronger language sometimes appears, denouncing the parent's character, rather than simply doubting the testimony. For example, parents have been described as 'adept at distorting the truth',²⁶ 'sly and evasive...aggressive in [their] denials of even the most patent of factual assertions',²⁷ possessing 'an unstoppable capacity to dissemble and exaggerate',²⁸ 'aggrieved and resentful...their evidence facile and guarded [and] pervaded by insincerity and equivocation'.²⁹ These and other strident criticisms typically apply to parents who are portrayed as dogmatically convinced of the righteousness of their own position. Around 15% of the 'no realistic possibility' judgments involve parents who appear to be, in varying permutations and degrees, intransigent.³⁰ This is often accompanied by a belligerent temperament in dealing with caseworkers, third parties or the Court,³¹ and/or entrenchment in an irrational, 'illusory'³² belief system.³³ They are usually self-represented, and in a couple of instances, appear to have conducted their litigation in a manner bordering on the

¹⁷ *Elizabeth* (n 13) [178]–[180]; *Logan* (n 12) 14–15.

¹⁸ *Lim children* (n 10) 9–10.

¹⁹ *Harris children* (n 13) [31]; *Lim children* (n 10) 11.

²⁰ *ASK* (n 13) [167]–[172]; *Ezekial* (n 12) 16; *RC & PK* (n 12) [132], [189]–[194].

²¹ *Charlie* (pseudonym, unpublished judgment, Children's Court, December 2021) 10–11 ('*Charlie*'); *Department of Family and Community Services and Nathan* [2018] NSWChC 1, [64] ('*Nathan*').

²² *Dupont v The Secretary, Department of Family and Community Services* [2014] NSWDC 240, [106] ('*Dupont*').

²³ *Department of Communities and Justice (DCJ) and the Dalton Tomkins children* [2023] NSWChC 10, [234] ('*Dalton Tomkins children*').

²⁴ *Rogers v The Secretary Department of Family and Community Services NSW* [2019] NSWDC 194, [78] ('*Rogers*').

²⁵ *A v Secretary, Department of Communities and Justice (No. 4)* [2019] NSWSC 1872, [98] ('*A*').

²⁶ *GR v The Department of Communities and Justice* [2021] NSWSC 1081, [828] ('*GR*').

²⁷ *DFaCS (NSW) re Amanda & Tony* [2012] NSWChC 13, [61] ('*Amanda & Tony*').

²⁸ *Oscar* (n 10) [98].

²⁹ *Saunders & Morgan* (n 3) [57].

³⁰ *Amanda & Tony* (n 27); *Charlie* (n 21); *GR* (n 26); *DFaCS (NSW) re Kim* [2013] NSWChC 6 ('*Kim*'); *Re M (No 6)* [2016] NSWSC 170 ('*Re M*'); *Oscar* (n 10); *Rogers* (n 24); *In the Matter of Samantha* (Children's Court, 21 July 2008); *VC* (n 7); *Waller children* (pseudonym, unpublished judgment, Children's Court, September 2022) ('*Waller children*'); *Y v The Secretary, Department of Communities and Justice (No. 6)* [2021] NSWDC 392 ('*Y*').

³¹ *Amanda & Tony* (n 27) [72]; *Charlie* (n 21) 25–6; *GR* (n 26) [602], [814]–[820], [826], [850], [865]; *Kim* (n 30) [53]–[58]; *Oscar* (n 10) [42]–[50], [64]–[65], [76(22)], [78], [90]–[94], [107]–[108], [110]–[111]; *VC* (n 7) [285], [351], [356]; *Waller children* (n 30) [23]–[37], [46], [48], [116]; *Y* (n 30) [10]–[17], [31]–[39], [45]–[46], [277]–[310].

³² *Re M* (n 30) [168].

³³ *GR* (n 26) [815], [854]; *Re M* (n 30) [168]; *Oscar* (n 10) [74(d)], [96], [98]; *VC* (n 7) [284].

vexatious.³⁴ It is probable that these cases are disproportionately represented within the pool of judgments. They are more likely than other matters to proceed to defended hearing in the first place, and the difficult nature of the ensuing litigation, and prospect of further appeal, may act as an incentive to judicial officers to scrupulously document their reasoning in a published decision.³⁵ The resulting prominence of these particularly challenging cases in published form has a distorting effect on the overall impression of parents' credibility.

Within the wider pool of judgments, adverse assessments of parents' credibility are based on a range of concerns. For parents under cross-examination, these include responses that are evasive,³⁶ vague or rambling,³⁷ defensive or self-serving,³⁸ or internally inconsistent.³⁹ The judgments do make some allowances for difficulties encountered by parents in giving oral evidence. There are several references to English not being the parent's first language.⁴⁰ There is acknowledgement of the stress of the proceedings,⁴¹ the normality of being nervous,⁴² and special difficulties for parents with cognitive impairment⁴³ or without legal representation.⁴⁴ It is accepted that parents might feel 'overwhelmed' by the momentous issues at stake,⁴⁵ exhibit distress based on legitimate concerns about their children's welfare in care,⁴⁶ and find it challenging to give evidence about being subjected to domestic violence.⁴⁷

³⁴ See GR (n 26), in which the mother had 'embarked on serial litigation in a most obsessive and aggressive manner': at [814], prompting the Judge to remark 'I do not see an end in sight which does not involve some adversarial process, short of GR's status as a litigant being altered': at [826]. See also Y (n 30), in which proceedings had been prolonged by the father's 'dilatatory, unhelpfully combative, provocative, at times bizarre, and later, avoidant litigation conduct': at [3], with the result 'that these proceedings have consumed extensive public resources at great cost to the State': at [48].

³⁵ Judicial Officer 6.

³⁶ JH (n 14) [197]; *Keziah* (pseudonym, unpublished judgment, Children's Court, October 2013) [60] ('*Keziah*'); *Nathan* (n 21) [65]; *Re Tanya* [2016] NSWSC 794, [39] ('*Tanya*').

³⁷ *Dorothy* (pseudonym, unpublished judgment, Children's Court, September 2019) [87] ('*Dorothy*'); JH (n 14) [197]; *Keziah* (n 36) [60]; *Department of Communities and Justice (DCJ) and Lewis* [2018] NSWChC 5, [67] ('*Lewis*'); *Lim children* (n 10) 14.

³⁸ JH (n 14) [196]; *Lewis* (n 37) [64]; *Department of Communities and Justice (DCJ) and May, June and Roy* [2023] NSWChC 15, [138] ('*May, June & Roy*'); *Re M* (n 30) [168].

³⁹ *Department of Family and Community Services (NSW) and the Bell-Collins Children* [2014] NSWChC 5, [119] ('*Bell-Collins*'); *Department of Communities and Justice (DCJ) and Bloom* [2021] NSWChC 2, [302] ('*Bloom*'); *Charlie* (n 21) 10–11; *Dorothy* (n 37) [87]; *Hatfield children* (n 10) 58; *Kee children* (pseudonym, unpublished judgment, Children's Court, June 2011) [50] ('*Kee children*'); *Lewis* (n 37) [66]; *Tanya* (n 36) [39].

⁴⁰ *ASK* (n 13) [227]; *Charlie* (n 21) 10; *Lim children* (n 10) 14.

⁴¹ *Charlie* (n 21) 10; *KH v Secretary, Department of Communities and Justice* [2021] NSWDC 498, [36] ('*KH*').

⁴² *Dorothy* (n 37) [87]; *Logan* (n 12) 9.

⁴³ *ASK* (n 13) [227]; *Charlie* (n 21) 10; *Ezekial* (n 12) 13; *Re Malakhai* [2022] NSWChC 6, [141]–[144] ('*Malakhai*').

⁴⁴ *KH* (n 41) [33], [36], [77]; *Mario* (n 6) [18].

⁴⁵ *Dorothy* (n 37) [87].

⁴⁶ *Department of Communities and Justice (DCJ) and the Yarran Taylor children* [2024] NSWChC 3, [85] ('*Yarran Taylor children*').

⁴⁷ *Ezekial* (n 12) 13; *Yarran Taylor children* (n 46) [136].

Despite such reservations, interviewed magistrates gave examples of the utility of hearing from a parent in some circumstances. The oral testimony may confirm an impression that the parent has not actually ‘seen the light’⁴⁸ in the way their affidavits claim (in regard to domestic violence, for instance).⁴⁹ Parents can be ‘frank and very, very honest’⁵⁰ in the witness box, especially if directly questioned by the judicial officer. This process helps the Court get a grasp on issues that remain hidden when the parent is silently ‘sitting behind a lawyer’.⁵¹ This will sometimes be to the parent’s advantage—for example, by demonstrating genuine learning from courses and programs.⁵² A magistrate spoke of finding a realistic possibility of restoration to a father after hearing from him in the witness box, whereas his earlier ‘demeanour in the courtroom didn’t assist him at all’.⁵³

Another magistrate was more circumspect, remarking that in the intimidating courtroom environment:

...parents in cross-examination often come across dreadfully, but that’s nothing to do with their truthfulness or their capacity to parent or anything... So I draw very little conclusion from what happened in court. (Judicial Officer 6)

In a similar vein, a registrar contrasted the courtroom environment with the very different atmosphere of a dispute resolution conference:⁵⁴

What the magistrates hear, even in cross-examination, is very filtered. It’s filtered through a lawyer; clients are coached about how to answer questions. In the dispute resolution conferences, you’re at the table with these people. It’s very informal. It’s very real. They will say things in the dispute resolution conference that they would never dare say in court. So you get a lot of honesty. (Registrar 2)

Beyond their evidence in the witness box, dishonesty or insufficient ‘transparency’ are noted in relation to parents’ communications with caseworkers,⁵⁵ police,⁵⁶ other third parties,⁵⁷ and

⁴⁸ Judicial Officer 4.

⁴⁹ Ibid.

⁵⁰ Judicial Officer 9.

⁵¹ Ibid.

⁵² Judicial Officer 4.

⁵³ Ibid.

⁵⁴ See Chapter 2, part C ‘The Legal Process’.

⁵⁵ *DFaCS (NSW) and Abbey* [2013] NSWChC 3, [103], [111] (*‘Abbey’*); *DCJ and Alice* [2024] NSWChC 12, [34] (*‘Alice’*); *Dalton Tomkins children* (n 23) [93]–[95], [234], [334]; *Harris children* (n 13) [40]; *Hatfield children* (n 10) 24; *Tanya* (n 36) [39], [41]–[46]; *VC* (n 7) [345].

⁵⁶ *Harris children* (n 13) [42]; *Hatfield children* (n 10) 24; *JH* (n 14) [198]; *JMS v Department of Family and Community Services & Ors* [2018] NSWDC 25, [34]–[36] (*‘JMS’*).

⁵⁷ *Alice* (n 55) [36]; *Grierson children* (pseudonym, unpublished judgment, Children’s Court, August 2019) [40], [179], [188] (*‘Grierson children’*); *Hatfield children* (n 10) 24, 52; *JH* (n 14) [252]; *Tanya* (n 36) [39].

in affidavits.⁵⁸ Importantly, the most damaging impact on the plausibility of parents' evidence arises from inconsistency between the *substance* of their evidence and that from other sources. This is apparent in the volume of references to factual inconsistencies,⁵⁹ and the emphasis placed on these factual findings in the Court's articulation of its reasoning. The judgment in *Amanda and Tony* stated the Court's ordinary preference for assessing credibility via the evidence as a whole, rather than in reference to witness demeanour⁶⁰ – thus aiming 'to rely as much as possible on contemporary materials; objectively established facts; independent support from other material; and the apparent logic of events'.⁶¹

In the absence of strict rules of evidence in the care jurisdiction, concern is sometimes raised that recourse to third party versions of events (such as records of hospitals, police, schools, or anonymous child protection reports) has 'unfairly prejudicial consequences'⁶² to parents.⁶³ However, while several judgments acknowledge that such documents as a matter of course may contain error, their independence and reliability are assessed in context within the totality of evidence.⁶⁴ On occasion the Court accepts a parent's account,⁶⁵ or the opinion of an expert witness,⁶⁶ over an allegation or suggestion based on third party records.

An assumption that honesty is judged by external demeanour may be 'a deep-rooted belief in our legal culture,'⁶⁷ but the NSW care jurisdiction clearly prioritises matter over manner.⁶⁸

⁵⁸ *Adriana* (pseudonym, unpublished judgment, Children's Court, July 2022) 4 ('*Adriana*'); *Alice* (n 55) [35]; *Carl* (n 3) [51]; *Harris children* (n 13) [42], [44]; *Keziah* (n 36) [128]; *Tanya* (n 36) [40]–[41].

⁵⁹ See, eg, *Amanda & Tony* (n 27) [44]–[55]; *Bloom* (n 39) [308]; *GR* (n 26) [828]–[841]; *Grierson children* (n 57) [37]–[38], [40]; *The Secretary, Department of Family and Community Services and the Harper Children* [2016] NSWChC 3 [155]–[156], [158]–[164] ('*Harper children*'); *Hatfield children* (n 10) 58, 59; *JH* (n 14) [197]; *Lewis* (n 37) [65]; *Department of Communities and Justice (DCJ) and the McAlister Children* [2020] NSWChC 4, [159]–[160] ('*McAlister children*'); *Mihar children* (pseudonym, unpublished judgment, Children's Court, August 2012) [56] ('*Mihar children*'); *Department of Communities and Justice (DCJ) and Murphy* [2020] NSWChC 11, [98] ('*Murphy*'); *RC & PK* (n 12) [101], [182]; *Tanya* (n 36) [39]; *Waller children* (n 30) [160].

⁶⁰ *Amanda & Tony* (n 27) [60].

⁶¹ *Ibid.* See also *KH* (n 41), in which the Judge states that 'caution requires that assessment of credibility on demeanour alone is not appropriate': at [76].

⁶² *J & T* (n 6) [131].

⁶³ *J & T* (n 6) [128]–[131]; *SK* (n 1) [163]–[165]. See also Teresa Hinton, *Rebalancing the Scales: Access to Justice for Parents in the Tasmanian Child Safety System* (Report, Anglicare Tasmania, 2020) 71, 72–4; Tamara Walsh and Heather Douglas, 'Lawyers' Views of Decision-Making in Child Protection Matters: The Tension Between Adversarialism and Collaborative Approaches' (2012) 38(2) *Monash University Law Review* 181, 199–200.

⁶⁴ See *GR* (n 26) [204]–[206], citing *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542; *Grierson children* (n 57) [37]; *Murphy* (n 59) [98]; *SK* (n 1) [216]–[217].

⁶⁵ See, eg, *Jamzie* (n 5) [107]–[109]; *Ramsay children* (n 10) 24.

⁶⁶ *SK* (n 1) [231], [234].

⁶⁷ Kenneth McK Norrie, 'Appellate Deference in Scottish Child Protection Cases' (2016) 20(2) *Edinburgh Law Review* 149, 153.

⁶⁸ See also Chapter 4, part A, section (ii) 'Discretion', in which decision-making on the issue of restoration was described by judicial officers as a holistic, fluid approach to assessing the 'whole picture' of the case.

Nonetheless, scrutiny of the substance of their evidence can place parents at a disadvantage, in the context of a legal process that they experience as confusing and alienating.⁶⁹ Robust testing of the reliability of their case for restoration is, within the paradigm of an essentially adversarial legal framework, justifiable in protecting the safety and interests of the child. But a focus on past wrongdoing, accompanied by rigorous challenges to claims of parenting capacity and personal progress, may be unlikely to place parents in a frame of mind conducive to self-confidence and readiness for positive change.⁷⁰

A magistrate asserted that it was actually rare, in his several decades on the bench, for a care hearing to involve a patently untruthful witness. To the contrary, all the parties, in the large majority of cases:

...really want to do the right thing by those children. Maybe they're not equipped to, but that's their desire and to write that off as 'this person being dishonest or untruthful' or whatever, it's callous. (Judicial Officer 10)

The same magistrate suggested, as did several others,⁷¹ that an inquiry-based model – rather than the conventional adversarial-style hearing – would be better suited to determining the best option for the child, this being the question in which all parties are invested. The issue of alternative court models is canvassed in chapter 10, along with arguments for adjusting existing processes so that parents feel less that their integrity is under siege, and rather that they are trusted participants in planning for their child's future.

(ii) Domestic Violence

...the Mother's attachment style had been affected by her fears of abandonment and rejection in relationships. Her relationships had been tumultuous and emotionally challenging; often leading to domestic violence. (Judge in *JH*, citing the Children's Court Clinician)⁷²

We don't do well with speaking to or working with Dads, I don't think, especially when the parents are separated. We very much focus on what Mum needs to do –

⁶⁹ See Chapter 4, part B, and Chapter 10, part B, section (i) 'Counter-Productive Aspects of the Child Protection Legal System'.

⁷⁰ See, eg, Michael S King and CL Tatasciore, 'Promoting Healing in the Family: Taking a Therapeutic Jurisprudence Based Approach in Care and Protection Applications' [2007] (1) *eLaw Journal: Murdoch University Electronic Journal of Law* 78, 87–8; Nicola Ross et al, 'Evidence-based law and practice with disadvantaged populations: Perspectives of parents involved in child protection proceedings' (2017) 12 *Newcastle Law Review* 23, 25–6; Alana Thompson, 'Therapeutic Jurisprudence and the Children's Court: Creating a More Relational Approach to Protection and Care Proceedings' (PhD Thesis, University of Western Australia, 2011) 167.

⁷¹ See Chapter 10, part C, section (ii).

⁷² *JH* (n 14) [86].

all these things – Mum needs to go address her domestic violence experience...we put it on the victim. (Caseworker 11)

Domestic violence influences the decision on realistic possibility of restoration in 45% of the judgments. As identified in chapter 6, it is the foremost leading factor in the Department's decision to remove the child and commence care proceedings. While remaining substantially influential, the emphasis on domestic violence *relative to other factors* decreases at the determination stage. As a directly cited reason for the Court's decision, it is relied upon in fewer judgments than are parental mental health, insight, engagement, and capacity to meet the child's emotional needs, all of which see an increased emphasis.⁷³

However, there is a deemed interaction between domestic violence and each of these leading factors. 'Lack of insight into domestic violence' makes up around 15% of references to deficient insight in the judgments,⁷⁴ and this in turn is assumed to impair recognition of children's emotional needs. 'Engagement' is frequently associated with a requirement to attend domestic violence counselling or programs, while 'mental health issues' are regarded as both an effect, and – as discussed later in this section – a *cause* of domestic violence.

The degree of direct weight placed on domestic violence in the Court's decisions is quite similar across 'realistic possibility' and 'no realistic possibility' decisions, appearing in 40% and 47% of these judgments respectively – the difference being whether the parents were or were not found to have adequately 'addressed' the issue. The gender ratio is also quite close to even: 54% of the parents for whom domestic violence was deemed a problem were mothers (representing 35% of all mothers in the pool of judgments), and 46% were fathers (representing 42% of all fathers in the judgments). There are, however, distinct differences in the way the violence and its impact are conceptualised for women and men, critiqued later in this section.

Most decisions articulate a link between domestic violence and harm to the child, in at least one point in the discussion. This ranges from broadly stating that restoration would risk exposing children to violence,⁷⁵ to descriptions of specific incidents experienced, or likely to

⁷³ See the discussion of these factors in Chapter 7.

⁷⁴ Additionally, several interviewed judicial officers drew a link between insight and domestic violence: Judicial Officers 3, 4, 8, 19, 20.

⁷⁵ See, eg, *Dupont* (n 22) [122]; *JH* (n 14) [258]; *Malakhai* (n 43) [188(9)]; *Nerayah and Kalista* (pseudonym, unpublished judgment, Children's Court, March 2009) [54] ('*Nerayah & Kalista*').

have been witnessed, by children,⁷⁶ and evidence of their reactions.⁷⁷ The Court sometimes conjectures on the probable impact on the child of these experiences,⁷⁸ and on occasion, rather than hypothesising, is able to cite clinical evidence of an identified impact on the child's emotional welfare, such as ongoing distress,⁷⁹ fear,⁸⁰ and symptoms of trauma.⁸¹

The violence in many cases had occurred in a current or recent relationship.⁸² Other judgments point to the parent's history or 'pattern'⁸³ of abusive relationships.⁸⁴ The key concerns attached to domestic violence in 'no realistic possibility' judgments are perceived failure to sufficiently recognise the violence as a serious child protection concern, and unwillingness to take steps to prevent its reoccurrence. These interlocked factors are indicated in several ways: by active denial that the violence occurred or that it posed any problem,⁸⁵ downplaying the violence and its impact on the child,⁸⁶ neglecting to attend a targeted program or counselling,⁸⁷ and/or maintaining the abusive relationship.⁸⁸

⁷⁶ *Amanda & Tony* (n 27) [45], [58], [68]; *Bloom* (n 39) [42]–[44], [240]; *Dalton Tomkins children* (n 23) [123]; *Kim* (n 30) [34], [35], [40]; *Harris children* (n 13) [4]; *Lewis* (n 37) [112]–[120]; *Lucy* (pseudonym, unpublished judgment, Children's Court, October 2012) [48]–[49] ('*Lucy*').

⁷⁷ *Alfred* (pseudonym, unpublished judgment, Children's Court, October 2020) [85] ('*Alfred*'); *Amanda & Tony* (n 27) [50]; *Bloom* (n 39) [45]; *Bradford children* (pseudonym, unpublished judgment, Children's Court, July 2011) [17]–[20] ('*Bradford children*'); *Dupont* (n 22) [76]; *JH* (n 14) [245]; *Lewis* (n 37) [138]–[142].

⁷⁸ *Amanda & Tony* (n 27) [59], [74]; *Dupont* (n 22) [84]–[85]; *Harris children* (n 13) [35]; *Kim* (n 30) [132]; *Lewis* (n 37) [165].

⁷⁹ *Bloom* (n 39) [230(9.4), (11.9)].

⁸⁰ *Ibid.*

⁸¹ *Bradford children* (n 77) [23]; *Harris children* (n 13) [52]; *Kim* (n 30) [64]–[67], [96]; *Lucy* (n 76) [59]–[62].

⁸² See, eg, *Alfred* (n 77) [104]; *Amanda & Tony* (n 27) [44]–[55], [66]–[70]; *Bloom* (n 39) [217], [237], [240], [307]; *Dalton Tomkins children* (n 23) [239]–[245]; *The Department of Community Services and Rachel Grant, Tracy Reid, Sharon Reid and Frank Reid* (Children's Court of New South Wales, August 2009), [74] ('*Grant & Reid*'); *Harris children* (n 13) [34]; *Jamzie* (n 5) [152], [176]; *Kim* (n 30) [99]; *Lewis* (n 37) [57], [166]; *Lucy* (n 76) [48]–[58]; *McAlister children* (n 59) [154], [158]–[163]; *Malakhai* (n 43) [43], [46], [97]; *Nerayah and Kalista* (n 75) [42]; *Department of Communities and Justice (DCJ) and the Prince and Johns Children* [2023] NSWChC 8, [55]–[62] ('*Prince & Johns children*'); *Rogers* (n 24) [78], [121], [125], [153]; *SK* (n 1) [48], [72], [80]–[81]; *VC* (n 7) [8], [166], [313(2)]; *Yarran Taylor children* (n 46) [91]–[102].

⁸³ *Alice* (n 55) [43]; *JH* (n 14) [187], [250].

⁸⁴ *Alice* (n 55) [43]–[46], [98]; *ASK* (n 13) [52]; *Department of Family and Community Services v Borg* [2011] NSWChC 4, [10] ('*Borg*'); *DFaCS and Boyd* [2013] NSWChC 9, [23] ('*Boyd*'); *Braidan* (pseudonym, unpublished judgment, Children's Court, August 2022) 16 ('*Braidan*'); *Carl* (n 3) [18], [58]; *Jamzie* (n 5) [179]; *JH* (n 14) [249]–[250]; *Lewis* (n 37) [165]; *Malakhai* (n 43) [37]; *Nicholls children* (pseudonym, unpublished judgment, Children's Court, March 2023) [80], [81] ('*Nicholls children*').

⁸⁵ *Amanda & Tony* (n 27) [44], [48], [70]; *Bloom* (n 39) [302]–[303]; *Bradford children* (n 77) [27]; *Dorothy* (n 37) [98]; *Lewis* (n 37) [164], [166]; *McAlister children* (n 59) [154], [158]–[161]; *Prince & Johns Children* (n 82) [55]; *Rogers* (n 24) [125]; *VC* (n 7) [279]; *Waller children* (n 30) [158].

⁸⁶ *Amanda & Tony* (n 27) [66]–[69]; *ASK* (n 13) [52], [171]; *Bloom* (n 39) [311]; *Dalton Tomkins children* (n 23) [244], [250]; *Harris children* (n 13) [36], [39]; *Kim* (n 30) [50]; *Lucy* (n 76) [50], [52], [58], [74]; *Rogers* (n 24) [78].

⁸⁷ *Alfred* (n 77) [102]–[103]; *Bradford children* (n 77) [27]; *Dalton Tomkins children* (n 23) [250]; *Dorothy* (n 37) [98]; *Lewis* (n 37) [58]; *Nerayah & Kalista* (n 75) [48], [53], [55]; *Rogers* (n 24) [84], [111], [120]–[121].

⁸⁸ *Charlie* (n 21) 30–32; *JH* (n 14) [176], [252] *Malakhai* (n 43) [188(9)]; *Nerayah & Kalista* (n 75) [47].

In decisions in favour of restoration, domestic violence is found to have been satisfactorily addressed by various means. These include relationship separation,⁸⁹ sometimes accompanied by obtaining an Apprehended Domestic Violence Order.⁹⁰ There is an emphasis on specialised domestic violence programs⁹¹ and counselling.⁹² An expectation to engage in therapy and learning is, across the pool of judgments, evenly directed at mothers and fathers⁹³—this obligation not appearing to discriminate between victims and perpetrators. Several cases found a realistic possibility of restoration to male perpetrators who were believed to have reformed their ways via counselling and/or self-reflection and the passage of time.⁹⁴

In raw numbers, the references to domestic violence reflect its gendered nature as predominantly comprised of male violence against women.⁹⁵ Approximately 30 men were either the sole perpetrator of violence in the relationship with the child’s mother, or the primary aggressor when mutual violence was alleged.⁹⁶ As well as being victims of the abuse in all of these instances, the mothers in several cases were described as having been subjected to violence in one or more previous intimate relationships.⁹⁷ No mothers were identified as being sole or primary domestic violence perpetrators.⁹⁸

⁸⁹ *DHK & Anor v Secretary, Department of Family and Community Services & Ors* [2018] NSWDC 221, [382(a)], [522] (‘DHK’); *Grant & Reid* (n 82) [74]; *Jamzie* (n 5) [77], [178]; *Oscar* (n 10) [5], [126]; *SK* (n 1) [82], [105], [107], [238(a)], [241].

⁹⁰ *Grant & Reid* (n 82) [74]; *Jamzie* (n 5) [178].

⁹¹ *Borg* (n 84) [48]; *Grant & Reid* (n 82) [49]–[50], [72]; *Jamzie* (n 5) [78], [181].

⁹² *DHK* (n 89) [378], [522]; *Grant & Reid* (n 82) [72]; *Jamzie* (n 5) [177]; *JMS* (n 56) [66]; *Oscar* (n 10) [126]; *SK* (n 1) [101]–[103], [175]; *VC* (n 7) [313(3)].

⁹³ In terms of the numbers of mothers and fathers mentioned as either engaging in domestic violence programs, or failing to meet expectations to do so.

⁹⁴ *Hatfield children* (n 10) 65–6; *JMS* (n 56) [66]; *Lim children* (n 10) 13–14, 19; *Naunton children* (n 10) 25, 26; *Ramsay children* (n 10) 19, 22.

⁹⁵ See, eg, Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia: Continuing the National Story* (Report, 2019) 3, 8; Commonwealth of Australia, *National Plan to End Violence Against Women and Children 2022–2032*, 33, 35 (‘National Plan to End Violence Against Women and Children’).

⁹⁶ In relation to the concept of the ‘primary aggressor’ see, eg, Heather Nancarrow et al, *Accurately Identifying the “Person in Most Need of Protection” in Domestic and Family Violence Law* (Research Report, ANROWS, Australia’s National Research Organisation for Women’s Safety, November 2020). The judgments do not use the term ‘primary aggressor’ nor expressly apply this concept; instead the presence of a primary aggressor has been assessed in the analysis based on the relative prevalence, nature and severity of violence perpetrated by male partners in comparison to that perpetrated by mothers, within the judgments’ accounts of the facts.

⁹⁷ See above n 83–84.

⁹⁸ The case of *Oscar* (n 10) is the only exception to this, although subject to complexity—the parent referred to as ‘the father’ throughout the judgment, who was the perpetrator of domestic abuse, had transitioned to living as a woman during the period of escalating child protection and domestic violence concerns: [68]–[72].

Over two-thirds of the male perpetrators were fathers seeking restoration,⁹⁹ all of whom were expected to ‘address’ domestic violence in order to demonstrate a realistic possibility of restoration. They were therefore subject to a form of accountability, which, to some extent, runs counter to perceptions of ‘perpetrator invisibility’ in the care and protection field.¹⁰⁰ There is also within the judgments an intermittent, but not infrequent, recognition of the coercive and controlling dimension of the abusive conduct. Studies have found that child protection systems prevailingly apply an ‘incident-based’ view of domestic violence,¹⁰¹ which distracts from an understanding of the nature of gendered violence as fundamentally an ongoing exercise of power and control.¹⁰² In the current study, many of the judgments recount descriptions of discrete incidents of violence; but there are also references to conduct characterised by ‘control’,¹⁰³ ‘coercion’,¹⁰⁴ and men choosing to use violence.¹⁰⁵

Judicial officers are substantially constrained by the form in which evidence of violence is presented to the Court, this being largely dictated by the Department’s approach to framing the issues. Unless contested by the parties as a significant issue in dispute, the Court has limited opportunity to probe the versions of incidents presented in documentary evidence (for instance, as sourced from police records and child protection ‘risk of serious harm’ reports). For example, in the case of *Dorothy*, the magistrate stated ‘[i]t is impossible to determine what level of domestic violence was taking place in the relationship between [the parents] and the level of responsibility each had for the violence. There are competing versions

⁹⁹ The remainder being either fathers who had conceded no realistic possibility of restoration, or other of the mother’s partners.

¹⁰⁰ Kate Alexander et al, ‘The Attitudes and Beliefs of the Child Protection Workforce and Why They Matter to Children Who Live With Violence’ (2022) 28 *Child & Family Social Work* 210, 211 (‘Attitudes and Beliefs’); Kelly Jane Cramp and Carole Zufferey, ‘The Removal of Children in Domestic Violence: Widening Service Provider Perspectives’ (2021) 26(3) *Affilia: Journal of Women and Social Work* 406, 415; Tracey De Simone and Susan Heward-Belle, ‘Evidencing Better Child Protection Practice: Why Representations of Domestic Violence Matter’ (2020) 32(4) *Current Issues in Criminal Justice* 403, 406; Cathy Humphreys and Deborah Absler, ‘History Repeating: Child Protection Responses to Domestic Violence’ (2011) 16 *Child and Family Social Work* 464, 466.

¹⁰¹ Alexander et al, ‘Attitudes and Beliefs’ (n 100) 212; Kate Alexander et al, ‘Why Do Mothers Stay? Challenging Attitudes in Decision Making About Children at Risk Because of Domestic Violence’ (2023) 146 *Child Abuse & Neglect* 106511: 1–11, 2 (‘Why Do Mothers Stay?’); De Simone and Heward-Belle (n 100) 410. See also Jane Wangmann, ‘“She said...” “He said...”: Cross Applications in NSW Apprehended Domestic Violence Order Proceedings’ (PhD Thesis, University of Sydney, 2009).

¹⁰² *National Plan to End Violence Against Women and Children* (n 95) 33.

¹⁰³ *Alice* (n 55) [26], [46]; *Charlie* (n 21) 25; *Harris children* (n 13) [31], [34]; *Jamzie* (n 5) [152]; *Kim* (n 30) [21]; *LZ and QJ v FACS* [2017] NSWDC 414, [260] (‘LZ & QJ’); *McAlister children* (n 59) [31], [36], [37], [109]; *Nerayah & Kalista* (n 75) [42]; *Oscar* (n 10) [74], [76], [89], [93], [109], [114(e)]; *VC* (n 7) [166], [168], [338], [356], [371]; *Vlachos children* (pseudonym, unpublished judgment, Children’s Court, June 2009) [6] (‘*Vlachos children*’); *Yarran Taylor children* (n 46) [140], [160(8)]; *Waller children* (n 30) [44].

¹⁰⁴ *FACS v AH and AN* [2017] NSWDC 412, [164(f)] (‘*AH & AN*’); *Alice* (n 55) [46]; *VC* (n 7) [8], [166], [168], [326], [336], [338], [356], [371].

¹⁰⁵ *Alice* (n 55) [46]; *Dalton Tomkins children* (n 23) [325]; *Yarran Taylor children* (n 46) [136].

of events'.¹⁰⁶ The case of *Rogers* is illustrative of the Court's efforts, in such circumstances, to assess witness credibility based on the overall evidence in the case. Amid several police records of the father's acts of violence, criminal convictions, and apprehended domestic violence orders made against him,¹⁰⁷ was an allegation that the mother had stabbed the father in his arm. The mother told police this was in the context of the father wounding her with a kitchen knife and strangling her to the point where she became unconscious.¹⁰⁸ The documented evidence was equivocal, and the magistrate expressed no specific opinion as to whether the mother had indeed been under brutal attack in this incident.¹⁰⁹ However, in detailing later in the judgment a series of offensive text messages sent by the father to the mother's phone, the magistrate noted that these 'are consistent with a man who may behave as the mother has alleged in respect of the various police incidents...and which the father has denied'.¹¹⁰ This observation represents an implicit acknowledgement of the most plausible, gendered dynamic of the violence in the relationship.

Despite allusions to its gendered nature, approximately one-third of the judgments concerned with domestic violence implicate the mother as having contributed to the violence in some way. There are direct accounts of mothers acting violently towards a partner¹¹¹ and 'instigating' violence.¹¹² There are many statements that do not specify who was the perpetrator, using generalised language (often constructed in 'the passive voice'), which implies both partners were responsible for an abusive relationship. These include many references to children being 'exposed to'¹¹³ domestic violence, as well as domestic violence *arising out of* the mother's previous relationships,¹¹⁴ occurring *between*¹¹⁵ the parents, and *within* or *in* the relationship.¹¹⁶ There is mention of casework or court-ordered requirements

¹⁰⁶ *Dorothy* (n 37) [98].

¹⁰⁷ *Rogers* (n 24) [44]–[46], [48].

¹⁰⁸ *Ibid* [47].

¹⁰⁹ *Ibid*.

¹¹⁰ *Ibid* [54].

¹¹¹ *Amanda & Tony* (n 27) [58]; *Boyd* (n 84) [23]; *Dorothy* (n 37) [91], [95], [98]; *GR* (n 26), [43]; *Harris children* (n 13) [43]; *Lucy* (n 76) [49]; *Malakhai* (n 43) [97]; *Rogers* (n 24) [41], [47].

¹¹² *Re: Alison Claire, Lauren Donovan and Victoria Claire* (Children's Court of New South Wales, 10 July 2009) [23].

¹¹³ See, eg, *ASK* (n 13) [41], [48]; *Braidan* (n 84) 3; *Dalton Tomkins children* (n 23) [331]; *Dupont* (n 22) [60]; *JH* (n 14) [258]; *Lim children* (n 10) 4, 8; *Lucy* (n 76) [3], [4], [58]; *Nerayah & Kalista* (n 75) [54]; *Prince & Johns children* (n 82) [1]; *Rogers* (n 24) [6]; *RC & PK* (n 12) [29].

¹¹⁴ *ASK* (n 13) [267].

¹¹⁵ *Dupont* (n 22) [60]; *Harris children* (n 13) [28], [32]; *Lucy* (n 76) [3], [4], [58]; *LZ & QJ* (n 103) [88], [117]; *Rogers* (n 24) [9]; *Vlachos children* (n 103) [7].

¹¹⁶ *Harris children* (n 13) [27]; *JMS* (n 56) [18].

that ‘the parents’ *refrain*¹¹⁷ from domestic violence, and *maintain a household free of violence*.¹¹⁸ The recurring use of these neutral phrases tends to lend support to arguments regarding ‘mutualising’ assumptions in justice system discourse,¹¹⁹ which de-contextualise women’s experiences and their acts of resistance to abuse.¹²⁰

Regardless of whether ‘mutual’ violence is alleged, the judgments contain elements of the ‘mother-blaming’ phenomenon – widely discussed in the literature – by which women are held responsible for the impact on their children of the abusive conduct of men.¹²¹ One manifestation of this is the notion of ‘failing to protect’ children from domestic violence.¹²² In referencing past incidents, the essential concern is that the mother is unable or unwilling to end an abusive relationship in order to protect the children from future harm.^{123 124} Among the problematic premises inherent in this perspective, commentators argue that the ‘fail to protect’ assumption underestimates or ignores the many ways in which mothers *do* protect their children from violence and strive to minimise its impacts.¹²⁵ Furthermore, leaving a violent relationship does not necessarily end the controlling behaviours, particularly where

¹¹⁷ *Harris children* (n 13) [3].

¹¹⁸ *GR* (n 26) [93(4)].

¹¹⁹ De Simone and Heward-Belle (n 100) 409; Susan Heward-Belle et al, ‘Invisible Practices: Interventions With Men Who Use Violence and Control’ (2019) 34(3) *Affilia: Journal of Women and Social Work* 369, 374; Briony Horsfall, ‘Children’s Participation Rights During Child Protection Hearings: Recognition, Legal Representation and Redistribution of Care in Victoria’s Children’s Court’ (PhD Thesis, Swinburne University of Technology, 2016) 252; Nisha Prichard, ‘Children at Risk: Domestic Violence, Child Protection and The Children’s Court of New South Wales Decision-Making Process’ (PhD Thesis, UNSW, 2015) 152, 278.

¹²⁰ De Simone and Heward-Belle (n 100) 405; Heward-Belle et al (n 119) 252, 379; Prichard (n 119) 278–9.

¹²¹ See, eg, Cramp and Zufferey (n 100) 411–12; Megan Davis, Independent Review of Aboriginal and Torres Strait Islander Children in Out-of-Home Care in New South Wales, *Family Is Culture* (Review Report, 2019) 348 (‘*Family Is Culture Report*’); Horsfall (n 119) 252; Humphreys and Absler (n 100) 466; Rachel Robbins and Kate Cook, ‘“Don’t Even Get Us Started On Social Workers”: Domestic Violence, Social Work and Trust: An Anecdote from Research’ (2018) 48 *British Journal of Social Work* 1664, 1676–7; Emma Tseris, ‘Diagnosing Distress? Psychiatric and Therapeutic Constructions of “Traumatised” Young Women’ (PhD Thesis, University of Sydney, 2014) 45.

¹²² De Simone and Heward-Belle (n 100) describe ‘[t]he “failure to protect” discourse’ as ‘remain[ing] stubbornly persistent’ in statutory child protection, ‘despite decades of scholarly research and attention illuminating its existence’: at 415. See also, eg, Cramp and Zufferey (n 100) 413; Humphreys and Absler (n 100) 469; Kendra L Nixon, Colin Bonnycastle and Stephanie Ens, ‘Challenging the Notion of Failure to Protect: Exploring the Protective Strategies of Abused Mothers Living in Urban and Remote Communities and Implications for Practice’ (2017) 26 *Child Abuse Review* 63, 64; Prichard (n 119) 278–9.

¹²³ *Bradford children* (n 77) [27]; *Lewis* (n 37) [166]; *LZ & QJ* (n 103) [257]; *McAlister children* (n 59) [163]; *Nicholls children* (n 84) [80].

¹²⁴ The case of *Kim* (n 30) is an exception to the gendered conception of ‘failure to protect’, with the father, as a perpetrator of domestic violence, being the party described as ‘unable to protect [the child] from witnessing, hearing and observing the after-effects of violence within the home’: at [51].

¹²⁵ See Alexander et al, ‘Why Do Mothers Stay?’ (n 101) 3; Cramp and Zufferey (n 100) 412–3.

children are involved,¹²⁶ and may place women and children at increased danger from the perpetrator.¹²⁷

Studies have raised distinct barriers, or disincentives, faced by women of particular ‘minority’ cultural backgrounds in disclosing violence or leaving an abusive marriage,¹²⁸ and the need for greater nuance, empathy and sophistication in system responses and support to these families.¹²⁹ These issues were echoed by participants in the current study. A judicial officer spoke about community isolation of culturally diverse women who engage with child protection or domestic violence services.¹³⁰ A lawyer observed that:

[d]ifferent communities react differently to domestic violence... But we have a very western lens. The thing to do, when you’re experiencing domestic violence, is ‘you must leave the perpetrator. You must take the kids. You must get an AVO. You must not let them know where you are’. We just have this list and we expect people to go through it, and we don’t look behind the risk into the cultural elements and the ways we may need to address those. (Lawyer 6)

A recurring theme in the judgments portrays mothers as chronically prone to abusive relationships. As with ‘failure to protect’, there is an implicit suggestion that women exercise a choice in being subjected to violence. However, here the conception becomes less about active ‘complicity’¹³¹ and ‘collusion’¹³² with the partner in disregarding the interests of the child, but rather an assumption of the mother’s passive unwillingness to protect herself. Examples of these depictions include: ‘a pattern of vulnerability to relationships marked by domestic violence’;¹³³ ‘her history of being the victim of domestic violence and priority given to intimate relationships involving violence’;¹³⁴ ‘[her] lifestyle has been chaotic and she has involved herself in multiple short-term relationships with a variety of dysfunctional, and sometimes, violent partners’;¹³⁵ ‘[she] continued to make poor choices concerning her

¹²⁶ Robbins and Cook (n 121) 1668–9; Ravi K Thiara and Cathy Humphreys, ‘Absent Presence: The Ongoing Impact of Men’s Violence On the Mother-Child Relationship’ (2017) 22 *Child and Family Social Work* 137, 139, 142–3.

¹²⁷ Alexander et al, ‘Why Do Mothers Stay?’ (n 101) 2, 3; Alexander et al, ‘Attitudes and Beliefs’ (n 100) 212; Cramp and Zufferey (n 100) 416.

¹²⁸ Cramp and Zufferey (n 100) 419; Pooja Sawrika, ‘Child Protection, Domestic Violence, and Ethnic Minorities: Narrative Results from a Mixed Methods Study in Australia’ (2019) 14(12) *PLoS ONE* 1, 7–9; Thiara and Humphreys (n 126) 140–41.

¹²⁹ Cramp and Zufferey (n 100) 419; Sawrika (n 128) 8, 9, 10–11.

¹³⁰ Judicial Officer 21.

¹³¹ De Simone and Heward-Belle (n 100) 407.

¹³² Tseris (n 121) 45.

¹³³ *JH* (n 14) [250].

¹³⁴ *Malakhai* (n 43) [37].

