"She will do anything to make sure she keeps the girls"

CAAG Minutes, Thursday 10 September 2009

Inquiry into the circumstances of a 12 year old child under Guardianship of the Secretary

FINAL REPORT

Note: For the purposes of public release personal information contained in the Commissioner's original Advice to the Minister has been removed from this document without altering the intent of the remaining text

MR PAUL MASON
COMMISSIONER

July 2010

The Commissioner for Children is an independent, statutory office responsible to the Parliament of Tasmania. The Commissioner's functions include promoting the rights and well-being of children and young people, examining and advising the Government on policies, practices and services provided for children and laws affecting their health, welfare, care, protection and development.

This Advice is dedicated to all Tasmanian children who feel that the Government does not understand them

Come mothers and fathers
Throughout the land
And don't criticize
What you can't understand
Your sons and your daughters
Are beyond your command
Your old road is rapidly agin'.
Please get out of the new one
If you can't lend your hand
For the times they are a-changin'.

EXECUTIVE SUMMARY

The title of the Report is a sentence from a list of "strengths" relied on to justify a recommendation that it was now safe to let a time-limited 12 month guardianship order lapse in October 2009. That "strength" was a weakness.

On 10 September 2009 the DCYFS Court Application Advisory Group (CAAG) met to consider a report dated the day before 9 September 2009 from the Child protection worker (CPW) allocated to the case and the CPW's Team Leader ending with "Recommendation: Allow orders to lapse".

On the same day, a Thursday, the child was occupied in activities that have since become notorious in the Tasmanian and national media.

The Recommendation to CAAG was a mistake. CAAG's recommendation to the Secretary was a mistake. The referral to the Gateway in September 2009 was not a mistake, but needed establishment and reinforcement in the minds of this family by the continued statutory intervention of the State. On one view of it the level of risk to the Subject Child in her Mother's home had not altered since January 2007. There was insufficient evidence of change.

This is not a story about sex. This is a story about the clash of two cultures: on the one hand the resistant culture of Tasmania's child neglecting community and on the other hand the paternalistic culture of Child Protection Services (CPS) in Tasmania's Department of Health and Human Services (DHHS).

Without the prostitution – a word I use to mean the exchange of sex in consideration of money or material support of any kind - this story may not have been very newsworthy at all, and resembles a large number of cases where the Court has found children to be "at risk" and ordered they be placed under the Guardianship of the Secretary of the DHHS.

This is nevertheless a story about Government making mistakes and there is a smaller audience for that in the media. Everybody makes mistakes and the biggest mistake of all is to be blind to our own mistakes. Accordingly instead of justifying what happened from the perspective of people on the ground at the time, I have used a pair of "20:20 hindsight spectacles" in conducting this Inquiry. If I say something was done which ought not to have been done or vice versa, it is not my intention to cast blame but to explore better ways of statutory intervention in the lives of families when that point has been reached.

To avoid blame, I have treated the Secretary – the legal guardian and custodian of the Subject Child and her two siblings at various times – as the person responsible, recognising that Government establishes a series of delegations for operational decisions to be taken and executed by people under his overall control. Obviously the Secretary himself is not personally responsible for each failure and each success of his staff.

This Report hopes to contribute pragmatic tools for Tasmania to reduce the chances of this happening again, and not only to children under Guardianship. One outcome it seeks is to create a statutory parent with a heart: a Model Parent able to model for families and in particular the children how parents should focus on the primacy of a child's interests before their own, the acceptance of child's rights as being truly in their best interests, and importantly how to deal respectfully and collaboratively with the child's other parent.

Not much of this Report will be publishable, because it relies on detail of what happened in the life of the Subject Child and not only is it prohibited to disclose information that would tend to

identify her, but she and at least one of her siblings are now acutely aware that their story did become public property and want the prurient fascination with it to end, so that they and their little sibling can create normal lives for themselves and their own future families.

An internal review of this case was conducted in February 2010, but its Recommendations were essentially that existing practice be more diligently pursued and that Child Protection staff be educated about existing practice. It also recommended an external review be undertaken, and this is that external review.

KEY RECOMMENDATIONS

The key Recommendations arising out of this report are as follows:

1. That the Tasmanian Government immediately commence negotiation with the Commonwealth Government to institute a system of income management for families with children under the guardianship of the Secretary as a means of encouraging and educating parents to put the nutritional, health and educational needs of children ahead of their own needs.

