# DISCUSSION PAPER

Child Protection: Legislative Reform
Legislative proposals

Strengthening parental capacity, accountability and outcomes for children and young people in State care

22 November 2012

# INVITATION TO COMMENT

I invite you to contribute your views about new policy and legislation which will transform the way child protection is done in NSW, to improve services and lives. Our vision is a strong, integrated and contemporary child protection system that protects and empowers the most vulnerable members of our society.

This discussion paper proposes ways to help families change, and to help local communities keep children and young people safe.

It is a major step in the NSW Government's 2012-15 reform agenda to create a strong child protection system that ensures children and young people at risk of significant harm are safer and those that need to be in State care have a better future.

The Government is:

- **reducing the number of children in care –** seeing more families earlier and better targeting early intervention; helping families take responsibility and change
- **seeking permanency for children in care –** making decisions quickly about a home for life, and focusing on their education and health needs
- **doing better for vulnerable adolescents –** getting our policies and programs right and encouraging innovative new approaches for this previously neglected age group
- **localising our service system –** harnessing the capacity of community and government partners to deliver services to the most vulnerable.

This discussion paper proposes a wide range of new initiatives to meet these themes and, in particular, the first two.

The government is under no illusion of the challenge ahead. Some of the reforms outlined in this paper will challenge the way we have been used to doing things in NSW. They will likely generate lively debate. That debate is welcomed as we cannot improve services and lives in NSW without real, and at times, bold reform.

I urge you to contribute your views and I look forward to an ongoing conversation with the community as the Government progresses this vital reform agenda.

The Hon. Pru Goward MP
MINISTER FOR FAMILY AND COMMUNITY SERVICES
MINISTER FOR WOMEN
22 November 2012

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# INTRODUCTION

## WHERE WE STAND TODAY

The NSW Government is committed to real reform of the NSW child protection system to make long-term improvements to services and lives.

We inherited a child protection system where although the overall number of reports received by the Department of Family and Community Services (FACS) through its Community Services Division ("FACS (CS)") is declining, the number of urgent 'risk of significant harm' reports is relatively the same. At the same time Community Services staff visited only one-fifth of these children and young people.

The number of children and young people in care is also too high. In 2010-11, there were 17,896 children and young people in out-of-home care (OOHC). This includes 11,813 (66 per cent) in statutory (court-ordered) care, 6,031 (33.7 per cent) in supported care with relative and kin and 52 (0.29 per cent) in other care arrangements. We inherited a system in which the rate of children and young people in out-of-home care (OOHC) had increased since 2007, and in which children and young people were staying in care for longer periods.

Too many children and young people in care are experiencing a revolving door of placements which impacts on their development, schooling, health and general wellbeing. Aboriginal and Torres Strait Islander children and young people continue to be significantly over-represented in the care system.

The human and economic cost of such large numbers of children and young people at risk of significant harm and in OOHC is too great and simply unsustainable.

NSW needs a contemporary child protection system that is more flexible and better able to respond to the corrosive effects of intergenerational abuse, drug and alcohol addictions and chronic violence in the home as well as geographic disadvantage.

This government is committed to repositioning the child protection system to put families, not systems, at the centre of attention.

Goal 13 of the State Plan, *NSW 2021*[1], reflects our commitment to "better protect the most vulnerable members of our community and break the cycle of disadvantage".

*NSW 2021* commits this government to:

- reducing the rate of children and young people reported at risk of significant harm by 1.5 per cent per year
- reducing the rate of children and young people in statutory OOHC by 1.5 per cent per year
- increasing the proportion of NSW children who are developmentally on track in Australian Early Development Index domains.

These are bold targets the government is determined to meet.

[1] *NSW 2021* can be accessed at http://2021.nsw.gov.au/

Since the Coalition Government came to power in 2011, we have made changes to reduce reliance on the statutory child protection system to help vulnerable families. We have developed a culture of continuous learning and improvement in FACS (CS) practice and a commitment to evidence-based, sustainable solutions. NSW continues to invest heavily in early intervention programs such as *Families NSW* and *Brighter Futures* (which is now delivered by the non-government sector) to divert families to services earlier.