¹³⁵ *Boyd* (n 84) [23].

partners’;¹³⁶ and ‘[she] presents, at times, as a vulnerable person...and this may attract intimate partners that are unsafe’.¹³⁷

This notion of vulnerability to abuse is frequently associated with the mother’s mental health. She is expected to take responsibility to mend her own victimisation, through therapy that addresses unhealthy relationship patterns grounded in past trauma. As discussed in chapter 7, this notion has been criticised for pathologising survivors of violence while ignoring societal and structural contexts.¹³⁸ The mental health focus, it is further argued, applies a ‘deficits’ model which fails to recognise and value the mother’s existing strengths,¹³⁹ protective capacities,¹⁴⁰ and resistance to violence.¹⁴¹ This is additionally reinforced by the phenomenon of ‘mental health coercion’,¹⁴² in which abusive men deflect attention from their own accountability by insisting their partner is mentally ill¹⁴³ — a manipulative strategy of ongoing control, in which child protection and other professional responders may become unconsciously complicit.¹⁴⁴

While domestic violence as a contributing *cause* of mental health problems is widely recognised in the literature,¹⁴⁵ a more contentious angle apparent in some of the judgments is the reverse: the victim’s mental health condition is framed as *causing* (or contributing to) the domestic violence. For example, in the judgment in *Boyd*, the mother’s borderline personality disorder was ‘consistent with’ her involvement with violent partners.¹⁴⁶ In *Arnott-Bloom*, a risk of recurring domestic violence¹⁴⁷ or relationship ‘volatility’¹⁴⁸ was correlated with the mother’s ‘emotional and mental [in]stability and drug use’.¹⁴⁹ While noting that the mother was not

¹³⁶ *O’Connor v The Minister for Family and Community Services* [2020] NSWDC 453, [14] (*O’Connor*), citing a clinician.

¹³⁷ *Nicholls children* (n 84) [80].

¹³⁸ See Chapter 7, section (iii).

¹³⁹ *Tseris* (n 121) 56–7.

¹⁴⁰ *Nixon, Bonnycastle and Ens* (n 122) 64–5.

¹⁴¹ See Leticia Funston, Ghena Krayem and Rita Shackel, ‘Transformative Social Responses to Domestic, Family, and Sexualised Violence: A Qualitative Exploration of Insight Exchange, a Victim-Survivor Centered Initiative Informed by Response-Based Practice’ (2023) 29(12–13) *Violence Against Women* 2569, 2583–4.

¹⁴² De Simone and Heward-Belle (n 100) 407.

¹⁴³ De Simone and Heward-Belle (n 100) 410; Cathy Humphreys et al, ‘Beyond Co-Occurrence: Addressing the Intersections of Domestic Violence, Mental Health and Substance Misuse’ (2022) 27 *Child & Family Social Work* 299, 306.

¹⁴⁴ Funston, Krayem and Shackel (n 141) 2571–2; Humphreys et al (n 143) 304.

¹⁴⁵ See, eg, Humphreys et al (n 143) 300; Cramp and Zufferey (n 100) 414–15; Rae Kaspiw et al, *Experience of Separated Parents Study* (Report, Evaluation of the 2012 Family Violence Amendments, Australian Institute of Family Studies, 2015) 38, 59–60; Thiara and Humphreys (n 126) 138.

¹⁴⁶ *Boyd* (n 84) [23].

¹⁴⁷ *DFaCS re Arnott Bloom* [2015] NSWChC 6, [52], [81] (*Arnott-Bloom*).

¹⁴⁸ *Ibid* [81].

¹⁴⁹ *Ibid*.

currently in a relationship, the Court commented that her ‘propensity for domestic disharmony, however, could be viewed as an inability to cope adequately with situations of stress’.¹⁵⁰ In *SK*, the Department’s arguments, supported by the Children’s Court Clinician, viewed the mother’s depression, ‘volatility’ and ‘inadequate personal control’ as being reflected in her ‘tolerance of’ domestic violence¹⁵¹ (although the judge re-framed this cause and effect narrative to emphasise that it was the domestic abuse that caused the depression).¹⁵² The clinical opinion relied upon in the case of *JH*, quoted at the start of this section,¹⁵³ explicitly referred to the mother’s mental health condition as ‘leading to’ the violence inflicted on her. The mother, who was diagnosed with borderline personality disorder, had been subjected to violence by the fathers of both her children.¹⁵⁴ The Court reiterated its affirmation of the clinician’s view, citing ‘as a significant passage’¹⁵⁵ the following:

When these relationships were affected by her emotional dysregulation, the children’s needs were not prioritised or met...Instead, [the mother’s] emotional needs to feel secure in the relationship exacerbated conflicts, which often led to domestic violence. (Judge in *JH*, quoting the Children’s Court Clinician)¹⁵⁶

In a counter-narrative, a pointed remark, essentially a rebuke to the Department, was made by the magistrate in *Dalton Tomkins children*:

The Secretary talks about the domestic violence and says it can be explained in the context of drug use and the mother’s mental health, and that is how it occurs. Domestic violence does not occur. A person chooses to use violence on an intimate partner. Domestic violence is a form of control, and is not a means of conflict resolution. (Magistrate in *Dalton Tomkins children*)¹⁵⁷

The judgments in *JH* and *Dalton Tomkins children* were both delivered in 2023, suggesting that there are divergent conceptualisations of the nature of domestic violence within the current care and protection legal system. Numerous interview participants raised domestic violence as a major factor in care and protection cases;¹⁵⁸ but overall, reflections on its gendered nature were not markedly prevalent. There were exceptions: several participants raised concerns

¹⁵⁰ Ibid.

¹⁵¹ *SK* (n 1) [28], [32], [187]–[192].

¹⁵² Ibid [219(6)], [226]–[227], [238(a)].

¹⁵³ See above n 72.

¹⁵⁴ *JH* (n 14) [85].

¹⁵⁵ Ibid.

¹⁵⁶ Ibid [86].

¹⁵⁷ *Dalton Tomkins children* (n 23) [325]. (The term ‘Secretary’ here refers to the head of the Department of Communities and Justice, and is thus used technically to mean ‘the Department’).

¹⁵⁸ Judicial Officers 2, 3, 4, 5, 6, 8, 13, 14, 15, 19, 20, 21; Registrar 1; Caseworkers 1, 2, 3, 8, 13; Lawyer 6.

aligned with this theme, including mother-blaming,¹⁵⁹ social isolation and inadequate practical supports for women expected to leave their partner,¹⁶⁰ and the psychological affront to a mother of removing her children to place them with relatives of the violent father.¹⁶¹ There were references to coercive control,¹⁶² and imposition of responsibility on mothers to facilitate children's contact arrangements with an abusive ex-partner.¹⁶³

Relatively recent research and policy initiatives within the Department,¹⁶⁴ and mirrored by projects in other Australian jurisdictions,¹⁶⁵ aim to embed 'strength-based',¹⁶⁶ 'dignity-driven'¹⁶⁷ practices when investigating and intervening in cases of domestic violence. These approaches are informed and inspired by 'response-based practice', a framework developed in Canada as a way of skilling workers to recognise, respect, and learn from the protective strategies innately employed by people subjected to violence.¹⁶⁸ Response-based casework in child protection shifts away from 'failure to protect' narratives, to 'partner with'¹⁶⁹ the non-abusing parent in safety planning that draws upon her 'insights, experiences and acts of resistance'¹⁷⁰ to violence. Chapter 10 discusses the wider context of current policy, program and law reform developments that seek, in varying degrees, to facilitate an inclusive rather than deficit-driven approach to care and protection law and casework.¹⁷¹

¹⁵⁹ Judicial Officer 9; Caseworker 11.

¹⁶⁰ Judicial Officers 13, 19, 21; Lawyer 6.

¹⁶¹ Judicial Officer 8.

¹⁶² Registrar 1.

¹⁶³ Judicial Officers 4, 8; Registrar 1.

¹⁶⁴ Alexander et al, 'Why Do Mothers Stay?' (n 101); Alexander et al, 'Bringing Dignity to the Assessment of Safety for Children Who Live with Violence' (2022) 52 *British Journal of Social Work* 3578 ('Bringing Dignity').

¹⁶⁵ De Simone and Heward-Belle (n 100), in relation to a the child protection statutory authority in Queensland; Humphreys et al (n 143), in relation to statutory and non-statutory agencies in Queensland, New South Wales and Victoria.

¹⁶⁶ Humphreys et al (n 143) 303.

¹⁶⁷ Alexander et al, 'Why Do Mothers Stay?' (n 101) 3.

¹⁶⁸ Alexander et al, 'Bringing Dignity' (n 164) citing, et al, A Wade and L Coates, 'Language and Violence: Analysis of Four Discursive Operations' (2007) 22 *Journal of Family Therapy* 511, and C Richardson and A Wade, 'Islands of Safety: Restoring Dignity in Violence-Prevention Work with Indigenous Families' (2010) 5(1) *First Peoples Child and Family Review* 137. See also Funston, Krayem and Shackel (n 141).

¹⁶⁹ De Simone and Heward-Belle (n 100) 412, 415

¹⁷⁰ Alexander et al, 'Why Do Mothers Stay?' (n 143) 8–9.

¹⁷¹ See Chapter 10, part C.

(iii) Child's Stability and Development

Turning now to the carers, the objective evidence, as articulated by Ms Wilson in her Clinic report, is that they are committed, responsible, safe and considerate carers, who have done an excellent job in looking after these children and helping them work through their past experiences. It is clear that each of the children has their own special issues and individual need for specialised care. These carers have the capacity to do that sensitively and understandingly. I have serious concerns about disrupting that environment by interfering with the current arrangements for the care of the children, and even deeper concerns as to the capacity of the parents to bring to that task the necessary level of skill and understanding. (Judge in *McAlister children*)¹⁷²

How are the kids feeling?...it's the kids that wear the risk and we don't see it like that. And they wear the risk of going into care. They're the ones we really need to be much more focused on. (Judicial Officer 19)

The theme of 'stability and development' is specific to individual children and their circumstances. It is distinguished from the parent's 'capacity to meet the child's emotional needs' (discussed in chapter 7),¹⁷³ although there are correlations between the two. The 'emotional needs' category is concerned with the adult's capacity for an empathetic parenting style. 'Stability and development' relates to the particular child's situation at the time of the hearing – and may encompass issues in the child's life that exist independently of the parent. Indeed, most of the references to this factor are focused on whether the child's needs are being met *in their care placement*, although comparisons are sometimes drawn with the parent's ability to provide for those same needs.

'Stability and development' is also distinguished from children's attachments and bonds in family and carer relationships. Although the judgments sometimes associate children's stability with being bonded to their carers, and being loved, this is not always the case. Nor, as seen in chapter 7, is a loving relationship with a parent necessarily equated with stability. The theme of the 'child's relationships' is separately discussed in section (iv), as the final substantially influential factor in the Court's decisions.

Appearing in 47% of the judgments overall, the 'stability and development' theme is particularly influential in decisions adverse to restoration – with close to 60%¹⁷⁴ of these judgments expressing concern that restoration would disrupt the child's stability. There may

¹⁷² *McAlister Children* (n 59) [173].

¹⁷³ See Chapter 7, section (iv).

¹⁷⁴ 58%.

be evidence of the child's gains in respect of health,¹⁷⁵ developmental or behavioural issues,¹⁷⁶ education,¹⁷⁷ or structure in activities and routines.¹⁷⁸ There are generalised references to the child 'prospering'¹⁷⁹ or 'thriving'¹⁸⁰ in an environment of stability, security and calm.¹⁸¹ The Court determines that being removed from the placement would jeopardise this progress,¹⁸² and/or that the upheaval wrought by the process and uncertainty of restoration itself may damage the child's wellbeing.¹⁸³ Notably, only one-quarter of these decisions are in 'section 90'¹⁸⁴ applications, seeking rescission of established care arrangements which may have been in place for many years. Most of the judgments relying on children's gains while in care are in original ('first instance') matters—indicating that interim placements, despite their technically tenuous status, are frequently perceived as providing the child with a reasonable degree of security and stability.

The theme of children's stability in care was consistently raised in the interviews. The general impression was that the Court is less likely to restore when the child is settled in an apparently stable placement,¹⁸⁵ this being pertinent to 'the circumstances of the child' limb of the realistic possibility test,¹⁸⁶ and to the paramount principle of the child's 'safety, welfare and wellbeing'.¹⁸⁷ However, magistrates described this as a very difficult aspect of their decision-making—it being far from straightforward to weigh the child's wellbeing in care against the

¹⁷⁵ GR (n 26) [783]–[787]; *Lucy* (n 76) [5], [64]; *Tanya* (n 36) [68].

¹⁷⁶ ASK (n 13) [72]–[73]; *LZ & QJ* (n 103) [65]; *Tanya* (n 36) [68].

¹⁷⁷ ASK (n 13) [73]; *Lucy* (n 76) [32]; *LZ & QJ* (n 103) [254]; *Tanya* (n 36) [68].

¹⁷⁸ ASK (n 13) [75]; *Jonah* (pseudonym, unpublished judgment, Children's Court, May 2023) 20 ('*Jonah*'); *McAlister children* (n 59) [55]; *Rogers* (n 24) [52]; *Y* (n 30) [816].

¹⁷⁹ ASK (n 13) [225], [278].

¹⁸⁰ *Arnott Bloom* (n 147); *Harper children* (n 59) [187].

¹⁸¹ See *Alice* (n 55) [91]; ASK (n 13) [225], [278]; *Bloom* (n 39) [230(11.6)]; GR (n 26) [850]; *JH* (n 14) [245]; *McAlister children* (n 59) [55], [173]; *May, June & Roy* (n 38) [115]–[118].

¹⁸² *Arnott-Bloom* (n 147) [90]; ASK (n 13) [225], [278]; *Bloom* (n 39) [230(11.6)]; GR (n 26) [849]–[850]; *Harper children* (n 59) [187]; *McAlister children* (n 59) [173]–[174]; *Malakhai* (n 43) [188(5)]; *RC & PK* (n 12) [152].

¹⁸³ *Arnott-Bloom* (n 147) [89]; *In the Matter of Chanlina* (Children's Court of New South Wales, 1 May 2009), [21], [23]–[24], [51] ('*Chanlina*'); *Dupont* (n 22) [96]; *Re Elizabeth* (n 13) [127]–[128], [179]–[180]; *Director of Family and Community Services v Jack* [2012] NSWChC 7, [25] ('*Jack*'); *May, June & Roy* (n 38) [119]–[123]; *Nathan* (n 21) [61].

¹⁸⁴ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 90 ('*The Act*'): applications to vary or rescind existing orders. It is to be expected that a rescission or variation case pays particular attention to the comparative stability offered by the existing placement versus the proposed restoration, as s 90 mandates prescribed considerations additional to those attached to a first-instance decision under section 83, including the length of time the child has been with the carers and the stability of the placement (s 90(6)(c)), and 'the risk to the child or young person of psychological harm if present care arrangements are varied or rescinded' (s 90(6)(f)).

¹⁸⁵ Judicial Officers 3, 4, 10, 17; Caseworkers 3, 7; Lawyer 5.

¹⁸⁶ Judicial Officer 4.

¹⁸⁷ Judicial Officer 8.

progress that the parents might be making,¹⁸⁸ especially in section 90 cases.¹⁸⁹ Furthermore, the impression in the judgments that interim care arrangements are often progressing smoothly is at odds with a more cynical perspective emerging from the interviews. Early identification of a secure placement was described by a caseworker as a rare ‘miracle’.¹⁹⁰ There were references to frequent placement ‘breakdowns’, attributed to abuse in residential care,¹⁹¹ and to carers struggling to cope with children’s complex needs:¹⁹²

...we’re getting so many kids with, you know, all these behavioural issues from drugs in utero or whatever the case may be or just general trauma; you’re getting more and more kids whose placements are breaking down with general foster carers because they just can’t handle them, then they’re going into these group homes as a last resort. And yeah, it just goes round and round. (Lawyer 1)

Consistent with existing research findings on the over-representation in care of children with disabilities,¹⁹³ the children in one-third¹⁹⁴ of the ‘no realistic possibility’ cases are noted to have special health, developmental, or trauma-derived needs. In some cases the Court is confident that the current carers are meeting the requisite standard of care.¹⁹⁵ Alternatively the emphasis is on the importance of the child remaining in care in order for a sustainable placement to be found with a carer attuned to the child’s special needs,¹⁹⁶ or so that the Department can oversee the continued provision of medical and therapeutic services.¹⁹⁷ These judgments

¹⁸⁸ Judicial Officers 2, 10.

¹⁸⁹ Judicial Officers 1, 2, 9, 10.

¹⁹⁰ Caseworker 7.

¹⁹¹ Lawyer 1.

¹⁹² Judicial Officer 15; Lawyers 1, 5.

¹⁹³ Many studies have noted a high presence of disability and special needs amongst children in the care system: see, eg, Davis, *Family Is Culture Report* (n 121) 173–5; George Economidis, ‘An Evaluation of the Implementation of Family-Based Therapy Programs to Enhance Government Responses to Child Physical Abuse and Neglect in New South Wales, Australia’ (PhD Thesis, UNSW Sydney, 2023) 28; Kathomi Gatwiri, Lynne McPherson and Samara James, ‘Experiences of Children and Young People with a Disability in Out-of-Home Care in Australia: A Scoping Review’, (2024) *Health & Social Care in the Community* 1, 2; Judith Harwin et al, ‘Child and Parent Outcomes in the London Family Drug and Alcohol Court Five Years On: Building on International Evidence’ (2018) 32 *International Journal of Law, Policy and The Family* 140, 155–7.

¹⁹⁴ Approximately 32%. Although a precise number is qualified by the generality of references to disability or special needs in the judgments, the estimated figure of 32% is disproportionate to the 12% of Australian children and young people (0–24 years) reported by the Australian Bureau of Statistics to have a disability in 2022: <https://www.abs.gov.au/articles/children-and-young-people-disability-2022>, and the 7.4% of Australian children aged 0–14 years who had a disability in 2015, cited in Australian Institute of Health and Welfare, *Australia’s Children* (Report, 2020) 93.

¹⁹⁵ GR (n 26) [849]; *Jonah* (n 178) 17, 19–20; *McAlister children* (n 59) [173]; *Rogers* (n 24) [52], [130].

¹⁹⁶ *Braidan* (n 84) 33–4; *In the Matter of Julian and Allan* (Children’s Court of New South Wales, 28 April 2006) [33] (‘*Julian & Allan*’); *In the Matter of Leonard* [2009] NSWLC 5, [26], [31] (‘*Leonard*’); *Re Lincoln and Raymond* (Children’s Court of New South Wales, 9 April 2008) [50], [58] (‘*Lincoln & Raymond*’).

¹⁹⁷ *DFaCS (NSW) and the Colt Children* [2013] NSWChC 5, [138], [139], [140], [150] (‘*Colt children*’); *Dupont* (n 22) [89]–[90]; *DFaCS re Lilly, Wade and Caleb* [2012] NSWChC 21, [80]–[82] (‘*Lilly, Wade & Caleb*’); *Malakhai* (n 43) [191(a)]; *SS v Department of Human Services (NSW)* [2010] NSWDC 279, [119] (‘*SS*’).

typically find that the birth parents are unable to provide an adequate level of care for the child's condition,¹⁹⁸ and/or that the child's emotional and behavioural difficulties require 'constant and steady and reliable parenting'¹⁹⁹ that would be put at risk if restoration was to occur.²⁰⁰ Only rarely does a judgment expressly find that the parent *is* able and equipped to care for a child with disability-related high needs.²⁰¹ Consistent with these concerns, interviewed caseworkers placed considerable emphasis on challenges and doubts surrounding restoration when children have special needs.²⁰²

Attention to children's stability and development is far less evident in judgments in favour of restoration.²⁰³ Several cases refer briefly to the *absence* of special health or behavioural needs, as a factor supporting restoration.²⁰⁴ More broadly, the child's long-term stability and security are to some extent implicit in references to the parent meeting the child's emotional needs. It is unusual, however, for the home environment to be depicted as directly enabling stability for the child. Instead, the risk of upsetting the stability achieved in the care placement is *outweighed by* the benefits of restoration, and is to be managed and mitigated in the process of transition to restoration.²⁰⁵

An exception is the case of *Jamzie*, in which the Court equates 'the certainty of a secure home'²⁰⁶ with both the practical provision of a home to be restored to ('accommodation'),²⁰⁷ and the psychological and developmental safety of placement with the biological mother and grandmother.²⁰⁸ The role of the grandmother was instrumental in this case – resonating with

¹⁹⁸ *Arnott-Bloom* (n 147) [89]; *GR* (n 26) [808], [849]; *Malakhai* (n 43) [97]; *Prince & Johns Children* (n 82) [35].

¹⁹⁹ *Lewis* (n 37) [108].

²⁰⁰ *Amanda & Tony* (n 27) [81]; *Arnott-Bloom* (n 147) [89]; *ASK* (n 13) [255]; *Dalton Tomkins children* (n 23) [307]; *GR* (n 26) [849]–[850]; *Harper children* (n 59) [99]–[101]; *Kim* (n 30) [96], [131]; *Leonard* (n 196) [32]; *Lewis* (n 37) [107]–[108]; *Lincoln and Raymond* (n 196) [58]; *McAlister children* (n 59) [174]; *Prince & Johns children* (n 82) [33].

²⁰¹ *Mario* (n 6) 23, 25; *Naunton children* (n 10) 28, 44; *Re Nellie* [2004] NSWLC 8 (no page or paragraph numbers) ('Nellie').

²⁰² Caseworkers 2, 4, 5, 8, 9, 13.

²⁰³ The factor appears in 58% of 'no realistic possibility' decisions, and 21% of 'realistic possibility' decisions.

²⁰⁴ *DFacCS re Eggleton* [2016] NSWChC 4, [42.3] ('Eggleton'); *Department of Communities and Justice (DCJ) and Evie and Grace* [2023] NSWChC 1, [54(5), (7)] ('*Evie & Grace*'); *Jamzie* (n 5) [136]; *JMS* (n 56) [45].

²⁰⁵ *AH and AN* (n 14) [190]–[191]; *Eggleton* (n 204) [46.2]–[46.30], [48]–[49]; *Lilly, Wade & Caleb* (n 197) [96]; *Naunton children* (n 10) 10; *Oscar* (n 10) [132]–[134], [142].

²⁰⁶ *Jamzie* (n 5) [131].

²⁰⁷ *Ibid* [125], [184].

²⁰⁸ *Ibid* [87], [125], [139]–[140], [184]–[186]. See also *Evie & Grace* (n 204), in which the successful interim restoration of the children is compared to the potentially adverse 'psychological consequences' of 'displacement from home': at [54(12)]; and *VC* (n 7) in which interim restoration to the mother had provided the child with 'a safe, nurturing, stable and secure' environment (this wording being reflective of the guiding principles of the Act in s 9): at [316].

comments in interviews that the stability offered by the presence of a kinship carer is a means by which upheaval in a child's life can be minimised.²⁰⁹

There are several 'realistic possibility' judgments in which concerns about the parents' capacity remain, yet restoration is seen as preferable to the neglect or chronic *instability* that the children have encountered in out-of-home care.²¹⁰ Hence, in situations where parents have made at least partial steps towards change, the likelihood of restoration may be contingent on whether or not a viable long-term placement can be found.²¹¹ However, the problem of care instability works both ways. It is sometimes treated as justification for a precarious restoration, or dichotomously it is a reason *not* to restore, because of the imperative need to secure reparative, 'better than good enough' parenting²¹² for a traumatised child who has been living with little security,²¹³ and/or because the risk of a failed restoration in such circumstances is 'unthinkable'.²¹⁴

In cases in which a sustainable placement appears to have been found, the indicators of its success tend to be briefly conveyed in broad and generic terms: reporting that the child is 'settled',²¹⁵ 'stable',²¹⁶ 'safe',²¹⁷ 'developing [or doing or progressing] well',²¹⁸ or 'thriving'²¹⁹ in the placement. Occasionally the child is described as 'happy'.²²⁰ With a few exceptions,²²¹ there is little sense of the fabric of the children's day-to-day lives – the 'ordinary' features such as school, friendships and community connectedness, which help counter the extraordinary experiences of abuse, neglect, disruption and dislocation.²²² Of course, this does not mean such

²⁰⁹ Judicial Officer 19; Caseworker 10; Lawyer 6.

²¹⁰ *Alfred* (n 77) [36]–[43], [159]–[164]; *Mario* (n 6) [24]–[29], [52]; *Yarran Taylor children* (n 46) [302]–[307].

²¹¹ Judicial Officers 10, 17; Caseworkers 1, 12; Lawyers 5, 7.

²¹² *Braidan* (n 84) 21, 24, 33–4; *Prince & Johns children* (n 82) [33]–[35].

²¹³ *Braidan* (n 84) 33–4; *Lewis* (n 37) [107]–[108], [244]; *Prince & Johns children* (n 82) [5], [71]–[72].

²¹⁴ *Arnott-Bloom* (n 147) [89]. See also *Braidan* (n 84) 21; *Jack* (n 183) [25].

²¹⁵ *Harris children* (n 13) [71]; *JH* (n 14) [148]; *LZ & QJ* (n 103) [254]; *Nicholls children* (n 84) [108]; *RC & PK* (n 12) [152].

²¹⁶ *Alice* (n 55) [116]; *JH* (n 14) [146], [259]; *LZ & QJ* (n 103) [275]; *May, June & Roy* (n 38) [97], [115].

²¹⁷ *Harper children* (n 59) [187]; *Harris children* (n 13) [71]; *JH* (n 14) [258]; *LZ & QJ* (n 103) [276].

²¹⁸ *Harris children* (n 13) [6]; *LZ & QJ* (n 103) [254]; *RC & PK* (n 12) [152].

²¹⁹ *Arnott Bloom* (n 147) [90]; *Harper children* (n 59) [187]; *Rogers* (n 24) [130].

²²⁰ *Elizabeth* (n 13) [179]; *Harris children* (n 13) [48], [71]; *Keziah* (n 36) [118]; *Lucy* (n 76) [66]; *Y* (n 30) [226].

²²¹ A level of detail of the children's lives in their care placement, usually citing from information provided by caseworkers or by the child's Independent or Direct Legal Representative, appears in, eg, *ASK* (n 13) [73]–[76], [106]–[107]; *Elizabeth* (n 13) [92]; *Malakhai* (n 43) [110]–[111]; *Y* (n 30) [816].

²²² It has been observed in research literature that placement stability 'does not in itself guarantee emotional, social or physical wellbeing': Jonathan Dickens et al, 'Courts, Care Proceedings and Outcomes Uncertainty: The Challenges of Achieving and Assessing 'Good Outcomes' for Children After Care Proceedings' (2019) 24 *Child and Family Social Work* 574, 573–4. See also Advocate for Children and Young People, *The Voices of Children and Young People in Out-of-Home Care* (Office of the Advocate for Children and Young People, NSW Government, 2021): chapter 9 'Education While in the Care System', and chapter 10 'Health and Wellbeing in the Care System'.

details are not within court documents and the submitted care plan; a judgment is a condensed summary of the evidence and aims to be as succinct as practicable. However, as touched upon in chapter 5 in relation to the statutory consideration of ‘the circumstances of the child’, some interview participants argued that the legal process could pay greater specific attention to the wellbeing and experiences of children, as these unfold after their removal from the parents.²²³ Particularly noticeable in the judicial interviews was a consciousness of the centrality of school in children’s lives—a fact that may seem obvious, yet is rarely factored into the reasoning of the judgments.²²⁴ Schooling issues were spontaneously raised in about half of the judicial interviews,²²⁵ including the impact on children of being shifted from school and established friendships due to placement changes, or as part of the upheaval of the initial removal itself.²²⁶

The following extract from the case of *Y*,²²⁷ quoting the submission of the child’s lawyer, is a rare example of a vivid, personable depiction of the child’s experience in her foster placement, transcending a formal, abstract notion of ‘stability’, and revealing the integral significance of the child’s relationships – which are the topic of the next and final section in this chapter.

Nobody wants to be a DOCS²²⁸ kid, to use the vernacular, especially not [the child] because that sets her apart from her peers. But she thinks these carers can provide her with a life that is more normal than any other placement option in front of her. They have a sense of family. She has extended family and friendships in their own social group. She has peers at school that she gets to have playdates and do all those sorts of things. Everybody treats each other respectfully. I’ve observed [the child] with her step-foster children and the child of the carers, who is disabled. And she is empathetic and she is kind and she is happy with them. She laughs and plays and does all the things a child would do. That’s a lifestyle for [the child] that she can see herself living as she goes through her teens and is allowed to live that existence that’s as normal as possible for a child in the care of the department.

That’s all she’s asking, just to be allowed to stay where she is. She’s virtually been with this carer now almost as long as she’s lived with any other person in her life. She’s had constant changes. She’s had Mum’s care. She’s had Dad’s care. She’s lived with Grandma in India. And this...is the most settled and the least frightened she’s ever been. (Judgment in *Y*, quoting the Independent Legal Representative for the child)²²⁹

²²³ See Chapter 5, part D, section (i).

²²⁴ Exceptions include *Dupont* (n 22) [96], and *Naunton children* (n 10) 10.

²²⁵ Judicial Officers 3, 7, 10, 15, 16, 17, 18, 19, 21.

²²⁶ Judicial Officers 7, 10, 15, 19.

²²⁷ *Y* (n 30) [816].

²²⁸ Acronym for Department of Community Services, a predecessor of the current Department of Communities and Justice.

²²⁹ *Y* (n 30) [816].

(iv) Child's Relationships

The risks involved with removal are much less obvious than the risks of remaining. You've got proof of concept in terms of the risks in a family, whereas the risk of disordered attachments, the assault on the child's identity, the risks of loss of extended family, grandparents, aunts, uncles, those sorts of things, are often much less obvious. Kids get moved away from a community that they're part of: school, extracurricular activities, friends, neighbours. That's often much less obvious than perhaps it could be when the risk assessment's got to be made, when the best interests of the child of are being considered. (Judicial Officer 7)

This theme encompasses children's 'relationships', 'bonds' or 'attachments' to significant people in their lives, as these inform the decision on realistic possibility of restoration. The substantial influence placed on this factor aligns with the statutory guiding principles of 'least intrusive intervention' in the child's life,²³⁰ the retention of the child's significant relationships,²³¹ and – pursuant to the permanent placement principles – the preferencing of restoration, 'so as to preserve the family relationship'.²³² However, the apparent weight placed on children's relationships is subject to a marked disparity between 'realistic possibility' and 'no realistic possibility' judgments: the factor appearing in 72% and 30% of these decisions respectively.

The Court's opinion on the presence and quality of the child's relationships is informed by a clinician in around 60% of instances. Other sources include caseworkers' observations, contact reports, and the judicial officer's independent assessment of the evidence. The words 'attachment' and 'bond', and to a lesser extent 'relationship', are used somewhat interchangeably in the judgments, each being described with adjectives such as 'strong',²³³ 'close',²³⁴ 'good',²³⁵ 'healthy',²³⁶ or 'positive'.²³⁷ These and similar references are linked to

²³⁰ *The Act* (n 184) s 9(2)(c).

²³¹ *Ibid* s 9(2)(f).

²³² *Ibid* s 10A(3)(a).

²³³ 'Strong' attachment: *Alice* (n 55) [108]; *Eggleton* (n 204) [19], [42.1], [46.3]; *Elizabeth* (n 13) [107]; *KH* (n 41) [590]; *Logan* (n 12) 15; *May, June & Roy* (n 38) [98]; *DFaCS re Poppy* [2012] NSWDC 281, [36], [41] ('*Poppy*'); strong bond: *Alice* (n 55) [91]; *KH* (n 41) [590]; *Lincoln & Raymond* (n 196) [60]; *SS* (n 197) [7]; strong relationship: *Depik & Senina* (pseudonym, unpublished judgment, Children's Court, May 2012) [16] ('*Depik & Senina*'); *George* (pseudonym, unpublished judgment, Children's Court, November 2022) [59] ('*George*'); *Keziah* (n 36) [115], [119].

²³⁴ 'Close' attachment: *KH* (n 41) [584]; close bond: *Grant & Reid* (n 82) [73]; *Jillian & Jacinta* (n 6) [27]; *LZ & QJ* (n 103) [178]; close relationship: *Dupont* (n 22) [95]; *May, June & Roy* (n 38) [117].

²³⁵ 'Good' attachment: *May, June & Roy* (n 38) [125]; good relationship: *Elizabeth* (n 13) [179]; *J & T* (n 6) [501]

²³⁶ 'Healthy' attachment: *VC* (n 7) [117]; healthy bond: *Eggleton* (n 204) [20]; healthy relationship: *Depik & Senina* (n 233) [16]; *Keziah* (n 36) [119].

²³⁷ 'Positive' attachment: *Department of Family and Community Services (DFaCS) and the Ali Children* [2018] NSWChC 6, [238] ('*Ali children*'); *Eggleton* (n 204) [46.2]; *J & T* (n 6) [464]; *Jillian & Jacinta* (n 6) [12]; positive bond: *Borg* (n 84)

children's interactions and relationships (actual or potential) with parents,²³⁸ kinship carers,²³⁹ foster carers,²⁴⁰ biological siblings²⁴¹ and foster siblings.²⁴² Very occasionally, and usually fleetingly, the judgments refer to children's wider network of relationships with biological extended family,²⁴³ the carers' extended family,²⁴⁴ school and friends,²⁴⁵ neighbours²⁴⁶ and community.²⁴⁷

The enmeshment of the terms 'attachment', 'bond' and 'relationship' is not strictly in line with developmental psychology. A child's attachment is a theory-driven concept,²⁴⁸ referring to the emotional and psychological connection formed with one or more primary or significant caregivers, in which a sufficiently present, responsive and sensitive caregiver provides the child with a 'safe haven' and a sense of security.²⁴⁹ As an innate biologically-driven mechanism for infant survival, a child seeks attachment with a primary caregiver even in situations of neglect or abuse²⁵⁰ – perceiving this adult as 'a potential source of comfort in stressful situations'.²⁵¹ Attachments are said to have a profound influence on the child's 'sense of self and the world',²⁵² shaping their emotional regulation²⁵³ and perceptions of trust.²⁵⁴

[19], [51]; *Eggleton* (n 204) [20]; *LZ & QJ* (n 103) [169]; positive relationship: *Bloom* (n 39) [230(11.6)]; *Jamzie* (n 5) [188]; *Poppy* (n 233) [36]; *Yarran Taylor children* (n 46) [267].

²³⁸ See, eg, *Borg* (n 84) [19]; *Depik & Senina* (n 233) [16]; *Eggleton* (n 204) [19], [42.1], [46.3]; *J & T* (n 6) [501]; *Jamzie* (n 5) [188]; *Jillian & Jacinta* (n 6) [12], [27]; *KH* (n 41) [418], [584], [590]; *O'Connor* (n 136) [25(5)]; *Poppy* (n 233) [41]; *VC* (n 7) [117];

²³⁹ *Alice* (n 55) [91]–[92]; *Bloom* (n 39) [230(11.6)]; *Dupont* (n 22) [69], [83]; *Keziah* (n 36) [119]; *May, June & Roy* (n 38) [98], [124].

²⁴⁰ See, eg, *Ali children* (n 240) [238]; *Arnott-Bloom* (n 147) [90]; *Chanlina* (n 183) [19]–[25]; *Logan* (n 12) 15; *Poppy* (n 233) [37]–[40].

²⁴¹ *Charlie* (n 21) 12; *Janet & Xing-fu* (n 9) [54]; *LZ & QJ* (n 103) [156], [157], [169]–[178], [276]; *Naunton children* (n 10) 12; *Nellie* (n 201); *Poppy* (n 233) [41]; *SK* (n 1) [239]–[240].

²⁴² *Chanlina* (n 183) [19]; *Elizabeth* (n 13) [179]; *Jonah* (n 178) 11; *Poppy* (n 233) [36].

²⁴³ *Jonah* (n 178) 11

²⁴⁴ *ASK* (n 13) [107]; *Chanlina* (n 183) [19]; *Y* (n 30) [816].

²⁴⁵ *Dupont* (n 22) [96]; *Elizabeth* (n 13) [160], [179]; *Y* (n 30) [816].

²⁴⁶ *Jonah* (n 178) 20.

²⁴⁷ *Ibid.*

²⁴⁸ Originating in the work of John Bowlby, *Attachment and Loss*, 1969–1982.

²⁴⁹ Amy Conley Wright and Peiling Kong, 'Attachment Theory', in S Heward-Belle and M Tsantefski (eds), *Working with Families Experiencing Vulnerability* (Cambridge University Press, 3rd ed, 2023) 79, 80; Tommie Forslund et al, 'Attachment Goes to Court: Child Protection and Custody Issues' (2022) 24(1) *Attachment and Human Development* 1, 7–8.

²⁵⁰ Chantal Cyr et al, 'Attachment Theory in the Assessment and Promotion of Parental Competency in Child Protection Cases' in Alexander Muela (ed), *Child Abuse and Neglect: A Multidimensional Approach* (IntechOpen, 2012) 63, 64; Forslund et al (n 249) 10.

²⁵¹ Cyr et al (n 250) 64.

²⁵² Conley Wright and Kong (n 249) 81.

²⁵³ *Ibid*; Sara McLean et al, 'Challenging Behaviour in Out-of-Home Care: Use of Attachment Ideas in Practice' (2013) 18 *Child and Family Social Work* 243, 243.

²⁵⁴ Conley Wright and Kong (n 249) 81.

However, it is important to note that traditional attachment theory is subject to criticism and revision for its westernised, ‘Eurocentric’ assumptions about the nature of families, communities and child-rearing—a theme discussed later in this section.

‘Bond’ is a much broader concept. Attachment is a form of ‘affectional bond’;²⁵⁵ but there are many other types of ‘bond’, both affectional and otherwise, formed between children and caregivers, relatives, teachers, playmates, etcetera, which are not characterised by the ‘secure base’ feature of attachment.²⁵⁶

‘Relationship’ is a wider term still—individuals in society engage with and relate to others in multiple forms of interactions, not all of which result in a bond.²⁵⁷ And attachment itself, while important, is not the only significant aspect of a child’s *relationship* with parents and other caregivers.²⁵⁸ Other important facets include physical care and safety, supervision and guidance, modelling of acceptable conduct, and wider influences within the child’s social environment.²⁵⁹ The caregiver should ‘know and value the child’²⁶⁰ and meet the child’s needs accordingly. It is therefore said that ‘attachment quality’ does not equal ‘overall relationship quality’.²⁶¹

The use of descriptive terms for attachment, such as ‘strong’, ‘positive’, and ‘good’, is technically at odds with the language of attachment theory,²⁶² in which an attachment is either ‘secure’ or one of the variants of ‘insecure’.²⁶³ (The latter terms do, however, appear in many of the judgments.)²⁶⁴ It is debatable whether the Court’s recourse to non-technical language in this context actually matters. Scholars caution against loose and misconstrued judicial application of attachment theory,²⁶⁵ observing the potentially serious ramifications for

²⁵⁵ Mary D Salter Ainsworth, ‘Attachments Beyond Infancy’ (1989) 44(4) *American Psychologist* 709, 711; Forslund et al (n 249) 7.

²⁵⁶ See Ainsworth (n 255) 711; Sofia Nord Levin et al, ‘Attachment Goes to Court in Sweden: Perception and Application of Attachment Concepts in Child Removal Court Decisions’ (2024) 26(6) *Attachment & Human Development* 521, 522.

²⁵⁷ See Ainsworth (n 255) 711.

²⁵⁸ Conley Wright and Kong (n 249) 80; Forslund et al (n 249) 9.

²⁵⁹ Conley Wright and Kong (n 249) 80; Forslund et al (n 249) 9.

²⁶⁰ Forslund et al (n 249) 31.

²⁶¹ *Ibid* 9.

²⁶² Conley Wright and Kong (n 249) 94–5; Forslund et al (n 249) 10; Levin et al (n 256) 530.

²⁶³ The variants of insecure attachment, identified by Ainsworth (1979) and Main and Solomon (1986) are identified as ‘insecure-avoidant’, ‘insecure-ambivalent’ and ‘insecure-disorganised’: see Conley Wright and Kong (n 249) 82–3.

²⁶⁴ See, eg, *Alfred* (n 77) [46]; *Alice* (n 55) [61]; *Chanlina* (n 183) [24]; *Elizabeth* (n 13) [101]; *JH* (n 14) [146], [148]; *KH* (n 41) [647]; *Kim* (n 30) [65]–[66]; *Lewis* (n 37) [99]; *Logan* (n 12) 15; *Oscar* (n 10) [89].

²⁶⁵ Forslund et al (n 249); Levin et al (n 256).

decisions about children's lives.²⁶⁶ However, the interchangeable use of 'attachment', 'bond' and 'relationship' in the current study, accompanied by plain English adjectives, generally represents the judicial officer's impromptu choice of wording—a turn of phrase—to affirm evidence of positive relationships in the child's life, rather than being an attempt to systematically apply attachment theory. When seeking to delve more thoroughly into the theory, the Court commonly defers to clinical expertise, particularly in relation to the impact of a change in the child's life which would disrupt or sever an existing attachment relationship.²⁶⁷ The judgments then closely paraphrase or directly quote the language of the clinician. Notably, clinicians themselves use the word 'strong' to describe attachments in some instances.²⁶⁸ Furthermore, so did the Parliament of New South Wales when passing section 90 of the Act, which prescribes that the Court have regard to 'the strength of the child's or young person's attachments to the birth parents and the present caregivers'²⁶⁹ when hearing an application to vary or rescind a care order.

In a few cases, the judgments reverse the conceptualised *direction* of an attachment by expressing it as an attribute possessed by, or lacking on the part of, the parent, instead of being formed and held by the child.²⁷⁰ Hence the mother in *SK* was argued to lack 'attachment to' her newborn baby,²⁷¹ while the judge relied on counter-evidence of the mother 'displaying' attachment 'upon' the baby.²⁷² In *Poppy*, the biological family and the long-term foster family were described as sharing 'a strong and enduring attachment to [the child]'.²⁷³ This inverted phrasing was of little practical significance in these particular judgments, the 'attachment' being but one small element of comprehensive evidence supporting a realistic possibility of restoration in each case. However, in the case of *Boyd*, concerning a one-year old child assumed into care at birth, a clinical opinion that the mother 'displays a very poor attachment to her other five children'²⁷⁴ appeared to be quite significant in contributing to the Court's determination. The five siblings had been previously removed and were all in long-term out-of-home care. No elaboration is provided in the judgment as to the nature or evidence of the

²⁶⁶ Forslund et al (n 249) 24, Levin et al (n 256) 536.

²⁶⁷ See, eg, *Chanlina* (n 183) [20]–[21]; *Dalton Tomkins children* (n 23) [129]; *Elizabeth* (n 13) [156]–[164]; *JH* (n 14) [179]; *May, June & Roy* (n 38) [117]–[122]; *Poppy* (n 233) [51]–[53]; *RC & PK* (n 12) [184]–[185].

²⁶⁸ *Ali children* (n 240) [100]; *Poppy* (n 233) [36], [37]; *RC & PK* (n 12) [185].

²⁶⁹ *The Act* (n 184) s 90(6)(d).

²⁷⁰ This same misconstrual was observed in a study of the use of attachment theory in care and protection legal proceedings in Sweden: Levin et al (n 256) 530, 535.

²⁷¹ *SK* (n 1) [69]

²⁷² *Ibid.*

²⁷³ *Poppy* (n 233) [69].

²⁷⁴ *Boyd* (n 84) [23], quoting the evidence of a psychologist.

‘very poor’ attachment, which is bundled up with the mother’s lack of insight, ‘past dysfunction’ and volatile mental health as reasons for there being no realistic possibility of the baby.²⁷⁵

The *Boyd* case is not typical in relying on an ostensibly ‘poor’ attachment; explicit findings of deficiency in the parent-child attachment relationship are rare in the judgments in this study.²⁷⁶ There are however references to *attenuation* of attachment—or limited opportunity for its formation—due to the length of time the child has been in care.²⁷⁷ The reflections of interviewed judicial officers indicated that they consider attachment mainly in the context moving a child away from a carer,²⁷⁸ rather than to look for its presence in the relationship with a parent, or to assess parenting capacity.²⁷⁹

I don’t think we use attachment to make conclusions about people’s parenting capacity. I’ve never done that. I’m really alert to when people say ‘there’s a strong attachment now’, and I’m going ‘what do you mean?’... But what I’m really interested in, I guess, is that disruption to the primary carer and stability. That’s what I want to know. What am I doing to this three-year old? Can I move him to Mum or not? (Judicial Officer 4)

To the extent that attachment theory is utilised to evaluate the *quality* of children’s relationships with parents (or other caregivers), magistrates mentioned the complexities of doing so, and emphasised their reliance on clinical expertise.²⁸⁰ The following extract from the case of *Alfred* illustrates the nuanced interplay between considerations of attachment, parenting skills, bonds and affection. Consistent with theory, it shows that the Court does not treat attachment as ‘the whole of relationships’:²⁸¹

Alfred, a 3 year old, who has never lived with his mother and who has had limited contact with his mother, particularly since the COVID 19 restrictions have been in place, could not be said to have an attachment to her. Ms Hawkins in her assessment stated that she observed [the mother] to be positive and attuned to Alfred and was of the opinion that the bond would develop... she could not identify a primary

²⁷⁵ Ibid [23]–[30].