2. That at each decision point of statutory intervention the Secretary and the Court formally include in the decision making process some person in the role of "contradictor" and actively examine contrary arguments to avoid "group think".

3. That the Court

- be required to take more active responsibility for the decisions it makes, the content of orders it makes and the supervision of their execution to prevent the perception that statutory intervention is undertaken by the Executive Government without judicial oversight; and

- have discretion to make orders allocating aspects of parental responsibility for any period it thinks necessary to provide for the safety and wellbeing of the child including the power to prevent orders lapsing without Court approval.

4. That decisions about statutory intervention and placement be informed by structured measures of a family's capacity to change, measured by verifiable facts and in every case informed by a qualified psychological assessment of the family's internal dynamics, potential for change and what markers would indicate real and sustainable change to create child safety.

5. That the Secretary take steps to establish the role of the State as the "Model Parent' in the lives of children for whom statutory intervention has been instituted, which includes getting to know the child and their perspective on life, incorporating school social work assessments, resisting the end of statutory intervention before demonstrated adequate improvement in safety, and modelling good parenting for the birth parents.

6. That the Minister conduct a public review of the independence, functions and powers of the Commissioner for Children particularly in relation to his or her powers to obtain information when conducting inquiries and providing advice under s.79(1)(a), (c), (e) and (f) of the *Children Young Persons And Their Families Act 1997* (CYPTF Act).

7. THAT the Government refer to the Tasmanian Law Reform Institute for consultation and advice the following matters:

- the question whether the defence of reasonable and honest mistake in relation to sexual offences against persons under 17 should be available and whether it should be altered;
- what additional protections can be provided to children giving evidence in cases involving sexual assault.

8.. THAT the Government review the *Sex Industry Offences Act 2005* and in doing so actively consider the option of prohibiting the purchase of sexual services other than for certified medical reasons and actively consider the contribution of any amendment to the safety and sexualisation of children.

9. That after an appropriate period of further investigation the Government under the *Commissions of Inquiry Act 1995* advise the Governor to appoint a Commissioner of Inquiry to review the decisions of the Crown in relation to the prosecution or otherwise of persons suspected of having had intercourse or indecent dealings with the subject child in order to address any public concerns about the probity of such decisions.

THE SUBJECT CHILD

I have taken as my lodestar the United Nations *Convention on the Rights of the Child* (the CROC), especially Articles 2, 12, 19 and 24.

I have endeavoured to be guided by the principles in the CROC. The paramount consideration is "the best interests of the child" or BIOC. Children have the right to be protected from abuse and from harmful family environments. Children have a right to education that they can understand the purpose of. Children have the right to a stable attachment to at least one adult to see them safely through to adulthood. Children have the right not to re-live the patterns of childhood trauma of their parent. Children have the right to be heard in administrative and judicial; proceedings that affect them.

I was informed by the Chief Executive Officer of Disability, Child, Youth and Family Services (DCYFS) on behalf of the Secretary that the Subject Child and her older sibling were suffering emotionally each time this story was raised in the papers. On the other hand I held to the view that because of Article 12 of the UN CROC the child who would know that this inquiry was being undertaken was entitled to have such input into it as she saw fit, being old enough, intelligent enough and mature enough to talk to me.

Accordingly, I wrote a letter to the Subject Child and sent it to her counsellor being a person I had identified as having built up her trust, and a person I could trust to explain it to her without adding to her trauma.

The Manager of the counselling service in a reply thanked me and said that the Subject Child declined an interview with me. Of course I accept that.

It is important that the Subject Child have the opportunity to know what I have said in this Report now that the Inquiry is concluded and I request that the Minister enable that, again through her counsellor, rather than through Child Protection Services (CPS).

In particular she needs to know that my concern has been not only with her but with all children who might now or in the future find themselves in similar situations, and to know that her story is not entirely unique.