We are working on reforms to deliver a seamless service system that works for families. The transfer of OOHC to the non-government sector has begun and FACS (CS) now co-delivers with our partner government agencies and non-government organisations (NGO) integrated services across the child protection spectrum, from early intervention to leaving OOHC. The non-government sector's capacity to deliver services is growing exponentially, as is its expertise and ability.

The government is also implementing new collaborative systems and means to share information that have seen us providing more holistic and targeted services to support families.

There is much more to do.

## WHERE WE ARE MOVING TO

Across FACS we have set out in a bold new direction, with the goal of transforming the status quo. Our future services will:

- focus on people, not programs
- work with individuals and families as early as possible
- harness community capacity, and
- drive a results-focused organisation and delivery system.

This vision for reform includes an ambitious suite of integrated reforms in legislation, policy and practice that are necessary to place FACS (CS) on a more sustainable footing and improve the outcomes for at risk children and young people. It builds on strong foundations and the strength of our community and government partnerships. It reflects a culture of continuous learning and improvement in practice and a commitment to evidence-based, sustainable solutions.

FACS (CS) work over the next three years will be guided by four overarching goals:

- fewer children and young people who are vulnerable to abuse and neglect
- children and young people at risk of significant harm are safer
- a better future for children and young people in care
- a capable organisation and service system.

These goals are driving change in FACS (CS) and the reforms set out in this paper.

Improving the lives of children in care is being led by the transfer of OOHC placements to non-government providers, and is supported by reforms proposed in this paper to increase permanency and new flexibilities to work with families, children and carers in different ways.

Our partnerships with the non-government sector help enable community and social capital to be built, creating communities that have greater social cohesion and less child abuse. These goals are supported through proposals in this paper to enhance the tools available to work with parents who are unable to look after their children effectively.

Getting things right in these areas will provide a solid foundation to reduce the number of children and young people at risk of harm and in state care. It will also enable the system to revolve around what is most important – providing children and young people and their families the support they need when they need it.

## LEGISLATIVE REFORM AGENDA

### Section 1: Promoting good parenting

We need to make sure all parents understand the great value our community places on what they do. While parents must know there are consequences when they aren't able to adequately care for or meet their children's needs and when they expose them to harm, they also need to know they are supported in meeting their responsibilities.

Section 1 of this discussion paper outlines ways in which parents' accountability for providing their children with a safe and nurturing home will be improved and how we will support and enable them to build their capacity and ability to do so. It proposes measures to strengthen our Parent Responsibility Contract (PRC) scheme and better use effective parenting capacity programs and other therapies to equip parents with the skills they need to keep their family together and avoid the need for child protection intervention. It also proposes reforms to educate parents through increasing the deterrents for child abuse and neglect.

These reforms will build a solid foundation to reduce the number of children and young people at risk of harm.

In summary, the proposals include:

- Introducing stand-alone parenting capacity orders to require parents to attend a parenting capacity program or therapeutic treatment or other service
- Strengthening the PRC scheme by:
  - introducing PRCs for use in early intervention programs to support disengaged parents
  - extending the maximum duration of a PRC from six to twelve months to enable parents to attend intensive parenting courses or therapeutic treatments and demonstrate abstinence from substance misuse so their children can stay at home with them safely
  - introducing PRCs relating to unborn children who are at risk of being taken into care once they are born, to help parents improve their parenting capacity in preparation for the birth of their child
  - requiring FACS (CS) caseworkers to attempt to use PRCs with parents prior to commencing care proceedings in appropriate matters
- Considering the suitability of Family Group Conferencing (FGC) for care matters to better engage families to resolve child protection concerns
- Introducing an enforcement regime for prohibition orders to ensure children and young people in the care system are protected from potential risk
- Improving the way in which we prevent and respond to serious abuse and neglect of children and young people by introducing alternative sentencing options (other than fines) to child abuse and neglect offences such as community services orders and therapeutic services/rehabilitation

## Section 2: Providing a safe and stable home for children and young people in care

Sadly, ongoing problems of substance abuse, mental illness, neglect and domestic violence mean that some children will never be able to live safely at home. However, we know that children who grow up in OOHC find it more difficult than their peers to successfully transition to adulthood. Too often care leavers experience unemployment, homelessness and social isolation.