²⁷⁶ There is one reference to a child having a ‘poor attachment’ to the parent: *Arnott Bloom* (n 147) [56]. In contrast, a study of the use of attachment theory in child protection legal proceedings in Sweden found that ‘misunderstood, imprecisely articulated’ concepts of attachment were relied upon predominantly to ‘infer attachment insecurity’ and deficient parenting capacity, in justification of children’s removal from parents: Levin et al (n 256) 531–6.

²⁷⁷ See, eg, *Alfred* (n 77) [45]; *Chanlina* (n 183) [20], [44]; *Elizabeth* (n 13) [101]–[102], [105]; *Lincoln & Raymond* (n 196) [3]; *Logan* (n 12) 15; *Tanya* (n 36) [71].

²⁷⁸ Judicial Officers 1, 2, 3, 4, 5, 7, 10, 17, 18

²⁷⁹ Judicial Officers 3, 4.

²⁸⁰ Judicial Officers 2, 5, 7, 8, 17, 18, 21, 23.

²⁸¹ Conley Wright and Kong (n 249) 80, quoting M Rutter, ‘Clinical Implications of Attachment Concepts: Retrospect and Prospect’ (1995) 36(4) *Journal of Child Psychology and Psychiatry* 549.

attachment figure for Alfred. Although she could see a clear bond between Alfred and [his foster carer] she could not identify a secure attachment and she noted that Alfred looks to [his foster sisters] for affection. I accept the submission of the Independent Legal Representative that Alfred does have some attachments in his current household and these will be disrupted if he is moved, but that the disadvantage of such a disruption will be far outweighed by the benefit Alfred can gain from more intensive attuned parenting he would receive from either of his parents. (Magistrate in *Alfred*)²⁸²

In *Alfred* the child experienced a ‘warm and loving’ environment in his placement.²⁸³ Nonetheless—for reasons associated with Alfred’s special needs, the large number of children in the household, and some practical and personal struggles of the carer—the placement did not provide him with stability or promote his development.²⁸⁴ This circumstance is far less common in the judgments than the reverse position: in which children’s stability and ‘progress’ in out-of-home care are unaccompanied by references to love and affection, nor any kind of emotional connection with the carers. Less than half²⁸⁵ of the judgments relying on placement stability refer to children’s positive relationship or bond with their carers. Of these, ‘love’, or a ‘loving’ environment, are a highlighted feature of some kinship placements.²⁸⁶ Foster family relationships, in isolated instances, are portrayed as playful,²⁸⁷ and providing a sense of belonging.²⁸⁸ In several cases the evidence is of a more abstract assessment that the children have (or are ‘likely’ to have) formed an attachment to the carers.²⁸⁹ Specific references to love in foster care are exclusive to very long-standing placements in which the child has been, essentially, a member of that family from young age.²⁹⁰ In comparison, decisions in favour of restoration are considerably more reliant²⁹¹ on the presence of love²⁹² and affection²⁹³ in the parent-child relationship.

²⁸² *Alfred* (n 77) [45]–[47].

²⁸³ *Ibid* [34].

²⁸⁴ *Ibid* [34]–[43].

²⁸⁵ 15 of 33 cases.

²⁸⁶ *Alice* (n 55) [115]; *Bloom* (n 39) [342]; *Dupont* (n 22) [95]; *Ezekial* (n 12) 17; *May, June & Roy* (n 38) [115].

²⁸⁷ *Elizabeth* (n 13) [92]; *Y* (n 30) [816].

²⁸⁸ *ASK* (n 13) [107]; *Chanlina* (n 183) [19]; *Elizabeth* (n 13) [92], [179]; *Y* (n 30) [816].

²⁸⁹ *Charlie* (n 21) 12; *Dalton Tomkins children* (n 23) [129], [185]; *JH* (n 14) [179]; *RC & PK* (n 12) [185].

²⁹⁰ *Chanlina* (n 183) [19]; *Elizabeth* (n 13) [95], [104]; *Logan* (n 12) 11.

²⁹¹ References to love (and affection) appear as reasons for decision in approximately 35% of ‘realistic possibility’ judgments, and in 11% of ‘no realistic possibility’ judgments.

²⁹² See, eg, *J & T* (n 6) [463]; *Janet & Xing-fu* (n 9) [87]; *KH* (n 41) [360]; *Mario* (n 6) [40]; *O’Connor* (n 136) [30]; *SK* (n 1) [69]; *VC* (n 7) [117].

²⁹³ See, eg, *Ali children* (n 240) [114]; *Eggleton* (n 204) [20], [22]; *J & T* (n 6) [463]; *Jamzie* (n 5) [185]; *Janet & Xing-fu* (n 9) [87]; *KH* (n 41) [252]; [428]; *Poppy* (n 233) [69]; *VC* (n 7) [117].

This study did not analyse the judgments for reliance on children's relationships in permanency planning decisions *flowing from* a decision not to restore a child to the parents. Nor did it refer to the many judgments exclusively concerned with contested placement issues. Furthermore, the absence of references to a child's emotional relationships within a judgment does not mean that such bonds are in not, in fact, a feature of the placement; but it does suggest that these were not considered of central importance to 'the circumstances of the child' element of the realistic possibility of restoration decision. The case of *McAlister children* aptly illustrates this: the Court quoting with approval a clinician's perspective on the carer's emotionally distant parenting style:

For the last 3 years these carers have offered difficult and troubled children routine, consistency and care. There have been comments about lack of warmth and emotional engagement with the children directed at these carers. The female carer presented as an organised, calm, no-nonsense individual, who described herself as 'not a cuddly sort of person'. This ability to be organised is needed to care for 4 foster children (there is a fourth older child in this placement), work full-time and help run a farm. Likewise, the children's sexualised behaviour may result in the carers keeping very distinct personal boundaries around the way they provide care. (Magistrate in *McAlister children*)²⁹⁴

As noted at the start of this section, children's relationships appear to carry much more overall weight in decisions to restore than in decisions that there is no realistic possibility of restoration. It can be surmised that this is a pragmatic reflection of realities in the care system, rather than any conscious belief on the part of judicial officers that children in out-of-home care are less in need of love than are other children. In many of the judgments there was not, at the stage of hearing, any long-term placement option established or even identified. In these circumstances the Court has minimal basis to incorporate into its reasons for decision the child's prospects for positive and nurturing relationships with particular people.

It has been argued that out-of-home care in Australia, despite 'child-centred' rhetoric or good intentions, focuses on essential safety, physical care and consistent routines, rather than children's emotional welfare, recovery from trauma, and their relationships with both caregivers and biological family.²⁹⁵ Yet extensive research with children in care, and with care-leavers, has shown that being loved, feeling wanted, and treated as an integral part of the family are crucially important elements of children's perceptions and experiences of a

²⁹⁴ *McAlister children* (n 59) [55], quoting the Children's Court Clinician.

²⁹⁵ Conley Wright and Kong (n 249) 13–14.

successful foster placement.²⁹⁶ Research has further suggested that a loving environment may be no less important in short-term than in longer-term placements.²⁹⁷ In either instance, the carer's willingness to empathetically facilitate the child's continuing relationship with parents and family is (in most circumstances) vital to a sense of belonging and identity.²⁹⁸

Culturally-based critiques of attachment theory are especially relevant to themes of relationships, belonging and identity in child protection. In its origins and traditional application, the theory is grounded in 'Eurocentric' normative assumptions in which a child's 'primary attachment' is to the mother, in a nuclear and heterosexual family.²⁹⁹ Although the mainstream of the theory has adjusted to accept that a child may have more than one primary attachment figure, the child's relationship with each of these people is conceptualised as 'dyadic',³⁰⁰ which is inconsistent with the extended kinship and community models of child-rearing in many non-western, 'collectivist' cultures.³⁰¹ There appears to be consensus that all children form attachments, and that these are derived from continuity of sensitive, responsive care;³⁰² however, the nature of this care-giving varies across cultural contexts.³⁰³ Moreover, 'a network of attachment relationships', in which multiple care-givers are involved in a child's life, has been shown to be a protective factor in child wellbeing across widely divergent cultures.³⁰⁴ In post-colonial settings, including Australia, child protection law and practice has

²⁹⁶ Karleen Gribble and Stacy Blythe, 'Love and Belonging in Foster Carer Recruitment Materials in New South Wales, Australia' (2022) 130 *Child Abuse & Neglect* 105341: 1-9, 2, citing, et al: J McDowall, *Experiencing Out-of-Home Care in Australia: The View of Children and Young People* (Report, Create Foundation, 2013), M Randle, 'Through the Eyes of Ex-Foster Children: Placement Success and the Characteristics of Good Foster Carers' (2013) 25(1) *Practice: Social Work in Action* 3, I Sinclair and K Wilson, 'Matches and Mismatches: the Contribution of Carers and Children to the Success of Foster Placements' (2003) 33(7) *British Journal of Social Work* 871, H Ward, T Skuse and E R Munro, "'The Best of Times, the Worst of Times": Young People's Views of Care and Accommodation' (2005) 29(1) *Adoption and Fostering* 8.

²⁹⁷ Gribble and Blythe (n 296) 6.

²⁹⁸ Jennifer Boyle et al, 'Specialist Reunification Foster Care: A Care Team Approach Around Trauma, Attachment and Supporting Children to Return Home' (2024) 45(4) *Australian & New Zealand Journal of Family Therapy* 477; Susan Collings and Amy Conley Wright, "'You Are Mum and Then They Are Mum": Negotiating Roles, Relationships, and Contact in Out-of-Home Care' (2022) 71(3) *Family Relations* 1211.

²⁹⁹ Peter Choate and Christina Tortorelli, 'Attachment Theory: A Barrier for Indigenous Children Involved with Child Protection' (2022) 19(14) *International Journal of Environmental Research and Public Health* 8754, 3; Wendy Hermeston, 'Safe, Protected...and Connected? The Best Interests of Aboriginal Children and Permanency Planning in the NSW Care and Protection System' (PhD Thesis, University of Technology Sydney, 2019) 46-7.

³⁰⁰ Choate and Tortorelli (n 299) 3; Hermeston (n 299) 51; A Wright et al, 'Attachment and the (Mis)Apprehension of Aboriginal Children: Epistemic Violence in Child Welfare Interventions' (2024) *Psychiatry, Psychology and Law* 1, 7.

³⁰¹ Choate and Tortorelli (n 299) 3; Hermeston (n 299) 51-4; Wright et al (n 300) 9, 12.

³⁰² Choate and Tortorelli (n 299) 3; Wright et al (n 300) 7.

³⁰³ Choate and Tortorelli (n 299) 3, 10; Wright et al (n 300) 6-7; Registrar 2.

³⁰⁴ Forslund et al (n 249) 12.

continued to apply traditional, even outdated understandings of attachment,³⁰⁵ in which a permanent and 'stable' environment in a one or two-carer household is prioritised over Aboriginal children's cultural rights to identity, community and kin.³⁰⁶ Reliance on attachment, and misconceptualisations about the theory, may lead to over-simplified assertions that children should not be detached from an 'established' out-of-home care placement, to the detriment of their wider psychological and developmental needs.³⁰⁷

In the judgments in this study, there is very little express use of the term 'attachment' in decisions where there is no realistic possibility of restoration of Aboriginal children to their parents. Exceptions are *May, June and Roy*, in which the children were found to have formed a 'robust' primary attachment to their (non-Aboriginal) carer grandmother,³⁰⁸ and *Jonah*, in which the eight-year-old child's primary attachment was to the carers (distant Aboriginal kin) with whom he had lived for most of his life.³⁰⁹ Jonah also had very 'strong connections'³¹⁰ with his mother, maternal grandparents and other family members, and the case turned on weighing the stability of his long-term placement against the benefits of being restored home to the heart of his loving, extended Aboriginal family. Complicating issues included Jonah's special needs arising from a brain injury, and risks associated with his mother's history of drug addiction. Although deciding against restoration, the magistrate was frank in admitting difficulty in reconciling the competing considerations, remarking that these were 'at knife's edge',³¹¹ and that:-

I am asked to reflect upon the safety of being in culture versus the safety of being in appropriate medical care, in a stable environment, which has gone on for years... It is an impossible task almost, really, to resolve this. (Magistrate in *Jonah*)³¹²

The theme of relationships is more often relied upon as a factor *in favour* of restoration in Aboriginal families. Within cases finding a realistic possibility of restoration for Aboriginal children, there are explicit references to children's attachment to their parents in four

³⁰⁵ Wright et al (n 300) 7; Registrar 1.

³⁰⁶ See Davis, *Family is Culture Report* (n 193) 16, 378–9; Hermeston (n 299) 146–155; Wright et al (n 300) 8.

³⁰⁷ Choate and Tortorelli (n 299) 9, 12; Wright et al (n 300) 8.

³⁰⁸ *May, June & Roy* (n 38) [124]–[125].

³⁰⁹ *Jonah* (n 178) 21.

³¹⁰ *Ibid* 21.

³¹¹ *Ibid* 17.

³¹² *Ibid* 20.

judgments,³¹³ as well as ‘bond’,³¹⁴ ‘love’,³¹⁵ ‘affection’,³¹⁶ and ‘positive’ connections,³¹⁷ mentioned across six judgments. Largely absent from these decisions,³¹⁸ however, is express consideration of the very fact of restoration to an Aboriginal parent as promoting or ensuring the child’s Aboriginal kinship connections and cultural identity – a finding explored in detail in chapter 9.³¹⁹

The judicial interviews revealed an acute awareness of the significance of culture, community and kin for Aboriginal children. Every judicial participant raised some aspect of these issues – several in response to specific questions about ‘cultural plans’,³²⁰ but many of their own volition. Overall there appeared to be a strong sense of commitment to the Court contributing, where it can, to repairing the historical and continuing harms of the separation of Aboriginal children from their families. The Court’s scope to do this is perceived mainly as a matter of ensuring children are placed with kin where possible,³²¹ and through scrutiny of the Department’s cultural plans³²² – these having improved in quality in recent years,³²³ but seen as needing continued improvement (in both content and implementation).³²⁴ As reflected in the judgments, there was little mention of restoration, of itself, upholding culture; rather the focus was overwhelmingly on how to maintain connection to culture for children who are not restored to their parents.

The Court’s power to intervene in these profound issues is limited by its role ‘at the pointy end’³²⁵ of a large and complex child protection system. There is resonance here with research on the impact of attachment theory in recent Canadian court decisions, in which First Nations

³¹³ *Eggleton* (n 293) [19], [42.1], [46.2]; *Jamzie* (n 5) [138]–[139]; *KH* (n 41) [360], [361], [418], [584], [590], [647]; *O’Connor* (n 136) [25(3)] (in *O’Connor* the attachment was to the children’s non-Aboriginal mother).

³¹⁴ *Alfred* (n 77) [45]; *Eggleton* (n 204) [20]; *Grant & Reid* (n 82) [73]; *Jamzie* (n 5) [80]; *KH* (n 41) [428], [429], [590], [647].

³¹⁵ *Jamzie* (n 5) [80], [185]; *KH* (n 41) [360], [428], [429].

³¹⁶ *Jamzie* (n 5) [185]; *Eggleton* (n 204) [20], [22]; *KH* (n 41) [252], [428].

³¹⁷ *Jamzie* (n 5) [188]; *Eggleton* (n 204) [20]; *Yarran Taylor children* (n 46) [267].

³¹⁸ *Yarran Taylor children* is a partial exception to this: at [125(13)], [298]–[299], but see also discussion of this case in Chapter 9, part B, section (ii).

³¹⁹ See Chapter 9, part B, section (ii).

³²⁰ As outlined in Chapter 3, the judicial interviews in this study were part of a combined process for four separate research projects, one being another PhD candidate’s research into the care jurisdiction’s implementation of the cultural plans that are mandated in the legislation.

³²¹ Judicial Officers 1, 2, 13, 16, 17, 18, 19, 21.

³²² Judicial Officers 1, 2, 6, 7, 9, 15, 17, 18; Registrar 2.

³²³ Judicial Officers 3, 4, 6, 7, 18, 20, 21; Registrar 1.

³²⁴ Judicial Officers 1, 2, 4, 5, 6, 16, 19, 20; Registrars 1, 2.

³²⁵ Registrar 1.

children were retained in their established placements in non-Indigenous foster homes.³²⁶ While ultimately prioritising ‘placement stability’ over culture, the Canadian courts were described as effectively sending the message ‘that, if culture really matters, do not ask the courts to address the issue long after the child has been placed in non-cultural care’,³²⁷ and urging that statutory authorities address these matters ‘as an immediate priority’ when first intervening in the child’s life.³²⁸ In other words, the wider child protection system cannot divest responsibility for children’s cultural needs solely into the hands of the courts.

Conclusions

This chapter discussed four ‘substantially influential’ factors in the Court’s decisions on realistic possibility of restoration: candour and credibility, domestic violence, children’s stability and children’s relationships. Each of these factors appears as a reason for decision in 40% to 50% of the sampled judgments.

The substantially influential factors are evident in the continuing stories of Sarita and Sonya, whose past victimisation at the hands of violent and controlling partners was perceived as a barrier to restoration. Both women were argued to have been insufficiently candid regarding domestic violence (or, in Sonya’s case, the timing of ending the abusive relationship), casting aspersions on their honesty. In Sarita’s case, however, the Court formed a favourable view of her credibility, based on observing her oral evidence, and on comprehensive evaluation of the overall weight of documentary evidence and expert testimony. The evidence in both Sarita’s and Sonya’s cases affirmed the presence of loving bonds between mother and child – but this was pitted against the stability and attachments the children were said to have formed in their care placements.

In assessing credibility, the Court considers the parents’ manner in giving evidence and the substance of the evidence. Based on both the judgments and interviews, it is apparent that greater weight is placed on substance than on demeanour: the Court scrutinises the plausibility of parents’ evidence within the context of its consistency or inconsistency with other sources, and hence on the parents’ overall candour in their dealings with child protection professionals or third parties. While this may be objectively ‘fairer’ than relying on a nervous or distressed person’s demeanour in the witness box, the stress of the legal

³²⁶ Choate and Tortorelli (n 299) 14–17, citing *MU v Alberta*, 2022 ABPC 42, and *ZB (Re)*, 2022 ABPC 66.

³²⁷ Ibid 16.

³²⁸ Ibid 16–17.

proceedings and the surrounding circumstances are likely to place parents at a disadvantage in striving to present a persuasive case for restoration.

Chapter 6 established domestic violence to be the foremost leading reason (within the sampled judgments) for the child's initial removal by the Department. In contrast, at the Court determination stage domestic violence as a standalone factor becomes superseded by the leading reasons discussed in the previous chapter. However, domestic violence is closely interlinked with those leading factors, having (or perceived as having) an almost symbiotic cause-and-effect relationship with insight, mental health and capacity to meet the child's needs. There is some express recognition by judicial officers, in both judgments and interviews, of the gendered nature of domestic violence and the presence of coercive control. However, the language in many of the judgments, and the expectations imposed on mothers as victims to take 'responsibility' for the violence, reflect well-established research findings on problematic conceptualisations of the nature of domestic violence in the child protection sphere.

The theme of stability and development indicates that concern about disrupting the 'status quo' of a child's placement is prevalent in decisions that there is no realistic possibility of restoration. This factor is not limited to the longer-term, established placements that feature in 'section 90' rescission applications; it is also an influential consideration in shorter-term, interim care arrangements. However, as evident in some judgments and emphasised in interviews, many cases are characterised by a crisis of *lack of* placement stability. This may lead either to a restoration proceeding in tenuous circumstances, or conversely to a judicial opinion that the child is more than ever in need of a quality of care which the parents are not equipped to provide.

Children's stability is much more influential in 'no realistic possibility' decisions than in decisions in favour of restoration, while the reverse position applies to children's relationships. References to placement stability and children's bonds with carers tend to be expressed in brief and generic terms. It is unusual for a 'no realistic possibility' judgment to closely consider the child's wellbeing in contexts such as daily life, schooling, friendships, community connectedness and happiness. There are very few references to foster care providing an environment of love, affection and fun. Decisions in favour of restoration, meanwhile, are far more likely to mention love, and to rely generally on positive relationships between carers (in this context, the parents) and child.

Recognition of the importance of loving relationships is evident in cases of restoration of Aboriginal children to their parents. However, largely absent from these decisions are express references to the cultural benefits of Aboriginal children being raised by their own family. Chapter 9 explores these issues more thoroughly, in light of the finding that children's cultural needs and cultural identity fall into the group of *less influential* factors in determining realistic possibility of restoration.

CHAPTER NINE

Reasons for Decision on 'Realistic Possibility of Restoration': Moderately and Less Influential Factors

Case Stories continued: Sarita and Sonya

Sarita's story continued¹

The Department maintained its concerns about Sarita's mental health history and 'inadequate personal control' of her emotions. The weight of medical opinion, however, was that Sarita's episodic depression was situational. The judge found that Sarita's health and lifestyle had stabilised since the 'tumultuous events' surrounding Sammy's removal. She had developed strong community ties and support networks through employment, volunteer work and involvement with her local Sikh temple.

Sarita's capable, attentive and nurturing care of Sammy during contact, as well as her exemplary raising of her older sons, was apparent in contact reports, clinical observations, and evidence of her various treating professionals. One of her sons was invited to present his views to the Court, expressing his opinion of Sarita as a good mother who 'deserves to have a complete family'. He impressed the judge as 'immaculately presented in his school uniform' and speaking with 'maturity and gravity'.

At the time the appeal was heard, Sammy had been recently moved from his previous foster carers to a new placement with proposed adoptive parents. The agency overseeing the adoption acknowledged that the new family was not a 'cultural match', being of neither Sikh religion or Punjabi ethnicity. Sarita was informed that 'they were Australian but had been in India several times and were open to Indian culture'.

Sonya's story continued²

The magistrate commented positively on Sonya's efforts in attending drug counselling, and her success in ceasing use of cannabis.

At the time of the hearing Sonya was pregnant with her third child. The magistrate observed that Sonya did not 'lack any general ability to be a parent', but was nonetheless of the opinion that Sonya underestimated the stress that would accompany caring for the new baby. This stress, it was felt, would jeopardise Sonya's state of mental health and potentially cause her to resume using drugs.

¹ Based on *SK v Secretary, Department of Family and Community Services* [2016] NSWDC 273 ('SK'). See parts 1, 2 and 3 of Sarita's story in chapters 6, 7 and 8.

² Based on an unpublished judgment of the Children's Court, 2009. See parts 1, 2 and 3 of Sonya's story in Chapters 6, 7 and 8.

It was briefly noted that the oldest child, Merinda (age four) 'expressed a wish to live with her mum rather than her dad'.

Sonya's sister Louise gave evidence that she was available to help Sonya with the care of the children. Due to inconsistencies in the evidence of Louise and Sonya, the magistrate had limited confidence in the level of support Louise would provide.

The children's Aboriginal cultural identity was not mentioned in relation to realistic possibility of restoration, although the importance of these issues was discussed in the context of the children's proposed long-term placement and care plans.

Sarita's and Sonya's stories conclude in chapter 10.

Chapter Overview

This chapter discusses the factors categorised as 'moderately' and 'less' influential in the Court's decisions on realistic possibility of restoration.

The moderately influential factors appear as reasons for decision in around one-third of the judgments. These are *substance use (alcohol and other drugs)* (in 31% of judgments), *informal supports* (in 32%), and *practical and generic parenting capacity* (32%).

The less influential factors are those appearing in up to 20% of the judgments.³ The discussion focuses on *housing* (20%), *the child's cultural identity* (17%), and *the child's views or wishes* (16%), with additional brief discussion of *employment* (11%), *finances* (10%), and *intellectual disability* (3%).

The chapter considers why particular factors (substance use and housing) are less significant at the Court determination stage than as reasons for the child's initial removal. It discusses the divergent impact that a focus on 'informal supports' can have for families from different backgrounds of social strata and privilege. The chapter also analyses the implications of the relatively low level of influence of children's cultural identity and children's views in decisions on restoration.

³ No factors fell in the range of >20–30%.

A. Moderately Influential Factors

(i) Substance Misuse: Alcohol and Other Drugs

I think that if you haven't got your mental health right, you're going to self-medicate, and domestic violence becomes very much a live issue if you've got a trauma background, which most of our parents do. This is all cyclical... I mean, it's a chicken and egg thing with drug dependency, isn't it – like, you know, where do you start? (Judicial Officer 2)

A little under one-third of the judgments refer to problematic use of alcohol or other drugs ('AOD') as a reason for determination, slightly less than the number of judgments citing AOD use as a reason for the child's initial removal.⁴ Relative to other factors, however, AOD use diminishes in influence, quite dramatically, at the determination stage. It is the second-most prevalent reason for the decision to remove the child and commence proceedings, yet as a reason for decision on realistic possibility of restoration it is superseded by the eight factors discussed in chapters 7 and 8.

This seems a curious shift, given that AOD use is widely regarded as a major risk factor in child protection,⁵ the presence of which reduces likelihood of reunification.⁶ The finding also appears incongruous with the interviews in this study, in which references to AOD use were emphatically dominant in general discussion about factors influencing restoration.⁷ The number of these spontaneous references exceeded mention of the other 'trifecta'⁸ issues of domestic violence and mental health, creating an impression of AOD use as being the *most*

⁴ Substance use is a cited reason for the child's removal in 37% of the judgments, and a reason for decision on realistic possibility of restoration in 31%.

⁵ See, eg, Peter W Choate and Sandra Engstrom, 'The "Good Enough" Parent: Implications for Child Protection' (2014) 20(4) *Child Care in Practice* 368, 375; Lillian De Bortoli et al, *The Family Drug Treatment Court: An Evaluation Report* (Centre for Forensic Behavioural Science, Swinburne University of Technology, November 2018) 14; Anna Doab, Cathrine Fowler and Angela Dawson, 'Factors that Influence Mother-Child Reunification for Mothers with a History of Substance Use: A Systematic Review of the Evidence to Inform Policy and Practice in Australia' (2015) 26 *International Journal of Drug Policy* 820, 820–21; Rachel Gregory-Wilson et al 'Infant Removal from Birth Parents: How Does Health Information Impact Court Decisions? A Scoping Review' (2022) 29(3) *Collegian* 379, 381, 383; Judith Harwin et al, 'Child and Parent Outcomes in the London Family Drug and Alcohol Court Five Years On: Building on International Evidence' (2018) 32 *International Journal of Law, Policy and The Family* 140, 140–41.

⁶ Choate and Engstrom (n 5) 375; Tessa Cunningham et al, *Reunification: Rapid Literature Review* (Flinders University and Anglicare SA, 2021) 410; Paul Delfabbro et al, 'An Analysis of Reunification from Out-of-Home Care in Three Australian States' (2015) 8 *Child Indicators Research* 359, 361, 368; Doab, Fowler and Dawson (n 5) 821.

⁷ Judicial Officers 2, 3, 4, 5, 6, 7, 8, 9, 14, 15, 16, 17, 18, 19, 20; Registrars 1 and 2; Caseworkers 2, 3, 4, 6, 8, 9, 10, 11, 12, 13; Lawyers 1, 2, 5, 8, 9.

⁸ See Chapter 6, part B, regarding the notion of 'the trifecta' in child protection.

common risk factor affecting prospects of restoration—or at least perceived as such. Possible explanations for these disparities are discussed later in this section.

The judgments rarely articulate a causal link between AOD use and the risk of a specific form of child maltreatment.⁹ A link is sometimes implicit in descriptions of events leading to the child's removal,¹⁰ but the factor otherwise tends to be bundled up within the narrative as part of an array of dysfunctional aspects of the parent's circumstances, its negative implications assumed. Interviewed judicial officers, in contrast, were forthcoming with examples of the ramifications of parental AOD use. These included serious neglect (for example, children unfed, unclean and not attending school),¹¹ unsafe driving with children as passengers,¹² the fall-out from parents being caught up in crime,¹³ and the drug overdose death of one or both parents.¹⁴ There was also mention of foetal alcohol spectrum disorder,¹⁵ and babies born drug-affected.¹⁶

Consistent across judgments and interviews are sceptical and pessimistic views of the prospects of AOD dependency being overcome and abstinence maintained. In many of the judgments, continued AOD use is either conceded by the parent¹⁷ (usually in relation to cannabis), or is strongly suspected.¹⁸ Other 'no realistic possibility' judgments acknowledge the parents' progress in *trying* to address the problem—through drug detoxification,¹⁹

⁹ A similar finding emerged from a study of references to parental cannabis use in care and protection judgments in England and Wales: Yuval Saar-Heimann, Anna Gupta and Griet Roets, 'Parenting Through the Lenses of Risk and Othering: Constructions of Parenting Cannabis Use in Child Protection Court Proceedings' (2023) 28 *Child and Family Social Work* 690, 693–4.

¹⁰ See Chapter 6, part B, section (ii).

¹¹ Judicial Officers 3, 7, 15.

¹² Judicial Officers 2, 15, 21.

¹³ Judicial Officer 21; Registrar 2.

¹⁴ Judicial Officer 7.

¹⁵ Judicial Officer 14.

¹⁶ Judicial Officer 21.

¹⁷ *Adriana* (pseudonym, unpublished judgment, Children's Court, July 2022) 9–10, 12 ('*Adriana*'); *Bradford children* (pseudonym, unpublished judgment, Children's Court, July 2011) [30] ('*Bradford children*'); *Department of Communities and Justice (DCJ) and the Dalton Tomkins children* [2023] NSWChC 10, [233]–[234], [259] ('*Dalton Tomkins children*'); *Dorothy* (pseudonym, unpublished judgment, Children's Court, September 2019) [53]–[62] ('*Dorothy*'); *JMS v Department of Family and Community Services & Ors* [2018] NSWDC 25, [50] ('*JMS*'); *Lim children* (pseudonym, unpublished judgment, Children's Court, July 2022) 9–10 ('*Lim children*'); *Re Malakhai* [2022] NSWChC 6, [145], [146] ('*Malakhai*'); *Nicholls children* (pseudonym, unpublished judgment, Children's Court, March 2023) [35]–[37] ('*Nicholls children*').

¹⁸ *DFaCS (NSW) and Abbey* [2013] NSWChC 3, [110]–[111] ('*Abbey*'); *DFaCS re Arnott Bloom* [2015] NSWChC 6, [82]–[84], [87] ('*Arnott-Bloom*'); *Dupont v The Secretary, Department of Family and Community Services* [2014] NSWDC 240, [93], [97] ('*Dupont*'); *Department of Communities and Justice (DCJ) and Murphy* [2020] NSWChC 11, [99]–[102] ('*Murphy*').

¹⁹ *FaCS v the Harris children* [2012] NSWChC 9, [20] ('*Harris children*').

residential rehabilitation,²⁰ AOD counselling²¹ or other specialised program.²² There is sometimes specific evidence of abstinence (via urinalysis or hair testing);²³ in other cases the judicial officer is willing to accept the parent's claim of abstinence in the absence of evidence to the contrary.²⁴ These efforts are examples of 'non-determinative strengths'²⁵ – being recognised as a positive feature of the parent's case, but not enough to persuade the Court in favour of restoration. The reservation is typically expressed as an opinion that a recent period of abstinence, rehabilitation or counselling is either of insufficient duration²⁶ or is simply unlikely to be sustained.²⁷ Risk of relapse is associated with mental health fragility,²⁸ inadequate insight into the impacts of the dependence,²⁹ lack of specialist or sufficiently intensive treatment,³⁰ and drug use within the person's family or social circle.³¹

Interviewed magistrates referred to chronic, 'out of control'³² and unacknowledged AOD dependence,³³ the uncertainty and fragility of purported recovery,³⁴ and connections between a parent's background of being abused, poor mental health, and 'self-medication' through AOD.³⁵ Cases of parents successfully overcoming their AOD problem were mentioned,³⁶ but this was seen as requiring exceptional motivation,³⁷ for which 'insight is not enough'.³⁸ The

²⁰ Ibid [20].

²¹ *Department of Family and Community Services and Nathan* [2018] NSWChC 1, [17] ('Nathan'); *Nerayah and Kalista* (pseudonym, unpublished judgment, Children's Court, March 2009) [33], [40] ('Nerayah & Kalista'); *In the Matter of Spencer* (Children's Court of New South Wales, 26 July 2005) [30], [46] ('Spencer').

²² *Harris* (n 19) [22], [24]; *Nathan* (n 21) [17].

²³ *Re: Alison Claire, Lauren Donovan and Victoria Claire* (Children's Court of New South Wales, 10 July 2009) [27], [37] ('Alison Claire'); *Nerayah & Kalista* (n 21) [40].

²⁴ *DFaCS and Boyd* [2013] NSWChC 9, [20] ('Boyd'); *Harris children* (n 19) [24]; *In the Matter of Jay* [2007] NSWChC 343, [9] ('Jay').

²⁵ See Chapter 3, part C 'Approach to Analysis'.

²⁶ *Abbey* (n 18) [110]; *Harris children* (n 19) [70]; *Director of Family and Community Services v Jack* [2012] NSWChC 7, [27] ('Jack'); *Nathan* (n 21) [60]; *Nerayah & Kalista* (n 21) [62]; *Sharpe children* (pseudonym, unpublished judgment, Children's Court, November 2008) [40] ('Sharpe children').

²⁷ *Dupont* (n 18) [93], [97]; *Jack* (n 26) [27]; *JH v Secretary, Department of Communities & Justice & Ors (No.3)* [2023] NSWDC 517, [258] ('JH'); *Nicholls children* (n 17) [40], [81]; *Spencer* (n 21) [28], [45]–[53].

²⁸ *Arnott Bloom* (n 18) [85]; *Nathan* (n 21) [60]; *Nerayah & Kalista* (n 21) [62]; *Spencer* (n 21) [30], [46]–[47], [50].

²⁹ *Dalton Tomkins children* (n 17) [231]; *Harris children* (n 19) [39], [51]; *Malakhai* (n 17) [188(8)]; *Nicholls children* (n 21) [40], [81]; *Spencer* (n 21) [30].

³⁰ *Dalton Tomkins children* (n 17) [250], [314]; *Nicholls children* (n 17) [40].

³¹ *JH* (n 27) [251]; *Jonah* (pseudonym, unpublished judgment, Children's Court, May 2023) 22 ('Jonah'); *Nicholls children* (n 17) [81].

³² Judicial Officer 15.

³³ Judicial Officers 3, 7, 8, 20.

³⁴ Judicial Officers 3, 4, 6.

³⁵ Judicial Officers 2, 7, 14, 19, 21; Registrar 1.

³⁶ Judicial Officers 2, 3, 13, 15.

³⁷ Judicial Officer 13.

³⁸ Judicial Officer 3.

inadequate availability of rehabilitation services was raised,³⁹ as was the brutal reality of statistics on relapse:

...we all have in the back of our mind that the relapse rates for methamphetamine are enormous. In fact, we had a talk at one of the care and protection conferences about the relapse rate for methamphetamine users who have had two or more entries into rehab – by three years post the last release, the relapse rate was something like 90-plus percent. That’s terrifying because being a methamphetamine user as a parent is devastating for the parenting of the children, especially young children. (Judicial Officer 6)

Several participants from the Department perceive the care legal system as predominantly having a rigid, ‘no tolerance’⁴⁰ approach to any parental AOD use,⁴¹ unaccommodating of the possibility that someone with ‘a long history’ of substance use might be capable of avoiding relapse.⁴² Others commented that there is little or no consistency – on the part of either Department or Court – around expectations for how and when a parent’s AOD problem may be considered satisfactorily addressed.⁴³

With this bleak picture presented in both judgments and interviews, why has AOD use emerged in this study as being only *moderately* influential, rather than heavily so, in decisions on realistic possibility of restoration? One probable explanation is that the study’s sample of judgments is skewed away from cases in which parents are in the most severe throes of AOD dependence. People in this situation are relatively unlikely to have the immediate stability and organisational capacity to pursue their cases all the way to contested hearing.⁴⁴ In this and other respects, the published decisions – or any matter in which there is a judgment rather than an unopposed ruling – do not fully reflect the nature of the issues in the wider body of cases in the jurisdiction.⁴⁵ As a magistrate observed, ‘if they’ve got an unresolved problem with drug use, they usually can’t keep up with proceedings, so they drop it’.⁴⁶ Hence the judgments in contested restoration cases may not represent ‘the worst’ instances of AOD dependence and its consequences.

³⁹ Judicial Officers 9, 14, 17; Registrar 1.

⁴⁰ Caseworker 4.

⁴¹ Caseworkers 2, 4, 11; Lawyers 2, 5.

⁴² Caseworkers 9, 11.

⁴³ Caseworker 12; Lawyer 8.

⁴⁴ Judicial Officers 6, 13.

⁴⁵ See Chapter 3, part D ‘Limitations’.

⁴⁶ Judicial Officer 13.

However, the biased nature of the contested cases does not entirely account for the shift, internal to the sample, whereby this leading cause of the Department's interventions – second only to domestic violence – becomes apparently less important than multiple other issues at the Court determination stage. The explanation here may lie in the very nature of those other issues, and their relationship with AOD use. Numerous judgments closely associate AOD use with impaired 'insight'⁴⁷ and/or mental health difficulties.⁴⁸ As explored in chapter 7, the most influential factors in restoration decisions are centred on the parent's *attitude* to the child protection intervention (as signified in the notions of insight, engagement, compliance and credibility), as well as their mental health, and their capacity to consistently meet the child's emotional needs. AOD use becomes subsidiary to, or subsumed within, these pre-eminent factors, and will rarely sway a decision on restoration *in isolation*:

[The Mother] has made progress with her mental health and with avoiding the use of cannabis. This progress has not yet been subjected to any great test. The past drug use is a minor matter by itself but has greater significance because of the potential to trigger mental ill-health. I am satisfied that a significant risk of relapse continues to exist if [the Mother] experiences circumstances of stress, particularly in an unsatisfactory relationship. (Magistrate in *Nerayah & Kalista*)⁴⁹

In the case of *Borg* the mother responded to her children's removal by promptly commencing AOD counselling,⁵⁰ and had been abstinent for 12 months by the time of the hearing.⁵¹ While these achievements were noted in the reasons for finding a realistic possibility of restoration,⁵² her compliant participation in mental health therapy⁵³ was explicitly stated as 'more important'.⁵⁴ Similarly, the judgment in *DHK* explicitly distinguished mental health therapy as the *most important* aspect of the mother's progress:

[The Mother's] increased maturity at the time of hearing, the removal of the influence of [the father] as to his domestic violence...her greatly reduced cannabis use or abstinence from cannabis use and her stable residential environment are all key

⁴⁷ See, eg, *Adriana* (n 17) 11; *Arnott-Bloom* (n 18) [87]; *Department of Communities and Justice (DCJ) and Bloom* [2021] NSWChC 2, [311] ('*Bloom*'); *Boyd* (n 24) [23]; *Dalton Tomkins children* (n 17) [231]; *Harris* (n 19) [35]–[39]; *Malakhai* (n 17) [150], [188(8)]; *Murphy* (n 18) [101]–[105]; *Nicholls children* (n 17) 30; *Rogers v The Secretary Department of Family and Community Services NSW* [2019] NSWDC 194, [153] ('*Rogers*'); *Spencer* (n 21) [30].

⁴⁸ See, eg, *Arnott-Bloom* (n 18) [82]–[87]; *Bradford children* (n 17) [31]; *DHK & Anor v Secretary, Department of Family and Community Services & Ors* [2018] NSWDC 221, [382(d)] ('*DHK*'); *Dupont* (n 18) [97]; *Lim children* (n 17) 11, 13; *Murphy* (n 18) [99]–[105]; *Nathan* (n 21) [58]–[60]; *Nerayah & Kalista* (n 21) [62]; *Sharpe children* (n 26) [38]; *Spencer* (n 21) [30], [46]–[47], [50].

⁴⁹ *Nerayah & Kalista* (n 21) [62].

⁵⁰ *Department of Family and Community Services v Borg* [2011] NSWChC 4, [17(e)], [48] ('*Borg*').

⁵¹ *Ibid* [17(e)], [16(c)], [17(e)], [19(d)], [26].

⁵² *Ibid* [48].

⁵³ *Ibid* [25]–[30], [48]–[50].

⁵⁴ *Ibid* [48]. Specifically, within her listed achievements, the mental health treatment was introduced with the phrase 'more importantly'.

factors in the changed circumstances... Most importantly, she has the benefit of pharmacological and therapeutic treatment for her problematic personality traits under the guidance of [her] specialist psychiatrist. (Judge in *DHK*)⁵⁵

The finding of AOD use as a moderately influential factor has some similarity with a previous study, conducted in the Children's Court of Victoria, which quantitatively analysed the impact of certain case variables on court outcomes.⁵⁶ It found the impact of substance misuse in sole parent households, although appearing substantial on its face, to be 'entirely mediated by its effects on [parental] compliance'.⁵⁷ That is, the primary determinant of a court decision whether to place a child in care was the parent's attitudinal response to professionally-imposed requirements for reunification, the likelihood of such compliance being in turn affected by AOD use.⁵⁸ An analysis of care judgments in Britain found parental cannabis use to be associated with lack of insight, responsibility, credibility and compliance,⁵⁹ and observed that 'cannabis use on its own did not serve as the driver for any decision or the sole threshold of intervention in any of the cases. Rather, professionals, judges and parents used it as one of several factors to develop their arguments'.⁶⁰

The judgments do not, ordinarily, distinguish between the impacts of different types of drug, or the level of severity of the parent's use. An isolated exception to this generic characterisation is the judgment in *Eggleton*, in which the parents' recreational alcohol and cannabis use was found *not* to impair their parenting capacity.⁶¹ In comparison to the judgments, the interviews revealed greater recognition that parental AOD use does not inevitably equate to inadequate parenting.⁶² When describing circumstances prohibitive to restoration, magistrates typically referred to methamphetamine⁶³/'ice',⁶⁴ whereas several argued that parents' use of cannabis can be quite benign.⁶⁵ This however was subject to

⁵⁵ *DHK* (n 48) [450].

⁵⁶ Lillian De Bortoli, Jan Coles and Mairead Dolan, 'Parental Substance Misuse and Compliance as Factors Determining Child Removal: A Sample from the Victorian Children's Court in Australia' (2013) 35 *Children and Youth Services Review* 1319.

⁵⁷ *Ibid* 1322.

⁵⁸ *Ibid* 1324

⁵⁹ Saar-Heiman et al (n 9) 695–6.

⁶⁰ *Ibid* 693.

⁶¹ *DFacCS re Eggleton* [2016] NSWChC 4, [40(24)], [40(33)–(36)], [44] ('*Eggleton*'), citing observations in the Supreme Court case (in its *parens patriae* jurisdiction) *Re Georgia and Luke (No 2)* [2008] NSWSC 1387, [33] that 'use of cannabis should not affect [the Department's] assessment of parental responsibility unless it actually impaired the parent's ability to care properly for the child'.

⁶² Judicial Officers 10, 14, 16.

⁶³ Judicial Officers 4, 6, 16, 19.

⁶⁴ Judicial Officers 2, 3, 8, 17, 21.