BACKGROUND

The National setting for this Inquiry includes the fact that through the Community & Disability Services Ministers' Advisory Council (CDSMAC) of the Council of Australian Governments (COAG), all Australian Governments are committed to the first 3-year implementation phase of the National Child Protection Framework, and the National Early Years Strategy. Both of these emphasise the critical importance of early intervention in the lives of children to optimise their prosects of a holistically safe, educated, self-determined, and pro-social development into adulthood. In this way Governments around the world hope to break the cycle of costly inter-generational disadvantage, including neglect and abuse, disengagement from education including extra-curricular learning, poverty and anti-social and criminal behaviour.

The Tasmanian setting includes the first 2 years of the implementation of the Child Protection Framework, the first 12 months (almost to the day) of the Community Based Intake system of child protection known as "Future Communities", the creation of an Early Years Framework for the protection and development of children 0-6 and the Kids Come First framework for all children and young people.

This case may have become the first big test of the "Future Communities" reforms. The statutory framework for Community Based Intake Services commenced on 1.7.09. The Gateways were launched in August 2009 and became active in September 2009. On 20 October 2009 – the expiry of the first 12 month care and protection order (CAPO) removing parental responsibility from both parents and vesting it in the Secretary – was looming. What was the Secretary to do with these two girls?

The outcome for each one of the children in this family has been in a different sense the worst outcome.

In this case the files as read from the responses of the Subject Child show a growing belief in her that the presence of the CPW was irrelevant. Her mother shared this view. Her mother may have shared this view because nothing the Secretary had done had encouraged her child to go to school regularly, helped her sell up and move to a safer environment, helped her stop the men coming round, or helped her get the toddler toileted and dummy-free – nor indeed got her to understand why these things were at all important for the children.

FINDINGS

1. Risks that were identified were identified very early, most in the first Notification January 2007.

2. At the end the best interests of the child slipped from being the paramount consideration and took second place to lapsing a 12 month order and closing the file, and disengagement of the protective role of the Secretary.

3. There was inconsistent assessment and documentation of the level of risk and of the nature of risk:

3.1 Amphetamine use was overlooked in absence of opiates, and persistent cannabis use was not regarded as "illicit" despite its impact on day to day parenting skills.

3.2 Threatening external relationships were overlooked.

3.3 The intergenerational nature of poor parenting was not visible in the absence of any assessment of the Mother's own abusive child history.

3.4 Not enough support was given to the Mother to assist with the needs she did identify: to pursue her Adelaide court case, to sell the house and move away, to maintain her private car (or overcome her difficulty with bus transport).

3.5 The risks identified for the eldest child were not treated as serious risks to which the younger children were exposed, although they had a common origin.

4. CPS did not obtain any assessment of the family, nor any assessment of the dynamics of relationships within that family. Without this guidance they were unable to affect that dynamic or those relationships and protect the children.

5. CPS failed to comply with Assessment Orders made by the Court.

6. By the same token the Court failed to word Assessment Orders so as to impose any obligation on any person, failed to word them so that they resulted in an assessment of the family dynamics, relationships and risks and failed to require compliance with the Assessment Orders it did make.

7. CPS failed to obtain written reports from all psychologists, psychiatrists and alcohol and drug therapists treating members of the family.

8. Police treatment of the absence/presence of consent in underage sex may have confused and distracted Child Protection Services from the risk.

9. Police knew about Gary Devine's history and knew of his associations with other teenage girls; even if they were unable to arrest Gary Devine there is no evidence they took any steps to disrupt that relationship, or attempted to interview the children away from him; Police may have been able to warn Child Protection Services.

10. The Complaints in Care visiting regime and the reasons for interviewing a child under orders alone is still misunderstood and remains a box-ticking exercise satisfied by any home visit in the presence of anyone (carer, parent, SSW). The Child has a right to regular 1:1 interviews with their CPW.

11. Drug screens relied on a method of testing for drugs with short half-lives which gave a false sense of security, and led to Mother's false reports of illicit drug abstinence being overlooked.

12. CPS knew about and condoned the Mother's continued abuse of cannabis, excluded it from their working definition of "illicit drugs" and thereby exposed the children to

risks of dangerous drug culture influences, poor parenting practices and the burden of parenting responsibility that fell on their shoulders.

13. CPW treated positive changes in the Mother's demeanour or conduct as proof of reduction of all risks present in the family, rather than relating improvements only to those risks created by those behaviours. For instance family support and Government workers performing ordinary parenting tasks were positively and illogically regarded as an improvement in the Mother's parenting capacity.