Children entering care with no possibility of restoration need a permanent family that gives them love, nurturing and a stable future. For some children, an open adoption offers their best chance of long term security and an opportunity to belong. For other children and young people, particularly from Aboriginal communities, adoption is not culturally appropriate, and different arrangements are needed for these groups to provide the stability and certainty that all children deserve.

Section 2 of this discussion paper outlines how the government plans to provide more children and young people in OOHC with safe and stable homes to improve their social, emotional, health and education outcomes.

Reforms focus on removing barriers to adoption when it is in a child's best interests, improving supported care placements and introducing new long-term guardianship orders to support permanency and stability for children in relative and kin placements.

In summary, the proposals include:

- Achieving greater permanency for children and young people in OOHC by:
  - incorporating permanency into the objects of the *Children and Young Persons (Care and Protection Act 1998* ("Care Act") including the preferred hierarchy of permanency being:
    1. family preservation/restoration
    2. long-term guardianship to relative or kin
    3. adoption
    4. parental responsibility to the Minister
  - legislating that the Court can only make an order for parental responsibility to the Minister if adoption or long-term guardianship have been considered and discounted
  - requiring permanency plans not involving restoration to include a proposal for pursuing guardianship or adoption (as appropriate) or a reason as to why these will not be pursued
  - legislating timeframes for decisions about the feasibility of restoration – within six months for children less than two years old or within twelve months for children older than two years
  - enhancing supported care placements by:
    - introducing the self-regulation of supported care placements to limit the intrusion of FACS (CS) in stable relative and kinship placements
    - introducing a two-year cap on the duration of supported care placements after which decisions are to be made about the permanent placement of the child or young person
  - providing permanent care to children and young people when adoption is not in their best interest by:
    - introducing long-term guardianship orders
    - repealing current under-utilised provisions of the Care Act for sole parental responsibility orders
    - introducing concurrent planning to support timely permanent placements for children in OOHC by either streamlining the assessment of authorised carers and prospective adoptive parents or creating a new category of "concurrent carer" who is authorised as both a long-term carer and prospective adoptive parent
- Making the adoption of children and young people in OOHC easier and quicker by:
  - conferring to the Children's Court jurisdiction to make adoption orders where there are child protection concerns
  - amending the *Adoption Act 2000* ("Adoption Act") to better recognise that authorised carers should not be required to undertake full assessment and authorisation as a prospective adoptive applicant
  - enhancing the capacity of non-government services to implement permanency planning policy and principles by merging the *NSW Standards for Statutory OOHC* and the *NSW Adoption Standards*

- amending the Adoption Act to improve the involvement of birth parents in planning for the adoption of their child, including allowing non-consenting parents to be parties to an adoption plan and greater use of alternative dispute resolution (ADR) in adoption proceedings so that parents are fully engaged in planning for matters such as contact arrangements
- amending the Adoption Act to provide for additional grounds for dispensing with parental consent including grounds where:
  - the parent is unable to care for and protect the child, for example, the parent is incarcerated for an offence against the child, or the parent repeatedly refused or neglected to comply with parental duties and reasonable efforts have failed to correct these conditions
  - a parent cannot be located, despite having given an undertaking to keep FACS (CS) informed of their whereabouts
  - there is no realistic possibility that the parent will be able to resume full-time care of the child or young person because reasonable efforts have failed to correct the conditions leading to the child or young person's placement and it is in the best interest of the child or young person to make the decision now
- limiting the parent's right to be advised of an adoption application when they cannot be located within a specified time period where:
  - their child is over twelve years of age and has given their sole consent to the adoption, or
  - when the Children's Court has taken away parental responsibility for that parent in care proceedings and found that there is no realistic possibility of restoration.