⁶⁵ Judicial Officers 3, 10, 16.

differing perspectives—one magistrate stated that parents often ‘don’t consider cannabis a drug, they don’t consider it a problem, and we know it is—it can be a real problem. It’s harder to get off cannabis than a lot of other things’.⁶⁶

Other participants expressed concern that magistrates are inconsistent with one another in their attitudes toward parental drug use, especially cannabis.⁶⁷ While this may be so, contrasting case anecdotes raised by magistrates can be seen as reflecting the complexity of the broad phenomenon of AOD use, and recognising that the child protection implications are reliant on context and circumstance:

[The parents] were building a new house on their property. They had their kids living in a caravan. The kids’ school reports were excellent, they were always well presented. They always had cut lunches and all that sort of thing, and their books. And they were clean and all that...but the caseworker went with the police to this property, and guess what? Some marijuana was found in the caravan, and also they saw a snake skidding across the grass. Well the next thing, it’s in the care and protection jurisdiction. The case didn’t go anywhere, it wasn’t established, nothing happened. I just restored the children to the parents. (Judicial Officer 16)

The Mum was a really good parent in lots of ways...but she had a terrible cannabis addiction that she wasn’t really owning up to, and this was resulting in really significant neglect because the kids were missing big chunks of school because she was asleep when it was time for them to go to school. The kids were not being fed adequately because she was out of it too often for them to be fed. Yet she’d take them to footy games and when she was on song she would be a good and nurturing Mum and the kids clearly had a strong attachment to her—but there was just too much practical stuff. She had a chance to engage with scaffolding, with support, to try and help her along the way. But in effect, she chose not to. (Judicial Officer 7)

Several participants argued for a degree of tolerance of AOD dependence and relapse—for instance, when a parent ‘stumbles’⁶⁸ on the road to recovery,⁶⁹ and even if relapses occur intermittently over the long-term.⁷⁰ Caseworkers argued that acceptance of the potential for relapse enables forward planning, so that—for example—extended family are equipped to help care for the child at these times. Such an arrangement may be preferable to permanent removal of the child.⁷¹ This perspective, which was also raised in relation to enduring mental

⁶⁶ Judicial Officer 15.

⁶⁷ Registrar 1; Caseworker 4.

⁶⁸ Judicial Officer 18.

⁶⁹ Judicial Officer 18; Caseworker 11; Lawyer 5.

⁷⁰ Caseworkers 10, 13.

⁷¹ Caseworkers 10, 13.

health conditions,⁷² intersects with the theme of ‘informal supports’, which is another moderately influential factor in determining realistic possibility of restoration, and the topic of the next section.

(ii) Informal Supports

...it depends on the whole infrastructure, not just child-parent, but what other supports are there? Is there a really helpful grandfather? Or is there a supportive godmother? Or is there a school community that enables this relationship to function better than it had been? (Judicial Officer 7)

We want to see the parents to be perfect and we want them to be off the drugs and we want them engaging with therapy and we want all those things, but the network and the community, I don’t think is taken into account. (Caseworker 2)

As part of the themes of parental engagement, cooperation and compliance, the judgments place a strong emphasis on parents’ involvement with professional support services in the period leading up to the Court’s decision.⁷³ There are also many references to the likelihood of *continued* formal cooperation with services should restoration takes place.⁷⁴ However, when predicting the future, the Court places more emphasis on *informal* than on formal support.⁷⁵ This is especially the case for decisions finding in favour of a realistic possibility of restoration. Approximately one-third of the judgments overall refer to the presence or absence of informal supports, while for ‘realistic possibility’ outcomes specifically, the figure is a substantially influential 50%.⁷⁶

⁷² See Chapter 7, section (iii).

⁷³ See Chapter 7, section (i).

⁷⁴ See, eg, *A v Secretary, Department of Communities and Justice* (No. 4) [2019] NSWSC 1872, [122] (‘A’); *Adriana* (n 17) 10; *Alfred* (pseudonym, Children’s Court, 13 October 2020) [114]–[115], [120] (‘Alfred’); *Department of Family and Community Services (DFaCS) and the Ali Children* [2018] NSWChC 6, [94]–[95] (‘Ali children’); *Alison Claire* (n 23) [35]; *FACS v AH and AN* [2017] NSWDC 412, [80]–[82] (‘AH & AN’); *Eggleton* (n 61) [46.1], [50]; *The Secretary of the Department of Communities and Justice (DCJ) and Fiona Farmer* [2019] NSWChC 5, [154] (‘Fiona Farmer’); *J & T v Department of Communities and Justice* [2023] NSWDC 78, [500], [502(13)] (‘J & T’); *Re Jillian and Jacinta* [2008] NSWLC 23, [26(vi)] (‘Jillian & Jacinta’); *Department of Communities and Justice (DCJ) and Lewis* [2018] NSWChC 5, [236(b)], [237] (‘Lewis’); *Murphy* (n 18) [107]; *Naunton children* (pseudonym, unpublished judgment, Children’s Court, August 2023) 38 (‘Naunton children’); *RC and PK v The Secretary, Department of Communities and Justice* [2024] NSWDC 196, [183] (‘RC & PK’); *Waller children* (pseudonym, unpublished judgment, Children’s Court, September 2022) [168] (‘Waller children’).

⁷⁵ 32% of judgments refer to *informal* support in the reasons for decision; 22% refer to the availability of continuing *formal* support and the future likelihood (or lack thereof) of the parent engaging with services.

⁷⁶ In contrast, *lack of informal support* is a reason for decision in approximately 25% of ‘no realistic possibility’ cases.

The child's grandparents,⁷⁷ and other extended family members,⁷⁸ are the most commonly cited sources of informal support. There are also references to support provided by a spouse/partner. This is sometimes within the existing family unit,⁷⁹ but more often in a new relationship entered since the child's removal, with a person who is perceived by the Court as a person of sturdy and respectable character.⁸⁰ Other sources of support are connections within the community⁸¹ (such as through organised religion),⁸² and friends.⁸³ The nature of the 'support' is usually the provision of direct practical help with parenting,⁸⁴ but extends to the notion of the family's 'visibility' in the community – enabling others to watch over the safety of the child.⁸⁵ Alternatively, informal supports are perceived as a general bolster and safeguard for the parent in maintaining their own mental wellbeing and stability.⁸⁶

Child protection literature recognises the significance, for both parents and children, of supportive extended family and community connectedness,⁸⁷ and that these may be

⁷⁷ *Department of Communities and Justice (DCJ) and Evie and Grace* [2023] NSWChC 1, [54(8)], [63] ('*Evie & Grace*'); *Fiona Farmer* (n 74) [57], [154]; *George* (pseudonym, unpublished judgment, Children's Court, November 2022) [98] ('*George*'); *The Secretary, Department of Family and Community Services and the Harper Children* [2016] NSWChC 3, [96] ('*Harper children*'); *Jack* (n 26) [8]; *Department of Communities and Justice (DCJ) and Jamzie* [2022] NSWChC 1, [79], [87], [122], [184]–[185] ('*Jamzie*'); *Nathan* (n 21) [18]; *Rogers* (n 47) [123].

⁷⁸ *Abbey* (n 18) [78]; *Re Anthony* [2008] NSWLC 21, [37] ('*Anthony*'); *DHK* (n 48) [551(1)(d)]; *Evie & Grace* (n 77) [54(4),(8),(9)], [63]; *Jack* (n 26) [8]; *Mario* (pseudonym, unpublished judgment, Children's Court, October 2022) [41]–[42] ('*Mario*'); *Ramsay children* (pseudonym, unpublished judgment, Children's Court, April 2021) 23; *Nathan* (n 21) [18]; *Naunton children* (n 74) 26; *Nerayah & Kalista* (n 21) [57]–[60]; *Waller children* (n 74) [173].

⁷⁹ *Ali children* (n 74) [71]; *Evie & Grace* (n 77) [57].

⁸⁰ *George* (n 77) [98]; *DFaCS re Lilly, Wade and Caleb* [2012] NSWChC 21, [70] ('*Lilly, Wade & Caleb*'); *Jillian and Jacinta* (n 74) [17], [18(viii)], [27]; *Naunton children* (n 74) 9, 12, 14, 28; *O'Connor v The Minister for Family and Community Services* [2020] NSWDC 453, [29], [32] ('*O'Connor*').

⁸¹ *Ali children* (n 74) [71]; *Re Nellie* [2002] NSWLC 8 (no page or paragraph numbers) ('*Nellie*'); *VC v Secretary, Department of Communities and Justice & Ors (No. 2)* [2024] NSWDC 192, [313(4)], [323]–[324] ('*VC*').

⁸² *Re Elizabeth* [2011] NSWDC 245, [119] ('*Elizabeth*'); *Nellie* (n 81); *Sharpe children* (n 26) [36]; *SK* (n 1) [238(e)], [242].

⁸³ *Evie & Grace* (n 77) [54(4)]; *Nellie* (n 81).

⁸⁴ *Fiona Farmer* (n 74) [57]; *Jamzie* (n 77) [133]–[134]; *Lilly, Wade and Caleb* (n 80) [70]; *Mario* (n 78) [42]; *Naunton children* (n 74) 12, 14.

⁸⁵ *Evie & Grace* (n 77) [54(8)], [63]; *Naunton children* (n 74) 38, 43.

⁸⁶ *Ali children* (n 74) [71]; *DHK* (n 48) [551(1)(d)]; *Jamzie* (n 77) [184]–[185]; *Jillian and Jacinta* (n 74) [18]; *Lilly, Wade & Caleb* (n 80) [69]–[70]; *O'Connor* (n 80) [32]; *VC* (n 81) [313(4)].

⁸⁷ See, eg, Fiona Arney, Carole Zufferey and Ruth Lange, "'Mental Health is One Issue. The Child is Another Issue. Issues Bounce Back and Clash Against Each Other': Facilitating Collaboration Between Child Protection and Mental Health Services' (2010) 5(1) *Communities, Children and Families Australia* 21, 22; Karen Broadley, 'Making the Decision to Remove a Child from Parental Care: Twelve Decision-Making Criteria' (2015) 41(2) *Children Australia* 90, 95; Choate and Engstrom (n 5) 375, 377–8; Chantal Cyr et al, 'Attachment Theory in the Assessment and Promotion of Parental Competency in Child Protection Cases' in Alexander Muela (ed), *Child Abuse and Neglect: A Multidimensional Approach* (IntechOpen, 2012) 63, 90; Sandra Heriot and Maria Kissouri, 'Moving Toward an Evidence-Based Family and Community Approach to Improve the Lives of Children and Young People Who Have Experienced Abuse and Neglect' (2018) 39 *Australian and New Zealand Journal of Family Therapy* 294, 296; Tim Moore et al, *Fostering Safety in Families Reunifying After Violence: Findings from a Participatory Study with Young People and Families* (Report, Australian Centre for Child Protection, University of South Australia, 2020) 8, 12, 30, 43, 88; Kendra L Nixon, Colin Bonnycastle and Stephanie Ens, 'Challenging the Notion of Failure to Protect: Exploring

specifically regarded as risk-reducing factors.⁸⁸ This theme has clear implications for the many parents in care matters who lack such support, or whose social connections are deemed disreputable. Parents in a number of judgments, often sole-parent mothers,⁸⁹ are noted as being isolated socially⁹⁰ and from their own families.⁹¹ There are several cases referring specifically to parents' fraught or fractured relationships with their own parents.⁹² The absence of *any* identified, clearly viable source of informal support is noted in around 10% of the judgments finding no realistic possibility of restoration.⁹³ The parents in another 20% of 'no realistic possibility' cases were able to suggest at least one person to help them care for the children. In some instances the Court does not question the apparently genuine nature of the potentially available support⁹⁴—but as a non-determinative strength it is mentioned only briefly in passing, and unable to counter-balance the negative features of the parent's circumstances. In other cases the support networks are viewed sceptically, in terms of the availability,⁹⁵ suitability⁹⁶ or sincerity⁹⁷ of the family member or friend relied upon. Reasons for these reservations include lack of evidence of the existence, nature or extent of the help,⁹⁸

the Protective Strategies of Abused Mothers Living in Urban and Remote Communities and Implications for Practice' (2017) 26 *Child Abuse Review* 63, 67.

⁸⁸ Broadley (n 87) 93, 95; Heriot and Kissouri (n 87) 296; Krissie Fernandez Smith and Phillip C O'Donnell, 'Practice Tips for Managing Challenges in Parenting Capacity Assessments in Child Protection Court' (2023) 61 *Family Court Review* 818, 823–4; David McConnell, Gwynnyth Llewellyn and Luisa Ferronato, *Parents with a Disability and the NSW Children's Court* (Research Report, University of Sydney, 2000) 26; M O'Donnell et al, 'Child Protection Proceedings for Infants: Analysis of Court Files to Identify Court Outcomes and Requirements for Families in Child Protection Safety Plans' (2024) 157 *Children and Youth Services Review* 1, 4.

⁸⁹ *ASK v Secretary DFACS* [2014] NSWDC 247 ('ASK'); *DFACS (NSW) v Carl* [2013] NSWChC 2, ('Carl'); *JH* (n 27); *Malakhai* (n 17); *Department of Communities and Justice (DCJ) and May, June and Roy* [2023] NSWChC 15 ('May, June & Roy'); *Spencer* (n 21).

⁹⁰ *Charlie* (pseudonym, unpublished judgment, Children's Court, December 2021) 20, 25 ('Charlie'); *JH* (n 27) [230(e)]; *RC & PK* (n 74) [131], [200]; *Sharpe children* (n 26) [33]; *Spencer* (n 21) [28]. See also *Malakhai* (n 17), in which the young mother was herself under the parental responsibility of the Minister and being 'case-managed', yet found by the magistrate to have been left without any practical or effective supports during her pregnancy and following the birth of the child: at [45], [67]–[89], [145], [197]–[198].

⁹¹ *ASK* (n 89) [167], [226]; *Carl* (n 89) [10]; *Charlie* (n 90) 25; *Malakhai* (n 17) [83]; *Spencer* (n 21) [22].

⁹² *JH* (n 27) [230(e)]; *Kee children* (pseudonym, unpublished judgment, Children's Court, June 2011) [70] ('*Kee children*'); *May, June & Roy* (n 89) [139], [203].

⁹³ *ASK* (n 89) [249]; *Carl* (n 89) [10], [58]; *JH* (n 27) [230(e)]; *Kee children* (n 93) [70]; *May, June & Roy* (n 89) [202]–[203]; *RC & PK* (n 74) [200]; *Spencer* (n 21) [22].

⁹⁴ *Alison Claire* (n 23) [45]; *Anthony* (n 78) [37]; *Elizabeth* (n 82) [122]; *Rogers* (n 47) [123].

⁹⁵ *Abbey* (n 18) [116]; *Harper Children* (n 77) [96]; *Nathan* (n 21) [62]; *Jack* (n 26) [27]; *Nerayah & Kalista* (n 21) [58].

⁹⁶ *Abbey* (n 18) [109]; *Grierson children* (pseudonym, unpublished judgments, Children's Court, August 2019) [227] ('*Grierson children*'); *Harper children* (n 77) [96], [158], [163]; *Nathan* (n 21) [62].

⁹⁷ *Harper children* (n 77) [163]; *Nerayah & Kalista* (n 21) [60]; *Sharpe children* (n 26) [37].

⁹⁸ See *Grierson children* (n 96) [227]–[228], [261]; *Jack* (n 26) [27]; *Nathan* (n 21) [55], [62]; *Nerayah & Kalista* (n 21) [60]; *Waller children* (n 74) [173].

the support person being insufficiently attuned to, or denying, the risk factors,⁹⁹ or the support person's own chequered history – of drug use, for example.¹⁰⁰

Along similar lines, a previous study in NSW found that child protection workers perceived some relatives as a 'hindrance' to restoration¹⁰¹ – for instance, grandparents who purportedly obstructed the parent's engagement with casework. These problems were described as reflecting complex mental health issues within the extended family household.¹⁰² Another Australian study found mixed views among child protection professionals regarding the importance of informal support, with reference again to 'interfering' relatives, especially grandparents, as a 'toxic influence'.¹⁰³

Structural inequality is relevant here, it being probable that the few relatively middle-class parents who become involved in the child protection system are more likely to impress the Court as having suitable support networks than are parents from backgrounds of intergenerational socio-economic deprivation. Two judgments, described below, provide an illustrative comparison of class-driven contexts for establishing the presence of 'support' within the parent's social circle.

It is manifestly apparent in the 'non-accidental injury' case of *Evie and Grace* that the parents are socio-economically privileged. The magistrate describes them as 'intelligent [and] and educated'.¹⁰⁴ The mother is a medical practitioner,¹⁰⁵ as are other close relatives.¹⁰⁶ As well as fully cooperating with the Department, the parents had the independent resources to initiate their own medical inquiries and psychological therapy.¹⁰⁷ It is expressly noted that none of the typical child protection risk factors are present for these parents:-

[They] do not use drugs or alcohol. They do not have an untreated or untreatable mental illness and have not been diagnosed with any cognitive impairments or personality disorders. There is no reported domestic or family violence in the relationship. The parents do not have criminal records. The parents' housing and

⁹⁹ *Abbey* (n 18) [66], [109]; *Harper children* (n 77) [96], [163]; *Keziah* (pseudonym, unpublished judgment, Children's Court, October 2013) [130] ('*Keziah*').

¹⁰⁰ *Jonah* (n 31) 20–22; *Nathan* (n 21) [55], [62].

¹⁰¹ McConnell, Llewellyn and Ferronato (n 88) 26.

¹⁰² *Ibid.*

¹⁰³ Philippa M Eve, M, Mitchell K Byrne and Cinzia R Gagliardi, 'What is Good Parenting? The Perspectives of Different Professionals' (2014) 52(1) *Family Court Review* 114, 121.

¹⁰⁴ *Evie & Grace* (n 77) [54(6)].

¹⁰⁵ *Ibid* [10], [63].

¹⁰⁶ *Ibid* [11], [56].

¹⁰⁷ *Ibid* [11], [23], [54(2), (6)], [70], [73].

income are stable. The parents and children are well-supported by family and friends. (Magistrate in *Evie & Grace*)¹⁰⁸

The two children in this case had sustained multiple fractures as young infants, which remained unexplained and for which both parents denied responsibility. In finding a realistic possibility of restoration in spite of these vexed circumstances, the Court referred to the children's future safety being informally scrutinised within the family: by each parent effectively watching the other,¹⁰⁹ and by other members of their extended family being 'alert' to any signs of harm.¹¹⁰ It was noted that the children attend childcare and have a nanny.¹¹¹ All of these factors contributed to a form of 'scaffolding'¹¹² that was found to reduce any risk to an acceptable level.¹¹³

The case of *Jamzie* involved an Aboriginal family. The mother's argument for restoration relied substantially on her co-residence with her own mother, who intended to support her with caring for the child. The grandmother was acknowledged to have 'her own strained history',¹¹⁴ including drug use,¹¹⁵ criminal convictions,¹¹⁶ and physical violence inflicted by mother and grandmother upon one another.¹¹⁷ The mother's childhood had been impacted by the violence of the grandmother's partners,¹¹⁸ and the mother and grandmother had previously been estranged from one-another for a substantial time.¹¹⁹ Nonetheless, the Court found the grandmother to be an impressive and credible witness,¹²⁰ who had demonstrated 'remarkable rehabilitation'¹²¹ to overcome her past problems.¹²² The magistrate expressed confidence in the grandmother as an appropriate support for mother and child,¹²³ noting that she 'has secure accommodation, stable employment, is drug free, [and] has been living a positive contributing prosocial lifestyle for ten years'.¹²⁴

¹⁰⁸ Ibid [54](4).

¹⁰⁹ Ibid [53(8)].

¹¹⁰ Ibid [54(8)], [73].

¹¹¹ Ibid [54(8)].

¹¹² Ibid [54(9)].

¹¹³ See Chapter 5, part B, section (iii) for discussion of this case as representing a shift in approach to risk analysis.

¹¹⁴ *Jamzie* (n 77) [67].

¹¹⁵ Ibid [98].

¹¹⁶ Ibid [125]–[126].

¹¹⁷ Ibid [67]–[68].

¹¹⁸ Ibid [96], [98].

¹¹⁹ Ibid [97].

¹²⁰ Ibid [98], [125].

¹²¹ Ibid [126].

¹²² Ibid [76], [126].

¹²³ Ibid [125]–[126], [184]–[186].

¹²⁴ Ibid [125].

Although the Court was satisfied of suitable family support in both these cases, the issue was contentious only in *Jamzie*. The respectable and reliable character of the relatives in *Evie and Grace* appears to be assumed; there is nothing in the judgment to suggest this was challenged during the course of argument. In *Jamzie*, the case for restoration turned not only on the mother's circumstances, but also delved into the grandmother's personal background of disadvantage and perceived dysfunction. Put simply, it was harder for the mother in *Jamzie*, than for the socially-privileged parents in *Evie and Grace*, to show that her family environment is suitable for raising a child.

The theme of informal supports was raised by several magistrates¹²⁵ and by a large number of participants from the Department.¹²⁶ While there were mixed perceptions of the extent to which the Court considers informal supports in determining restoration, there was a prevailing view that the factor should be given greater attention. Many actual and hypothetical examples were given of the role of extended family in helping facilitate restoration,¹²⁷ and in avoiding the need for a care application in the first place.¹²⁸ Family involvement is already formally built-in to the system as a pre-cursor or adjunct to court proceedings—primarily through the forum of ‘family group conferencing’,¹²⁹ and relatively recently as a requirement under the Aboriginal and Torres Strait Islander Child and Young Persons Principle¹³⁰ and the ‘active efforts’ provisions.¹³¹ Despite these provisions, it was argued that the legal process remains preoccupied with the personal actions and responsibilities of the parents themselves¹³²—‘just individual growth and risk factors’¹³³—rather than embracing the notion that ‘it takes a village to raise a child’.¹³⁴

It was further argued that the legal process unreasonably discourages the direct participation of family members, by requiring them to make a formal ‘joinder’ application (in order to become a party to the case),¹³⁵ instead of facilitating a simpler process for hearing the voices

¹²⁵ Judicial Officers 2, 5, 7, 13, 19, 21.

¹²⁶ Caseworkers 1, 2, 4, 5, 7, 8, 9, 10, 13; Lawyers 2, 3, 5, 6, 9.

¹²⁷ Judicial Officers 13, s19; Caseworker 1, 5, 7, 8; Lawyer 6.

¹²⁸ Judicial Officer 4; Caseworkers 2, 8, 10; Lawyer 9. See also Chapter 10, part C, section (i) ‘Building on Strengths’.

¹²⁹ See Chapter 4, part B, ‘The Progress of a Case’.

¹³⁰ Caseworker 10; Lawyer 9. See also Chapter 2, part D ‘The Evolution of the “realistic possibility of restoration” test’.

¹³¹ Caseworkers 9, 13. See also Chapter 2, part D.

¹³² Caseworkers 2, 8.

¹³³ Caseworker 8.

¹³⁴ Caseworker 10.

¹³⁵ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 98(3) (*‘The Act’*). See also the ‘Care Tree’ in the *Children’s Court of New South Wales Resource Handbook* (Judicial Commission of New South Wales, 2nd ed, 2023,

of significant people in the child's life.^{136 137} Relatives are otherwise reliant on the Department to inform the Court of their perspective on the issues and their capacity to assist.¹³⁸ In this regard, a caseworker acknowledged the importance of the Department being very clear in evidence as to exactly what help a particular family member can bring. Rather than vaguely stating that the parents 'have these people in their lives', the Court should be informed of what each support person is actually going to do to assist the viability of restoration—for instance: 'realistically, are they going to be the person that the parent can call in the middle of the night?'¹³⁹

Participants recognised complexities in implementing the theoretical ideal of 'networks of support'. Family members may be distrusting of the Department and resistant to cooperating,¹⁴⁰ or reluctant to be involved due to exhaustion and frustration in coping with the behaviours of the parents.¹⁴¹ Onerous expectations are placed on 'over-stressed'¹⁴² relatives who have their own health¹⁴³ or financial difficulties;¹⁴⁴ others are deemed unsuitable because they are struggling with 'the same issues' as the parents.¹⁴⁵ However, there was also a sense that the onus is properly on the Department to earn the trust of and 'invest'¹⁴⁶ in extended family,¹⁴⁷ and that a shift is needed away from an 'old mindset' which too readily assumes family members with their own child protection history are an inappropriate source of support.¹⁴⁸

updated November 2025) [2-2280], on procedure and principles applying to application by a person to be joined as a party.

¹³⁶ Caseworker 10.

¹³⁷ The same issue has been raised in the UK context: Andrew Bainham. 'What is Justice in Care Proceedings?' in Jens M Scherpe and Stephen Gilmore (eds), *Family Matters: Essays in Honour of John Eekelaar* (Intersentia, 2022) 915, 927, arguing '[t]he principal difficulty faced by relatives is their lack of automatic legal aid or representation in the proceedings...[which] progress without their participation or input'.

¹³⁸ Caseworker 10.

¹³⁹ Caseworker 4.

¹⁴⁰ Caseworker 13; Lawyers 3, 5.

¹⁴¹ Caseworker 10.

¹⁴² Judicial Officer 7.

¹⁴³ Judicial Officer 14.

¹⁴⁴ Caseworker 7.

¹⁴⁵ Judicial Officer 2; Caseworker 8; Lawyer 1.

¹⁴⁶ Caseworker 10.

¹⁴⁷ Caseworkers 7, 10, 13.

¹⁴⁸ Caseworker 13.

(iii) Practical and Generic Parenting Capacity

The issue of whether they have parenting skills is often raised. I actually don't consider that to be a particularly important issue, because people can be taught parenting skills and often are, and over time they learn how to be better parents. It's not so much that... it gets back to values, responsibility; the responsibility really of a parent is to put the interests of the child above their own, I would think. (Judicial Officer 16)

This factor encompasses generic references to 'parenting capacity' or 'parenting skills', as well as specific consideration of the child's physical or practical needs. It appears in one-third of judgments overall, but carries more weight in decisions in favour of restoration (being cited in 44% of these judgments) than in 'no realistic possibility' judgments (28%). In either instance, the factor receives substantially less attention than does capacity to meet the emotional and psychological element of children's needs (as discussed in chapter 7).¹⁴⁹

In decisions in favour of restoration, references to practical parenting capacity are sometimes brief and generalised, essentially affirming that this parent is 'good enough'. Hence the parent has 'adequate'¹⁵⁰ capacity to meet the child's 'day to day needs',¹⁵¹ and 'to do what is necessary to care for the children'.¹⁵² More specific examples include attending to (or planning for) the child's health care,¹⁵³ schooling,¹⁵⁴ and daily routines.¹⁵⁵ In some cases the person's parenting capacity has improved since the time of the child's removal, the Court attributing this progress to a cooperative attitude and engagement with services.¹⁵⁶ Hence any concerns about risk of physical neglect are assuaged. Other parents are acknowledged to have been largely competent from the outset. It was an aberrant event¹⁵⁷ or circumstance¹⁵⁸ that led to the child's removal, and which needed to be addressed, rather than a case of basic skills needing to be acquired.¹⁵⁹

¹⁴⁹ See Chapter 7, section (iv).

¹⁵⁰ *Ali children* (n 74) [258]; *Lim children* (n 17) 19; *Mario* (n 78) [45].

¹⁵¹ *Lim children* (n 17) 15.

¹⁵² *Vlachos children* (pseudonym, unpublished judgment, Children's Court, June 2009) [83] ('*Vlachos children*').

¹⁵³ *Evie & Grace* (n 77) [54(6)]; *Mario* (n 78) [34]; *Naunton children* (n 74) 9; *Ramsay children* (n 78) 23; *VC* (n 81) [323].

¹⁵⁴ *Ramsay children* (n 78) 23; *SK* (n 82) [146]–[149]; *VC* (n 81) [323].

¹⁵⁵ *Naunton children* (n 74) 26; *Ramsay children* (n 78) 23.

¹⁵⁶ *Alfred* (n 74) [109]–[110]; *Lim children* (n 17) 15, 16, 19; *Mario* (n 78) [33]–[45]; *Naunton children* (n 74) 29; *Vlachos children* (n 152) [83].

¹⁵⁷ Such as a one-off unexplained injury to the child.

¹⁵⁸ Such as domestic violence perpetrated by the other parent.

¹⁵⁹ *Depik and Senina* (pseudonym, unpublished judgment, Children's Court, May 2012) [16] ('*Depik & Senina*'); *Evie & Grace* (n 77) [54(7)], [72]; *Department of Communities and Justice (DCJ) and Janet and Xing-fu* [2022] NSWChC 7, [87] ('*Janet & Xing-fu*'); *SK* (n 82) [108], [153], [172], [238]; *VC* (n 81) [127(6)], [309(3)].

In judgments finding no realistic possibility of restoration, parents are perceived as having inadequate or doubtful parenting ‘skills’;¹⁶⁰ lacking capacity to provide for the child’s ‘basic’,¹⁶¹ ‘physical’,¹⁶² everyday care;¹⁶³ and failing (or being unable) to learn these skills during attempted interventions.¹⁶⁴ Such findings sometimes flow from more dominant concerns about mental ill-health¹⁶⁵ and lack of insight.¹⁶⁶ There are additional references to immature, unrealistic expectations of the parenting role,¹⁶⁷ poor preparedness for the practical necessities of running a family household,¹⁶⁸ and—in relation to fathers—little to no prior experience caring for a child.¹⁶⁹

Notably, the parents in 22% of the ‘no realistic possibility’ judgments are recognised as possessing some level of practical parenting competence¹⁷⁰—that is, as a non-determinative strength. As discussed in chapter 7, strengths in basic parenting skills, along with other features such as commitment to the child and efforts to cooperate with services, are usually not enough to establish a realistic possibility of restoration—unless accompanied by capacity to provide for the child’s long-term psychological stability and emotional wellbeing.¹⁷¹

Several interviewed caseworkers saw ‘good enough parenting’, or minimum requirements for restoration, as the ability to provide for the child’s daily basic needs:¹⁷² mentioning food,¹⁷³

¹⁶⁰ *Abbey* (n 18) [109]; *ASK* (n 89) [167]; *Barnett children* (pseudonym, unpublished judgment, Children’s Court, March 2005) [61] (‘*Barnett children*’); *In the Matter of Chanlina* (Children’s Court of New South Wales, 1 May 2009) [23] (‘*Chanlina*’); *Ezekial* (pseudonym, unpublished judgment, Children’s Court, May 2021) 12 (‘*Ezekial*’); *MXS v Department of Family and Human Services (NSW)* [2012] NSWDC 63, [72] (‘*MXS*’).

¹⁶¹ *Ahmad* (pseudonym, unpublished judgment, Children’s Court, April 2023) 6 (‘*Ahmad*’); *Barnett children* (n 160) [6].

¹⁶² *Ezekial* (n 160) 16; *Malakhai* (n 17) [37].

¹⁶³ *Braidan* (pseudonym, unpublished judgment, Children’s Court, August 2022) 15 (‘*Braidan*’); *Malakhai* (n 17) [97]; *MXS* (n 160) [74]; *Nicholls children* (n 17) [16].

¹⁶⁴ *Ahmad* (n 161) 6; *Barnett children* (n 160) [58]–[61]; *Ezekial* (n 160) 12.

¹⁶⁵ *Barnett children* (n 160) [62]; *Nicholls children* (n 17) [32]; *Spencer* (n 21) [37]–[39].

¹⁶⁶ *Murphy* (n 18) [107]; *Nicholls children* (n 17) [32].

¹⁶⁷ *Ezekial* (n 160) 14; *Jay* (n 24) [15]; *JH* (n 27) [256]; *Murphy* (n 18) [91]–[92], [107].

¹⁶⁸ *Dupont* (n 18) [105]–[106]; *MXS* (n 160) [75]; *RC & PK* (n 74) [131]; *Rogers* (n 47) [115].

¹⁶⁹ *Abbey* (n 18) [109], [116]–[117]; *RC & PK* (n 74) [132], [192]–[195].

¹⁷⁰ *Alfred* (n 74) [59], [62]; *Alison Claire* (n 23) [17], [36]; *Jack* (n 26) [13], [26]; *Charlie* (n 90) 24; *Hatfield children* (pseudonym, unpublished judgment, Children’s Court, April 2018) 90 (‘*Hatfield children*’); *Nathan* (n 21) [45]; *Re Tanya* [2016] NSWSC 794, [64(8)] (‘*Tanya*’).

¹⁷¹ See Chapter 7, section (iv).

¹⁷² Caseworkers 7, 8, 9, 12.

¹⁷³ Caseworkers 4, 5, 8, 12.

shelter,¹⁷⁴ clothing,¹⁷⁵ bathing,¹⁷⁶ school attendance,¹⁷⁷ and domestic cleanliness.¹⁷⁸ This practical emphasis likely reflects the role of caseworkers at the frontline – visiting families at home and constantly confronted with ‘micro’ level issues of children’s living conditions. In contrast, judicial officers tended not to identify particular parenting skills as informing realistic possibility of restoration. There was however consensus across all participant groups that ‘perfection’ is not (or should not be) the required standard of parenting;¹⁷⁹ rather the crucial elements are willingness to address the risk factors,¹⁸⁰ and that any residual risks are manageable.¹⁸¹ An additional and differing perspective, raised by one magistrate, is that ‘good enough’ is not enough for many of the children in the care system, who need ‘enriched’, parenting – reaching far beyond basic physical care – in consequence of the maltreatment and instability they have endured.¹⁸²

B. Less Influential Factors

(i) Housing

The number of cases referring to housing issues remains consistent between the removal and determination stages, at approximately 20% at each stage.¹⁸³ Relative to other factors, however, housing reduces in significance: shifting from a moderately influential factor in reasons for removal, to a less influential factor in realistic possibility of restoration.

Only five judgments, of the total sample of 106, rely on insecure housing as a reason for there being no realistic possibility of restoration. Just one of these cases suggests the parent is *currently* homeless (in its narrowest sense),¹⁸⁴ although this is vaguely expressed as the mother

¹⁷⁴ Caseworkers 8, 10.

¹⁷⁵ Caseworkers 8, 10.

¹⁷⁶ Caseworker 4.

¹⁷⁷ Caseworkers 8, 9, 12.

¹⁷⁸ Caseworkers 5, 9, 12.

¹⁷⁹ Judicial Officers 3, 5, 7, 8, 18; Registrar 2; Caseworkers 3, 9, 11; Lawyers 3, 4, 6.

¹⁸⁰ Judicial Officers 3, 5, 7, 9, 16, 18, 23; Caseworkers 7, 8, 9, 11, 12.

¹⁸¹ Judicial Officers 3, 8; Caseworkers 9, 12.

¹⁸² Judicial Officer 4. Children’s needs for ‘reparative’ care are referred to in, eg, *ASK* (n 89) [199]; *Braidan* (n 163) 21; *Carl* (n 89) [12]–[13]; *Lilly, Wade & Caleb* (n 80) [86].

¹⁸³ Housing issues are a cited reason for removal in 22% of the judgments, and a reason for decision on realistic possibility of restoration in 20%.

¹⁸⁴ The Australian Bureau of Statistics defines a ‘homeless’ person as someone whose current living arrangement ‘is in a dwelling that is inadequate; (and/or) has no tenure, or if their initial tenure is short and not extendable; (and/or) does not allow them to have control of, and access to, space for social relations’. *Persons living in improvised dwellings, tents or sleeping out* is just one of multiple groupings listed under this definition:

‘[being] said to be living in a tent’.¹⁸⁵ In two cases in which the parent is living with relatives, the Court’s concern is a lack of firm arrangements for establishing an independent home for the children in the future.¹⁸⁶ More broadly there are references to *past* periods of homelessness,¹⁸⁷ frequent changes of residence¹⁸⁸ and failure to maintain tenancies.¹⁸⁹

In another small pool of judgments, it is the *state* of the parent’s home that is the subject of concern – or rather, its state at the time the children were removed. There is a blurred line here between reasons for initial removal and reasons for decision on restoration: even if some improvements¹⁹⁰ have been made in household cleanliness, the Court emphasises the conditions the children were previously living in.¹⁹¹ There is lack of confidence in any improvement being maintained,¹⁹² especially if the parent is regarded as failing to acknowledge that the previously squalid physical environment was a problem.¹⁹³

Housing is proportionally more influential in judgments in favour of restoration than in those against.¹⁹⁴ One-third of ‘realistic possibility’ judgments refer to the parent having suitable accommodation for the child to come home to. The accommodation is typically described as ‘stable’,¹⁹⁵ and as having been secured *by* the parents during the course of proceedings¹⁹⁶ – suggesting that they took initiative to organise housing, rather than being wholly dependent on support services to do this for them. This commentary tends to be relatively brief, receiving only passing mention.¹⁹⁷ The impression is that adequate housing is seen as incidental to, or

<<https://www.abs.gov.au/census/guide-census-data/census-dictionary/2021/variables-topic/housing/homelessness-operational-groups-opgp>>.

¹⁸⁵ *JMS* (n 17) [59].

¹⁸⁶ *Dupont* (n 18) [98], [105]–[106]; *Nicholls children* (n 17) [50].

¹⁸⁷ *Alfred* (n 74) [99]; *Nicholls children* (n 17) [52].

¹⁸⁸ *Lewis* (n 74) [181]–[185], [192]–[194].

¹⁸⁹ *Lewis* (n 74) [185]; *Nicholls children* (n 17) [42], [44], [52].

¹⁹⁰ *Braidan* (n 163) 14; *Sharpe children* (n 26) [24]; *Tanya* (n 170) [67].

¹⁹¹ *Braidan* (n 163) 14; *Department of Communities and Justice (DCJ) and the McAlister Children* [2020] NSWChC 4, [43], [165]–[166] (*‘McAlister children’*); *Sharpe children* (n 26) [23]; *Tanya* (n 170) [70(7)]; *Waller children* (n 74) [140]–[142].

¹⁹² *Braidan* (n 163) 10; *McAlister children* (n 191) [166]; *Sharpe children* (n 26) [24]; *Tanya* (n 170) [67], [70(7)].

¹⁹³ *Braidan* (n 163) 14; *McAlister children* (n 191) [165]–[166]; *Tanya* (n 170) [70(7)]; *Waller children* (n 74) [149].

¹⁹⁴ 34% of ‘realistic possibility’ decisions refer to housing, compared to 14% of ‘no realistic possibility’ decisions.

¹⁹⁵ *DHK* (n 48) [328(c)], [411(y)], [522], [526]; *Fiona Farmer* (n 74) [27(16)]; *Jamzie* (n 77) [184]; *Naunton children* (n 74) 9; *Yarran Taylor children* [2024] NSWChC 3, [125(3)] (*‘Yarran Taylor children’*).

¹⁹⁶ *DHK* (n 48) [328(b)], [397]; *Fiona Farmer* (n 74) [48]; *Naunton children* (n 74) 11; *Vlachos children* (n 152) [16]; *Yarran Taylor children* (n 195) [125(3)].

¹⁹⁷ There are exceptions to this: for example, in *DHK* (n 48) the mother’s achievement in securing and maintaining stable accommodation is repeatedly emphasised in the judgment, particularly for its contribution in giving her independence from an abusive ex-partner and from undesirable flatmates.

flowing from, more fundamental concerns around progress with matters such as mental health, engagement and insight.

Interestingly, housing issues are slightly more prevalent as a *strength* than as a deficit in ‘no realistic possibility’ judgments. While 14% of the ‘no realistic possibility’ judgments express concerns about accommodation, 18% commend the parents’ efforts in finding or maintaining housing.¹⁹⁸ The fact that these achievements did not alter the adverse decisions is a further indication that housing does not carry a great deal of sway, of itself. A suitable physical place for a child to live is of course a fundamental necessity, but the question of its attainability, and sustainability, become subsumed within overarching issues of the parent’s capacity to provide the child with a lifestyle of stability and psychological security. For example, in the case of *Nicholls children*, the magistrate was satisfied that the child protection system and associated social services can, ordinarily, procure accommodation for a family when this is essential.¹⁹⁹ Consistent with the legislation’s explicit exclusion of ‘poverty’ as a basis for finding that a child’s basic needs are unmet,²⁰⁰ the mother’s ‘limited income and the shortage of housing options’ were not the crux of concern.²⁰¹ Rather, her likelihood of *maintaining* a home for her children was jeopardised by her confrontational, aggressive manner—and that of her partners—in interactions with housing providers and with neighbours,²⁰² and by her chronic and disabling mental health condition.²⁰³

The lack of availability of a current home is not an issue in my determination as to restoration. With the assistance of services and support she would, likely, be able to obtain some form of housing. The issue is really, whether, given her history of evictions, she will be able to abide by the terms of any tenancy and whether, given her anxiety and need for support for her own activities of daily living, she would be able to live without the support of another adult living in the household. (Magistrate in *Nicholls children*)²⁰⁴

Research literature frequently associates inadequate housing and homelessness with families’ involvement in child protection systems.²⁰⁵ However, while many studies point to general

¹⁹⁸ See, eg, *Alfred* (n 74) [63]; *Alison Claire* (n 23) [26], [27], [45]; *Bloom* (n 47) [73]; *Dalton Tomkins* (n 17) [126]; *Ezekial* (n 160) 13; *Jay* (n 24) [9]; *Re M* [2016] NSWSC 170, [132] (*‘Re M’*); *Department of Communities and Justice (DCJ) and the Prince and Johns Children* [2023] NSWChC 8, [24] (*‘Prince & Johns children’*).

¹⁹⁹ *Nicholls children* (n 17) [51].

²⁰⁰ *The Act* (n 135) s 71(2)(b), setting out criteria upon which a care order may be made,

²⁰¹ *Nicholls children* (n 17) [55].

²⁰² *Ibid* [42]–[45], [52]–[55], [82].

²⁰³ *Ibid* [17], [32], [51], [81].

²⁰⁴ *Ibid* [51].

²⁰⁵ See, eg, Megan Davis, Independent Review of Aboriginal and Torres Strait Islander Children in Out-of-Home Care in New South Wales, *Family Is Culture* (Review Report, 2019) 144, 160, 171–2 (*‘Family is Culture Report’*); Ilana

intersections between housing insecurity, child removal,²⁰⁶ and prospects of reunification,²⁰⁷ it is rare to find analysis of the direct correlation between housing issues and court outcomes. A study in Victoria, applying quantitative methodology, found a *low* association of ‘economic deprivation’ factors—including housing issues—with court outcomes placing children in care.²⁰⁸ The authors surmised that poverty and other chronic stressors in the parents’ circumstances ‘tended to be met with leniency by the court’ in order not to ‘further marginalise already disadvantaged families’,²⁰⁹ whereas the most strongly determinative factors pertained to parental attitude towards the proceedings and towards the child.²¹⁰

Participants in the current study saw housing problems as intertwined with drugs,²¹¹ mental ill-health,²¹² and domestic violence.²¹³ There was a stronger sense in the interviews than in the judgments of housing stress as a structural societal issue, with specific mention of its impact on Aboriginal families,²¹⁴ migrants,²¹⁵ refugees,²¹⁶ and women experiencing domestic violence.²¹⁷ Perspectives on the responsibility of the Department were varied. A lawyer expressed frustration about lack of cooperative assistance from other government agencies in addressing homelessness: ‘we [the Department] can’t exert any more influence than just providing a letter for the Aboriginal Housing Office’.²¹⁸ Other participants argued that the Department, and other State entities, should and can do more:²¹⁹

Dodi Luther, “‘On the Poverty of Responsibility’: a Study of the History of Child Protection Law and Jurisprudence in Nova Scotia” (PhD Thesis, Dalhousie University, 2015) 354–61; McConnell, Llewellyn and Ferronato (n 88) 38, 39; M O’Donnell et al (n 88) 9; Phillip A Swain and Nadine Cameron, “‘Good Enough Parenting’: Parental Disability and Child Protection” (2003) 18(2) *Disability and Society* 165, 167.