14. CPW treated referral to Family Support Services as evidence of reduced risk before assessing any change in behaviours giving rise to the those risks.

15. CPS may have failed to fully utilise family networks at an early stage, including two aunties, or failed to have given the older children's father and step-mother encouragement and support to provide a stable parenting role at an earlier stage.

16. There was no "ecological map" of the child's extended family and neighbourhood/community to identify and assess strengths and risks outside the immediate family.

17. CAAG recommended lapsing the order when the subject child was not consistently engaged in education and not engaged with a peer group and while Gary Devine was involved with the family;

18. The Referral acceptance by Gateway was greeted with relief and regarded as a component of child safety in its own right.

19. There is a persisting culture of CPS treating the judiciary as an arm of the executive, encouraged by carte blanche orders allocating the entire parental responsibility for a child to the Secretary, by there being no means in the CYPTF Act of enforcing obligations cast upon the Secretary and leaving an unfettered and unchecked discretion to let orders lapse resting in the Secretary.

20. The verbal assessment of the child's consultant psychiatrist was that "What happens day to day has greatest chance of changing her [the child's] behaviours" but CPS put nothing in place that could affect what happened day to day in the home.

21. Eligibility rules for Distance Education appeared to be based on classification rather than need

RECOMMENDATIONS

1 PARENTAL POVERTY AS A CHILD RISK FACTOR

1.1 THAT the Tasmanian Government as a matter of urgency commence negotiations with the Commonwealth Government through FAHCSIA and CENTRELINK for voluntary income management for families referred to Gateway which Gateway assess as likely to benefit and involuntary income management for families with children under a Voluntary Care Agreement, requirement or orders assessed by Child Protection Services as likely to increase the level of child protection.

1.2 THAT the CPIS Notification record and Tasmanian Risk Framework include as risk factors:

- family structure, in particular assessments of spouses of single mothers and the presence of itinerant male associates of single mothers
- childhood trauma of primary carer

2. SECRETARY TO BECOME THE MODEL PARENT

2.1 THAT case closure ceases to be a measure of successful removal of risk to a child.

2.2. THAT the fact of acceptance of a referral to Gateway and Government-funded Family Support Services (FSS) not be an indication of any change in the level of risk until a) the brokered FSS has engaged and b) the engagement has been evaluated and FSS has reported demonstrated capacity to have reduced risk to an acceptable level.

2.3 THAT s.42(4) of the *Children, Young Persons and Their Families Act 1997* (CYPTF Act) be amended to include (a1) an order for a specified period not exceeding 12 months placing the child under the supervision of the Secretary and requiring the child or a guardian of the child to follow all reasonable directions of the Secretary.

2.4. THAT S.42(4) of the CYPTF Act be amended to provide that the Court have power to make an order placing the child under the guardianship of the Secretary for such period exceeding 12 months as the Court considers necessary to provide for the safety and wellbeing of the child.

2.5 THAT Child Protection Workers (CPWs) conduct joint home visits with Department of Education School Social Workers in cases like the present where school non-attendance has become a threat to the developmental safety of the child and/or is a symptom of neglect or risk at home.

2.6 THAT DCYFS conduct joint training of CPWs with Youth Justice Workers to understand cultural perspectives of children and young people.

2.7 THAT s.59 of the CYPATF Act be amended to provide that the appointment of the Separate Representative shall terminate when the Court so orders, and that during their tenure, the Secretary consult with the Separate Representative in Family Group Conferences, and in CAAG meetings to obtain an independent perspective of the best interests of the child.

2.8 THAT the Legal Aid Commission of Tasmania use every endeavour to engage the same Separate Representative in relation to each child where there are multiple proceedings or applications.

3 COURT APPLICATION ADVISORY GROUP (CAAG) DECISION MAKING PROCESSES

3.1 THAT the CAAG decision making process for considering reunification of children placed in OOHC or placing children in the care of family with whom they were living when the most recent substantiated risk arose is conducted according to a Structured Decision making process.

3.2. THAT in order to correct excessive optimism about family strengths, capacity to change and actual change, the CAAG structure be formally altered to include on every occasion perspectives from outside DCYFS drawn from the following: School Social Worker, Early Intervention Police Officer, Community Youth Justice Worker, relevant Co-located Gateway Child Protection Worker, the Family Support Service Worker who most recently visited the child.