## Section 3: Creating a child-focused system

The government is committed to creating a child-focused system that promotes stronger outcomes and better lives for vulnerable children and young people.

Section 3 outlines a number of proposals to make this a reality. They cover a broad range of issues that affect children and young people such as contact arrangements between children and young people in OOHC and their birth families, the misuse of social media, special medical treatment for children and young people and improving Court orders.

FACS (led by CS) is also currently reviewing FACS policies and programs that seek to help highly vulnerable teenagers, in order to identify potential reforms that improve outcomes for this very vulnerable group of young people. This includes identifying possible reforms in collaboration with our partners the Department of Attorney-General and Justice, including Juvenile Justice NSW, and the Department of Education and Communities and the Ministry of Health to improve outcomes for young people who are in contact with the juvenile justice, education and health systems. The reforms that arise from this review will complement the measures canvassed in this discussion paper.

In summary, the proposals include:

- Focussing contact arrangements as elements of decision-making between children and young people in OOHC, their carers and their birth families by:
  - enabling designated agencies to make contact arrangements as part of case planning where there is no possibility of restoration
  - developing a common framework about contact arrangements between children and young people and their birth families to guide designated agencies when making contact decisions
  - improving the resolution of contact disputes by requiring ADR to be used to settle contact disputes and introducing a review mechanism for contact disputes either in the Children's Court or the Administrative Decisions Tribunal or the Family Court where ADR has been unsuccessful
  - giving the Children's Court the power to enforce contact orders and arrangements
- Establishing a comprehensive legislative framework for the use of ADR in the child protection sector dealing with a range of matters including definitions, role, obligations and protections of convenors, confidentiality of ADR processes, and the limitations on the admissibility of information or documents disclosed in the course of ADR

- Clarifying and consolidating in the legislation the provisions relating to the regulation of special medical treatment for children and young people
- Minimising the improper use of social media in a child protection context by strengthening provisions in the Care Act to prevent the unlawful publication of names and images of children and young people on social media sites and to prevent the publication of offensive or derogatory material about FACS (CS) workers which is intended to harass
- Simplifying the current scheme of parental responsibility orders by:
    - streamlining parental responsibility orders that may be made by the Court to make it easier to identify who holds which aspect of parental responsibility for a child or young person
    - introducing a 'self-executing' order whereby parental responsibility is with one person for a period of time and then passes to another at the end of the period
- Allowing supervision orders to be extended for a further twelve months where the original order has expired and no report has been filed for the Court's consideration
- Enabling the Aboriginal Child, Family and Community Care State Secretariat (AbSec) and the CREATE Foundation to have access to personal information to permit fulfilment of their objective
- Enabling private medical professionals to share with other relevant agencies personal and health information about children, young people and families without client consent where this relates to the safety, welfare and wellbeing of a child or young person
- Requiring government to report on the deaths of children and young people known to FACS (CS)
- Clarifying the reporting requirements regarding children living away from home without parental consent.

## CONSULTATION PROCESS

Comments on proposals which underpin the government's reform agenda are invited from all interested parties, including children, young people, parents, carers, services providers, government agencies, FACS staff, the legal community, NGOs, and the wider community.

Following the consultation period, a Bill will be drafted for introduction into the NSW Parliament during 2013.