²⁰⁶ See, eg, Davis, *Family Is Culture Report* (n 205) 205; Delfabbro et al (n 6) 366; Joshua Gupta-Kagan, ‘Confronting Indeterminacy and Bias in Child Protection Law’ (2022) 33 *Stanford Law and Policy Review* 217, 225–6; Luther (n 205) 356–7; Teresa Hinton, *Rebalancing the Scales: Access to Justice for Parents in the Tasmanian Child Safety System* (Report, Anglicare Tasmania, 2020) 38; BJ Newton, ‘Aboriginal Parents’ Experiences of Having their Children Removed by Statutory Child Protection Services’ (2020) 25 *Child & Family Social Work* 814, 820.

²⁰⁷ See, eg, Davis, *Family is Culture Report*’ (n 205) 349, 350, 358, 359–60; Delfabbro et al (n 6) 361, 368; Gupta-Kagan (n 206) 226; Newton (n 206) 818, 820; Elizabeth Fernandez and Jung-Sook Lee, ‘Accomplishing Family Reunification for Children in Care: An Australian Study’ (2013) 35 *Children and Youth Services Review* 1374, 1375, 1382.

²⁰⁸ Lillian De Bortoli et al, ‘Preliminary Evaluation of Structured Professional Judgment to Assess Removal in Child Protection Practice’ (2015) 5 *Journal of Forensic Social Work* 29, 38, 41.

²⁰⁹ Ibid 41.

²¹⁰ Ibid 41–3.

²¹¹ Judicial Officer 23; Caseworkers 1, 6.

²¹² Judicial Officers 13, 15; Caseworker 1; Lawyer 3.

²¹³ Judicial Officers 19, 23.

²¹⁴ Judicial Officer 14.

²¹⁵ Caseworker 8.

²¹⁶ Judicial Officer 19.

²¹⁷ Judicial Officer 19.

²¹⁸ Lawyer 5.

²¹⁹ Judicial Officers 13, 19; Registrar 1.

We've got a practice note in relation to section 85,²²⁰ where the Court can request the provision of services... It's been used in relation to housing recently. The order was made and asked the Department of Housing to provide a house to a Mum because the only thing holding her back from getting her kids back was the fact she didn't have a roof over her head, and that's no fault of hers. So when we used section 85, magically a house became available. (Registrar 1).

(ii) Child's Cultural Identity

This Aboriginal little girl is not in an Aboriginal placement. We're not exploring Mum as a first option – we've got all this data and research about how we're still not doing well with Aboriginal families. But that's not a thing that's considered when we are talking about restoration or not... and she's the one that's driving all the cultural stuff for this little girl, for her daughter. We're doing none of that. (Caseworker 11)

We do have to look at safety, and that's the primary question, isn't it? But culture is really, really vital and I feel like I'm being entrusted with an unbelievably sacred question in resolving it. (Judicial Officer 2)

This theme relates to the needs and rights of children to identify with, participate in, and maintain connection with the cultural heritage of their family.²²¹ It is concerned with the capacity of the child's parents, carers or other adults to provide for the child's cultural needs or facilitate these being met. While ostensibly applicable to all children in care matters, in the social-demographic context of New South Wales ('NSW') this issue arises almost exclusively in regard to Aboriginal children and children of other ethnic, cultural and ethno-religious backgrounds that are distinctive from the majority, (loosely termed) 'Anglo-Australian' or 'European Australian' population.

Within the judgments studied for this thesis, there is no uniform, consistent mode of indicating that the child is of a particular cultural origin. Whether or not this information is specified is ad hoc.²²² The child's or parent's ethnicity is sometimes clearly stated towards the

²²⁰ *The Act* (n 135) s 85 'Provision of services to facilitate restoration': 'A government department or agency or a funded non-government agency that is requested by the Children's Court to provide services to a child or young person or his or her family in order to facilitate restoration is to use its best endeavours to provide those services.' See also Children's Court of New South Wales, Practice Note 15, *Requests for the provision of services to facilitate restoration in care proceedings* (issued 29 April 2022). The provision is also discussed in Chapter 10, part C, section (ii).

²²¹ *The Act* (n 135) s 9(2)(b), (d); *United Nations Convention on the Rights of the Child*, article 30.

²²² This limitation is reflective of the 20-year time span of the judgments—it is likely that recent judgments pay more specific attention to cultural issues, due to an increasing emphasis on the importance and quality of cultural plans to accompany final orders: see Chapter 8, section (iv) 'Child's Relationships'. The Court has also taken steps

start and/or conclusion of the judgment, most often in relation to Aboriginal families. In other cases there is just an incidental, passing mention, somewhere within the judgment, of a matter of culture, religion or language. As far as can be ascertained, it appears that the children are Aboriginal in 21 of the 98 judgments, or 22%.²²³ An additional 10% of the judgments mention the country of origin or cultural affiliation of non-Aboriginal children or parents, but there is no way of knowing whether this figure is reflective of the actual proportion of culturally diverse families in the study sample.

The child's cultural needs are part of the reasons for determination on realistic possibility of restoration in 17% of the judgments, this proportion being consistent across 'realistic possibility' and 'no realistic possibility' cases.²²⁴ In analysing the Court's reasoning, it is important to distinguish between cultural identity as a factor informing the decision on restoration, and cultural identity issues that are *consequent* upon a decision that there is no realistic possibility of restoration. If a child is not to be restored to the parents, disputes often arise regarding competing placement options—and may encompass considerations of which option best meets the child's cultural needs, among other aspects of permanency planning. These issues are especially pertinent to Aboriginal children, for whom placement decisions are governed by additional statutory principles and provisions,²²⁵ and are the subject of a series of published cases.²²⁶ The resolution of cultural planning and placement matters, post-disposition of the question of restoration, are outside the direct scope of this thesis. The relevant concern for this study is the extent to which cultural issues *inform the assessment of realistic possibility of restoration* itself—as per the 'circumstances of the child' limb of the statutory test, and in the wider context of the child's 'safety, welfare and wellbeing'.

to enhance its data collection 'about the cultural background of both the parents and the children': Children's Court of NSW, *News*, November 2023: <<http://childrenscourt.nsw.gov.au/news>>.

²²³ The more precise percentage is 21.5%.

²²⁴ 18% and 16% respectively.

²²⁵ *The Act* (n 135) s 11: Aboriginal and Torres Strait Islander self-determination; s 12: Aboriginal and Torres Strait Islander participation in decision-making; s 12A: Aboriginal and Torres Strait Islander Children and Young Persons Principle; s 13: Aboriginal and Torres Strait Islander Child and Young Person Placement Principles; s 83A: Additional requirements for permanency plans for Aboriginal and Torres Strait Islander children and young persons (including mandated cultural plans to accompany final orders). See also Chapter 5, part A: The Legal Framework.

²²⁶ See, eg, *C v The Secretary, Family & Community Services* [2016] NSWDC 103; *Re Daisy Logan* [2023] NSWChC 16; *Director-General of DFaCS (NSW) and Gail and Grace* [2013] NSWChC 4; *DFaCS (NSW) re Ingrid* [2012] NSWChC 19; *Re Lucinda Porter (No 2)* [2023] NSWChC 2; *In the Matter of Victoria and Marcus* (Children's Court of New South Wales at Lismore, 29 March 2010).

In relation to cultural origins other than Aboriginal, three ‘realistic possibility’ judgments refer to the cultural identity benefits of children being raised within their family of origin,²²⁷ noting in each case that the existing or proposed foster placements were not with carers of the child’s cultural background.²²⁸ This theme is extensively explored in *Ali children*, with detailed consideration of the ways in which the foster carers and the supervising out-of-home care agency had neglected to facilitate the children’s cultural and linguistic needs.²²⁹

Conversely, several ‘no realistic possibility’ judgments determined that the children’s cultural needs were adequately met by the commitment of the foster carers to facilitate this, and in accordance with cultural plans.²³⁰ The related judgments in *Chanlina*²³¹ and *Elizabeth*²³² (an original decision and an appeal concerning the same child) provide the most comprehensive examination of cultural issues in determining that there is not a realistic possibility of restoration. The child was placed in care as a one-year old after travelling to Australia from Cambodia with her mother, who was apprehended on arrival and imprisoned for a drug trafficking crime. The Children’s Court and District Court judgments were delivered when the child was respectively three and six years old. She had remained in one foster placement, which was perceived as stable and nurturing, but not culturally aligned. Her mother sought restoration upon her release from prison, with an expectation that restoration would necessitate the child returning to Cambodia (in the likelihood of the mother’s deportation). Expert evidence encompassed generic research findings on children’s experiences of ‘intercountry’ and ‘transracial’ adoption and fostering,²³³ and clinical evaluation of the implications of detachment from culture and country in the specific case, as balanced against the child’s established life in Australia.²³⁴ The Children’s Court judgment also traversed a number of precedents, from appellate courts in both England and NSW, relating to this theme.²³⁵ The decision in both instances was that the significant issue of detachment from

²²⁷ *Ali children* (n 74) [260]; *Nellie* (n 81); *SK* (n 82) [239], [242].

²²⁸ *Ali children* (n 74) [114]; *Nellie* (n 81); *SK* (n 82) [130]–[131], [138].

²²⁹ *Ali children* (n 74) [125]–[126], [129], [134]–[137], [140], [149], [151]–[164], [190]–[226], [248]–[251], [260].

²³⁰ *ASK* (n 89) [269]–[276]; *Charlie* (n 90) 11–12; *LZ & QJ* [2017] NSWDC 414, [24], [97]–[102], [297], [298] (*‘LZ & QJ’*); *RC & PK* (n 74) [122], [209].

²³¹ *Chanlina* (n 160).

²³² *Elizabeth* (n 82).

²³³ *Chanlina* (n 160) [26]–[27]; *Elizabeth* (n 82) [146]–[149].

²³⁴ *Chanlina* (n 160) [20]–[24]; [28], *Elizabeth* (n 82) [152]–[168].

²³⁵ *Chanlina* (n 160) [30]–[50], citing: *P (a child)* [1999] EWCA Civ 1323; *Re M* [1996] EWCA 1320; *Director-General, Department of Community Services v D & Ors* [2007] NSWSC 762.

culture was outweighed by the ‘undoubted psychological harm’²³⁶ that would result from uprooting the child from her existing primary attachments.²³⁷

In relation to Aboriginal families, six judgments found a realistic possibility of restoration of children to their Aboriginal parent or parents.²³⁸ In none of these judgments is preservation of the child’s cultural identity an expressly articulated reason for the decision. The judgment in *Yarran Taylor children* comes the closest. Its discussion of ‘the father’s progress’ notes that he ‘has a deep connection with culture and is passing that on to his children’.²³⁹ The judgment’s section on ‘the children’s circumstances’ refers to their cultural needs in out-of-home care being ‘met through their engagement with their parents’ as well as through school and day-care activities,²⁴⁰ and observes that the father ‘is adamant that no other family members be involved in supporting the children’ with culture.²⁴¹ However, the issue is not explicitly revisited in the subsequent part of the judgment formulating the conclusion on realistic possibility of restoration, which is focused on weighing the parents’ insufficient progress on core risk factors (such as domestic violence)²⁴² against the harm and instability experienced by the children in out-of-home care.²⁴³

There are three cases in which the ‘realistic possibility of restoration’ of Aboriginal children is to their non-Aboriginal parent. In one of these judgments the Court specifies its satisfaction that the children’s cultural needs will be met by the ‘instrumental’ role of their Aboriginal maternal grandmother and aunt.²⁴⁴ In another judgment there are brief, rather oblique references to the Aboriginal father being ‘likely’ to promote the children’s cultural identity;²⁴⁵ while the remaining case does not refer to the issue at all.²⁴⁶

²³⁶ *Elizabeth* (n 82) [180].

²³⁷ *Chanlina* (n 160) [51]; *Elizabeth* (n 82) [178]–[181].

²³⁸ *Alfred* (n 74); *Eggleton* (n 61); *Jamzie* (n 77); *KH v Secretary, Department of Communities and Justice* [2021] NSWDC 498 (‘KH’); *Mario* (n 78); *Yarran Taylor children* (n 195).

²³⁹ *Yarran Taylor children* (n 195) [125(13)].

²⁴⁰ *Ibid* [298].

²⁴¹ *Ibid*.

²⁴² *Ibid* [304].

²⁴³ *Ibid* [302]–[316].

²⁴⁴ *Ramsay children* (n 78) 27.

²⁴⁵ *O’Connor children* (n 80) [3], [33].

²⁴⁶ *The Department of Community Services and Rachel Grant, Tracy Reid, Sharon Reid and Frank Reid* (Children’s Court of New South Wales, August 2009) [43], [48] (‘*Grant & Reid*’). It is again important to note that the thesis did not study the details of children’s care plans (permanency planning), including cultural planning, following on from the determination on restoration; nor are such details routinely provided in the judgments.

In ‘no realistic possibility’ cases concerning Aboriginal children, two judgments found cultural connection to be maintained by placements with (distant) kin,²⁴⁷ and by continuing contact with parents and extended family.²⁴⁸ In *May, June & Roy* the children’s long-term placement was with their non-Aboriginal grandmother, but the Court was satisfied of arrangements for ‘continuing contact with their Aboriginal family, community and culture’.²⁴⁹

Other ‘no realistic possibility’ judgments—tending towards the earlier years of the study sample²⁵⁰—are more cursory in relation to Aboriginal children’s cultural needs. In *Harris children* there was no indication that the children, or either of the parents, are Aboriginal other than a fleeting statement, in the context of a child being content with arrangements for contact with his parents, that ‘[h]e is aware of his Aboriginality, and took part in NADOC (sic) and other Aboriginal events’.²⁵¹ In *Jack* there was mention that the child would be moving from his interim placement to a ‘long-term Aboriginal carer’.²⁵² The judgment in *Nathan* identified the child as Aboriginal²⁵³ and briefly noted that this was considered in the Court’s assessment of permanency planning.²⁵⁴ In *Boyd*, there was a similarly brief reference at the start of the judgment to the child being Aboriginal.²⁵⁵ This judgment concluded with the opinion (the basis for which is not explained) that the ‘section 13’ principles²⁵⁶ had ‘not been appropriately addressed by the Department’,²⁵⁷ and that finalisation of the case was to be held over until cultural planning for the child was properly achieved.²⁵⁸ In none of these cases were any implications of the child’s or parents’ cultural identity integrated into the exploration of the question of realistic possibility of restoration.

In contrast, the judgment in *Malakhai* provides relatively detailed attention to the child’s and the parent’s Aboriginality. This is mainly in the context of the Court’s denunciation of the

²⁴⁷ *Bloom* (n 47) [230(11.12), [11.16)], [322], [325]; *Jonah* (n 31) 22.

²⁴⁸ *Bloom* (n 47) [230(11.12)], [325]; *Jonah* (n 31) 22–3.

²⁴⁹ *May, June & Roy* (n 89) [219]. Section 13(4) of *The Act* (n 135) provides that a child with one Aboriginal and one non-Aboriginal parent ‘may be placed with the person with whom the best interests of the child will be served having regard to the principles of this Act’.

²⁵⁰ The four judgments cited in this paragraph date from 2012 (*Harris children* and *Jack*), 2013 (*Boyd*) and 2018 (*Nathan*). The interviews revealed a consensus that attention to cultural planning has considerably improved in more recent years: see Chapter 8, section (iv).

²⁵¹ *Harris children* (n 19) [48].

²⁵² *Jack* (n 26) [13], [15].

²⁵³ *Nathan* (n 21) [2].

²⁵⁴ *Ibid* [77].

²⁵⁵ *Boyd* (n 24) [2].

²⁵⁶ Aboriginal and Torres Strait Islander Child and Young Person Placement Principles.

²⁵⁷ *Boyd* (n 24) [35].

²⁵⁸ *Ibid*.

circumstances in which the vulnerable 17-year old mother, herself a young person in the care of the Minister and with an extensive history of trauma, had been left without any effective support to look after her baby.²⁵⁹ The magistrate refers to the way the case resonates with key systemic criticisms in the *Family is Culture* review,^{260 261} and acknowledges the legitimacy of the mother's fears for the child being in out-of-home care and 'the cultural planning for him'.²⁶² Although finding no realistic possibility of restoration, and broadly satisfied with arrangements for the child's placement with Aboriginal foster carers 'on country',²⁶³ the Court is concerned that details of cultural planning are inadequate, and declines to approve the proposals for permanency planning until a new Care Plan has been prepared.²⁶⁴

It is evident overall that the 'no realistic possibility' judgments limit the relevance of children's Aboriginality to the issue of whether cultural needs will be met within proposed out-of-home care arrangements. If cultural planning is not yet satisfied, this delays approval of the care plan—but does not have a bearing on the question of restoration, which has already been determined and effectively closed.

In judgments in *favour of* restoration, Aboriginal cultural identity becomes essentially a moot point: the decisions being instead based on the parent's satisfactory progress in addressing the risk factors that led to the child's removal.

Largely absent from the cases, regardless of the restoration outcome, is consideration of what *the parents themselves* have to offer the child in terms of cultural knowledge, practices and belonging, accompanied by explicit weighing of the potential cultural benefits of restoration versus risk factors in the family home. A rare exception to this is the (unpublished) case of *Jonah*, with these competing considerations expressly canvassed throughout much of the judgment.²⁶⁵

Interview participants, when discussing matters related to Aboriginal families, tended to focus on cultural connection for children who are subject to long-term care orders,²⁶⁶ including

²⁵⁹ *Malakhai* (n 17) [77]–[90].

²⁶⁰ *Ibid* [61]–[65], [88]–[89].

²⁶¹ Davis, *Family is Culture Report* (n 205).

²⁶² *Malakhai* (n 17) [188(2)].

²⁶³ *Ibid* [191(a)], [204].

²⁶⁴ *Ibid* [206]–[209], findings and orders [3].

²⁶⁵ *Jonah* (n 31) 17–23.

²⁶⁶ Judicial Officers 1, 4, 7, 9, 15, 17, 18, 19, 20; Registrar 2; Caseworkers 1, 2, 7, 10; Lawyer 8.

the importance of ‘family finding’²⁶⁷ and placement with kin.²⁶⁸ In other words, conceptualisations of the significance of cultural identity defaulted, as in the judgments, to the issue of *placement* for children who cannot live with their parents. This led, in some of the Departmental interviews, to further questioning by the researcher about the possibility that culture might be relevant to the issue of restoration – that is, to the very relationship between child and parent, and the cultural strengths of the family, prior to any need to arrange a culturally-appropriate long-term placement. This met with diverse responses. Several caseworkers struggled initially to understand the question, which of itself suggests that equating culture with realistic possibility of restoration is outside the norm of casework discourse. Nevertheless, several caseworkers and lawyers agreed, some emphatically, with the proposition that Aboriginal cultural identity is, or should be, treated as part of the child’s circumstances in considering restoration.²⁶⁹ Their reasoning reflects the distinctive concept of family in Aboriginal culture, in which a child is raised by parents and a network of kin – who may or may not be related by blood – within community and on country.²⁷⁰ The implications for the legal context of restoration are essentially twofold. First, that the kinship environment encircling²⁷¹ parent and child is a source of strength for a parent experiencing hardship, which can be drawn upon to bolster child safety and to ‘fill the gaps to support restoration’.²⁷² ²⁷³ Secondly, that separating Aboriginal children from their parents, community and culture causes profound harm, and is therefore ‘a risk factor’ in and of itself.²⁷⁴ Hence:

...you’re not just assessing restoration anymore on what a parent as an individual does, you’ve got to look at it as a parent in partnership with the community, and thinking about this principle of maintaining connection. (Lawyer 2)

²⁶⁷ Meaning efforts, preferably at an early stage, to identify, locate and engage potential carers within the child’s extended kin.

²⁶⁸ Judicial Officers 1, 2, 3, 5, 13, 16, 17, 18, 19, 21; Caseworkers 1, 2, 3, 10.

²⁶⁹ Caseworkers 8, 10, 11; Lawyers 7, 8, 9.

²⁷⁰ See, eg, BJ Newton et al, ‘Restoring Children from Out-of-Home Care: Insights From an Aboriginal-Led Community Forum’ [2024] *Child & Family Social Work* 1, 5; Stephen Ralph, ‘Child Protection and Indigenous Children’ (Paper prepared for Legal Aid NSW, 2022) 20; Tamara Walsh et al, “Are Human Rights “Toothless” in Australian Child Protection Matters? Perspectives of Lawyers and Social Workers’ (2022) 36(1) *International Journal of Law, Policy and The Family* 1, 11.

²⁷¹ Lawyer 9.

²⁷² Caseworker 10.

²⁷³ Caseworkers 1, 8, 10; Lawyers 2, 3, 5, 9. Additionally, although judicial officers were not specifically asked about culture as a factor informing realistic possibility of restoration, the issue of kinship networks as a strength in supporting prospects of restoration was raised by Judicial Officers 5 and 19.

²⁷⁴ Caseworkers 2, 10, 11; Lawyers 2, 7, 8.

A few participants, although proponents of the link between culture and restoration in principle, were hesitant about the implications of distinguishing Aboriginal cases in applying the statutory tests:²⁷⁵

I just don't know how you would get there...it's tricky, because, you know, Aboriginal people are not immune from the trifecta of drink, drugs and mental issues. And so, the same risk issues are going to be there in their case as they would be for non-Aboriginal people. (Lawyer 5)

It was thought there would be 'push back', within the legal system, against a proposition that 'this is an Aboriginal child and there's a greater impetus to restore [than for other children] because of what's lost with maintaining the separation'.²⁷⁶

At the further end of the spectrum of opinion, one lawyer and one caseworker were firmly opposed to the notion that cultural identity should be given any greater weight in decision-making than already occurs. They both asserted that Aboriginal children are currently being left in situations of comparatively higher risk than non-Aboriginal children, due to policy and casework efforts to reduce the number of Aboriginal children coming into care.²⁷⁷ The caseworker was additionally sceptical of conceiving of culture as relevant to realistic possibility of restoration:

It's around placement...yeah, it's not around what the parents can bring to the children's culture. I wouldn't say that's come up at all. It's definitely placement, and perhaps frequency of contact. (Caseworker 12)

Regardless of individual standpoint, there was consensus that the legal process does not as a matter of course incorporate cultural considerations into the question of realistic possibility of restoration.²⁷⁸ This finding aligns with existing studies, which argue that the Aboriginal and Torres Strait Islander Child Placement Principle²⁷⁹ has been narrowly construed as being confined to the literal issue of out-of-home care 'placement', whereas culturally-appropriate care should be viewed as only one element of a wider commitment to Aboriginal family and community self-determination in all aspects of child protection.²⁸⁰ However, several participants were confident that this position is starting to shift, in response to increasing

²⁷⁵ Caseworker 7; Lawyers 5, 8.

²⁷⁶ Lawyer 8.

²⁷⁷ Caseworker 12; Lawyer 1.

²⁷⁸ Caseworkers 4, 7, 8, 9, 10, 11, 12; Lawyers 2, 5, 6, 7.

²⁷⁹ *The Act* (n 135) s 13.

²⁸⁰ Davis, *Family is Culture Report* (n 205) 248–250; Paul Gray, 'Beyond Placement: Realising the Promise of the Aboriginal and Torres Strait Islander Child Placement Principle' (2021) 33(10) *Judicial Officers' Bulletin* 99.

pressure on the government to address the over-representation of Aboriginal children in the care system,²⁸¹ and in line with reforms flowing from the *Family is Culture* review.²⁸² Specific legislative amendments were mentioned as better enabling, and potentially *requiring*, that the child's cultural needs be considered as part of realistic possibility of restoration. These include: the 'active efforts' obligations;²⁸³ the requirement that decision-makers apply the principles of prevention, partnership, participation and connection;²⁸⁴ and enhanced provision for Aboriginal families and communities to 'be heard' in Court proceedings.²⁸⁵

Many participants referenced the (relatively new) process, within the Department, whereby all new cases of removal or potential removal of an Aboriginal child are referred to a specialist consultative panel.²⁸⁶ Several lawyers spoke about the work of a new legal team, Waruuguma Barrmarrany,²⁸⁷ which advises caseworkers on 'less intrusive'²⁸⁸ legal options in order to 'stem the flow' of Aboriginal children entering out-of-home care.²⁸⁹ There was a sense of optimism, on the part of some participants, of a current momentum for change:

Basically we were saying we were part of the problem in bringing those 6500 Aboriginal children into out-of-home care; so we thought we needed to change the way we do business within Legal Services. And the formation of this team 'Waruuguma' was to do exactly that. ... I am positive; I think that there's some real positive things coming out of [the Family is Culture review] that we're seeing... and look – Aboriginal business, you know, it comes in waves. I've been doing this for a long time and sometimes I love working in Aboriginal affairs, and then sometimes I just go, 'I'm out for a while, I need a break', because it's not on the table – Aboriginal affairs and Aboriginal rights are not on the table. But at the moment we're looking at Aboriginal children's rights to be with their family, to be brought up with community, and I do think that there's some positive aspects about that.²⁹⁰

²⁸¹ See also Chapter 2, parts D, E, and Chapter 10, part C, section (i) 'Building on Strengths'.

²⁸² Davis, *Family is Culture Report* (n 205).

²⁸³ *The Act* (n 135) s 9A; Caseworkers 7, 13; Lawyers 6, 7, 9.

²⁸⁴ *Ibid* s 12A; Lawyers 2, 7, 8, 9. The principles of 'prevention', 'partnership', 'participation', and 'connection', together with 'placement', are explicitly recognised in s 12A: the 'Aboriginal and Torres Strait Islander Children and Young Persons Principle', introduced by the Children and Young Persons (Care and Protection) Amendment (Family is Culture) Bill 2022. See Chapter 2, part D.

²⁸⁵ *The Act* (n 135) s 87(2A); Lawyer 2. This provision enables people who are not parties to the proceedings, including Aboriginal families or communities or their representatives, to 'be heard' by the Court if significantly affected by a proposed order.

²⁸⁶ 'Safeguarding Decision-Making for Aboriginal Children' panels ('SDMAC'), mentioned by Caseworkers 1, 3, 4, 5, 7, 10, 12, 13; Lawyers 2, 4, 8.

²⁸⁷ Lawyers 2, 8, 9.

²⁸⁸ Lawyer 8.

²⁸⁹ *Ibid*.

²⁹⁰ Participating lawyer (identifier removed).

(iii) Child's Views and Wishes

Logan is eight years and seven months; he is a bright child. His maturity and cognitive development is beyond his chronological age... His expressed view is that he wishes to stay with [his foster family]. His views carry some weight, but, as even he acknowledges, the decision is not for him. He is fatigued and I am conscious of that. I am conscious of his desire to please all the adults in his life that love him but want different things for him. (Magistrate in *Logan*)²⁹¹

This theme refers to the child's perspective ('view') or wishes with respect to restoration. The words 'view' and 'wish' tend to be used interchangeably in this context, and are sometimes encapsulated in the wider notion of the child's 'voice'.²⁹²

Several provisions of the legislation enshrine the right of children to be heard and participate in care proceedings concerning them. Under the Act's guiding principles, a child 'able' to form views on 'his or her own safety, welfare and wellbeing' must have opportunity to express those views, and these are to be given 'due weight' in accordance with the child's 'developmental maturity' and other circumstances.²⁹³ Additional provisions prescribe the responsibilities of the Secretary²⁹⁴ and the Court²⁹⁵ in ensuring that children are appropriately informed about interventions, decisions and processes affecting them, and assisted to freely²⁹⁶ and fully²⁹⁷ express their views.

In practice the child's voice is conveyed to the Court by various means: formally via the child's legal representative²⁹⁸ or in a clinician's assessment,²⁹⁹ but also in caseworker evidence, supervised contact reports, and other accounts of the child's utterances, behaviours and

²⁹¹ *Logan* (pseudonym, unpublished judgment, Children's Court, March 2022) 13.

²⁹² *Bloom* (n 47) [332]; *Judicial Officers* 4, 6, 7, 9, 22; *Registrars* 1, 2.

²⁹³ *The Act* (n 135) s 9(2)(a).

²⁹⁴ *Ibid* s 10.

²⁹⁵ *Ibid* s 95.

²⁹⁶ *Ibid* s 10.

²⁹⁷ *Ibid* s 95(3).

²⁹⁸ See, eg, *A* (n 74) [75]–[83]; *ASK* (n 89) [67]; *Dalton Tomkins* (n 17) [298]; *Harris children* (n 19) [48]–[49]; *Janet & Xing-fu* (n 159) [52]; *LZ & QJ* (n 230) [228]–[230], [252]; *Y v The Secretary, Department of Communities and Justice* (No. 6) [2021] NSWDC 392, [815]–[817], [875] ('Y').

²⁹⁹ See, eg, *Bloom* (n 47) [333]; *George* (n 77) [157]–[159]; *Logan* (n 291) 13; *LZ & QJ* (n 230) [160]–[168]; *Naunton children* (n 74) 8, 9.

circumstances.³⁰⁰ Interviewed magistrates indicated that a range of sources is desirable when trying to ascertain the child's wishes,³⁰¹ with caseworkers' evidence on this issue afforded the lowest weight due to perceptions that it lacks independent objectivity.³⁰²

It is difficult to measure the impact of children's views and wishes on the Court's determination. There are fine lines between a child's desire being *mentioned*, *acknowledged*, *taken into account*, and given determinative *weight*—with permutations of each of these possibilities appearing in the judgments, and sitting along a continuum of influence.³⁰³ Forty-five percent of the judgments make some mention of the child's views or wishes in connection with the question of restoration.³⁰⁴ This figure, if taken at face value, would place this factor in the 'substantially influential' range. Crucially, however, it is only in a much smaller sub-set of cases that the cited view or wish appears to have an *actual bearing* on the Court's decision. These instances have been categorised as carrying 'some weight', and appear in 16% of the judgments. In the other portion of references to children's wishes, a rationale is given for qualifying, limiting or dismissing the significance of this factor to the Court's assessment of realistic possibility of restoration. Prevalent considerations, distinguishing whether or not the judgments attach weight to the voice of the child, are the child's age, their perceived intelligence, the clarity and consistency of the views expressed, and the extent to which these align with the Court's wider perspective on the child's interests.

In relation to age, the pattern in the judgments is to grant a degree of 'significance',³⁰⁵ either explicitly or implicitly, to the wishes of children from about the age of 11 or 12—where these wishes are perceived as firm or unequivocal,³⁰⁶ clear,³⁰⁷ or consistent.³⁰⁸ This applies to

³⁰⁰ See, eg, *A* (n 74) [78]–[83]; *ASK* (n 89) [68], [69]; *Bradford children* (n 17) [33]–[38]; *Charlie* (n 90) 12; *Keziah* (n 99) [114]–[119]; *LZ & QJ* (n 230) [250]–[252]; *Naunton children* (n 74) 8.

³⁰¹ *Judicial Officers* 5, 6, 7, 14, 18. See also *EC v Secretary, NSW Department of Family and Community Services* [2019] NSWSC 226, [79].

³⁰² *Judicial Officers* 5, 6, 18, 20.

³⁰³ Other studies have noted a lack of clarity as to what is meant by giving 'weight' to a child's views in judicial determinations, and how this is distinguished from the weight placed on other factors: see Tina Gerdtz-Andersen, 'A Scoping Review of When and How a Child's View is Weighted in Decision-Making Processes in Law Proceedings' (2021) 129 *Children and Youth Services Review* 1, 4, 9–10.

³⁰⁴ Excluded from this figure are additional judgments that reference children's views in connection with issues other than realistic possibility of restoration, such as contact.

³⁰⁵ *George* (n 77) [161].

³⁰⁶ *LZ & QJ* (n 230) [20]–[21]; *Y* (n 298) [115], [816], [891].

³⁰⁷ *ASK* (n 89) [67]; *LZ & QJ* (n 230) [70], [229]; *Vlachos children* (n 152) [71].

³⁰⁸ *LZ & QJ* (n 230) [21]; *Y* (n 298) [816], [873].

decisions both in favour of³⁰⁹ and contrary to restoration,³¹⁰ and occasionally extends to the views of older siblings of the subject child.³¹¹ In all these cases the child's preference accords with the Court's overall assessment of the viability of restoration, and is therefore regarded as consistent with an adult perspective of the child's best interests. References to a child being 'intelligent', 'articulate' or 'mature', in connection with their views, transcend the factor of chronological age, being applied in the judgments to children ranging in age from five through to twelve.³¹²

There is a recurring theme of children's adamant opposition to restoration to a parent with whom they do not feel physically or psychologically safe, due to past domestic violence³¹³ or physical abuse.³¹⁴ This resonates with Briony Horsfall's study in the Children's Court of Victoria,³¹⁵ which focused on the role of children's direct legal representation. In a sample of 50 court files involving 84 children,³¹⁶ the proportion of children wanting to remain in care was only slightly less than those seeking to return home,³¹⁷ contrary to commonly-held assumptions or assertions that children in care matters are inevitably aligned with their parents.³¹⁸ Children were conscious of their own safety in relation to reunification and contact with violent and abusive parents, conveying these concerns in instructions to their lawyers.³¹⁹ Importantly, magistrates did not order reunification against the wishes of children who expressed ongoing fear of the parent.³²⁰ Similarly, the present study shows the Court to be attentive to, and respectful of, the legitimacy of children's views and fears in relation to

³⁰⁹ *George* (n 77) [99]–[106], [161]; *Janet & Xing-fu* (n 159) [66]; *Vlachos children* (n 152) [71].

³¹⁰ *A* (n 74) [76]; *ASK* (n 89) [67]–[68], [77]; *Harris children* (n 19) [70]; *LZ & QJ* (n 230) [250]–[352]; *Y* (n 298) [115], [817], [875]–[892].

³¹¹ *Charlie* (n 90) 12; *SK* (n 82) [151]–[152]. *The Act* (n 135) s 103 provides that the Court may obtain and consider the views of siblings of the child in respect of whom the proceedings are brought, and must take into account the interests of siblings.

³¹² *Bradford children* (n 17) [37]; *Janet & Xing-fu* (n 159) [66]; *Logan* (n 291) 14; *LZ & QJ* (n 230) [16], [160]; *Y* (n 298) [879], quoting from the decision under appeal.

³¹³ *Bradford children* (n 17) [33]–[34]; *Harris children* (n 19) [19], [70].

³¹⁴ *A* (n 74) [76]–[77], [82]; *ASK* (n 89) [67]–[69]; *David White v The Director-General Department of Human Services* [2011] NSWDC 106, [55] ('*David White*'); *Harris children* (n 19) [48], [70]; *LZ & QJ* (n 230) [20]–[21], [56]–[57], [69]–[70]; *Y* (n 298) [875]–[892].

³¹⁵ Briony Horsfall, 'Children's Participation Rights During Child Protection Hearings: Recognition, Legal Representation and Redistribution of Care in Victoria's Children's Court' (PhD Thesis, Swinburne University of Technology, 2016).

³¹⁶ *Ibid* 105.

³¹⁷ *Ibid* 187–8. This finding applies to the 35 children for whom a view on residence was recorded in the judgment, with 20 children seeking reunification to parent(s) and 15 wishing to remain in out-of-home care.

³¹⁸ *Ibid* 218, 271.

³¹⁹ *Ibid* 162–3, 212–13, 216–7, 242–5, 255.

³²⁰ *Ibid* 268.

physical abuse.³²¹ Although these cases usually concern children around the age of 12 or 13, the theme extends to children as young as eight,³²² and five:³²³

Talissa has made clear statements on a number of occasions that she does not want to be returned to the care of her parents. She wishes to have contact with them but not to live with them. She has made these statements consistently... It is much more difficult to deal with firmly expressed wishes of a five-year old about whom they wish to live than a more mature child. Nevertheless it is a relevant consideration... To return Talissa to her parents' care would be a further infliction of trauma on her. It would mean that her statements about what she had experienced and her wishes for the future were of no significance. It would be likely to affect her ability to trust people and to feel safe. (Magistrate in *Bradford Children*)³²⁴

The instances of young children's firm opposition to restoration is the exception to the norm. Evidence of the wishes of young children is more often regarded as oblique, and hence 'approached with caution'.³²⁵ This is due to apparent ambivalence,³²⁶ variability,³²⁷ or ambiguity³²⁸ of the child's expressed views, and indications that children feel 'torn'³²⁹ between competing relationships and are trying to avoid upsetting the adults in their lives.³³⁰ There are also several judgments, concerning both younger and older children, in which evidence of their views is regarded as compromised or ambivalent because of a disability affecting intellectual capacity and/or their communication style.³³¹ However, as emphasised in human rights discourse, children's rights of 'participation' in legal proceedings affecting them³³² are not confined to contexts in which the child is of sufficient age and communicative ability to explicitly articulate a firm opinion; nor is it necessary that they fully comprehend all the issues in an adult-like manner.³³³ Rather, their indirect and non-verbal forms of expression,

³²¹ A (n 74) [14], [25]–[26], [75]–[83], [109]; *ASK* (n 89) [69], [77]; *Charlie* (n 90) 20; *David White* (n 314) [55]–[57]; *Harris children* (n 19) [48], [70]; *LZ & QJ* (n 230) [57], [151]–[152]; *Y* (n 298) [873]–[892].

³²² *David White* (n 314).

³²³ *Bradford children* (n 17).

³²⁴ *Bradford children* (n 17) [33], [37]–[39].

³²⁵ *In the Matter of Julian and Allan* (Children's Court of New South Wales, 28 April 2006) [35].

³²⁶ *LZ & QJ* (n 230) [180], [252].

³²⁷ *McAlister children* (n 191) [47].

³²⁸ *Eggleton* (n 61) [13]–[15]; *Jonah* (n 31) 21; *McAlister children* (n 191) [175].

³²⁹ *LZ & QJ* (n 230) [162], [166], [180], [181], [297].

³³⁰ *KH* (n 238) [596]; *Logan* (n 291) 13; *DFaCS re Poppy* [2012] NSWDC 281, [31].

³³¹ *DFaCS (NSW) and the Colt Children* [2013] NSWChC 5, [334], [387] ('Colt children'); *GR v The Department of Communities and Justice* [2021] NSWSC 1081, [789]–[796] ('GR'); *In the Matter of Samantha* (Children's Court, 21 July 2008) [31]–[36] ('Samantha'); *Tanya* (n 170) [29]. The judgment in *Naunton children* (n 74) is an exception, placing explicit weight on the wishes of three young children each with an intellectual disability: at 3, 8, 9, 38.

³³² *United Convention on the Rights of the Child*, article 12.

³³³ Laura Lundy, John Tobin and Aisling Parkes, 'Article 12: The Right to Respect for the Views of the Child' in John Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 397, 405, citing Committee on the Rights of the Child, *General Comment No 12: The Right of the Child to be Heard* (2009).

conveying their emotions, fears and concerns, can help inform decision-makers as to ‘what constitutes safety and comfort’³³⁴ from the child’s perspective.³³⁵ Moreover, children’s apparent indecisiveness in care matters might be misconstrued as an inability to form a view – as opposed to being the child’s sensitive response to the complex dynamics, adult tensions and changing circumstances they are confronted with.³³⁶

For the most part, it appears that the child’s wishes are given no real determinative weight in the judgments if deemed uncertain.³³⁷ But there are exceptions to this. The young children in *Bloom*,³³⁸ and *LZ & QJ*,³³⁹ had not expressed clear and fixed preferences as to where and with whom they were to live. Despite this lack of certainty, the Court in each case (with the benefit of clinical opinion) comprehensively examined the nuances of the child’s seemingly complex and hesitant viewpoints, evaluating the underlying implications in relation to restoration.³⁴⁰

The preceding discussion relates to the 45% of judgments in which there is some reference to the wishes of the child. But what of the other judgments? Given the legislative requirements for children’s participation, it may seem surprising that more than half the judgments do not mention the child’s views on the issue of restoration. This is accounted for, to some extent, by the very young age of many of the children: around 30% of the children across the pool of judgments were younger than four years at the time of the hearing. Nonetheless, the sample encompasses many children from the age of four or five and through to teenage years whose wishes are not expressly referred to.³⁴¹ Furthermore, the statutory obligation to have regard

³³⁴ Asgeir Falch-Ericksen et al, ‘Children Expressing Their View in Child Protection Casework: Current Research and Their Rights Going Forward’ (2021) 26 *Child & Family Social Work* 485, 486.

³³⁵ Falch-Ericksen et al (n 334) 486; Gerdtz-Andersen (n 303) 3; Lundy, Tobin and Parkes (n 333) 407; Justine Ogle, Sharon Vincent and Marine Hawkes, ‘Authenticity, Power and the Case Record: A Textual Analysis of the Participation of Children and Young People in Their Child Protection Conference’ (2021) 27 *Child & Family Social Work* 278, 284.

³³⁶ The adaptive nature of children’s views was touched upon in interviews by Judicial Officers 13, 15, 22. See also Horsfall (n 315) 141, 143, 216.

³³⁷ See, eg, *Eggleton* (n 61) [13]–[15]; *Jonah* (n 31) 21; *KH* (n 238) [596]–[598]; *McAlister children* (n 191) [176]; *Samantha* (n 331) [36].

³³⁸ *Bloom* (n 47).

³³⁹ *LZ & QJ* (n 230).

³⁴⁰ *Bloom* (n 47) [230(9.1–11.10)], [326]–[337]; *LZ & QJ* (n 230) [22], [59], [71]–[74], [160]–[181], [250]–[253], [297].

³⁴¹ *Arnott-Bloom* (n 18); *Barnett children* (n 160); *Borg* (n 50); *Braidan* (n 163); *Chanlina* (n 160); *David White* (n 314) (other than in respect of the oldest child); *Depik & Senina* (n 159); *Grant & Reid* (n 246) (other than in respect of the oldest child); *Harper children* (n 77); *JH* (n 27); *JMS* (n 17); *DFaCS (NSW) re Kim* [2013] NSWChC 6; *In the Matter of Leonard* [2009] NSWLC 5; *Lewis* (n 74); *Lim children* (n 17); *In the Matters of Lincoln and Raymond* (Children’s Court of NSW, 9 April 2009); *Lucy* (pseudonym, unpublished judgment, Children’s Court, October 2012); *Re M* (n 198); *Prince & Johns children* (n 198); *Ramsay children* (n 78); *Rogers* (n 47); *SS v Department of Human Services* [2010] NSWDC 279; *Waller children* (n 74); *Yarran Taylor children* (n 195).

to ‘the circumstances of the child’³⁴² might reasonably import an expectation that the child’s wishes are an integral part of their own circumstances. However, the study is consistent with other research, in Australia and internationally, which has generally found there to be barriers to children’s participation in care decision-making, and limited or minimal attention to their views (at both administrative and judicial levels) – although this varies considerably across and within jurisdictions.³⁴³

The issue of children’s views was discussed in all the judicial officer interviews. Only a relatively small number expressed a strong conviction in this factor being of central or fundamental significance, either as a matter of principle,³⁴⁴ or for its practical relevance in assessing the overall evidence.³⁴⁵ However, a general acceptance of the importance of the child’s voice was implicit in the emphasis placed on the value of clinician’s assessments in ascertaining the child’s wishes,³⁴⁶ and on the role of children’s legal representatives, when competently performed.³⁴⁷ Children’s lawyers were regarded as instrumental in eliciting the child’s views.³⁴⁸ Ideally the lawyer will also convey contextual details of these wishes, such as the child’s relationships and current circumstances,³⁴⁹ and which give ‘a picture of this child as a human being’.³⁵⁰

Several judicial officers referred to young children as perceptive and capable of forming and expressing a view.³⁵¹ There was greater emphasis, however, on older children – particularly teenagers – who hold a firm position. Many participants raised the issue of these children

³⁴² *The Act* (n 135) s 83(1)(a).