3.3. Alternatively that the CPW Report to CAAG be circulated to the above before the CAAG meeting and they have adequate opportunity to put their views before the CAAG.

3.4. Alternatively that the delegate be required to consult with the above before making a decision on behalf of the Secretary.

3.5. THAT CAAG and the Delegate in every case actively consider the option and the benefits of seeking an extension to statutory intervention and record reasons for excluding it in the particular case.

4. FILE CLOSURE

4.1. THAT DCYFS change its file closure procedure so that when a child is living with family members with whom they were living when the original risk arose the file is closed only when an Area Manager (alternatively a Senior Practice Consultant) from an Area other than the "home" area is satisfied that:

- there is documentary evidence from a professional outside DCYFS who has interviewed the child/ren and the adult family that the adults' capacity to protect and provide for the child/ren's health, development, education and wellbeing has changed so as to reduce the risks identified in the most recent substantiated notification
- the child has died or moved out of the jurisdiction; or
- the child has attained 18 years.

5. SCHOOL SOCIAL WORKERS

5.1 THAT the Secretary accept the assessment of a Department of Education Social Worker recorded on a Common Risk Assessment Framework Tool, to be developed for the purpose, as a substantiated notification and allocate it to case management with priority.

5.2. THAT Department of Education School Social Workers undergo professional development in the proper use of the Common Risk Assessment Framework Tool.

5.3. THAT the Common Risk Assessment Framework Tool be amended so that it contains all the information necessary for a CP Intake Assessment, save for previous CPIS history to be included by Child Protection.

6. INVOLVEMENT OF COURT WHEN MAKING ORDERS

THAT in order to address the cultural expectation that the Secretary determines statutory outcome the following amendments to the CYPATF Act be made or Rules of Court provide as appropriate:

6.1 THAT the Secretary when filing an Application for an Assessment Order under s.22 of the CYPTF Act identify on the notice and identify in the application what aspect of the child's circumstances and each parent's circumstances are to be assessed, from what professional discipline the assessor or assessors is to be drawn and the names and dates of the probable appointments made for the assessment; and that the relevant form be altered accordingly.

6.2 THAT s.22(3)(a) be amended to provide "in accordance with the application and such other assessments if any as the Court may order the Secretary to undertake";.

6.3 THAT s.22(5)(b) be repealed or the words "in any other case" be replaced by words to the effect "to enable the completion of an assessment ordered pursuant to s.22(3)".

6.4 THAT Interim and Final Assessment orders identify the party who is to comply with the order of the Court (or express Assessment Orders in the active sense).

6.5 THAT the Secretary be required to tender a Care Plan when seeking a final Care And Protection Order specifying inter alia the risk factors identified by the Secretary that gave rise to the Application and the circumstances the Secretary in his opinion says will be evidence that the identified risks have abated to an acceptable level.

6.6 THAT the Court makes orders that give effect to a Care Plan or require a person or persons to do such things as the Court considers will address the risk factors identified in the Application.

6.7 THAT a Care and Protection Order made pursuant to s.42(4)(a), (b) or (c) only expires upon the Court satisfying itself on evidence adduced that the lapsing of the order is in the best interests of the child (BIOC) in the circumstances that exist at the time of the re-listing and that if such expiry hearing occurs after the expiry of the period of the order, that the order continue in force until such time as the Court discharges it.

6.8 THAT the Court in each case specify the date that the appointment of the Separate Representative shall expire and in an apposite case have power to order that a Separate Representative provide such advocacy services to the child as it sees fit, in particular but not limited to representing the child at a Family Group Conference ordered by the Court or convened by the Secretary and representing the Child at an expiry hearing.

7. CHILDREN AND YOUNG PEOPLE UNDER CARE AND PROTECTION ORDERS (CAPO)

7.1 THAT the Department of Education prepare an Individual Education Plan for each child under the guardianship or custody of the Secretary and provide resources for alternative educational programs recommended by the School Social Worker, the School Principal and the School Psychologist after consultation with the child.

7.2 THAT the Government as a matter of urgency provide community based education settings for children who are at high risk of disengaging from formal education or for whom the classroom setting has been assessed by the relevant School Social Worker and Principal as unsuitable.