Individuals and organisations are invited to comment by any of the following means:

- downloading a feedback form from the NSW Government's Have Your Say website: http://haveyoursay.nsw.gov.au/child-protection-reforms, and
- emailing your feedback to: cpreforms@facs.nsw.gov.au, or
- electronically lodging your submission through http://haveyoursay.nsw.gov.au/child-protection-reforms, or
- posting your feedback to the:

  Statutory Child Protection Branch
  Department of Family and Community Services (Community Services)
  Locked Bag 4028
  Ashfield NSW 2131

Printed copies of this discussion paper can also be obtained by calling (02) 9716 2121.

Feedback must be received by close of business on 8 March 2013.

# SECTION 1: PROMOTING GOOD PARENTING

This section outlines proposals to better support parental capacity and accountability where voluntary early intervention and compulsory child protection approaches have been unsuccessful. They will:

- **Create new parenting capacity orders** which will require parents to attend parenting capacity courses or other treatments or therapies
- **Extend the scope of the PRCs** from six to twelve months duration and to include unborn children
- **Require FACS (CS) to attempt to use PRCs with parents prior to commencing care proceedings** in appropriate matters
- **Adapt PRCs for use at an earlier stage of need**
- **Require FGC to be used for care matters**
- **Enforce prohibition orders**
- **Introduce alternative penalties to fines for offences in the Care Act** to deter repeat abuse and neglect offences and serve as a greater rehabilitative function.

These interventions will form part of a best practice approach to promote good parenting, prevent harm and ensure that fewer children end up in the child protection system.

## 1.1 FRAMEWORK FOR PARENTING SUPPORT AND ACCOUNTABILITY

Providing children with a loving, nurturing and safe environment as they grow and develop from babies to teenagers is one of the most challenging, and important things that a person can do. Most parents do a good job of raising their child. Yet, for various reasons, some parents are unable to meet the needs of their children and the responsibilities of being a parent.

The government has made a significant investment in a spectrum of services that recognise the importance of the early years to a child. The services provided are evidence-based and aim to build the capacity of parents to provide safe environments for their children to grow and to protect children and young people when they are at risk of harm.

Support ranges from building strong communities; targeted prevention and early intervention services for parents who need a little extra support; through to a range of more intensive programs for parents whose children have been, or are, on the cusp of being removed. To align current service provision with the needs referred to in this paper a variety of program reviews are taking place.

### BUILDING COMMUNITIES

FACS (CS) manages a number of programs that contribute to building harmonious, resourceful and resilient communities as a way to providing the best possible environment for families to flourish, such as the whole-of-government *Families NSW* strategy. Appendix 1 on page 63 provides further information on this program.

The premise of these programs is that they provide a platform aimed at the general population and accessible to all population groups to prevent family problems occurring, particularly around key life stages and transitions such as the birth of a child and school-entry. They also provide an ideal 'soft entry' point for early identification and referral for children and families who may require more targeted or tertiary services.

They include community building services and networks available to every family regardless of need - antenatal, maternal and child health, early childhood education, childcare and family support services, supported playgroups, community centres, as well as information for families, employers and the broader community.

## EARLY INTERVENTION AND PREVENTION SERVICES

Prevention and early intervention strategies aim to influence identified children's, parents' or families' behaviours in order to reduce the risk, or ameliorate the effect of, less than optimal social and physical environments. An important goal of prevention and early intervention is to change the balance between risk and protective factors so that the effect of protective factors outweighs the effect of risk factors thus building resilience.

Prevention and early intervention is intended not only to prevent the development of future problems such as child abuse, emotional and behavioural problems, substance abuse and criminal behaviour, but also to promote the necessary conditions for a child's healthy development in all areas.

There is a range of early intervention and prevention services available in NSW for parents who may need additional help with their parenting that community building services are not equipped to provide. Many of these, for example *Brighter Futures, Child Youth and Family Services, Staying Home Leaving Violence and Integrated Domestic and Family Violence Services*, are delivered on behalf of the government by our non-government partners. Services include home visiting, domestic violence support, homelessness accommodation, parenting capacity programs, case management and quality children's services.