³⁴³ See, eg, Davis, *Family is Culture Report* (n 205) 314–15; Sheila Gray, ‘Parenting Capacity: An Analysis of Parenting Capacity Assessment in the Children’s Court of New South Wales’ (PhD Thesis, University of Sydney, 2014) 132, 160, 226; Falch-Eriksen et al (n 334) 487, 488–491, 493; Anne-Mette Magnussen and Marit Skivenes, ‘The Child’s Opinion and Position in Care Order Proceedings: An Analysis of Judicial Discretion in the County Boards’ Decision-Making’ (2015) 23(4) *International Journal of Children’s Rights* 705, 719–21; Ogle, Vincent and Hawkes (n 335); Conor O’Mahony et al, ‘Child Care Proceedings in Non-Specialist Courts: The Experience in Ireland’ (2016) 30 *International Journal of Law, Policy and The Family* 131, 146–50; Tarja Poso and Rosi Enroos, ‘The Representation of Children’s Views in Finnish Court Decisions Regarding Care Orders’ (2017) *International Journal of Children’s Rights* 736, 747–751; Nicola Ross, ‘Different Views? Children’s Lawyers and Children’s Participation in Protective Proceedings in New South Wales, Australia’ (2013) 27(3) *International Journal of Law, Policy and the Family* 332; Marit Skivenes and Milfrid Tonheim, ‘Improving Decision-Making in Care Order Proceedings: A Multijurisdictional Study of Court Decision-Makers’ Viewpoints’ (2018) *Child & Family Social Work* 1, 6.

³⁴⁴ Judicial Officers 9, 17.

³⁴⁵ Judicial Officers 13, 14, 17.

³⁴⁶ Judicial Officers 4, 5, 8, 20, 12.

³⁴⁷ Concerns about mixed quality and sub-performing children’s lawyers were prevalent: Judicial Officers 2, 3, 4, 5, 9, 13, 22; Registrar 1.

³⁴⁸ Judicial Officers 2, 3, 4, 5, 6, 7, 8, 14, 15, 16, 17, 19, 20, 22, 23; Registrars 1, 2.

³⁴⁹ Judicial Officers 4, 7, 9, 19.

³⁵⁰ Judicial Officer 4.

³⁵¹ Judicial Officers 6, 8, 14, 17; Registrar 1.

‘voting with their feet’³⁵² by moving or remaining where they want to be, regardless of a legal order.³⁵³ Depending on the particular situation, the Court and the parties will sometimes respond pragmatically, to ‘craft’ a legal outcome that accommodates the young person’s stance while endeavouring to maintain their safety.³⁵⁴ In other situations the Court is less inclined to appease adolescents who (typically wanting restoration) are not in a position to make an objective decision in their own interests and which properly comprehends risk. This context arose in both interviews³⁵⁵ and judgments:³⁵⁶

I also take into account Adriana’s wishes. I have had the benefit of three wishes reports. It is clear Adriana wishes to live with her mother... I have no confidence that Adriana will not change her mind, given the history to date of Adriana and [her sister] moving back and forth between both parents. Fourteen-year-olds do not always make decision in their best interests; that is why we have a child protection authority, that is why we have a Children’s Court. (Magistrate in *Adriana*)³⁵⁷

Very few caseworkers mentioned children’s views.³⁵⁸ This is partly explained by there being no set question on this topic in the caseworker interviews, whereas almost all the judicial officers were asked questions on this theme.³⁵⁹ Nonetheless, it is curious that caseworkers did not of their own volition mention children’s wishes when questioned about key considerations for realistic possibility of restoration. This is, perhaps, reflective of overall findings in this thesis that decision-making on restoration is heavily occupied with adult factors rather than the child’s situation. In the words of one of the few caseworkers who *did* raise children’s views as a relevant consideration:

...unfortunately, the kids’ voices do get lost in the Children’s Court space. They say it’s a non-adversarial space. Well, we know that’s not true. And the loudest voice becomes the parent, right? (Caseworker 9)

³⁵² Judicial Officer 17.

³⁵³ Judicial Officers 4, 7, 9, 14, 17, 18, 21.

³⁵⁴ Judicial Officers 7, 9, 17, 18.

³⁵⁵ Judicial Officers 3, 4, 5, 21.

³⁵⁶ *Adriana* (n 17) 13; *Dalton Tomkins children* (n 17) [134], [302]; *Sharpe children* (n 26) [34]–[35].

³⁵⁷ *Adriana* (n 17) 13.

³⁵⁸ The exceptions were Caseworkers 3, 8, 9.

³⁵⁹ One of the 4 projects combined for the purposes of the judicial officer interviews concerned the voice of the child in Children’s Court Clinic reports.

(iv) Other Less Influential factors

(a) *Employment and finances*

References to parents' employment status and financial stability each appear in 10% of the judgments overall. Both factors are cited more often in 'realistic possibility' than in 'no realistic possibility' decisions.³⁶⁰ In a similar vein to housing, it appears that although having a job³⁶¹ and reasonable financial security³⁶² are positive attributes in support of restoration, unemployment and low income will not usually contribute to a finding of no realistic possibility of restoration—unless interlinked with more serious concerns. Given that the legislation expressly states that 'poverty' alone cannot be a ground for a care order,³⁶³ it is necessary that the Court's reasoning attaches to unemployment or financial instability some direct connection with deficient parenting capacity. In the few judgments that do so, the Court associates these issues with lack of effort and responsibility in planning for the child's restoration.³⁶⁴

(b) *Intellectual disability*

Despite substantial evidence in the literature that parents with intellectual disability are over-represented in and disadvantaged by care and protection systems,³⁶⁵ a mere four judgments in this study (3%) refer to this factor as part of the reasons for there being no realistic possibility of restoration. The references are to 'learning difficulties',³⁶⁶ 'mild intellectual disabilities',³⁶⁷ and impaired 'cognitive [or executive] functioning',³⁶⁸ which are perceived as

³⁶⁰ Employment and financial security are each contributing reasons for decision in around 18–20% of 'realistic possibility' judgments, but appear in the reasoning of just 5–8% of 'no realistic possibility' judgments.

³⁶¹ *Ali children* (n 74) [71]; *David White* (n 314) [89]; *George* (n 77) [67]–[69]; *DFaCS (NSW) re Oscar* [2013] NSWChC 1, [126] ('*Oscar*'); *SK* (n 82) [227], [238(b), (e)]; *Yarran Taylor children* (n 195) [125(3)].

³⁶² *David White* (n 314) [89]; *Evie & Grace* (n 77) [54(4)]; *George* (n 77) [67]–[69], [99]; *Naunton children* (n 74) 26; *Nellie* (n 81); *Ramsay children* (n 78) 22; *SK* (n 82) [109], [238(b)].

³⁶³ *The Act* (n 135) s 71(2)(b).

³⁶⁴ *Dupont* (n 18) [105]–[106]; *Jay* (n 24) [12]–[13]; *Keziah* (n 99) [88], [90]; *Lewis* (n 74) [190]; *MXS* (n 160) [72], [75].

³⁶⁵ Susan Collings et al, "'She was there if I needed to talk or to try and get my point across": Specialist Advocacy for Parents with Intellectual Disability in the Australian Child Protection System' (2018) 24(2) *Australian Journal of Human Rights* 162; Susan Collings et al, 'Intersectional Disadvantages: Exploring Differences Between Aboriginal and Non-Aboriginal Parents with Intellectual Disability in the New South Wales Child Protection System' (2018) 12(2) *Journal of Public Welfare* 170, 171–2, 183–4, 185; Lima Fernando et al, 'Child Protection Involvement of Children of Mothers with Intellectual Disability' (2022) 126 *Child Abuse & Neglect* 105515, 1–10; Chris Maylea et al, 'Advocacy as a Human Rights Enabler for Parents in the Child Protection System' (2023) 17(3) *Ethics and Social Welfare* 275, 278, 284–6; Munazza Tahir and Virginie Cobigo, 'Accessibility of Child Protection Investigations During Pandemic: A Qualitative Analysis of Court Proceedings' (2023) 36 *Journal of Applied Research in Intellectual Disabilities* 343.

³⁶⁶ *Abbey* (n 18) [109], [118].

³⁶⁷ *ASK* (n 89) [224].

³⁶⁸ *ASK* (n 89) [172]; *Ezekial* (n 160) 13, 15; *Malakhai* (n 17) [135].

limiting the parent's capacity to reflect on and understand the child protection concerns,³⁶⁹ or to learn new parenting skills.³⁷⁰ It can be surmised as likely that more than 3% of the parents in the study sample had some level of intellectual disability, but that the magistrates are conscious to avoid an appearance of discriminatory assumptions equating intellectual disability with incompetent parenting.³⁷¹

Conclusions

This chapter discussed the moderately influential factors of alcohol and other drugs ('AOD'), informal supports, and generic or practical parenting capacity, and the less influential factors of housing, the child's cultural identity, and the child's wishes.

The stories of Sarita and Sonya each contain some of these factors. Sonya was commended for successfully tackling her cannabis use—which was regarded as a contributing cause of her mental health problems, including prior episodes of psychosis. However, the magistrate remained concerned about the risk of Sonya resuming drug use in future situations of stress. This view is consistent with an overall tendency in the judgments to be sceptical of the sustainability of parents' efforts to overcome AOD dependency, and—in assessing realistic possibility of restoration—to perceive the relevance of AOD as contingent on the more strongly influential factors of mental health and insight. Hence the significance of AOD in the Court's determination on restoration is less than might be envisaged given its dominance as a reason for the child's initial removal. This chapter also hypothesised that parents who, unlike Sonya, have *not* been able to attain drug abstinence during the course of proceedings, are less likely to navigate their legal case all the way to contested hearing.

³⁶⁹ *ASK* (n 89) [172], [224]; *Ezekial* (n 160) 13, 14; *Malakhai* (n 17) [144].

³⁷⁰ *Abbey* (n 18) [109].

³⁷¹ See also Swain and Cameron (n 205), a study of the presence of parental disability in care and protection court files in the Children's Court of Victoria, which noted that 'orders made by the [court] rarely explicitly referred to disability in their terms and conditions, even where the reports presented to the Court explicitly did refer to parental disability' (at 172), and that although parents with intellectual disability were disproportionately represented in cases before the Court, 'there was little evidence of "difference" in the response of the [court] to disabled and non-disabled parents' (at 175), thereby placing disabled parents at a relative disadvantage by failure to accommodate for their difference. The study further found that 'the weight or significance that magistrates give to particular disabilities in their determinations, is almost impossible to establish through scrutiny of the Court file' (at 175).

Housing is another issue to diminish in significance, relative to other factors, between the initial removal and the determination stage. Together with employment status and financial security (both positive features of Sarita's situation), the Court sometimes notes the parent's accommodation arrangements as *enhancing* a case for restoration—but tends not to treat any of these matters of material security as being of crucial significance. Housing insecurity is not usually a reason for finding no realistic possibility of restoration, other than to the extent it is associated with notions of parental irresponsibility or volatility. However, the pool of judgments may not fairly reflect the full impact of homelessness and financial stress on parents whose children are removed into care—as these burdens are likely to add to the obstacles making it difficult for many parents to pursue a contested court hearing.

Sarita and Sonya were both regarded as generally competent in their practical parenting ability. Given that the question of restoration is fundamentally intertwined with evaluation of parenting capacity, it is unsurprising that the judgments refer to generic parenting skills sufficiently often for this factor to appear as 'moderately' influential. It is far less influential, however, than the capacity to nurture the child's emotional security³⁷²—an attribute which Sarita was found to possess, and Sonya to lack.

The presence of informal support, within family or community networks, is a reason for decision in 50% of the judgments finding a realistic possibility of restoration. Sarita's case for restoration was bolstered by her community networks. Sonya's circumstances fell within the one-quarter of 'no realistic possibility' judgments in which the parent's support options are deemed either non-existent or inadequate—the Court being sceptical of the level of support Sonya's sister could provide. It is clear that social isolation presents a barrier to restoration for many parents, as do the structural and intergenerational social inequalities that affect perceptions of whether a parent's friends and relations are suitably respectable and reliable sources of support.

The theme of informal supports links strongly with issues of children's cultural identity. There is little conceptualisation in the judgments of Aboriginal children's cultural needs—and the ability of the family to fulfil these—as being directly relevant to assessment of realistic possibility of restoration. Instead, as illustrated in Sonya's case, the importance of family, kin and community is seen as an issue for the placement and continuing cultural identity of children who are *not* restored to their parents. Several interview participants from the

³⁷² See Chapter 7, section (iv).

Department are optimistic that the system is currently poised for change in this regard, with a series of legislative, policy and program reforms strengthening the scope for argument that Aboriginal children's restoration to their parents is the foremost means of securing their cultural wellbeing and belonging.

Lastly, this chapter found that fewer than half of the judgments discussed children's views or wishes in regard to restoration, and a smaller proportion of these placed actual weight on these as contributing to the decision. The child's voice appears to be most strongly respected when resistant to restoration to a parent who has been physically or psychologically violent. The absence of a more consistent, explicit consideration of the voice of the child, across the body of judgments, appears to reinforce other findings of this thesis in relation to the system's relatively limited focus on the 'circumstances of the child' component of the test for realistic possibility of restoration.

CHAPTER TEN

Conclusions and Implications

Case Stories concluded: Sarita and Sonya

Sarita's story concluded¹

The Court found that Sammy's return to the care of his mother would meet his developmental, familial and cultural needs, and was consistent with the statutory permanent placement hierarchy² and principle of least intrusive intervention.³ Given Sarita's successful management of her mental health for the past two years, the support of her local Sikh community, and her competence in raising her older sons, any risk to Sammy was 'very low'.

There was, therefore, a realistic possibility of restoration. The Court's final orders were for parental responsibility to remain with the Minister for a further 12 months, with Sammy to be restored to Sarita's care during the first three months of this period. Thereafter full parental responsibility was to revert to Sarita.

Sonya's story concluded⁴

While acknowledging Sonya's achievements in drug abstinence and stabilising her mental health, the Court stated that 'this progress has not yet been subjected to any great test'. It was also decided that Sonya's general parenting skills did not extend to insight into the children's emotional needs, particularly for protection from exposure to violent relationships. There was therefore no realistic possibility of restoration.

Merinda and Nate would remain in their placement with Merinda's father under the parental responsibility of the Minister. The Court emphasised that planning was yet to be undertaken to ensure their Aboriginal cultural identity needs were met through engagement with Sonya's mother and extended family. The Court suggested there be consideration of allocating to Sonya 'at least part of' parental responsibility for the children's cultural identity.

¹ Based on *SK v Secretary, Department of Family and Community Services* [2016] NSWDC 273 ('SK'). See parts 1–4 of Sarita's story in chapters 6, 7, 8 and 9.

² *Children and Young Persons (Care and Protection) Act 1998* (NSW) ('The Act') s 10A(3)(a) ('permanent placement principles'): preferencing restoration to the parent[s] if practicable and in the best interest of the child.

³ *Ibid* s 9(2)(c) ('principles for administration of Act'): decisions to protect a child from harm must be the least intrusive intervention into the child's life consistent with the paramount concern of protection from harm and the promotion of the child's development.

⁴ Based on an unpublished judgment of the Children's Court, 2009. See parts 1–4 of Sonya's story in chapters 6, 7, 8 and 9.

Chapter Overview

This chapter concludes the thesis. Part A consolidates the study's findings on the factors influencing judicial decisions on 'realistic possibility of restoration' (research question 1). Part B considers particular obstacles to restoration, in light of the findings in Part A (research question 2). Part C discusses some of the practical, policy and reform implications of the findings (research question 3).

A. Research Question 1: Requirements for a Realistic Possibility of Restoration

...they're harping on about [the mother's] mental health and not seeing a psychiatrist, yet she's done everything else under the sun. No-one was really looking at what is going on for this little child. She's regressing...a lot of things are happening for her, yet we're so caught up about, you know, Mum not seeing a psychiatrist – it's just – it's really bizarre. (Caseworker 11)

Research question 1 asked: According to the factors influencing judicial determinations on whether restoration is or is not realistic, what is needed from the Court's perspective for restoration to be achievable?

In answering this question, the thesis analysed the Court's application of the statutory test of realistic possibility of restoration. The test requires evaluation of whether restoration is a realistic possibility within a 'reasonable period' of up to 24 months, in consideration of two components: the circumstances of the child, and the likelihood of the parents satisfactorily addressing the issues that led to the child's removal. The test operates in conjunction with other important legal constructs, including the paramount concern of the child's safety, welfare and wellbeing, and the avoidance of unacceptable risk to the child.

Naturally, the Court's assessment varies from case to case in accordance with individual facts, and no precise formula emerges from the study, uniformly applicable to each set of circumstances. However, there are some clear, consistent patterns in the factors most strongly influencing the Court's reasoning, as well as in the moderately and less influential factors.

The thesis also sought to identify areas of *inconsistency* in the reasons for decision. Particular contrasts have been noted during the course of discussion in chapters 7 to 9. These relate to

differences in the perspective of individual judicial officers on certain issues.⁵ Additionally, the relative weight placed on some factors is contingent on whether the decisions are in favour of or adverse to restoration.⁶ Overall, however, there are few areas of incongruity, and the themes are remarkably consistent across the body of judgments.

(i) Adult-focused factors

The Court's reasons for decision on restoration are dominated by interrelated matters of the parents' *state of mind*: mental health and 'insight', and *attitude*: acceptance of responsibility, cooperation with the child protection intervention, and willingness or capacity to prioritise the child's needs.

The theme of *mental health*⁷ emerged as second only to 'insight' in its prevalence as a factor informing the reasons for decision. Most parents involved in the child protection legal system are expected to attend counselling, whether this be to treat a diagnosed mental health condition, or more generally to confront and address the circumstances of their child's neglect or abuse. The desired outcomes of therapy include recognition of and empathy for the child's emotional needs, and the parent achieving their own state of wellbeing sufficient to enable a stable environment for the child in the foreseeable future. In many cases there is a perception that, in order to tackle the root causes of the child protection issues, the therapy should delve into the parent's own history of childhood abuse or other trauma.

*Insight*⁸ is 'the' leading factor as measured by its overall frequency as a cited reason for decision. However, this is heavily weighted to lack of insight, which appears in 80% of 'no realistic possibility' decisions – whereas just over 50% of 'realistic possibility' outcomes expressly affirm the presence of insight. To some degree lack of insight serves as a 'catch-all' notion, but there is also consistency in its association with minimisation of responsibility for risk or actual harm to a child. Other associated factors are dishonesty, belligerence, inadequate engagement with programs and services, and denial of one's own mental health problems.

⁵ See, eg, Chapter 8, section (ii), on conceptualisations of domestic violence, especially its perceived connections with mental health; and Chapter 9, part A, section (i) on cannabis use.

⁶ For example, more weight is placed on the absence of 'insight' than on its presence (see Chapter 7, section (ii)). The reverse position applies to 'informal supports' (Chapter 9, part A, section (ii)) and 'housing' (Chapter 9, part B, section (i)). Children's relationships receive more attention in decisions in favour of restoration than in decisions against (see Chapter 8, section (iv)), while the reverse applies to children's stability (Chapter 8, section (iii)).

⁷ See Chapter 7, section (iii).

⁸ Ibid section (ii).

*Engagement, cooperation and compliance*⁹ are seen as important – in demonstrating a positive attitude to the child protection intervention, and in order to ‘address’ specific concerns such as mental health, domestic violence, drug and alcohol misuse, and practical parenting skills. The vast majority of parents achieving restoration, along with 55% of parents in the ‘no realistic possibility’ judgments, had engaged with casework, services or programs in some way. However, these efforts, no matter how busy and concerted, are unlikely to be deemed sufficient in the absence of the therapeutic mental health outcomes outlined above.

Approximately 50% of the judgments place reliance on the parent’s *candour* (their honesty in general) and *credibility* (specific to their evidence in Court).¹⁰ Although adverse inferences are sometimes drawn from the parent’s demeanour as a witness, the Court is usually more concerned with the substance of the parent’s evidence and its reliability.

*Domestic violence*¹¹ was the leading cause, in the sampled judgments, for the Department’s initial removal of the child. It remains a substantially influential concern in the Court’s assessment of realistic possibility of restoration, but becomes proportionally less significant than mental health and the ‘attitudinal’ factors discussed above. Domestic violence is, however, closely interwoven in the judgments with the leading factors of insight, mental health, and capacity to meet the child’s emotional needs. Perceived associations between mental ill-health and domestic violence—including the mental health status of women as *contributing to* the violence inflicted on them—reflect well-established concerns in research literature about ‘mother-blaming’ discourses in the child protection sphere.

*Alcohol and other drugs misuse*¹² was the second-most prevalent reason for initial removal, but in proportion to other factors becomes much less influential at the Court determination stage, being a reason for decision in under one-third of the judgments. This surprising finding may be partly the result of a ‘distortion’ in the nature of the sample of judgments—it being likely that substance-addicted parents struggle, in a range of ways, to persist with litigation all the way to defended hearing. The study also found that consideration of substance misuse is sometimes subsumed into issues of insight and mental health, and treated as subsidiary to, or contingent on, the resolution of mental health as the primary concern.

⁹ Ibid section (i).

¹⁰ See Chapter 8, section (i).

¹¹ Ibid section (ii).

¹² See Chapter 9, part A, section (i).

The availability of *informal support*¹³ for the parent, from family members or community networks, is a substantially influential consideration in decisions in favour of restoration, and moderately influential in the judgments overall. Perceptions of social isolation, or unreliable, unsuitable friends and family, influence the decisions in around one-quarter of ‘no realistic possibility’ outcomes.

Sarita and Sonya revisited

The contrasting outcomes in the cases of Sarita and Sonya epitomise these adult-focused factors, and the fine distinctions that separate the efforts of parents as ‘good’ or ‘not good enough’. The main form of Sarita’s engagement with the system’s expectations was mental health therapy. She did not enlist in a frenzy of courses—in fact, there is no mention in the judgment of Sarita attending any parenting program. While not uncooperative, her relationship with caseworkers appears to have been tense, even terse, at times. But her engagement with mental health services was committed and sustained. The evidence of the treating practitioners, combined with Sarita’s own credibility as a witness, convinced the judge that she possessed the requisite insight and mental health stability for restoration. Her respectable networks of community support were an additional bolster to the Court’s confidence.

Sonya engaged in several activities, including generalist and drug counselling, parenting education, and a domestic violence service for help moving house away from her ex-partner. There was no suggestion in the judgment that she wasn’t cooperative. However, Sonya’s participation in counselling was deemed insufficiently intensive—or not correctly targeted—therefore failing to enable insight and capacity to meet the children’s psychological needs. Additionally, although she had achieved drug abstinence, the Court decided that a hypothetical drug relapse posed a risk to the more significant issue of mental ill-health. The informal support of Sonya’s sister was regarded as unreliable, and other family members were briefly mentioned as ‘unsuitable’.

¹³ Ibid, part A, section (ii).

(ii) Parent-Child Relationship and Child-focused factors

The parent's *capacity to meet the child's emotional (or psychological) needs*¹⁴ is a leading influential factor in the decisions, and receives far greater emphasis than practical ability to provide for the child's day-to-day physical care. Perceived indicators of this attribute include reflective and responsive empathy, prioritisation of the child's needs above adult concerns, and a 'consistent' style of parenting (as opposed to erratic or emotionally volatile interactions). The parent's own mental health, and a stable lifestyle, are also seen as essential in providing for the child's wellbeing. Many of the parents in the 'no realistic possibility' judgments were acknowledged as having love for and commitment to their child. They were observed to respond to the child's cues and reciprocate affection intermittently, or in an immediate context – but were deemed to fall short in capacity to *sustainably* provide emotional security.

The child's *stability and development*¹⁵ is a substantially influential factor. It arises mainly in the context of the child's perceived gains in interim out-of-home care (or kinship care), and concerns that restoration would undo these gains. The emphasis is on progress in areas such as health, behaviour, school attendance, and the general benefits of a structured routine. Conversely, a small minority of judgments draw attention to the chronic *instability* imposed on some children in out-of-home care.

While the 'stability and development' theme refers to children being 'settled' in their placement, it is less common for the judgments to consider whether the children are experiencing happiness, love and connectedness in out-of-home care. The theme of the *child's relationships*,¹⁶ also substantially influential, is more likely to be associated with the child's positive, loving bond with their parents – and hence to be relied upon in decisions in favour of restoration – than to be an identified feature of foster care. However, a pre-existing parent-child bond will not usually tip the scales in favour of restoration unless accompanied by the more dominant factor of the parent's capacity to provide for the child's emotional security into the future.

Other child-focused factors emerge from the analysis as not strongly influential. These are, firstly, the *views (or wishes) of the child*,¹⁷ which are specifically mentioned in under half of

¹⁴ See Chapter 7, section (iv).

¹⁵ See Chapter 8, section (iii).

¹⁶ Ibid section (iv).

¹⁷ See Chapter 9, part B, section (iii).

the judgments, and carry determinative weight in a smaller proportion. Also appearing in the ‘less influential’ category is the child’s *cultural identity*,¹⁸ and the cultural needs flowing from this identity. As there is no way of determining how many families in the pool of judgments were of a culturally and linguistically diverse background, the proportion of cases referencing the child’s cultural needs is a compromised form of measurement. However, of the 22% of decisions identifying the family as Aboriginal, it is clear that consideration of cultural identity is overwhelmingly confined to planning for the child’s future in out-of-home care – that is, in consequence of a decision that there is to be no restoration to the parents. It is rare for matters of culture to be treated as directly pertinent to the question of realistic possibility of restoration itself.

Sarita and Sonya revisited

Sarita’s son, Sammy, and Sonya’s son, Nate, were both around two years old at the time of the decisions, making it unsurprising that their wishes were not referred to. Sarita’s teenage son, however, expressed his views to the Court. He made a very positive impression on the judge, adding to the weight of evidence of Sarita’s capable parenting.

There was brief mention of Sonya’s four-year-old daughter wanting to live with her mother, but this did not affect the Court’s decision. Nor was the magistrate swayed by the ‘good relationship’ between mother and daughter, or by Sonya’s generally competent parenting skills. These were outweighed by her perceived inability to provide for the children’s emotional security.

The Court referred to incidents of conflict between Sarita and caseworkers, arising from Sarita’s distress at aspects of her son’s quality of care. There is otherwise very little detail, in the 66-page judgment, regarding the child’s life in foster care over the two years since his birth.

In Sarita’s case, the Punjabi heritage and Sikh religion of mother and child were treated as a reason for finding a realistic possibility of restoration. In contrast, Sonya’s contribution to her children’s Aboriginal cultural needs was raised by the magistrate as a subsidiary consideration, only *after* reaching a determination of ‘no realistic possibility of restoration’.

¹⁸ See Chapter 9, part B, section (ii).

(iii) Conclusions on the Requirements for Realistic Possibility of Restoration

This section consolidates the core thematic patterns in the factors informing the Court's decisions, as these relate to the two limbs of the statutory test for realistic possibility of restoration: the likelihood of the parents satisfactorily addressing the issues that led to their child's removal, and the child's own circumstances.

As discussed in chapter 6, and reinforced in subsequent chapters, there is a marked shift in emphasis from the reasons for the child's initial removal to the reasons for the Court's decision on realistic possibility of restoration. The Department's decisions to remove a child are largely based on (a) visible, externalised adult behaviours which pose a potential child protection risk, and (b) indications of actual, *physical*, neglect or abuse. These are the 'issues' that, according to the wording of the legislation, the parent is expected to satisfactorily address. The Department formulates a set of required tasks for the parent, listed in a 'Summary of Proposed Plan',¹⁹ and filed with the Court. However, few of the judgments mention this Plan and its components²⁰—instead turning the spotlight on the parent's insight, attitude, an intensified focus on parental mental health, and capacity to provide for the child's psychological rather than physical needs. What appears to be implicitly happening, as a matter of statutory interpretation, is that the test becomes not so much addressing 'the issues' themselves as the *underlying* contributors to those issues. These underlying 'root' causes, in turn, may be deeply personal to the parent's psyche. The tangible, precipitating issues for the child's removal become less important than the *intrinsic* qualities equipping a parent to meet the child's own intrinsic needs.

In relation to the prescribed consideration of 'the circumstances of the child', there is a dichotomy in the extent to which the judgments can be described as child-focused. On the one hand, the parent's capacity to meet the child's emotional needs ranks within the group of four 'leading' influential factors in the Court's decisions. Children's stability, development, and relationships are substantially influential factors, and the parent's practical parenting skills moderately influential. Even the ostensibly 'adult-focused' factors are at issue only because they impair the adult's parenting capacity and/or pose a risk to the child. Thus it cannot be

¹⁹ The 'Summary of Proposed Plan' is prepared by the Department and sets out tasks and goals for the parent to meet: see Chapter 2, part C 'The Legal Process', and the Court's *Practice Note 5: Case Management in Care Proceedings*. It is colloquially referred to by professionals in the legal system as the 'SoPP'.

²⁰ The Summary of Proposed Plan is mentioned in 17 of the 98 judgments. Not all of these references entail a specific assessment of whether the various components of the plan have been addressed. See also Chapter 5, part D, section (ii).

said that the Court's concerns are not, ultimately, child-focused – as inherent to the nature of the jurisdiction.

Yet, the outward reasoning in many of the judgments does not direct a strong lens on the individual child whose future is at stake. Around half the judgments do not expressly reference the child's circumstances at all. Of those that do, the description of the child's 'circumstances' is often subsumed into a reiteration of the risks posed by the parent's circumstances,²¹ rather than considering the child as a unique person with an existence independent of the parent's behaviours. Furthermore, the Court's concern for the child's emotional needs is approached from the angle of *the parent's* capacity. This is often an abstract, hypothetical future capacity, although incorporating evidence of observed parent-child interactions. The emphasis on this factor tends to overlook the personal, immediate wellbeing of the individual child, including the fabric of the child's current 'circumstances', relationships, and happiness (or otherwise) in interim care.²² Of course, any potential for the Court to delve into these issues is highly constrained by time and workload pressure, and by its circumscribed role vis-à-vis the Department. This situation appears to be replicated internationally: an American study of 'hearing quality' in child protection cases observed that:

the wellbeing of children in care...was the least covered area of inquiry by the courts. The time and resources available to most courts leave judges with little time to consider wellbeing factors. Most courts seemed to assume that if there is an issue about a particular wellbeing factor, someone will bring it up to be addressed; therefore if it is not brought up it is not an issue.²³

²¹ See Chapter 5, part D, section (i).

²² See Chapter 5, part D, section (i), and Chapter 8, section (iii).

²³ Judge Robin D Sage and Tara Grigg Green, 'Improving Hearing Quality in Child Welfare Cases' (2022) 73 *Juvenile and Family Court Journal* 17, 31.

B. Research Question 2: Obstacles to Restoration

What is the system if we don't see that parents have capacity to change and address the issues? And I think that children have a right to live with their parents if their parents are safe. So I think that it's so frustrating when we can see that all of this work is being done and there are strides, but it's just getting lost in the sauce, almost, of the proceedings. (Caseworker 7)

Research question 2 asked: What do the Court's decisions on realistic possibility of restoration indicate about the societal or systemic problems perceived as impeding or prohibiting 'good enough parenting'?

At a broad 'societal' level, question 2 is partly answered by looking at the main reasons for children's removal from their parents—such as domestic violence, drug and alcohol misuse, poor mental health—and the ways in which the Court evaluates the significance of these and the many other factors in its decisions. Chapters 6 to 9, and the summaries in Part A of the present chapter, discuss various intersections between these social problems and the Court's view of the essential requirements for adequate parenting capacity—drawing out mental ill-health as a key societal problem in the child protection field. This Part turns to consideration of particular 'systemic' barriers to realistic possibility of restoration. The study's finding of parental attitude and mental health as the Court's leading concerns bring into sharp relief the limits of the child protection legal system in facilitating parental mental wellbeing and constructive engagement.

(i) Counter-Productive Aspects of the Child Protection Legal System

It is firmly established in existing research that parents, on the whole, experience the bureaucratic and legal processes flowing from child removal as overwhelmingly negative. Reasons include the inherent distress, grief and stigma of the child's removal;²⁴ the stress,

²⁴ Frank Ainsworth and Patricia Hansen, 'Behind the Closed Door: A Guide and Parents' Comments on the Workings of the New South Wales Children's Court' (2013) 38(2) *Children Australia* 47, 51; Teresa Hinton, *Rebalancing the Scales: Access to Justice for Parents in the Tasmanian Child Safety System* (Report, Anglicare Tasmania, 2020) 38; David McConnell, Gwynnyth Llewellyn and Luisa Ferronato, *Parents with a Disability and the NSW Children's Court* (Research Report, University of Sydney, 2000) 86; BJ Newton, 'Aboriginal Parents' Experiences of Having their Children Removed by Statutory Child Protection Services' (2020) 25 *Child & Family Social Work* 814, 818; Nicola Ross et al, 'Evidence-based law and practice with disadvantaged populations: Perspectives of parents involved in child protection proceedings' (2017) 12 *Newcastle Law Review* 23, 38; Senate Community Affairs Reference Committee, *Report: Out of Home Care* (Commonwealth of Australia, 2015) 139–40; Alana Thompson, 'Therapeutic Jurisprudence and the Children's Court: Creating a More Relational Approach to Protection and Care Proceedings' (PhD Thesis, University of Western Australia, 2011) 140–42, 178; Tamara Walsh and Heather Douglas,

confusion and time pressure of Court proceedings;²⁵ and the largely adversarial, deficit-focused and ‘forensic’ nature of the case as presented against them.²⁶ Therefore, the process is unlikely to be conducive – and indeed may be counter-productive – to the personal wellbeing and stability that the system requires of a parent in order to constructively build a case for restoration.

These barriers to parent ‘engagement’ are affirmed by the present study – particularly by the observations of interview participants²⁷ – but are not new findings. The study does, however, provide original angles on these well-traversed themes. First is the finding of the substantial extent to which parents’ relevant strengths, particularly in cooperation and engagement, *are* present and recognised in the judgments that nonetheless find no realistic possibility of restoration.²⁸ As observed in chapter 7, ‘[a]t first glance...there can appear little to distinguish between the parents whose cases for restoration are successful and, among those who are refused restoration, the large subset who make a concerted effort to cooperate with restoration requirements’.²⁹ This suggests that there is clear and manifest *potential*, for some of these parents at least, to reach a realistic possibility of restoration – and which the legal (and casework) process might do more to support and facilitate. Some policy implications of this finding are canvassed in Part C.

A second and related finding is that a parent’s busy engagement, with a series of services, programs and courses, may be less important than is generally assumed. There is complexity in this argument – as a motivated attitude is undeniably perceived favourably by the Court. However, as seen in the ‘extrinsic-intrinsic shift’, and in the priority placed on certain outcomes from mental health therapy, a parent’s well-intended efforts to complete a list of tasks will not necessarily result in a realistic possibility of restoration. It seems that the services parents engage with are often ‘not quite the right sort’ – being not sufficiently targeted, in the

‘Lawyers, Advocacy and Child Protection’ (2011) 35(2) *Melbourne Law Review* 621, 636. See also Chapter 7, nn 283–88, and accompanying text.

²⁵ Susan Collings et al, ‘“She was there if I needed to talk or to try and get my point across”: Specialist Advocacy for Parents with Intellectual Disability in the Australian Child Protection System’ (2018) 24(2) *Australian Journal of Human Rights* 162, 169, 173; Hinton (n 24) 39, 46, 62–9; Ilana Dodi Luther, ‘“On the Poverty of Responsibility”: a Study of the History of Child Protection Law and Jurisprudence in Nova Scotia’ (PhD Thesis, Dalhousie University, 2015) 389–90; Ross et al (n 24) 29–30; Rosemary Sheehan, ‘The Marginalisation of Children by the Legal Process’ (2003) 56(1) *Australian Social Work* 28, 31–2; Thompson (n 24) 154–5, 227.

²⁶ Hinton (n 24) 6, 71, 75–6; Ross et al (n 24) 29–30, 37–8; Walsh and Douglas (n 24) 623.

²⁷ Judicial Officer 22; Registrars 1, 2; Caseworkers 1, 5, 8; Lawyers 6, 8.

²⁸ See part A, section (i) above.

²⁹ See Chapter 7, section (i).

eyes of the Court, to the core child protection issues.³⁰ Therefore it appears there is a need for better integration between the child protection legal system and the most appropriate services for parents' needs, especially in the mental health field.

(ii) Lack of Integrated Mental Health Service Provision

With [public] health services, the wait list for a psychiatrist is three to six months. Then we get there, and then the service doesn't even reply to us half the time. Then they end up telling us 'Oh, the psychiatrist is not available'. Okay, move on to the next psychiatrist. 'Oh, that psychiatrist can't do reports'. And the time frames become blown out. And then the Court's coming back to us saying 'what's going on? Nothing's happening – we need to finalise this matter'. (Caseworker 11)

Chapter 7 referred to the consensus of study participants, expressed as a sense of either frustration or resignation, that it is difficult for parents in care matters to access mental health assistance.³¹ The caseworker quoted above was describing the situation in the suburbs of Sydney; the position in regional and rural areas is in all likelihood worse.³² Waiting lists and delay were not the only source of complaint, which also related to the *suitability* of the available services. Public mental health services were described as crisis-based, rigid in eligibility criteria and mode of service delivery, and not adapted to the needs of parents in a child protection context.

These concerns are strongly reflected in existing research on a disjuncture between mainstream mental health services and child protection systems. Commonly identified problems include differing institutional aims, philosophies and constructs of 'roles',³³ poor

³⁰ See Chapter 7, section (i).

³¹ See Chapter 7, section (iii).

³² Ibid. See also Auditor-General for New South Wales, *Oversight of the Child Protection System* (Performance Audit Report, June 2024) 47.

³³ Fiona Arney, Carole Zufferey and Ruth Lange, "'Mental Health is One Issue. The Child is Another Issue. Issues Bounce Back and Clash Against Each Other": Facilitating Collaboration Between Child Protection and Mental Health Services' (2010) 5(1) *Communities, Children and Families Australia* 21, 23, 30; Dominiek Coates, 'Working with Families with Parental Mental Health and/or Drug and Alcohol Issues where there are Child Protection Concerns: Inter-Agency Collaboration' (2017) 22 *Child & Family Social Work* 1, 3, 4–5; Yvonne Darlington and Judith A Feeney, 'Collaboration Between Mental Health and Child Protection Services: Professionals' Perceptions of Best Practice' (2008) 30 *Children and Youth Services Review* 187, 188; Ruth Lange and Anne Sved Williams, 'Linking Adults' Problems with Children's Legal Pain: Legal, Ethical and Clinical Issues' (2011) 18(2) *Psychiatry, Psychology and Law* 232, 234–5; Rosemary Sheehan, 'Partnership in Mental Health and Child Welfare' (2005) 39(3)–(4) *Social Work in Health Care* 309, 319.

inter-agency communication,³⁴ lack of coordination in service provision,³⁵ and an absence of holistic, multidimensional responses to the complex circumstances of the families.³⁶ Many Australian studies have highlighted a need for collaborative and integrated programs connecting child protection and mental health.³⁷ These arguments are usually made in the context of early intervention and prevention, but also relate to events after a child is removed;³⁸ for instance, there have been suggestions that counselling services be embedded in the care and protection court process.³⁹

In NSW, most non-government sector agencies in child protection provide ‘generic casework support’, not therapeutic services.⁴⁰ Traditional case management assists families to access resources for their practical needs and goals,⁴¹ whereas family therapy involves ‘evidence-based’ interventions⁴² that apply a ‘clear treatment protocol’,⁴³ and are delivered by qualified mental health professionals.⁴⁴ A review of the NSW statutory child protection system in 2024

³⁴ Arney, Zufferey and Lange (n 33) 23; Coates (n 33) 2, 3, 4; Darlington and Feeney (n 33) 188; Sheehan (n 33) 317–18.

³⁵ Arney, Zufferey and Lange (n 33) 23; Samuel Carpenter and Agnik Sarkar, ‘Narrative Exposure Therapy in a Child Protection Context: Breaking Intergenerational Cycles by Providing a Pathway Through Trauma’ (2024) 45 *Australian and New Zealand Journal of Family Therapy* 464, 466; Darlington and Feeney (n 34) 188; Coates (n 33) 2; Daryl Higgins et al, *Experiences of People with Mental Ill-Health Involved in Family Court or Child Protection Processes: a Rapid Evidence Review* (Report, Institute of Child Protection Studies, Australian Catholic University, 2021) 34–5; Lange and Sved Williams (n 33) 237; Rhys Price-Robertson, ‘Fatherhood and Mental Illness: a Review of Key Issues’ (Child Family Community Australia Policy and Practice Paper No 30, Australian Institute of Family Studies, 2015) 16; Sheehan (n 33) 317–20; Rosemary Sheehan and Greg Levine, ‘Parents with Mental Illness: Decision-making in Australian Children’s Court Cases Involving Parents with Mental Health Problems’ (2005) 27(1) *Journal of Social Welfare and Family Law* 17, 26–7.

³⁶ Price-Robertson (n 35) 15–16.

³⁷ See, eg, Coates (n 33) 7–8; Darlington and Feeney (n 33) 194–7; Elizabeth Fernandez et al, *A Study of the Children’s Court of New South Wales* (Research Report, UNSW, 2014) 22; James G Scott et al, ‘The Association Between Child Maltreatment and Mental Disorders in the Australian Child Maltreatment Study’ (2023) 218(S6) *Medical Journal of Australia* S26–S33, S32; Sheehan (n 33) 321; Sheehan and Levine (n 35) 27; Ain Suomi, Annalese Bolton and Dave Pasalich, ‘The Prevalence of Post-Traumatic Stress Disorder in Birth Parents in Child Protection Services: Systematic Review and Meta-analysis’ (2023) 24(2) *Trauma, Violence and Abuse* 1032, 1041; Thompson (n 24) 209–11.

³⁸ Carpenter and Sarkar (n 35); Sheehan and Levine (n 35); Suomi, Bolton and Pasalich (n 37) 1033.

³⁹ Laura Dodds, ‘Fragmented Justice: The Role of Social Work in Addressing Risks to Children Navigating Parallel Legal Systems in Australia’ (2025) *Australian Social Work* (published online 13 November 2025) 1–14: 7–8; Thompson (n 24) 209–10.

⁴⁰ Auditor-General for New South Wales (n 32) 36.

⁴¹ Bianca Albers et al, ‘The Early Implementation of FFT-CW, MST-Psychiatric, and SafeCare in Australia’ (2020) 30(6) *Research on Social Work Practice* 658, 664–5; George Economidis, ‘An Evaluation of the Implementation of Family-Based Therapy Programs to Enhance Government Responses to Child Physical Abuse and Neglect in New South Wales, Australia’ (PhD Thesis, UNSW Sydney, 2023) 146; George Economidis et al, ‘Enablers and Barriers to the Implementation of Multisystemic Therapy for Child Abuse and Neglect (MST-CAN) into the Routine Delivery of Child Protection Services in New South Wales, Australia’ (2023) 155 *Children and Youth Services Review* 107297: 1–12, 8 (‘Multisystemic Therapy’).

⁴² Economidis (n 41) 32, 34.

⁴³ Ibid 32.

⁴⁴ Ibid 34.

found that ‘only a small proportion of the families receiving family preservation services were offered a therapeutic or clinical service component’.⁴⁵

There are isolated instances, in NSW and other parts of Australia, of dedicated programs specifically targeting the mental health needs of parents and children within the care and protection system. Examples include:⁴⁶

- Multisystemic Therapy for Child Abuse and Neglect (‘MST-CAN’) and Functional Family Therapy–Child Welfare (‘FFT-CW’) (in NSW, Victoria and Queensland)—evidence-based interventions adopted from the USA, combining intensive family therapy with case management in family preservation programs, usually delivered by non-government agencies;⁴⁷
- ‘Nabu Aboriginal family preservation and restoration’ (in NSW)—a culturally grounded, strengths-based wellbeing program, providing ‘narrative therapy-informed’ healing, case planning support, advocacy and mentoring, delivered by an Aboriginal community-controlled women’s health and welfare organisation;⁴⁸
- ‘Whole Family Teams’ (in NSW)—combining mental health, drug and alcohol and parenting interventions for families with significant child protection concerns, delivered by the State Government’s health portfolio;⁴⁹
- ‘Narrative Exposure Therapy’ (in South Australia)—‘trauma-responsive’ therapy for parents, as a component of a combined casework and therapeutic family reunification program delivered by a non-government agency;⁵⁰
- ‘Mental Health Liaison Project’ (in South Australia)—situating a mental health nurse within a statutory child protection intake and assessment team.⁵¹

⁴⁵ Auditor-General for New South Wales (n 32) 5.