7.3. THAT in designing any Statewide alternative education models under the Children and Youth Strategy and the Youth At Risk Strategy, the Government consult closely with children and youths identified as chronic non-attenders, rather than create a model solely based on academic study and models external to Tasmania.

7.4 THAT the Government streamline the capacity for the Department of Education to allocate funding for and provide Distance Education to children under a CAPO on the joint recommendation of the School Social Worker and the CPW, especially when the child declines or fails to attend assessment for general eligibility.

7.5 THAT if the evaluation of the current Children's Visitors Pilot shows that children under the guardianship of the Secretary have obtained benefit from the Pilot that the Minister provide for the appointment of a Children's Visitor for each such child whether in OOHC, in their birth family or in kinship care, such Visitors to be engaged by a body independent of the Government.

7.6 THAT the functions of the Commissioner for Children to include "advocating for children under the guardianship or custody of the Secretary".

8 CHILD PROTECTION AND GATEWAYS PRACTICE

8.1 THAT the Secretary mandate the use of the Form "Complaints in Care Policy Standard – CHILD VISIT" in relation to all children under the guardianship or custody of the Secretary.

8.2 That the Secretary mandate that such visits be conducted with the child in the absence of any other person unless in the special circumstances of the case it is not practicable to arrange such a visit or it is not in the best interests of the child for reasons given.

8.3 THAT Gateways accept referrals from Child Protection Services if accompanied by a Tasmanian Risk Framework report and a briefing from the CPW without conducting a further risk assessment.

9 FUTURE MANAGEMENT OF SUBJECT CHILD

9.1 THAT the Secretary in association with the Child's counselling service refer the Child to a legal practitioner outside Tasmania and specialising in personal injuries to provide her with legal advice as to her prospects of recovering damages or any other redress against any person or body arising relevantly out of her exposure to the risk of harm in the period 22 August 2009 to 20 September 2009.

9.2 THAT the Legal Aid Commission of Tasmania meet the proper costs of such advice including the advice of counsel and the party-party costs of any proceedings instituted as a result of such advice.

10. COMMISSIONER FOR CHILDREN FUNCTIONS AND POWERS

10.1 THAT the Government review the wording of s.80 of the CYPTF Act and enact amendments necessary to clarify the powers of the Commissioner for Children to obtain documents and information either necessary or convenient to the Commissioner to enable him to perform his functions under that or any other Act.

10.2 THAT s.79 of the CYPTF Act be amended to give the Commissioner for Children such additional functions as will enable that Officer to fulfil the promise of "Preventing problems before they arise" including but not limited to:

- conducting audits both individually and generally of the circumstances of children and young people in the guardianship or custody of the Secretary
- conducting investigations of his own motion into the matters in existing paragraph 79(1)(f)
- intervening in Court proceedings at the invitation of a Court and subject to rules of Court.

10.3. THAT the Secretary make the Action Research and Learning Project a permanent part of Child Protection Practice and develop processes that encourage Child Protection, Foster Care and Family Support Workers to share learning for adverse outcomes.

10.4 THAT the Department of Education institute and adequately resource a uniform and universal school-based personal safety program in the primary school curriculum of all Tasmanian Schools, both Government and Independent.

11. CRIMINAL LAW

11.1 THAT the Government refer and provide adequate resources to the Tasmanian Law Reform Institute for consultation and advice on the following matters:

- the question whether the defence of reasonable and honest mistake in relation to sexual offences against persons under 17 should be available and whether it should be altered.
- what additional protections can be provided to children giving evidence in cases involving sexual assault.

11.2. THAT the Government review the *Sex Industry Offences Act 2005* and in doing so actively consider the option of prohibiting the purchase of sexual services other than for certified medical reasons and actively consider the contribution of any amendment to the safety and sexualisation of children.

11.3 That after an appropriate period the Government advise the Governor to appoint a Commissioner of Inquiry under the *Commissions of Inquiry Act 1995* to review the decisions of the Crown in relation to the prosecution or otherwise of persons suspected of having had intercourse or indecent dealings with the subject child in order to address any public concerns about the probity of such decisions.

Paul Mason
Commissioner for Children
August 2010