## CHILD PROTECTION SERVICES

In January 2012 the government introduced *Strengthening Families*, a much-needed higher tier of targeted support for families whose children and young people were reported to FACS (CS) as being at risk of significant harm and requiring a child protection intervention.

The *Early Intervention and Placement Prevention program* aims to provide support to vulnerable children, young people and families who are in the child protection system to reduce the likelihood of children and young people entering or remaining in child protection and OOHC. It consists of *Intensive Family Support* and *Intensive Family Preservation* programs which provide higher-level family and youth interventions to prevent children and young people coming into care.

*Intensive Family Support Services* help families who are at substantial risk of having their children entering OOHC, but not at imminent significant risk, to keep their children at home safely. Intensive support is provided for up to forty weeks, with caseworkers being available to families 24 hours a day for the first twelve weeks. *Intensive Family Preservation Services* include all the components of the *Intensive Family Support* model but at a higher intensity for families whose children are at imminent risk of removal.

## 1.2 WAYS TO BETTER ADDRESS ESCALATING RISK IN EARLY INTERVENTION AND CHILD PROTECTION

The disengagement of parents, particularly from voluntary early intervention programs can result in the risk to their children escalating to a point where a child protection response is required.

While existing options are effective at engaging parents at the voluntary stage, where parents disengage from voluntary activity or where risk continues to escalate there is a gap in available interventions.

FACS (CS) and some NGOs delivering early intervention and prevention support services have found that a mechanism that has a greater element of enforceability and degree of consequence is needed to secure a commitment from parents to improve their skills as parents. Particularly where the parents have a low-level of resilience and/or their lives are chaotic.

A gap in the way escalating risk is addressed in families between voluntary early intervention and prevention programs and the removal of a child from the care of their parents was also found to be a key risk factor in the *Child Deaths 2010 Annual Report.*[2] It is a response that needs to be improved if the tragic deaths of children and young people known to child protection services are to be prevented.

### 1.2.1 ENHANCING PARENTING CAPACITY

#### Parenting Capacity Programs in an Early Intervention Context

Parenting capacity courses can be an effective way to increase parenting ability and skills. The evidence is that they are most effective when provided in a holistic way with other targeted supports such as therapy and treatment programs that address the particular needs of a family. They aim to help parents develop knowledge and strategies to build positive behaviours in their children, positive family relationships, appropriate discipline techniques, increase parental warmth and responsiveness and decrease harsh coercive parenting.

They may also target other family risk and protective factors in order to improve child outcomes and the parent-child relationship. These factors can include parental mental health; self-esteem; parenting confidence and competence; beliefs about causes of child behaviour; problem solving and coping skills; and communication skills. Other programs that assist with the basic social, health (particularly mental health and substance misuse) and economic needs of the family also improve the ability of a parent to parent better.

There is growing evidence demonstrating the effectiveness of parenting capacity programs.[3] In NSW, parents are being provided with access to programs with a proven track record and an international evidence base. FACS (CS), NSW Health and the non-government sector in NSW have invested heavily in the provision of population-based parenting capacity programs. *Triple P* (Positive Parenting Program) is the main program delivered in NSW, although other programs

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2 Department of Family and Community Services , *Child Deaths 2010 Annual Report.*, 2006, viewed 19 September 2012, <http://www.facs.nsw.gov.au/__data/assets/pdf_file/0013/251320/Child_Deaths_2010_Annual_Report_final_online_version_141211.pdf.>

3 For examples of studies looking at the impact of improved parenting see: H L MacMillan, C N Wathen , E Jamieson et al, 'Screening for intimate family violence in health care settings: a randomised trial' *Journal of the American Medical Association,* vol. 302, no. 5, 2009, pp. 493-501; H Dubowitz, W G Lane, J N Semiatin, et al, 'The safe environment for every kid model: impact on paediatric primary care professionals' *Pediatrics,* vol. 127, no. 4, 2011, pp. 962-970

such as *Parent Child Interaction Therapy, 123 Magic, TIPS* (Tips and Ideas on Parenting Skills) Package and *Incredible Years* are also delivered. Parenting capacity programs that fall within this evidence base can run for between six and thirty weeks in either an individual or group format.