⁴⁶ As based on research literature, and not all necessarily current programs.

⁴⁷ Albers et al (n 41); Economidis (n 41); Economidis et al, ‘Multisystemic Therapy’ (n 41); Economidis et al, ‘Identifying Enablers and Barriers to the Implementation of Functional Family Therapy–Child Welfare (FFT-CW) into the Routine Delivery of Child Protection Services in New South Wales, Australia’ (2023) 149 *Children and Youth Services Review* 106927: 1–20 (‘Functional Family Therapy’); Anthony Shakeshaft et al, *The Application of Functional Family Therapy–Child Welfare (FFT-CW) and Multisystemic Therapy for Child Abuse and Neglect (MST-CAN) to NSW: An Early Evaluation of Processes, Outcomes and Economics* (Report, UNSW Sydney, June 2020); Helen Stallman et al, ‘New Directions in the Treatment of Child Physical Abuse and Neglect in Australia: MST-CAN, A Case Study’ (2010) 9 *Advances in Mental Health* 148.

⁴⁸ SNAICC, Early Intervention Programs: Waminda – South Coast Women’s Health and Welfare Aboriginal Corporation, Nabu Aboriginal family preservation and restoration program (‘Doing It Our Way’ case study resource, SNAICC and Waminda, 2021).

⁴⁹ Coates (n 33).

⁵⁰ Carpenter and Sarkar (n 35).

⁵¹ Arney, Zufferey and Lange (n 33).

Distinctive aspects of these programs have been identified in evaluations and other literature as significant and (broadly) successful. These include a non-judgmental,⁵² empathetic⁵³ attitude towards the parents; investment of time to establish rapport and trust;⁵⁴ delivery of casework in conjunction with therapy⁵⁵ (thereby addressing ‘the interdependency of clinical and practical risk factors’);⁵⁶ intensive⁵⁷ engagement and ‘after-hours’ worker availability;⁵⁸ empowerment of the family in creating their own solutions;⁵⁹ holistic and multidisciplinary service provision;⁶⁰ and parents developing empathy for their children’s experiences via guided reflection on their own history.⁶¹

These features appear, on their face, to be directly responsive to problems identified in this thesis. These problems are parents’ experiences of the system as stigmatising and alienating; wasted participation in counselling and other programs deemed ill-fitted; and the presence of parental strengths which so often fail to translate into a convincing case for restoration. However, the listed programs are confined to certain locations within their State, and are not all necessarily current.

The programs known in shorthand as MST-CAN and FFT-CW⁶² are a case-in-point for the *limited* accessibility of therapeutic child protection interventions. These programs were announced with considerable fanfare by the NSW Government in 2016, as part of a suite of policy reforms named ‘Their Futures Matter’. The reforms were intended to drive ‘evidence based’, ‘data informed’ interventions for vulnerable children and families.⁶³ MST-CAN and

⁵² Economidis et al (‘Multisystemic Therapy’) (n 41) 8; Shakeshaft et al (n 47) 51; Stallman et al (n 47) 150.

⁵³ Stallman et al (n 47) 150.

⁵⁴ Carpenter and Sarkar (n 35) 470; Economidis et al (Functional Family Therapy’) (n 47) 8; Economidis et al (‘Multisystemic Therapy’) (n 41) 3, 8; Shakeshaft et al (n 47) 46, 48; SNAICC (n 48) 8.

⁵⁵ Economidis et al (‘Multisystemic Therapy’) (n 41); Stallman et al (n 47) 154–8.

⁵⁶ Stallman et al (n 47) 159.

⁵⁷ Economidis et al (‘Multisystemic Therapy’) (n 41) 2, 8; Shakeshaft et al (n 47) 14; SNAICC (n 48) 7, 8.

⁵⁸ Albers et al (n 41) 666; Economidis et al (‘Multisystemic Therapy’) (n 41) 3; Sandra Heriot and Maria Kissouri, ‘Moving Toward an Evidence-Based Family and Community Approach to Improve the Lives of Children and Young People Who Have Experienced Abuse and Neglect’ (2018) 39 *Australian and New Zealand Journal of Family Therapy* 294, 296, 297; Stallman et al (n 47) 151–2.

⁵⁹ Economidis et al (Functional Family Therapy’) (n 47) 5, 8; Economidis et al (‘Multisystemic Therapy’) (n 41) 2, 6, 8; Stallman et al (n 47) 149, 150; SNAICC (n 48) 7.

⁶⁰ Arney, Zufferey and Lange (n 33) 27; Coates (n 33) 3; Economidis et al (‘Multisystemic Therapy’) (n 41) 3; Neve Mucabel-Bue et al, ‘“Keeping Ourselves Safe From the System”: Perinatal Care Model Considerations for Aboriginal and Torres Strait Islander Families Intersecting With Child Protection’ (2025) *Australian Journal of Social Issues* 10.1002: 1–14, 2.

⁶¹ Carpenter and Sarkar (n 35) 471.

⁶² See above n 47.

⁶³ See Audit Office of New South Wales, *Performance Audit: Their Futures Matter* (Report, July 2020) 3, 9, 11, 49; Australian Institute of Health and Welfare, *Child Protection Australia 2018–19* (Report, 2020): Appendix D: Recent state and territory policy changes, 36–8; Heriot and Kissouri (n 58) 295–7; Shakeshaft et al (n 47) 13.

FFT-CW have continued in operation since 2017,⁶⁴ and ‘new contracts’ for both models were announced in late 2025.⁶⁵ However, the programs are not uniformly available, being restricted to certain geographical sites.⁶⁶ MST-CAN and FFT-CW are reported to have difficulty recruiting and retaining the highly skilled workers needed,⁶⁷ particularly in rural areas.⁶⁸ Their suitability for Aboriginal families has also been contested,⁶⁹ despite efforts to make culturally-appropriate adaptations.⁷⁰ The impressions of interview participants, regarding these programs, were underwhelming. One caseworker spoke enthusiastically, saying [FFT-CW] ‘is really good, it’s a really good model’, but added that ‘unfortunately the one person that was doing that job has left [the regional area] in the last couple of months’.⁷¹ Other participants referred to the programs as having ‘dropped away’⁷² or being unavailable in their location,⁷³ being restrictive in eligibility criteria,⁷⁴ and offered to parents ‘too late’.⁷⁵ One caseworker stated bluntly: ‘I never saw them. We didn’t even get a brochure’.⁷⁶

Moreover, as family *preservation* services, MST-CAN and FFT-CW are not designed to help parents achieve restoration—unless, in rather a catch-22, there is already a formal plan for imminent restoration.⁷⁷ In the 2018 case of *Nathan*, which found no realistic possibility of restoration to the mother, Judge Johnstone, then Children’s Court President, observed:

[d]uring the course of the hearing, I did express some concern that the casework team had not satisfactorily addressed the potential for working with the mother to address her issues, short of removal, and for the mother to participate in the ‘evidence based intervention programs’ proposed by the Department in the form of, ‘Multisystemic Therapy for Child Abuse and Neglect (known as MST-CAN), and Functional Family

⁶⁴ Ombudsman New South Wales, *Protecting Children at Risk: An Assessment of Whether the Department of Communities and Justice is Meeting its Core Responsibilities* (Report, July 2024) 90, 100–101.

⁶⁵ Department of Communities and Justice, *Transitioning to the new Family Preservation System* (November 2025) 8.

⁶⁶ Auditor-General for New South Wales (n 32) 36; Ombudsman New South Wales (n 64) 99.

⁶⁷ Albers et al (n 41) 668; Economidis et al (‘Multisystemic Therapy’) (n 41) 7.

⁶⁸ Economidis et al (‘Multisystemic Therapy’) (n 41) 7; Shakeshaft et al (n 47) 49.

⁶⁹ Economidis (n 41) 122–3, 135–6, 176, 178–9, 188, 190; Economidis et al (‘Multisystemic Therapy’) (n 41) 9; Office of the Children’s Guardian, *Special Report under section 139(2) of the Children’s Guardian Act 2019: Family is Culture Review* (NSW Government, March 2022) 11.

⁷⁰ Shakeshaft et al (n 47) 34, 48–9.

⁷¹ Economidis (n 41) 55–6, 108, 156.

⁷² Caseworker 6.

⁷³ Lawyer 4.

⁷⁴ Caseworker 2.

⁷⁵ Caseworker 7.

⁷⁶ Lawyer 6.

⁷⁷ Caseworker 12.

⁷⁸ Shakeshaft et al (n 47) 15–16.

Therapy-Child Welfare (known as FFT-CW)', which the Department states will help 900 families per annum in the future.⁷⁸

The caseworkers made enquiries, eventually relaying to the Court that in order for the mother to be eligible for the programs, there must be in place 'a plan for the child to return home within 4 weeks'.⁷⁹ The judge accepted this was the position, but in a tone of tacit displeasure noted that it 'does not necessarily conform with my understanding of the Department's policy concerning FFT-CW and MST-CAN' and directed that his concerns 'be brought to the attention of' the Department's managing lawyers.⁸⁰ Thus, even from the early stages of *Their Futures Matter* and its purported 'roadmap to deliver transformational change',⁸¹ it was apparent that the change did little to permeate the mental health needs of families once they have entered the legal process.

C. Research Question 3: Implications

I want parents in court, and to actively encourage them, whenever they want to say something, especially in the early stages where they're really just upset...and that children be encouraged to attend court, that the court be a family friendly place ... I'm strongly of the view there needs to be changes in place to make it far less adversarial, and more of a problem solving forum. (Judicial Officer 17)

Research question 3 asked: How might the societal and systemic problems reflected in the Court's decisions be better addressed by the statutory child protection system?

Part C responds to this question by considering the alignment of key findings of the thesis with current developments and ideas in law and policy reform. Section (i) focuses on recent and evolving reforms, primarily flowing from the *Family is Culture* review,⁸² and their resonance with findings regarding 'non-determinative strengths', parental mental health, informal support networks, and children's cultural identity. Section (ii) turns to potential adaptations to the court process, which might help overcome the barriers to engagement and mental wellbeing discussed in Part B. In keeping with the characterisation of question 3 as a 'sub-question', the topics are briefly canvassed rather than comprehensively analysed. Themes such as engaging the extended family, enhanced judicial case management, and

⁷⁸ DFaCS and Nathan [2018] NSWChC 1, [67].

⁷⁹ Ibid [68].

⁸⁰ Ibid [69]–[70].

⁸¹ Heriot and Kissouri (n 58) 295.

⁸² Megan Davis (Chairperson), Independent Review of Aboriginal and Torres Strait Islander Children in Out-of-Home Care in New South Wales, *Family Is Culture* (Review Report, 2019) ('*Family is Culture Report*').

alternative court models, each have significance and complexity that would justify dedicated PhD studies in and of themselves. Nor do I attempt to make specific law reform recommendations. Rather, the discussion in this part aims to provide food for thought, and contribute to existing ideas for constructive change in care and protection.

(i) Building on Strengths

In most⁸³ ‘no realistic possibility’ judgments, there were references to positive aspects of the parents’ efforts, circumstances or capabilities. The thesis identified these as ‘non-determinative strengths’—present and acknowledged by the Court, but outweighed by negative factors. As discussed in Part B, the statutory intervention process is in many ways counterintuitive in supporting parents to progress towards a realistic possibility of restoration. Do recent changes in casework and legal practice have potential to better build on parents’ strengths? A ‘strengths-based’, ‘relational’ and ‘dignity-driven’ approach has been embedded in Departmental policy for at least a decade,⁸⁴ and was emphasised by caseworkers and lawyers in interviews.⁸⁵ The extent to which this translates into practice is inevitably variable across a large workforce,⁸⁶ and highly contested from a parent perspective—as indicated by studies continuing to report on parents’ feelings of disempowerment in interactions with the Department.⁸⁷

Irrespective of these conflicting perceptions, the *Family is Culture* reforms are manifestly directed at supporting parents to retain care of their children, and, crucially, at drawing on the cultural strengths of the kinship network. Some key components of the reforms were summarised in Chapter 2,⁸⁸ while Chapter 9 refers to specific legislative amendments, and incorporates reflections of interview participants on a perceived momentum for change.⁸⁹

⁸³ Approximately 85%.

⁸⁴ Kate Alexander et al, ‘Bringing Dignity to the Assessment of Safety for Children Who Live with Violence’ (2022) 52 *British Journal of Social Work* 3578 (‘Bringing Dignity’) 3581; Natasha Cortis et al, ‘Changing Practice Cultures in Statutory Child Protection: Practitioners’ Perspectives’ (2019) 24 *Child & Family Social Work* 50, 51–2.

⁸⁵ Caseworkers 1, 2, 4, 8; Lawyers 3, 5, 8. See also Chapter 5, part B, section (i) ‘Risk Assessment in the Preparation of a Case’.

⁸⁶ Betty Luu et al, ‘Strengths, Compliance, or Deficits: Examining Professional Viewpoints on the “Realistic Possibility of Reunification” for Parents with Children in Care’ (2025) *Journal of Public Child Welfare* (published online 8 May 2025): 1–25; Davis, *Family is Culture Report* (n 82) Chairperson’s foreword, XVI–XVII; Lawyers 2, 3, 8.

⁸⁷ Kate Davies et al, ‘Family Inclusion in Child Protection: Knowledge, Power and Resistance’ (2023) 147 *Children and Youth Services Review* 106860: 1–9, 4–6; BJ Newton (n 24) 820–21; BJ Newton et al, ‘Restoring Children from Out-of-Home Care: Insights from an Aboriginal-Led Community Forum’ (2025) 30(3) *Child & Family Social Work* 366, 371–2.

⁸⁸ See Chapter 2, part E ‘Recent Policy Developments’.

⁸⁹ See Chapter 9, part B, section (ii) ‘Child’s Cultural Identity’.

In brief, changes in relation to earlier intervention and diversion include: the Department's obligation to apply 'active efforts'; a revamped suite of risk and restoration assessment tools; a specialist consultation panel for every case of potential removal of an Aboriginal child; formation of a specialist, Aboriginal-led program within the Department's legal team; and an inter-agency partnership for the provision of early legal advice to parents. For matters that do land in Court, 'active efforts' continue to apply, this time in relation to the goal of restoration,⁹⁰ and a dedicated court list for Aboriginal care and protection matters has been established at the Children's Court in Dubbo.⁹¹ At all stages there is an emphasis on engaging the child's and parents' family and community: for instance, as an integral aspect of active efforts;⁹² in upholding the s12A Aboriginal and Torres Strait Islander Children and Young Persons Principle; and in flexible adaptation of alternative dispute resolution forums to be more suitable to local communities and culturally driven.⁹³

Underpinning all of these reforms is recognition that the best interests of an Aboriginal child are inseparable from the child's rights to be raised in culture, 'on country', by kin and community.⁹⁴ The findings of this thesis show that the Court already places general weight on family and community support networks as a parental strength—the 'informal supports' factor being a reason for decision in 50% of the judgments finding in favour of restoration. However, there was little emphasis in the judgments on Aboriginal cultural identity as directly informing the evaluation of realistic possibility of restoration. There may be scope to draw on the tension between these findings to bolster advocacy and arguments for (a) the child's cultural needs being expressly considered as part of 'the circumstances of the child' limb of the test in section 83, and (b) greater attention to the strengths of the kinship network in assessing the likelihood of the parent addressing the issues that led to the child's removal.

In a similar vein, greater support for and resourcing of the role of extended family (on the part of the Department and wider social services) may help in some cases to alleviate concerns about parental mental health. Running through the interviews were interconnected views that parental mental health problems do not ordinarily preclude good parenting, that a mental health condition does not necessarily need to be medically 'cured', and that it is unrealistic to

⁹⁰ *The Act* (n 2) s 9A(2)(b)(i).

⁹¹ The Winha-nga-nha List. See Chapter 2, part E 'Recent Policy Developments'.

⁹² *The Act* (n 2) ss 2(b)(ii), 3(d), (e), 4(b), (c).

⁹³ Caseworker 10; Lawyers 3, 9.

⁹⁴ See Chapter 8, section (iv) 'Child's Relationships', and Chapter 9, part B, section (ii) 'Child's Cultural Identity'.

expect this to always be possible. Instead, engagement of kin and community enables support for both parent and for child, especially for times when a parent is particularly unwell:⁹⁵

It's not about Mum's mental health is not addressed. Mum's mental health is an ongoing battle that she's going to battle for the rest of her life. And how do we plan for that and how do we put a network around Mum and the child for those times? That's the reality. ...You can send parents off to a thousand parenting courses—a parenting course doesn't keep the kids safe. A family network keeps the kids safe, right? So let's invest in the network. (Caseworker 10)

Beyond the reforms specific to the *Family is Culture* recommendations, it was apparent in interviews that there are various innovations within the Department to adapt casework roles in targeted ways. Examples include dedicated restoration caseworkers, dedicated 'permanency support' teams working closely with the child and interim carer, and a pre-natal casework position in partnership with NSW Health. Although participants in these roles expressed committed enthusiasm for the value of these adaptations, it was clear that such initiatives are confined to certain districts, with resulting inconsistency and inequity in the kinds of support offered to families across the State.⁹⁶ A participant in a regional area described being unable to attain bare minimum levels of staff; the 'luxury' of divvying up casework roles was outside contemplation.⁹⁷ Nonetheless, the dedicated restoration worker model seems promising in principle, and perhaps holds significant potential if resourced more widely.⁹⁸ The model applies to cases in which restoration is viewed by the Department as a realistic possibility, and enables the caseworker to work more closely and supportively with a parent than ordinary resourcing constraints permit. A participant in this position described asking questions of the parent, to elicit small but significant steps that parents would otherwise assume were not important, and which would fly under the radar:

They might be doing these things day-to-day, but it's not on paper, and no-one knows about it... I always make a point when I first meet parents to say, 'Keep me posted, keep me updated about things that are happening. If you have done something different, let me know, text me after your session with the psychologist if there was a lightbulb moment in there—just tell me things that are actually going on in your matter'. Otherwise there's no evidence. (Caseworker 11)

⁹⁵ See Chapter 5, part C, section (i) 'The Circumstances of the Child'; Chapter 7, section (iii) 'Mental Health'; and Chapter 9, part A, section (iii) 'Informal Supports'.

⁹⁶ This impression is confirmed by references in recent Reports to inconsistent practices and procedures across the Department's districts: see Auditor-General for New South Wales, *Oversight of the Child Protection System* (Performance Audit Report, June 2024) 35; Department of Communities and Justice NSW, *System Review into Out-of-Home Care* (Final Report, October 2024) 61, 88, 90 ('*System Review*').

⁹⁷ Caseworker 2.

⁹⁸ At the time of the interviews in late 2024, this model was said to be running in just two districts.

This concentrated gathering of evidence of parental progress, should – theoretically – strengthen arguments for restoration being a realistic possibility *within the reasonable period* of up to 24 months. As discussed in Chapter 5, the point of the ‘reasonable period’ amendment has been somewhat lost in caseworker assumptions that it means delaying the decision on realistic possibility for this period – as distinct from a forecast made by the Court at the time of hearing, which predicts the likelihood of satisfactory parental progress within two years.⁹⁹ Judicial officers and lawyers had mixed views on whether this reform, implemented from early 2019, had made any real difference in the cases before the Court, and there was a sense that coinciding variables make this hard to assess.¹⁰⁰ Several, however, did feel that the provision should, if properly utilised, enhance prospects for restoration:¹⁰¹ ‘it’s untapped potential, the arguments you can have around that, but it’s about bringing everybody on board. But I think it’s a massive difference’.¹⁰²

(ii) Adjustments to Court Process or Model

It’s a very strange role being a care magistrate. I mean, you don’t interface with the real world except through all of this filtered material...I think it’s a really tough gig because we’re downstream from every decision that’s made. (Judicial Officer 2)

In response to a question about what they would ideally like to change about the care and protection legal system, several participants felt that the legislation is essentially sound.¹⁰³ Instead, problems are seen to lie in the broader societal context of neglect of the needs of vulnerable people,¹⁰⁴ and in the limited capacity of the Court to wield the resources to make a difference for individual children and families.¹⁰⁵ There is very little opportunity for magistrates to explore underlying reasons for a parent’s apparent lack of progress in completing expected tasks, or to guide them in the steps most likely to be effective in achieving requisite change.¹⁰⁶ The Court is similarly constrained in intervening in the immediate circumstances of the child in interim care, or even to be aware of the details of what is

⁹⁹ See Chapter 5, part D, section (ii) ‘Likelihood of the Parents Satisfactorily Addressing the Issues’.

¹⁰⁰ Judicial Officers 4, 6, 9; Lawyers 1, 2, 7, 8. The ‘variables’ include other legislative amendments, changes to Departmental policy and practice influencing the nature of cases in which children are removed, and the extent to which caseworkers or lawyers are ‘taking [the amendment] on board’.

¹⁰¹ Judicial Officers 9, 20, 22; Registrar 1; Lawyers 7, 8, 9.

¹⁰² Lawyer 8.

¹⁰³ Judicial Officers 14, 15; Registrar 1; Caseworker 8; Lawyers 3, 5.

¹⁰⁴ Judicial Officer 5, 8, 14, 19; Registrar 1; Lawyers 3, 5.

¹⁰⁵ Judicial Officers 13, 14; Registrar 1; Caseworker 8; Lawyer 1.

¹⁰⁶ See Chapter 4, part C, section (iii) ‘Hazy Lines and Systemic Constraints’; Chapter 5, part B, section (i) ‘Risk Assessment in the Preparation of a Case’; Chapter 7, section (iii) ‘Mental Health’.

currently happening for the child – these issues being, normally, treated as the province of Departmental (and non-government agency) casework.¹⁰⁷

There was a prevailing sense among interviewed judicial officers that they would *like* to have a more influential role in shaping the direction of cases, and a range of ideas on how to do so. Section (a) below discusses the scope for adjustments within the existing legal process, and section (b) turns to the possibility of more radical changes to the court model itself.

(a) *Adjustments within the existing process*

Despite a general consensus that care matters are conducted in a predominantly adversarial way, some participants argued that ‘all the tools’¹⁰⁸ for a more interventionist approach are in the legislation,¹⁰⁹ but are under-utilised.¹¹⁰ Others are keen to find new ways to expand the scope for the Court to ‘make a difference’. Summarised below are various examples of initiatives and ideas for intensified case management by the Court:

- The 2024 pilot, since extended, of ‘Support Plan Conferences’, is an adapted version of the established model for the Court’s Dispute Resolution Conferences (‘DRCs’).¹¹¹ Support Plan Conferences aim to proactively establish (among other issues) what support will be provided to the parents to address the child protection concerns,¹¹² and the agencies responsible for this support.¹¹³ Feedback has indicated that parents are helped to better understand what is expected of them, and why.¹¹⁴ Prior to its commencement, the pilot was described by a judicial officer as an idea for ‘greater autonomy or agency for parents’ – by consulting parents on their own priorities, and enabling them to devise their own action plans instead of these being entirely scripted by the Department.¹¹⁵
- Somewhat more ambitiously, a magistrate suggested that Dispute Resolution Conferences might adopt a more ‘therapeutic’ model, involving a wider range of

¹⁰⁷ See Chapter 4, part C, section (iii) ‘Hazy Lines and Systemic Constraints’; Chapter 5, part D, section (i) ‘The Circumstances of the Child’; Chapter 8, section (iii) ‘Child’s Stability and Development’.

¹⁰⁸ Judicial Officer 4.

¹⁰⁹ Judicial Officers 4, 13; Lawyer 7.

¹¹⁰ Judicial Officer 4; Lawyer 6.

¹¹¹ Children’s Court of New South Wales, *Practice Note 19: Support Plan Conference Pilot* (2 May 2024, updated as at 31 October 2025) (‘*Practice Note 19*’); Children’s Court of New South Wales, *2024 Annual Review* 28; Legal Aid NSW, *Legal Aid News*, November/December 2024. See also Chapter 2, part E ‘Recent Policy Developments’.

¹¹² *Practice Note 19* (n 111) 3.2(c).

¹¹³ *Ibid* 3.2(d).

¹¹⁴ Legal Aid NSW (n 111).

¹¹⁵ Judicial Officer 21.

people and services significant in the child's life: '...you pull in everyone for that first DRC – the social workers, the school counsellors, the school, and you get a picture of these kids and where these families are at'.¹¹⁶

- Section 85 of the Act enables the Court to request a government or non-government agency to provide services 'to facilitate restoration', in response to which the agency must 'use its best endeavours' to assist.¹¹⁷ Several participants commented that this provision is rarely utilised (for instance, in advocacy by legal representatives), and should be strategically engaged.¹¹⁸
- One magistrate, a staunch advocate for the legal process building a stronger 'lens' on the child's wellbeing, argued that a hearing on the child's interim care should be held at an early stage in proceedings, aiming for kinship placement where possible, which 'then sets the agenda moving forward as to children being able to stay, play soccer, go to school, go to dance, whatever they've been doing. Very middle class, but [it's about] connectedness to community and friends'.¹¹⁹ Conversely another judicial officer commented that the Court lacks resources for such a task, and that the substance of a child's welfare in interim care is the responsibility of the administrative arm of government.¹²⁰
- There were suggestions that the Court could more closely critique¹²¹ the contents of the 'Summary of Proposed Plan',¹²² and methodically monitor its implementation by requiring specific updates from the parties at each Court mention.¹²³ While the usual judicial approach is to trust the professionals in the case to have matters under control,¹²⁴ it was also recognised that solicitors 'are busy' and parents 'drop away', and that 'if we're trying to actually achieve change...there's a role for pushing people along'.¹²⁵ However, this sort of active case management is acknowledged to be demanding of the Court's time.¹²⁶

¹¹⁶ Judicial Officer 19.

¹¹⁷ *The Act* (n 2) s 85.

¹¹⁸ Judicial Officer 13; Registrar 1; Lawyer 6.

¹¹⁹ Judicial Officer 19.

¹²⁰ Judicial Officer 21.

¹²¹ Judicial Officer 4.

¹²² See above n 19.

¹²³ Judicial Officers 13, 18.

¹²⁴ Judicial Officer 13.

¹²⁵ *Ibid.*

¹²⁶ Judicial Officers 4, 18.

- Many judicial officers referred to a degree of authority to actively monitor the child's wellbeing *after* case disposition, via section 82 of the Act.¹²⁷ This provision empowers the Court, at its discretion, to order progress reports on the Care Plan for a period of up to 24 months after final orders,¹²⁸ and to accordingly re-list the case if dissatisfied with arrangements for the child.¹²⁹ There was consensus in the utility of these reports in 'keep[ing] everybody on their toes',¹³⁰ and on occasion 'forcing the parties to look at things again'.¹³¹

These strategies are not primarily concerned with expeditious efficiency; rather, they are about a form of judicial case management that enables stronger oversight. There are several unifying threads: holding the Department to account; monitoring children's welfare; and engaging parents in a constructive, even empowering, way. The latter theme has the clear practical objective of facilitating parents' immediate cooperation, but might produce wider benefits through better confidence and trust in the system. Several studies have examined child protection proceedings through the lens of procedural justice.¹³² Procedural justice theory holds that people's perceptions of being treated fairly and respectfully in legal proceedings are crucial to their acceptance of both the process and the formal outcome.¹³³ Fairness includes being able to have a real 'voice', which is heard by an arbiter trusted as impartial.¹³⁴ Elements of procedural justice can be as simple as direct and respectful communication from the judicial officer to the parent in the courtroom.¹³⁵ ¹³⁶ This may seem unremarkable—but such communication does not always occur in a busy environment in which the lawyer speaks on the parent's behalf,¹³⁷ obtuse legal jargon prevails,¹³⁸ and the

¹²⁷ Judicial Officers 1, 4, 5, 7, 8, 10, 13, 15, 17, 21. See also *DFaCS and Amber* [2019] NSWChC 10.

¹²⁸ *The Act* (n 2) ss 82(1), (2).

¹²⁹ *Ibid* s 82(3).

¹³⁰ Judicial Officer 15.

¹³¹ Judicial Officer 5.

¹³² Judy Cashmore, 'Procedural Justice and the Impact of Court and Other Decision-Making Processes on Children and Families in the Child Protection System' (2024) 46(2) *Children Australia* 3035: 1–8; Vicki Lens, 'Engaging Parents in Family Court: Lessons from an Observational Study of Child Protection Cases' (2017) 17(2) *Journal of Social Work* 129; Tammy Richards and Anne Fromknecht, 'Measuring Due Process and Fairness in the Child Welfare Court System' (2024) 75(2) *Juvenile and Family Court Journal* 27; Sage and Green (n 23); Alicia Summers, Sophia Gatowski and Melissa Gueller, 'Examining Hearing Quality in Child Abuse and Neglect Cases: The Relationship Between Breadth of Discussion and Case Outcomes' (2017) 82 *Children and Youth Services Review* 490.

¹³³ Cashmore (n 132) 2; Richards and Fromknecht (n 132) 34; Sage and Green (n 23) 25–6; Summers, Gatowski and Gueller (n 132) 492. The development of the theory is attributed to, et al, T R Tyler (1988, 1990, 2000, 2001, 2006).

¹³⁴ Cashmore (n 132) 2; Lens (n 132) 130–31; Summers, Gatowski and Gueller (n 132) 492.

¹³⁵ Caseworkers 3, 6.

¹³⁶ Hinton (n 24) 85–6; Lens (n 132) 137–8, 140–41; Sage and Green (n 23) 35.

¹³⁷ Hinton (n 24) 46; Lens (n 132) 131, 135.

¹³⁸ Hinton (n 24) 46.

parent's presence is often unacknowledged¹³⁹ other than in brief impersonal references to 'the mother' or 'the father'.¹⁴⁰ Judicial efforts at a more personable and inclusive style of discourse can of course be achieved within the existing system. However, direct engagement with parents is time-consuming, and not the norm of adversarial courtroom culture. A concerted and consistent embodiment of procedural justice may require more far-reaching adjustments to the nature of the model in which care and protection cases are heard. This is the subject of the final section, below.

(b) *Alternative Court Models*

The topic of 'inquisitorial' and 'therapeutic' (or 'problem-solving') courts arose during the course of discussion in 13 of the 23 judicial interviews. There appeared to be strong interest in,¹⁴¹ or at least openness to,¹⁴² the possibility of the care and protection legal process being adapted along one or either of these lines.

An 'inquisitorial' system has been defined as one in which judicial officers are 'actively involved in the investigation and analysis of cases and in which the courts are animated by "truth seeking rather than proof making"'.¹⁴³ As indicated in the previous section, there are varied perspectives on the degree to which the Children's Court process is already semi-inquisitorial.¹⁴⁴ However, it was clear that in advocating for a 'more inquisitorial' system most magistrates were contemplating something distinctly new. There were references to a 'counsel assisting'¹⁴⁵ model, and analogies drawn with the Coroner's Court.¹⁴⁶ The thrust of these ideas is the value of thorough investigation of the evidence, and narrowing of the issues in dispute, by an objective source independent of the Department.¹⁴⁷

¹³⁹ Ibid 47.

¹⁴⁰ Lens (n 132) 136; Sage and Green (n 23) 28.

¹⁴¹ The following participants expressed strong interest or definite views in favour of an inquisitorial approach: Judicial Officers 3, 10, 14, 17, 19, 20, 21.

A strong interest or definite view in favour of a therapeutic approach was expressed by Judicial Officers 2, 7, 14, 17, 19, 21.

¹⁴² An open view with regard to an inquisitorial approach was expressed by Judicial Officers 2, 6, 18.

An open view with regard to a therapeutic approach was expressed by Judicial Officers 4, 5, 6.

¹⁴³ Allan Borowski, 'A Portrait of Australia's Children's Courts: Findings of a National Assessment', in Rosemary Sheehan and Allan Borowski (eds), *Australia's Children's Courts: Today and Tomorrow* (Springer, 2013) 165, 167, citing A Freiberg, 'Non-Adversarial Approaches to Criminal Justice: Transcending Traditional Penological Paradigms' (2011) 8(1) *European Journal of Criminology* 82.

¹⁴⁴ See also Chapter 4, part B, section (ii) 'Adversarialism'.

¹⁴⁵ Judicial Officers 3, 10, 19, 20, 21.

¹⁴⁶ Judicial Officers 2, 3, 17, 18, 20.

¹⁴⁷ Judicial Officers 3, 10, 20, 21.

There was overlap in the discussion in relation to inquisitorial and problem-solving courts – both are perceived as enabling *collaborative* efforts to reach the best outcome,¹⁴⁸ and as driving *resources* to meet children’s needs.¹⁴⁹ The distinction between the two is the absence of an explicit therapeutic aim in inquisitorial models. ‘Problem-solving’ courts, sometimes called ‘solution-focused’ courts,¹⁵⁰ seek to address the underlying psycho-social contributors to legal problems,¹⁵¹ by combining judicial and interdisciplinary case management.¹⁵² They apply therapeutic jurisprudence, a theory-based approach to recognising the psychological harms caused within legal forums, which harnesses behavioural sciences knowledge to turn legal processes into a force for healing and rehabilitation.¹⁵³

Several programs in Australia apply elements of a problem-solving approach to care and protection law. These all operate as adaptations *within* mainstream Children’s or Youth Courts. Examples are the Winha-nga-nha List for Aboriginal families, in Dubbo, NSW;¹⁵⁴ the Family Drug Treatment Court in Shepparton and Broadmeadows, Victoria;¹⁵⁵ the Marram-Ngala Ganbu (Koori Family Hearing Day), also in Shepparton and Broadmeadows;¹⁵⁶ and the Reunification Court in South Australia.¹⁵⁷ Perceived strengths of problem-solving courts in care and protection include parent participation and motivation (through procedural justice principles);¹⁵⁸ practical coordination of service-provision;¹⁵⁹ the benefits to judicial officers of active case involvement – for example, knowing what did and did not work, and applying

¹⁴⁸ Judicial Officers 10, 14, 19.

¹⁴⁹ Judicial Officers 2, 14.

¹⁵⁰ Australian Human Rights Commission, ‘*Help Way Earlier!': How Australia Can Transform Child Justice to Improve Safety and Wellbeing*’ (Report, 2024) 82; Michael S King, ‘Should Problem-Solving Courts be Solution-Focused Courts?’ (2011) 80(4) *Revista Juridica Universidad de Puerto Rico* 1005.

¹⁵¹ Michael S King and CL Tatasciore, ‘Promoting Healing in the Family: Taking a Therapeutic Jurisprudence Based Approach in Care and Protection Applications’ [2007] (1) *eLaw Journal: Murdoch University Electronic Journal of Law* 78, 80; Thompson (n 24) 7–8, 92.

¹⁵² Borowski (n 143) 283; King and Tatasciore (n 151) 79.

¹⁵³ See Dodds (n 39) 9–10; Lens (n 132) 130; King and Tatasciore (n 151) 78; Gwenn Murray and Glen Cranwell, ‘Therapeutic Jurisprudence in Child Protection Matters’ (2022) 105 *Australian Institute of Administrative Law Forum* 86, 86–7; Thompson (n 24) 93. The development of the theory is attributed to Wexler and Winnick (1996).

¹⁵⁴ Children’s Court of New South Wales, 2024 *Annual Review* 16; Children’s Court of New South Wales, *Practice Note 18: Winha-nga-nha List* (September 2023). See also Chapter 2, part E ‘Recent Policy Developments’.

¹⁵⁵ Lillian De Bortoli et al, *The Family Drug Treatment Court: An Evaluation Report* (Centre for Forensic Behavioural Science, Swinburne University of Technology, November 2018).

¹⁵⁶ K Arabena et al, *Evaluation of Marram-Ngala Ganbu* (Report, prepared for the Children’s Court of Victoria, 2019).

¹⁵⁷ Judge Penny Eldridge, ‘Bringing Families Back Together: The Role of the Reunification Court’ (*The Bulletin*, Law Society of South Australia, April 2023).

¹⁵⁸ Arabena et al (n 156) 37; De Bortoli et al (n 155) 8.

¹⁵⁹ Arabena et al (n 156) 6, 18; Lucas A Gerber et al, ‘Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare’ (2019) 102 *Children and Youth Services Review* 42, 43; Judith Harwin et al, *The Family Drug & Alcohol Court (FDAC) Evaluation Project* (Final Report, March 2011) 52, 59, 116.

this learning in future cases;¹⁶⁰ and, for Aboriginal families, a stronger focus on culture and options for direct participation of kin, Elders and community members.¹⁶¹

There was enthusiasm in the interviews for a problem-solving approach—to try to ‘mobilise’ parents to ‘see their capacity to adequately parent this child’,¹⁶² to engage children in the process,¹⁶³ and to link parents and children with social work support.¹⁶⁴ The notion of facilitating a more direct engagement by the Court with the child, or with the child’s needs, aligns with recent Australian research. The 2024 *System Review* of out-of-home care in NSW referred to the disrupted lives of children ‘lost in long, drawn-out, adversarial proceedings’,¹⁶⁵ and suggested that ‘less formal court settings’ may better accommodate children’s voices.¹⁶⁶ The author of a 2025 paper advocates for coordinated, therapeutic support to be embedded in both family law and care and protection law,¹⁶⁷ arguing that existing adversarial processes disregard children’s human rights to psychological recovery and social integration following maltreatment.¹⁶⁸ There have also been calls to consider introducing a version of New Zealand’s ‘Crossover Court Lists’,¹⁶⁹ which apply a problem-solving approach to the situations of children ‘dually involved’¹⁷⁰ in child protection and juvenile criminal law proceedings. The former President of the NSW Children’s Court argued more generally for the Children’s Court to adopt therapeutic justice approaches for ‘the crossover kids’¹⁷¹ in both its criminal and child protection jurisdictions, with particular attention to the cultural needs of Aboriginal children.¹⁷²

¹⁶⁰ Arabena et al (n 156) 46; Cashmore (n 132) 5.

¹⁶¹ Judicial Officer 3; Arabena et al (n 156) 21, 30, 34, 36, 45.

¹⁶² Judicial Officer 21.

¹⁶³ Judicial Officers 6, 17.

¹⁶⁴ Judicial Officers 2, 19.

¹⁶⁵ Department of Communities and Justice, *System Review* (n 96) 44.

¹⁶⁶ Ibid.

¹⁶⁷ Dodds (n 39) 7–10.

¹⁶⁸ Ibid 8, 10.

¹⁶⁹ See, eg, Australian Human Rights Commission (n 150) 82; Sentencing Advisory Council of Victoria, ‘Crossover Kids’: *Vulnerable Children in the Youth Justice System – Report 3, Sentencing Children Who Have Experienced Trauma* (July 2020) 46–8.

¹⁷⁰ Rubini Ball, Susan Baidawi and Anthony FitzGerald, ‘Approaches for Supporting Youth Dually Involved in Child Protection and Youth Justice Systems: An International Policy Analysis’ (2024) 57(4) *Journal of Criminology* 445, 458.

¹⁷¹ See Chapter 2, part C, section (i) ‘Children in Out-of-home Care: Overview’.

¹⁷² Judge Peter Johnstone, ‘Cross-over Kids: The Drift of Children from the Child Protection System into the Criminal Justice System’ (Conference Paper, Aboriginal Legal Service Symposium on Aboriginal Children, Culture and the Law, 5 August 2016) 21–6.

Reservations were also expressed—mainly by Departmental participants rather than magistrates—and which echo themes in scholarly critiques of therapeutic justice. There are concerns about magistrates’ skills to facilitate a therapeutic forum,^{173 174} potential undermining of judicial ‘authority’,^{175 176} and blurring of boundaries between the roles of the Department and the Court.^{177 178} The issue of compromised judicial authority has been found in several studies to be an unwarranted fear: the opportunity for closer engagement with judicial officers, fused with respect for their inherent status, seems to engender in parents a sense of the seriousness of the forum and a commitment to their agreed undertakings.¹⁷⁹ Broader quandaries, relating to systemic issues, probably have more foundation. In addition to the expense of running a therapeutic or inquisitorial court,¹⁸⁰ there are reservations about prolonging legal proceedings.¹⁸¹ A caseworker felt that an intensive, therapeutic process would be burdensome on both the Department and the families, as it is not beneficial for parents to have the Department intruding in their lives, ‘wield[ing] a very big stick’, for longer than absolutely necessary.^{182 183} There is also scepticism about the ability of a legal procedure to procure adequate social resources to overcome deeply entrenched social problems:¹⁸⁴

I often wonder whether the court is optimistic in thinking about the levers it has to be able to effect the type of change that's needed. Overall, for kids, that's not the solution. I've realised now, after many years, that by the time a matter gets to court, it's probably too late to really turn the ship around.¹⁸⁵

¹⁷³ Caseworker 2; Lawyer 9.

¹⁷⁴ Harwin et al (n 159) 120.

¹⁷⁵ Caseworkers 1, 13.

¹⁷⁶ See Melissa Carter, Cristopher Church and Vivek Sankaran, ‘A Quiet Revolution: How Judicial Discipline Essentially Eliminated Foster Care and Nearly Went Unnoticed’ (2022) 12(1) *Columbia Journal of Race and Law* 496, 502.

¹⁷⁷ Caseworker 2; Lawyer 9.

¹⁷⁸ Carter, Church and Sankaran (n 176) 502.

¹⁷⁹ De Bortoli et al (n 155) 50, 65–6; Harwin et al (n 159) 7, 107; Shelley Kierstead, ‘Therapeutic Jurisprudence and Child Protection (2011) 17(1) *Barry Law Review* 31, 37.

¹⁸⁰ Judicial Officers 19, 20, 21.

¹⁸¹ Lawyer 7.

¹⁸² Caseworker 5.

¹⁸³ See Carter, Church and Sankaran (n 176) 502.

¹⁸⁴ Carter, Church and Sankaran (n 176) 501–2; De Bortoli et al (n 155) 51; Harwin et al (n 159) 13.

¹⁸⁵ Lawyer 7.

Concluding Remarks

I embarked on this research with open curiosity, without a hypothesis about what I might find. The predominance of the mental health theme was unexpected, and initially startling. Like many of the participants in interviews, a practice background had led me to think of mental health as one of a ‘trifecta’ of recurring issues in child protection – no more influential, and perhaps less so, than drugs and domestic violence. On reflection, however, the discovery was not so very surprising – a reaction shared by most of the study’s participants. There is a logical coherence to the linkages in the Court’s decisions between parental mental health, responsiveness to the child, and capacity to provide for the child’s emotional security, and clarity in the notion that mental health underpins other key factors in the parent’s circumstances. There are echoes here of the metaphor that good parenting requires ‘securing one’s own oxygen mask first’.

The dilemma then becomes a question of whether the statutory child protection system can promote parental mental wellbeing – and by extension, the wellbeing of the child – as opposed to exacerbating or *causing* mental ill-health. Clearly the Court itself, stepping in at ‘the pointy end’ of the system, cannot be expected to solve the entirety of this problem. In this sense, the findings of the thesis support existing arguments for the integration of specialised therapeutic programs into the early intervention and diversion stages of child protection, which has thus far occurred in Australia in a rather piecemeal and patchwork fashion. Nonetheless, when attempts to avoid a child’s removal are unsuccessful and litigation ensues, it is not always too late to ‘turn the ship around’. Ideas for problem-solving or inquisitorial approaches do resonate with the juxtaposition of mental health as a leading factor in restoration decisions and the inherently adverse impact on parental mental wellbeing of the experience of having a child removed. An adjusted Court process, responsive to this incongruity, might enable not only a more inclusive and empowering role for parents and their networks of informal support, but also a closer, more consistent focus on the child as an individual and unique person, in place of the current tendency to consider ‘the circumstances of the child’ as a mere adjunct to the capacities and circumstances of adults.

