



NSW Ombudsman's Special Report

The Death of Ebony: The need for an effective
interagency response to children at risk

NSW FOI/Privacy Practitioners Network

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My brief today is to talk about the Ombudsman's October 2009 Special Report: The Death of Ebony, insofar as it relates to child protection and privacy practice, and related information exchange more broadly.

Ebony was aged 7 when she died on 3 November 2007 of starvation and neglect. On 23 June 2009, a jury found her mother guilty of murder and her father guilty of manslaughter by virtue of their appalling neglect of their daughter.

In between her death and the finalisation of her parents' trial, we had the Wood Special Commission of Inquiry. The Special Commission was established as a consequence of the death of Ebony, and that of a young Aboriginal boy who died around the same time. In December this year, we will also release a Special Report about our investigation of the circumstances leading up to that child's death. In both matters, we have made observations about child protection practices/challenges relating to the exchange of information. In relation to the death of Ebony, our investigation was into the actions of DoCS, Education, Housing, DADHC and Police in the lead up to her death. In relation to the young Aboriginal boy, our investigation examines both the conduct of DoCS and an NGO agency, including exchange of information challenges in the NGO/government agency context.

Time doesn't permit me to go into all of the significant events in relation to the death of Ebony. But let me note the following.

She was one of four siblings – the second youngest. In October 2003, the Children's Court made an order for the youngest child to be placed in the care of the Minister until aged 18. In the period leading up to and in the months following the care application before the Children's Court there had been good interagency work with Ebony and her family. Why? Because the Children's Court processes gave agencies a strong 'buy-in' to examine the family's circumstances, and so good interagency work was able to be carried out.

Following the Court case and just prior to Ebony turning 5, she had been identified by DADHC as having a disability, and Education and DADHC had decided to put disability supports in place once she had commenced school - this was planned to occur in 2006. However, she didn't attend school at any time. Also, her two older siblings had very protracted absences from school during the 2006-2007 period leading up to Ebony's death.

In 2005, six risk of harm reports were made in relation to the children. More resulted in comprehensive assessment. That same year, a paediatrician saw Ebony and described her as "slightly obese". In 2006 there were three more risk of harm reports about the children. What our investigation shows is that in 2005, 2006 and 2007, despite a child protection history that clearly required agencies to identify this family as high risk; actively share relevant information with each other and respond in a coordinated way; no such response occurred. Furthermore, our investigation also highlights that an approach which is dependent on DoCS playing the role of ensuring that critical information is assessed and responded to in a systemic, coordinated fashion, can be highly problematic and completely ignores that, with 300,000 child protection reports coming through its doors each year, the notion of DoCS being able to play an effective role as the hub of all key child protection communications is a myth. Yet, despite this myth, we have continued to operate an exchange of information regime which has services with responsibility for protecting and supporting children and their families, breaching privacy law if they pass on relevant personal information to other like bodies without their client's consent. In order to understand why this has been the case, we need to appreciate that, in most child protection matters, Section 248 of the Children and Young Persons (Care and Protection) Act **only** allows DoCS to receive information from and furnish information to other agencies about the safety and wellbeing of children.

From where we sat, having reviewed thousands of child protection reports and hundreds of deaths of children known to DoCS, we were of the view that the approach to exchanging personal information needed be completely turned on its head – from justifying why information needed to be exchanged, to justifying why information was not being exchanged between key agencies when safety, welfare or wellbeing issues were in play. We outlined our views along these lines in a submission to Wood on privacy and the exchange of information. However, this was not our first venture into this area.

On the tabling of his annual report for 2005 – 2006, the Ombudsman said:

A final and emerging theme touched on in my report, is the need for agencies to be able to communicate effectively. This is especially important where the wellbeing of the most vulnerable in our community is the purpose of the communication.

It is sometimes a difficult task – to balance the right of privacy against the needs for agencies to share information about vulnerable persons. However, where there are real risks if information is not appropriately and expeditiously shared, arrangements should facilitate and not hinder free communication. Part of the cause [of the problem in this area], is the complex and cumbersome array of privacy rules binding public and private sector agencies, which are in urgent need of review.

Furthermore, in 2006 and 2007 submissions to DoCs' review of the Children and Young Persons (Care and Protection) Act, we argued that Section 248 is too limited in what it allows because key government and non government agencies other than DoCS also need to have the power to exchange personal information about their clients with each other.

In particular, we argued that because these agencies have significant responsibilities in relation to protecting children, and need to share information with each other to jointly support vulnerable children without DoCS necessarily being involved, it was completely impractical to make information exchange go via the DoCS route in every case.

In our submissions we had also noted that, apart from key privacy legislation, Section 254 of the Children and Young Persons (Care and Protection) Act provides that it is an offence for a person to disclose any information obtained in connection with the administration or execution of that Act. Therefore, this also restricted the ability of agencies to directly exchange information about a child's safety, welfare and well-being with each other.

In fact, in practice, an agency deciding whether or not certain information should be disclosed to another agency, needed to consider:

- sections 248 and 254 of the Protection Act – which are very restrictive in nature
- the Privacy Acts and regulations
- any Privacy Codes of Practice (under the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002*) that may be applicable
- any Privacy Directions that may be applicable
- any privacy management plan that the agency has in place.