Appendix 2 on page 68 provides further information on the evidence base and availability of parenting capacity programs in NSW.

## Parenting Capacity Programs in a Child Protection Context

Parenting capacity programs are not just a prevention/early intervention measure. They can also build the ability and skills of parents within the child protection system who are on the cusp of having their children removed if their parenting behaviours do not change.

Studies in the United States have demonstrated that parenting programs can significantly reduce re-reports of physical abuse[4] and improve parenting and perceptions of child behaviour in parents who neglect their children.[5] However, while a meta-analysis of research studies found some evidence that parenting programs may be effective in improving outcomes that are associated with physically abusive parenting, it emphasised the need for further rigorous research in this area.[6]

Other studies also reach the conclusion that targeted intervention is a more cost effective response, and likely to lead to better outcomes for the child, than occurs within a tertiary child protection system.[7]

While the evidence exists for the merits of these programs in a child protection context, there are limited tools to induce parents, who are otherwise unengaged, to participate in them.

In the United States, parent training is a routine component of judicial orders to parents.[8] Despite this, research on its impact is not extensive as might be desired. Likewise despite there being a lack of research on parenting interventions for parents who have abused or neglected their children[9] there are some parenting programs that have been found to be effective in well-controlled studies within the research literature.

Parenting capacity programs that will address the needs of parents already within the child protection system and be suitable for inclusion in a PRC need to offer a level of intensive support and targeted learning that is not provided by current mainstream universal programs and be part of a holistic case plan that addresses child safety issues.[10] For example, the *Triple P* programs -

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4 For example, M Chaffin, J F Silovsky, B Funderburk, L A Valle, E V Brestan and T, Balachova, 'Parent-child interaction therapy with physically abusive parents: Efficacy for reducing future abuse reports', *Journal of Consulting Clinical Psychology,* vol. 72, 2004, pp. 500-510

5 For example, M Letarte, S Normandeau and J Allard, 'Effectiveness of a parent training program 'Incredible Years' in a child protection service', *Child Abuse & Neglect,* vol. 34, 2010, pp. 253-261

6 J Barlow, I Johnston, D Kendrick, L Polnay, and S Stewart-Brown, 'Individual and group-based parenting programmes for the treatment of physical child abuse and neglect' *Cochrane Database of Systematic Reviews*, Issue 3, 2006

7 For example: M O'Donnell, D Scott, D, F Stanley,, 'Child abuse and neglect – is it time for a public health approach?', *Australian and New Zealand Journal of Public Health,* vol. 32, 2008, pp. 325-330; M W Stagner and J Lansing, 'Progress towards a prevention perspective', *The Future of Children,* vol. 19, no. 2, 2009, pp.19-38; E G Flaherty, and J Stirling, J, 'Clinical report – the paediatricians role in child maltreatment prevention', *Pediatrics*, vol. 126, no. 4, 2010, pp.833-841

8 R P Barth, J Landsverk, P Chamberlain, J B Reid, J A Rolls, M A Hurlburt et al, 'Parent-training programs in child welfare services: Planning for a more evidence-based approach to serving biological parents', *Research on Social Work Practice*, vol. 15, 2005, pp. 353-371

9 J Barlow, I Johnston, D Kendrick, L Polnay and S Stewart-Brown, "Individual and group-based parenting programmes for the treatment of physical child abuse and neglect", *Cochrane Database of Systematic Reviews*, Issue 3, 2006,

10 This is consistent with research that looks at the needs of young people where wrap-around service delivery is more suitable for

*Pathways Triple P* (level 5) and *Enhanced Triple P* (level 5) have been designed for parents at risk of maltreating their children or for families with child behaviour issues and concurrent family dysfunction such as parenting depression and conflict between partners. Whilst there are some practitioners accredited in Level 5 *Triple P* in NSW, parenting support at this level is not widely available across NSW. Thus, in order to provide this program to families in NSW, the existing workforce would need to be trained and accredited in delivery of this program.