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Appendix A: Decision Factors – Tables and Figures

1. Influential factors in the child's removal by the Department

Table 1: *Factors Resulting in the Child's Removal by the Department (98 judgments)*

Factors	n	% of Judgments
Domestic violence	39	40
Alcohol or other drugs misuse	36	37
Physical neglect	31	32
Physical abuse	29	30
Mental health concerns	29	30
Housing issues	22	22
Parental engagement, cooperation, compliance (lack of)	20	20
Practical & generic parenting capacity (inadequate)	18	18
Sexual abuse	17	17

2. Factors Influencing Court Decisions on Restoration, combined across 'realistic possibility' and 'no realistic possibility' outcomes

Table 2: *Factors Influencing Court Decisions on Restoration (106 decisions)*

Factors	n	% of Decisions
Insight (presence or absence of)	76	72
Mental health issues (addressed or not addressed)	72	67
Engagement, cooperation, compliance (adequacy or inadequacy)	63	59
Capacity to meet the child's emotional needs (presence or absence of)	62	58
Candour & credibility (presence or absence of)	53	50
Child's stability & development	50	47
Domestic violence (addressed or not addressed)	48	45
Child's relationships	45	42
Informal supports (presence or absence of)	34	32
Practical & generic parenting capacity (adequacy or inadequacy)	34	32
Alcohol or other drugs misuse (addressed or not addressed)	33	31
Housing issues	21	20
Child's cultural needs/identity	18	17
Child's views/wishes	17	16

Figure 1: Factors Resulting in the Child's Removal by the Department

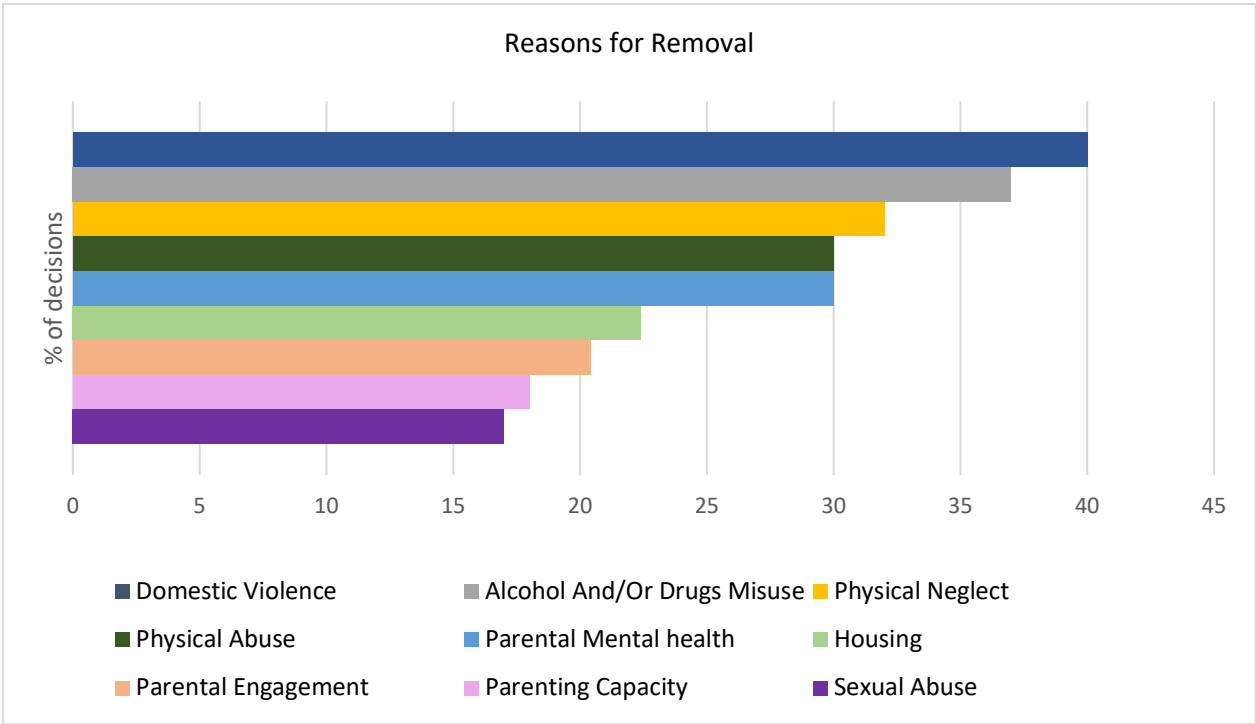
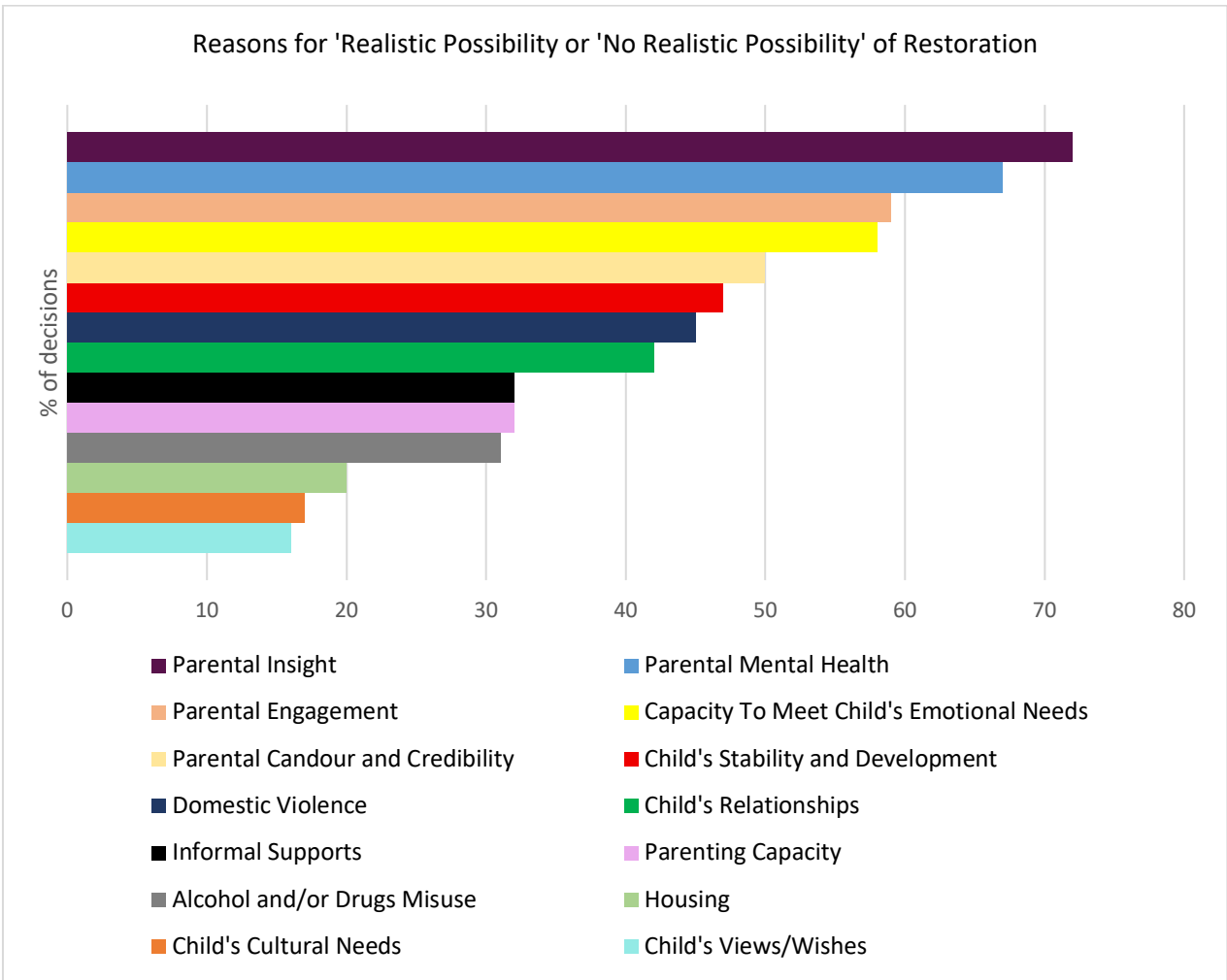


Figure 2: Factors Influencing Court Decisions on Restoration



3. Factors Influencing Court Decisions in Favour of Restoration

Table 3

Factors Influencing Court Decisions in Favour of Restoration (32 decisions)

Factors	n	% of Decisions
Engagement, cooperation, compliance	27	85
Mental health issues addressed	25	78
Child's relationships	23	72
Capacity to meet child's emotional needs	20	63
Insight	17	53
Informal supports	16	50
Practical and generic parenting capacity	14	44
Domestic violence addressed	13	40
Candour and credibility	13	40
Housing (adequate)	11	34
Alcohol or other drug misuse addressed	9	28
Child's stability and development	7	21
Child's cultural needs/identity	6	18
Child's views/wishes	6	18

4. Factors Influencing Court Decisions Adverse to Restoration

Table 4

Factors Influencing Court Decisions Adverse to Restoration (74 decisions)

Factors	n	% of Decisions
Parental insight (lack of)	59	80
Parental mental health (insufficiently addressed)	46	62
Candour and credibility (lack of)	43	58
Child's stability and development	43	58
Parents' capacity to meet child's emotional needs (inadequate)	42	56
Engagement, cooperation, compliance (lack of)	36	49
Domestic violence	35	47
Alcohol or other drug misuse (insufficiently addressed)	24	32
Child's relationships	22	30
Practical and generic parenting capacity (inadequate)	21	28
Informal supports (absent or inadequate)	18	24
Child's cultural needs/identity (met in out-of-home care)	12	16
Child's views/wishes	15	15

Figure 3: *Factors Influencing Court Decisions in Favour of Restoration*

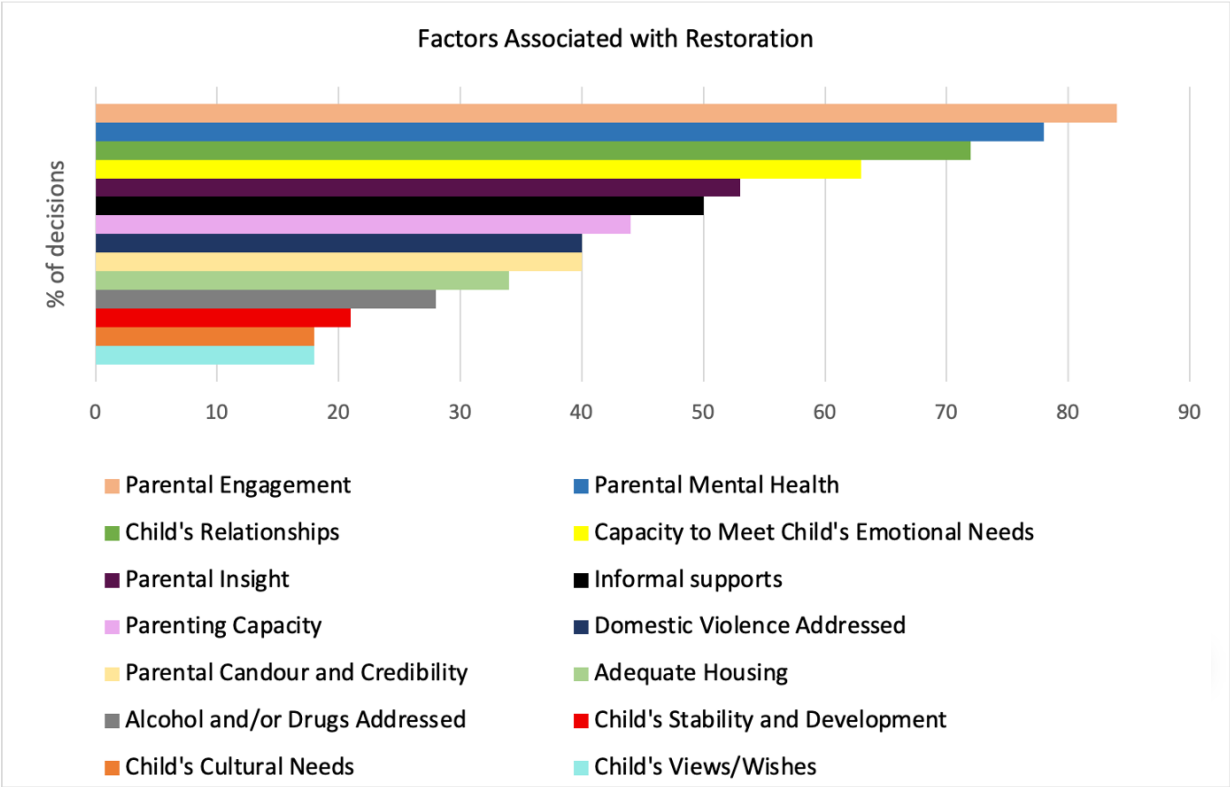
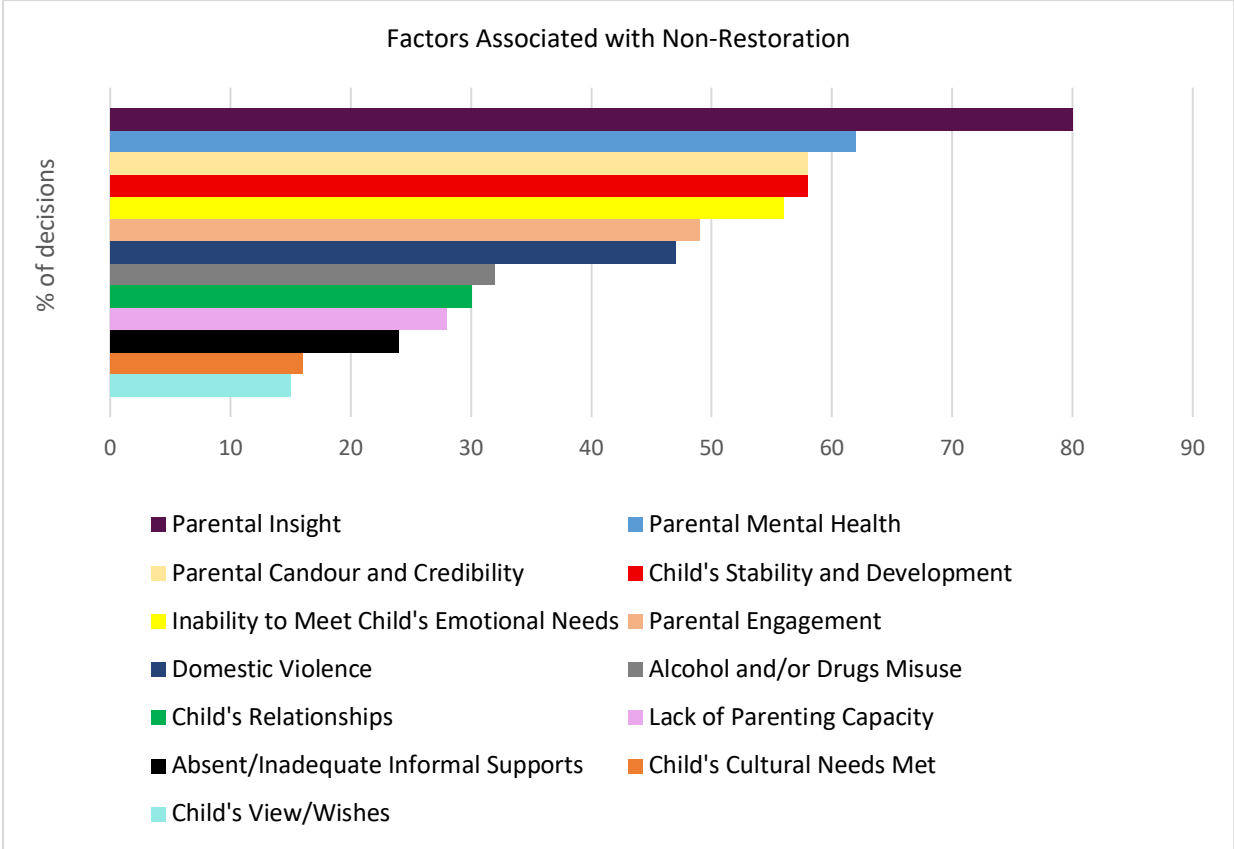


Figure 4: *Factors Influencing Court Decisions Adverse to Restoration*



**5. Non-Determinative Strengths in ‘no realistic possibility’ outcomes
(positive aspects of parents’ circumstances, which did not sway the Court in favour of restoration)**

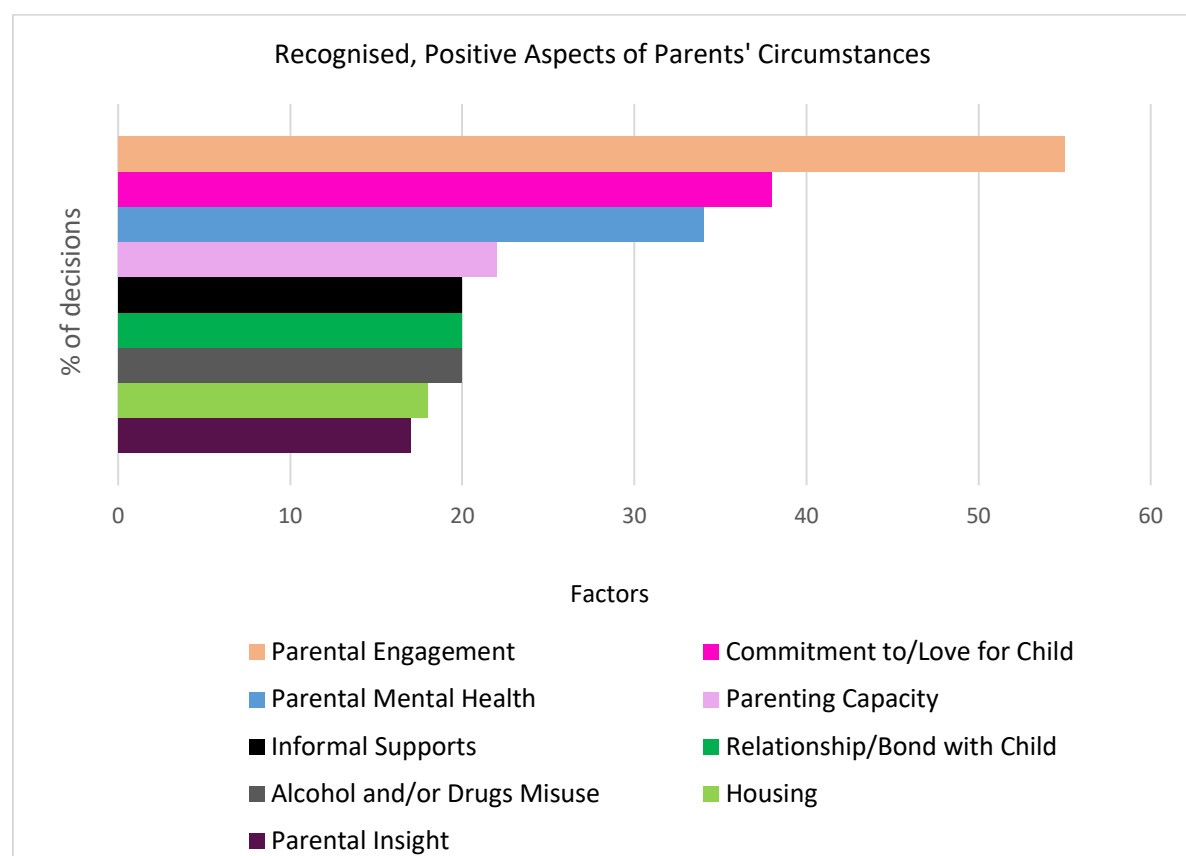
Table 5

Recognised but Non-Determinative Strengths in “No Realistic Possibility” Outcomes (74 decisions)

Factors	n	% of Decisions
Parental engagement, cooperation, and compliance	41	55
Commitment to the child	28	38
Parental mental health*	25	34
Practical and generic parenting capacity	16	22
Informal supports	15	20
Relationship/bond with child	15	20
Alcohol and/ or drugs misuse*	15	20
Housing (adequate)	13	18
Insight (partial)	12	17

* Efforts to address

Figure 5: *Recognised but Non-Determinative Strengths in “No Realistic Possibility” Decisions*



Appendix B: Questions for Semi-Structured Interviews with Judicial Officers (combined projects)

Focus on

- Whether there is a realistic possibility of restoration within a reasonable period
- Role of social science evidence : Children's Court clinician reports and evidence in court
- Children's views
- Cultural plans

1. How long have you been a magistrate in Children's Court or presiding over regional Children's Court work? (Experience)
2. What do you find the most rewarding aspects of this work?
3. And the most difficult? Or frustrating?
4. Which decisions in relation to care and protection matters do you find the most challenging (of those outlined in the comment?)?
5. What evidence is used to inform your decisions (affidavits, clinician report, health records, contact reports etc)?
6. Do you give some evidence given greater weight than other evidence – and why is that?
7. The big decision is **whether there is a realistic possibility of restoration within a reasonable period** – what evidence are you looking for here?
 - a. What factors impact your decision to restore a child or not restore a child?
 - b. Do you have a particular/structured process or format in reaching your determination?
 - c. How much weight do you put on:
 - i. Parental compliance, cooperation and candour?
 - ii. Parental insight? *Probe*: What does that mean? How is it assessed?
 - iii. Active efforts - whether the parent has been offered support and assistance and able to use it?

Probe: 'The phrase '**good enough**' appears in some of the case law and research literature. Would you agree that the phrase 'good enough' describes the standard of parenting that the care system is looking for? (If so) what does 'good enough' mean from your perspective?

8. **In terms of the legislation/plans:**
 - a. One of the aims of the NSW care legislation is to **minimise the time to permanency for children**, especially for young children under s 83(5). How well do you think the particular time frames are working in the Court's decision-making particularly for young children?
 - b. Under section 83(1), a 'realistic possibility of restoration' requires consideration of the child's circumstances, as well as the likelihood of the parents satisfactorily addressing the issues that led to the removal. Do you find that you consciously 'weigh' these two factors against one another? Which aspects of the child's 'circumstances' are most important here?
 - c. What do you think are the essential aspects of a 'permanency plan' to satisfy the court that permanency planning has been 'appropriately and adequately' addressed (s83(7))? + unacceptable risk – not in legislation + 24 months.
9. **How helpful do you find the Children's Court Clinic reports?**
 - a. Their report vs their in-court evidence? (DRC attendance?)
 - b. How often are CCC reports ordered? Requested by?
 - c. Are they more important in some types of cases than others?
 - d. What distinguishes a good CCC report from a not-so-good one?
Probe: Any differences by disciplinary background and private assessors/assessors sought by DCJ or parents privately?
 - e. Do you prefer reports where they make a clear recommendation or recommend certain conditions/actions if court finds X or court finds Y?
 - f. In-court evidence – how well do most CCC give evidence in court as expert witnesses? Sufficient training? Good vs not-so-good?
10. **To what extent do you think "attachment" theory and notions of bonding are influential – and well understood – by:**
 - a. Caseworkers
 - b. Lawyers? (esp. re contact when there is a realistic possibility of restoration)?
 - c. Judicial officers?
11. **What access do you have to social science evidence - literature/research and ongoing judicial education? Like more access? Or...**
12. **What evidence are you looking for in relation to the views of the child?**
 - a. What sources of information do judges/magistrates rely on to ascertain children's views/wishes? eg the Children's Court Clinic report, caseworker's evidence, evidence of parents, carers, or people with a genuine interest in the child?

- b. To what extent do you think ILRs adequately represent the children's views, best interests compared to experts?
 - b. What factors influence the weight you place on children's views? eg *balance children's views with their best interests*?
 - c. What would help judges and magistrates better understand children's views?
 - d. Do you think it is appropriate for judges/magistrates to meet with children?
- 13. Cases you have felt concerned about? Appeals?
- 14. How often do you make orders **that do not align with the proposed care plan**? Are there any aspects of the care plan that are most likely to be challenged/problematic?
- 15. **Contact can be a contentious issue:** How well do you think the law re contact and contact orders works? How useful do you find contact assessment reports in caseworker evidence?
- 16. **What particular challenges do you find in dealing with cases involving Aboriginal and children of other cultural backgrounds?**
 - a. What are you looking for in assessing the quality of cultural plans (esp in a permanency context)?
- 17. Do you think that **(written) reasons for the orders and judgements** (*Family is Culture* rec) in care and protection matters would be helpful: ie to legal and other professionals, parents, others (eg legal academics)??
- 18. **Is there anything you would like to change about the way these cases are dealt with in Children's Court?**
- 19. Adversarial nature of Children's Court proceedings – way experts and caseworkers treated? Judicial intervention?
- 20. **Any other comments you would like to make?**

Appendix C: Questions for Semi-Structured Interviews with DCJ Caseworkers

1. Can you describe your role at DCJ?
2. Can you tell me a bit about your work background and how you came to be in the current role?
3. Most rewarding/enjoyable, and challenging/frustrating parts of the work?
4. I'd like to turn now to some questions about cases in the Children's Court after a child has been removed from their parents. Under the *Children and Young Persons (Care and Protection) Act*, the Court must decide whether to accept the Secretary's assessment on the question of realistic possibility of restoration. Before we get into the details of the legislation, can you give a general overview of the process, within your workplace, for reaching a decision on whether or not to support restoration?
5. Are there, typically, key 'stand-out' factors that distinguish a realistic from a non-realistic restoration, from your perspective?
6. My case research indicates that the parent's mental health, and the parent's 'insight' and cooperation are leading factors influencing the court's decision on restoration. Do you agree that these are important considerations? (*if not addressed in response to preceding questions*)
7. Under section 83 of the Act, 'realistic possibility of restoration' requires two main considerations: the circumstances of the child, and the likelihood of the parents satisfactorily addressing the issues that led to removal. Do you find that you consciously consider each of these separately? Or do they tend to merge together?
8. What part of the child's 'circumstances' are relevant in assessing realistic possibility of restoration?
9. Although it isn't specifically mentioned in the legislation, the 'unacceptable risk' test is central to the court's decisions. Can you talk about how the existence and level of 'risk' is assessed at the casework level? (+ 'good enough' parenting)
10. In regard to Aboriginal children, do you think that cultural identity and cultural needs are important considerations in assessing realistic possibility of restoration? How are cultural factors taken into account in decisions on restoration? (*explore – eg seen as less central to restoration, as opposed to placement decisions? Is the Court's approach consistent or different to that of the Department in relation to Aboriginal children?*)
11. How important are expert assessments, like clinical parenting capacity assessments, in assessing realistic possibility of restoration?

12. In your experience, is the Court's approach to realistic possibility of restoration usually aligned with the Department's view? (If not, why not?)
13. What do you find challenging, if anything, about the Court process or its decisions?
14. In early 2019 legislative amendments came into effect, requiring the 'realistic possibility' to be achievable within 24 months, instead of it being present at the date of hearing. In your experience, what impact has this change had?
15. In 2022 the 'family is culture' amendments were made, including the new requirement for the Department to show the court that 'active efforts' were made to prevent removal and to facilitate restoration. What sort of impact do you think this has made / will make?
16. If there was something you could change about the law or legal process for care and protection, what would it be?
17. Is there anything else you would like to add before we finish?

Appendix D: Questions for Semi-Structured Interviews with DCJ Lawyers

1. Can you describe your current role in DCJ?
2. Can you tell me a bit about your work background and how you came to be in the current role?
3. What do you find the most rewarding/enjoyable aspects of this work?
4. And the most difficult? Or frustrating?
5. How often, typically, do you see cases going to a contested hearing on the issue of realistic possibility of restoration? (ie re new matters, as distinct from section 90. Explore – factors influencing whether matters settle; whether this proportion has changed over time)
6. Are there, typically, key ‘stand-out’ factors that distinguish a realistic from a non-realistic restoration, from your perspective?
7. Under section 83 of the Act, ‘realistic possibility of restoration’ requires two main considerations: firstly, the circumstances of the child. In your experience, what aspects of the child’s circumstances are factored into the Court’s decisions? (explore - e.g. linkages between this test and the paramount concern of the child’s ‘safety, welfare and wellbeing’; **unacceptable risk**; permanency planning; benefits of being raised within the biological family; cultural factors)
8. The second s83 factor is the likelihood that the parent is able to satisfactorily address the circumstances that led to removal of the child. What do you think are the most important factors in predicting whether a parent can address the issues that led to removal? (explore – barriers? Facilitators? Concept of ‘**good enough** parenting’?)
9. My case research indicates that the parent’s mental health, and the parent’s ‘insight’ and cooperation are leading factors influencing the court’s decision on restoration. Do you agree that these are important considerations? (*if not addressed in response to preceding questions*) (explore – e.g. is the legal process a suitable forum for dealing with mental health and insight/attitude?)
10. In your experience, does the Court / the Department / the legal process adequately take into account cultural factors in decisions on restoration? (explore – why / why not? barriers? How can this be better achieved? etc)
11. From your perspective, how are unacceptable risk and ‘good enough parenting’ assessed?

12. Do you think that expert assessments, like clinical parenting capacity assessments, are important in contributing to assessments on realistic possibility of restoration?
13. Are the Court's decisions usually aligned with your expectations, or do the decisions sometimes surprise or disappoint you? (explore – why?)
14. In early 2019 legislative amendments came into effect, requiring the 'realistic possibility' to be achievable within 24 months, instead of it being present at the date of hearing. In your experience, what impact has this change had?
15. The Act has been amended to include the new requirement for the Department to show the court that 'active efforts' were made to prevent removal and to facilitate restoration. What sort of impact do you think this has made / will make?
16. If there was one thing you could change about the law or legal process for care and protection, what would it be?
17. Is there anything else you would like to add before we finish?

Appendix E: Participant Information Statements



Sydney Law School and Research Centre for Children and Families

Professor Judy Cashmore AO

Direct Tel:

Mobile:

Email:

How Children's Courts Make Decisions in Care Matters

The Perspectives of Judicial Officers in the Children's Court

1. Introduction

You are invited to take part in a research project, *How Children's Courts make Decisions in Care Matters* as a judicial officer who presides over care and protection matters in the Children's Court. This Participant Information Sheet/Consent Form tells you about the research project. It explains the purpose and nature of the research.

2. What is the purpose of this research?

Children's Courts make decisions in care and protection proceedings that can have a profound impact on the lives of children and their family. The aim of this study is to understand how Children's Courts make these decisions, what type of evidence they use, and how they use and interpret social science evidence. There has been very little research addressing these issues in the Children's Court in Australia and the aim of this research is to provide constructive information to assist the Court and those involved in its processes.

3. Who is carrying out the study?

The study is being led by Professor Judy Cashmore in the Research Centre for Children and Families and involves three PhD students in Sydney Law School and the Research Centre (Pei Kong, Megan Mitchell and Meredith McLaine) whose research focuses on particular aspects: the consideration of children's views, cultural plans and determining whether there is a realistic possibility of restoration.

4. What does participation in this research involve?

Your participation would involve an interview, either by phone or Teams or zoom or possibly in person. The focus will be on your experiences and assessment of the evidence available to the court in making its decisions and on your experience in making decisions in this court. It is expected to take about 60 minutes. With your consent, our discussion would be audio-recorded for later transcription and accuracy. We may also ask whether you would be interested in responding to a short follow-up online survey about your perspectives on particular aspects related to consideration of children's views, cultural plans and determining whether there is a realistic possibility of restoration.

4. Do I have to take part in this research project?

Participation in any research project is voluntary. If you decide to take part and later change your mind, you are free to withdraw from the project at any stage. Any information you have provided will be taken from the data set and destroyed.

5. What are the possible risks and benefits of taking part?

We do not anticipate any risks to you as a result of participating in an interview. We cannot guarantee that you will receive any benefits from this research; however, the aim of the research is to promote understanding of the decision-making process and it may provide valuable findings for judicial and legal education and assistance to non-legal professionals. The data may be analysed in additional studies in the future but would require further ethics approval to do so.

6. What will happen to information about me?

You will not be identified in the research or in any reports on the findings. Your information will only be used for the purpose of this research project and disclosed only with your permission, except as required by law. The research data will be securely stored at the University of Sydney Research Data Store and in password protected computers and files.

7. Can I tell other people about the study?

Yes, you are welcome to tell other people about the study.

8. What if I would like further information about the study?

If you would like to know more at any stage during the study, please feel free to contact Professor Judy Cashmore, Principal Investigator, on 9351 0469 or 0403 010 949.

9. Will I be told the results of the study?

You have a right to receive feedback about the overall results of this study. This may be in form of a summary or as publications.

It is anticipated that the results of this research project will be published and/or presented in a variety of forums including s 16 conferences, Children's Law News, the PhD theses, and peer-reviewed journal articles. In any publication and/or presentation, information will be provided in such a way that you cannot be identified, except with your permission.

10. What if I have a complaint or any concerns about the study?

If you are concerned about the way this study is being conducted or you wish to make a complaint to someone independent from the study, please contact the university using the details outlined below.

Please quote the study title and protocol number.

The Manager, Ethics Administration, University of Sydney:

- **Telephone:** +61 2 8627 8176
- **Email:** human.ethics@sydney.edu.au

All research in Australia involving humans is reviewed by an independent group of people called a Human Research Ethics Committee (HREC). The ethical aspects of this research project have been approved by the HREC of the University of Sydney [Approval 2022/190]. This project will be carried out according to the *National Statement on Ethical Conduct in Human Research* (2007). This statement has been developed to protect the interests of people who agree to participate in human research studies. The project has the support of Judge Johnstone, Chief Magistrate of NSW and the President of the Children's Court.

Participant Information Statement

Project: Judicial interpretation and application of the statutory “realistic possibility of restoration” test in care and protection proceedings in the Children’s Court of NSW: DCJ interviews phase

1. Introduction

As a Casework Manager or Caseworker in child protection, Department of Communities and Justice, you are invited to take part in a PhD research project on court decision-making in care matters. This Participation Information Sheet tells you about the purpose and nature of the research project.

2. What is the purpose of this research?

The study aims to analyse the reasoning applied in judicial interpretation of the “realistic possibility of restoration” test under the *Children and Young Persons (Care and Protection) Act 1998* (NSW). This includes consideration of the impact of legislative and policy reforms, and the extent to which the Court’s approach may differ from perspectives of other stakeholders. As most care and protection cases are not published, there is little existing research-based knowledge of the way the Court applies the legislation in practice. The research methods include (a) qualitative analysis of judgments in contested restoration hearings; (b) interviews with magistrates; and (c) interviews with DCJ caseworkers and lawyers. The findings of the research will have practical significance in helping inform caseworkers, lawyers, parents and families of the Court’s expectations for restoration, and potentially contribute to continuing developments in child protection law and policy.

3. Who is carrying out the study?

Interviews will be conducted by Meredith McLaine, PhD candidate and former care and protection solicitor, under the supervision of lead investigator Professor Rita Shackel (Sydney Law School, University of Sydney), and co-investigators Professor Judith Cashmore (Faculty of Arts and Social Sciences, University of Sydney), Professor Amy Conley Wright (Faculty of Arts and Social Sciences, University of Sydney) and Dr BJ Newton (external supervisor, Social Policy Research Centre, UNSW).

4. What does participation in this research involve?

Your participation would involve an interview, either in person or by phone or video-link (Microsoft Teams). The discussion will be semi-structured and based on questions about

your professional experiences in assessing cases for realistic possibility of restoration and your involvement with these cases through the court process.

The interview is likely to take between 45 minutes to an hour. The interview will be audio-recorded and transcribed to ensure accuracy in analysis. Transcripts will be de-identified via editing to ensure your privacy, and audio-recordings will be deleted once transcription is completed. You may request a copy of the transcript to review for accuracy prior to its being de-identified and used in data analysis.

5. Can I change my mind?

Participation in any research project is voluntary. If you decide to take part and then change your mind, you are free to withdraw from the project up until the time at which the transcript is de-identified. In the event of withdrawal, any information you have provided will not be used and any recording or transcript of the information you have provided up to the point of withdrawal will be removed from the data set and destroyed unless you tell us otherwise. Your intention to withdraw may be communicated to the researcher either in person during the interview, or by telephone or email to the researcher following the interview, and/or by completing and returning the 'revocation of consent' form attached to your Participant Consent Form. There are no consequences for withdrawing, other than loss of the time you have spent being interviewed. Your decision will not affect your current or future relationship with the researchers or anyone else at The University of Sydney.

6. What are the possible risks and benefits of taking part?

We do not anticipate any risks to you as a result of participating in an interview. We cannot guarantee that you will receive any benefits from this research; however, as the aim of the research is to promote understanding of Court decision-making processes in child protection it aims to provide valuable findings for policy and practice in child protection casework.

7. What will happen to information about me?

You will not be personally identified in the research or in any publications on the findings. Your information will only be used for the purpose of this research project. Any information identifying you may be disclosed only with your permission, except as required by law. The research data will be securely stored within the University of Sydney Research Data Store and in password protected computer files.

8. Can I tell other people about the study?

Yes, you are welcome to tell other people about the study.

9. What if I would like further information about the study?

If you would like to know more at any stage during the study, please contact Meredith McLaine, PhD student, by telephone: or email:

10. Will I be told the results of the study?

You have a right to receive feedback about the overall results of this study. A summary of the findings can be sent to you at your request. The results will also be available in the form of the PhD thesis, which will be available publicly via the University of Sydney Library, and other publications or conference presentations.

11. What if I have a complaint or any concerns about the study?

If you are concerned about the way this study is being conducted or you wish to make a complaint to someone independent from the study, please contact the university or the Aboriginal Health & Medical Research Council using the details below. Please quote the study title and protocol number.

The Manager, Ethics Administration, University of Sydney:

- **Telephone:** +61 2 8627 8176
- **Email:** human.ethics@sydney.edu.au

The Chairperson,
AH&MRC Ethics Committee,
35 Harvey Street
Little Bay, NSW, 2036 **Email:** ethics@ahmrc.org.au

All research in Australia involving humans is reviewed by an independent group of people called a Human Research Ethics Committee (HREC). For this research project, additional Ethics review has been sought in regard to its ethical dimensions for Aboriginal people. The ethical aspects of this research project have been approved by the HREC of the University of Sydney [Approval 2023/202], and by the Human Ethics Committee of the Aboriginal Health & Medical Research Council of NSW [Approval 2203/23]. This project will be carried out according to the *National Statement on Ethical Conduct in Human Research (2007)* and the *NSW Aboriginal Health Ethics Guidelines (2023)*, both of which have been developed to protect the interests of people who agree to participate in human research studies.

Participant Information Statement

Project: Judicial interpretation and application of the statutory “realistic possibility of restoration” test in care and protection proceedings in the Children’s Court of NSW: DCJ interviews phase

1. Introduction

As a lawyer in child protection litigation, Department of Communities and Justice, you are invited to take part in a PhD research project on court decision-making in care matters. This Participation Information Sheet tells you about the purpose and nature of the research project.

2. What is the purpose of this research?

The study aims to analyse the reasoning applied in judicial interpretation of the “realistic possibility of restoration” test under the *Children and Young Persons (Care and Protection) Act 1998* (NSW). This includes consideration of the impact of legislative and policy reforms, and the extent to which the Court’s approach may differ from perspectives of other stakeholders. As most care and protection cases are not published, there is little existing research-based knowledge of the way the Court applies the legislation in practice. The research methods include (a) qualitative analysis of judgments in contested restoration hearings; (b) interviews with magistrates; and (c) interviews with DCJ caseworkers, lawyers and the Director of Aboriginal Culture in Practice. The findings of the research will have practical significance in helping inform caseworkers, lawyers, parents and families of the Court’s expectations for restoration, and potentially contribute to continuing developments in child protection law and policy.

3. Who is carrying out the study?

Interviews will be conducted by Meredith McLaine, PhD candidate and former care and protection solicitor, under the supervision of lead investigator Professor Rita Shackel (Sydney Law School, University of Sydney), and co-investigators Professor Judith Cashmore (Faculty of Arts and Social Sciences, University of Sydney), Professor Amy Conley Wright (Faculty of Arts and Social Sciences, University of Sydney) and Dr BJ Newton (external supervisor, Social Policy Research Centre, UNSW).

4. What does participation in this research involve?

Your participation would involve an interview, either in person or by phone or video-link (Microsoft Teams). The discussion will be semi-structured and based on questions about your professional experiences in assessing cases for realistic possibility of restoration and your involvement with these cases through the court process.

The interview is likely to take between 45 minutes to an hour. The interview will be audio-recorded and transcribed to ensure accuracy in analysis. Transcripts will be de-identified via editing to ensure your privacy, and audio-recordings will be deleted once transcription is completed. You may request a copy of the transcript to review for accuracy prior to its being de-identified and used in data analysis.

5. Can I change my mind?

Participation in any research project is voluntary. If you decide to take part and then change your mind, you are free to withdraw from the project up until the time at which the transcript is de-identified. In the event of withdrawal, any information you have provided will not be used and any recording or transcript of the information you have provided up to the point of withdrawal will be removed from the data set and destroyed unless you tell us otherwise. Your intention to withdraw may be communicated to the researcher either in person during the interview, or by telephone or email to the researcher following the interview, and/or by completing and returning the 'revocation of consent' form attached to your Participant Consent Form. There are no consequences for withdrawing, other than loss of the time you have spent being interviewed. Your decision will not affect your current or future relationship with the researchers or anyone else at The University of Sydney.

6. What are the possible risks and benefits of taking part?

We do not anticipate any risks to you as a result of participating in an interview. We cannot guarantee that you will receive any benefits from this research; however, as the aim of the research is to promote understanding of Court decision-making processes in child protection it aims to provide valuable findings for policy and practice in child protection casework.

7. What will happen to information about me?

You will not be personally identified in the research or in any publications on the findings. Your information will only be used for the purpose of this research project. Any information identifying you may be disclosed only with your permission, except as

required by law. The research data will be securely stored within the University of Sydney Research Data Store and in password protected computer files.

8. Can I tell other people about the study?

Yes, you are welcome to tell other people about the study.

9. What if I would like further information about the study?

If you would like to know more at any stage during the study, please contact Meredith McLaine, PhD student, by telephone ... or email:

10. Will I be told the results of the study?

You have a right to receive feedback about the overall results of this study. A summary of the findings can be sent to you at your request. The results will also be available in the form of the PhD thesis, which will be available publicly via the University of Sydney Library, and other publications or conference presentations.

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If you are concerned about the way this study is being conducted or you wish to make a complaint to someone independent from the study, please contact the university or the Aboriginal Health & Medical Research Council using the details below. Please quote the study title and protocol number.

The Manager, Ethics Administration, University of Sydney:

e. **Telephone:** +61 2 8627 8176

f. **Email:** human.ethics@sydney.edu.au

The Chairperson,

AH&MRC Ethics Committee,

35 Harvey Street

Little Bay, NSW, 2036 **Email:** ethics@ahmrc.org.au

All research in Australia involving humans is reviewed by an independent group of people called a Human Research Ethics Committee (HREC). For this research project, additional Ethics review has been sought in regard to its ethical dimensions for Aboriginal people. The ethical aspects of this research project have been approved by the HREC of the University of Sydney [Approval 2023/202], and by the Human Ethics Committee of the Aboriginal Health & Medical Research Council of NSW [Approval 2203/23]. This project will be carried out according to the *National Statement on Ethical Conduct in Human Research* (2007) and the *NSW Aboriginal Health Ethics Guidelines* (2023), both of which have been developed to protect the interests of people who agree to participate in human research studies.