It is important for me to stress that we have not been engaged in some theoretical exercise in raising concerns around this issue. Through our child protection work over the past six years we have conducted over 100 investigations. From this work we have seen the impact of a culture which operates against the exchange of information. For example, in one case in which an infant died from abuse while in relative care, the police had contacted DoCS to inquire about where the child had been placed and they had been told that they had no right to ask. If DoCS had told Police the details of the placement, the Police would have been in a position to advise DoCS of significant risks with that placement.

As early as our 2006 and 2007 submissions to DoCS' review of the *Children and Young Persons (Care & Protection) Act*, we had argued that all prescribed bodies – government and non government alike – need to be able to exchange information with each other in relation to the “safety, welfare and wellbeing of a child”. This view had not been accepted. Therefore, in our submission to Wood we ran the same line. As part of our submission we wrestled with whether opening up the exchange of information pathways should take place through privacy codes of practice or directions, or through legislative change. We opted for legislative change. In part, we decided against dealing with this issue through privacy directions because of the complicated directions that had been issued in the past. On this specific issue, Justice Wood in his final report noted that:

As a final observation, the Inquiry notes the existence of an early draft for a DoCS Privacy Code of Practice which is ultimately to comprise two documents, an explanatory memorandum and the Code. The text currently runs to 75 pages without the several appendices, which include nine Privacy Directions and three Codes. Its stated purpose is “to simplify and clarify what the Department is able to do with its clients’ personal and health information under its own Act and under other privacy and health laws.”

The draft code observes that:

- a. in order to allow this to occur the code is to modify the existing information privacy principles under the PPIP Act and HRIP Act, so far as DoCS is concerned*
- b. it is recognised that the draft code could not regulate what other government agencies can do with the personal/health information they hold*
- c. it is “considerably different from Codes of Practice currently used in other government agencies.”*

While the hope is expressed that it will be a ‘one shop stop’ for DoCS employees in dealing with privacy matters, the Inquiry notes that in several places it requires or invites hot links to other documents, including various Acts and Regulations, as well as to caseworker manuals, and advises that, where there is an inconsistency with privacy principles under other laws pursuant to which DoCS may carry out various functions, those other laws will prevail.

The reasons for drafting the code are understandable. However, the sheer length and complexity of this document, its expansion by reason of the cross references to a number of other documents, the caution that where it is inconsistent with laws other than the Care Act those laws will prevail, and the further caution that its provisions will differ from the provisions of the code of other agencies, leads to only one conclusion. In its current format, rather than simplifying the work of DoCS staff in managing privacy issues, it will only make that task even more difficult. It will, in the Inquiry’s view, do little to resolve the problems faced by DoCS in exchanging information with other agencies, and its publication would not assist the other agencies.

The rest now is history. Justice Wood accepted the approach we had been recommending for a number of years and, importantly, linked this issue of freeing up the capacity to exchange information with a shared responsibility on agencies to coordinate the provision of services to families. (Importantly, Judge Taylor also endorsed the need for legislative change.) Having read our full investigation report into the death of Ebony – and DoCS' related report – and having witnessed the need for a system in which free exchange of information was an important element in achieving an integrated service system, Justice Wood recommended – and the government accepted – legislative change to permit the free exchange of information in child protection matters between government and non government agencies with direct responsibilities for children’s welfare. The new S.245A of the Act also outlines the principle that getting services to people takes “precedence over the protection of confidentiality or an individual’s privacy” in child protection or child welfare matters.

And so, has this issue now been successfully dealt with?

Well, I would like to suggest the jury is still out.

It is important to recognise that legislative change and the related formal arrangements being developed in relation to information exchange present only part of the challenge. Both the government and non government agencies alike need to appreciate that effective child protection practice is contingent on agencies understanding the need to be proactive in obtaining information from other agencies and in passing it on. As I have said earlier, we have seen an emphasis in child protection practice on the risks associated with the disclosure of confidential information at the expense of recognizing the very significant child protection risks which can arise from the failure to pass on vital information. Therefore, while the recent legislative amendments represent an opportunity to improve practice in relation to the exchange of information, we believe this will not occur without a corresponding cultural shift that promotes information exchange as part of good child protection practice.

Finally, I would add that it is somewhat tunnel visioned to believe that this issue of the need for greater early exchange of information is only relevant to vulnerable kids. In our recently released Annual Report, we made the following comment about the exchange of information in the context of the Human Services area generally. In particular our comment referred to our investigation work on the Joint Guarantee of Service for people with mental health problems and disorders living in Aboriginal community and public housing:

Our work has shown us that this is a problem that goes beyond child protection, impacting on those providing services to adults, and includes those working in areas such as domestic violence and mental health. During our JGOS [Joint Guarantee of Service] investigation, we found many frontline staff were struggling with when and how they could share information with other organisations. They had real difficulties in situations where someone either refuses to, or is unable to, provide consent for the release of information. This can stop people from being provided with essential care and support.

I recognise that we have to strike a balance between effective care and protection for the most vulnerable in our society and the need to deal with personal information correctly. What we have now is not working, and time and again we speak with frontline staff confused and frustrated by the complex legislative system around the exchange of information. They are working hard to implement new initiatives, only to be hamstrung by their uncertainty and fear around what, if any, information they can pass on.

We need to provide these frontline workers with a greater level of certainty and guidance and make sure the people they support receive the level of service to which they are entitled. This is a pressing issue, and we will continue to push for change.

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