In Australia, research has demonstrated that *Pathways Triple P* can improve parenting skills and attitudes, increase parenting efficacy and reduce child behaviour problems.[11] A recent pilot study in the United States examined the fit and acceptability of *Pathways Triple P* to parents and caseworkers in the child protection system and found high ratings of acceptability[12] demonstrating that this program shows considerable promise for implementation in the child protection system.

## Proposal 1: Create mandatory parenting capacity orders

Despite the benefits and availability, there is currently no power within the Care Act, in the absence of parental consent, to require parents or primary caregivers to attend a parenting capacity program, counselling or other personal development or support group, for example, drug and alcohol counselling and domestic violence support groups.

Requiring a parent to attend a compulsory parenting capacity program, therapy or other treatment suited to their particular needs and skill requirements may be an effective mechanism to reengage parents who have become disengaged from voluntary prevention and early intervention support and reduce the escalation of risk. Attendance would be mandated by the Court via a stand-alone parent capacity order.

The consequences of a parent breaching a parent capacity order when it is made in an early intervention context and not attending mandated treatment or programs would be to escalate intervention with the family.

Current evidence suggests that mandating parents to attend parenting programs does not impact on their effectiveness. The 2002 evaluation of the Parenting Programme in the United Kingdom (UK) examined the impact of the program on parents.[13] A key question for the Parenting Programme as a whole was whether the referral route (court ordered or voluntary referral) made a measurable difference to the impact on parents in terms of improvement in skills and competencies.[14] The conclusion of the evaluation, which was at a national level, was that the referral route did not make a difference to the level of impact that parents reported.[15] The significance of the referral route is that it addresses the consequences of chaotic lives and enhancing the educative impact of why attendance is necessary – without altering the value of how parenting capacity is improved.

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those with mild to moderate needs rather than those with greater needs: J Barker, P Humphries, M McArthur, L Thomson, *Literature Review: Effective interventions for working with young people who are homeless or at risk of homelessness, ,* Department of Families, Housing, Community Services and Indigenous Affairs, 2012

11 M R Sanders, A M Pidgeon, F Gravestock, M D Connors, S Brown and R W Young, 'Does parental attributional retraining and anger management enhance the effects of the Triple P – Positive Parenting Program with parents at risk of child maltreatment?"', *Behavior Therapy*, vol 35, 2004, pp. 513-535

12 M Petra and P Kohl, 'Pathways Triple P and the child welfare system: A promising fit', *Child Youth Services Review*, vol., 32, 2010, pp.611-618

13 D Ghate and M Ramella, *Positive Parenting: The National Evaluation of the Youth Justice Board's Parenting Programme*, Policy Research Bureau for the Youth Justice Board, September 2002, ,i. at 26

14 Ibid, at 29

15 Ibid, at 36

To improve parenting capacity and promote parental accountability it is proposed to introduce stand-alone orders in the Care Act requiring a parent or primary caregiver to attend a parenting capacity program or other treatment, therapy, course or program (including Family Group Conferencing which is discussed in section 1.3. of this discussion paper) aimed at building their parental capacity and addressing safety risks to their child or young person.

This order would be available once Court proceedings have already been commenced by FACS (CS) including as a stand-alone order.[16] The existing requirement to establish the need for care and protection[17] prior to making any care order would be removed and the sole relevant factor to be established would be the need to improve parenting.

Such an order would recognise that it is preferable for a child to remain with their family and so wherever possible, to encourage and strengthen supports within a family as an alternative to the child being removed from his or her family.

The consequences of breaching a parenting capacity order would be dependant on the risk within the family.

If used in an early intervention context, it would lead to appropriate intervention taken to address escalating risk factors.

If used in a child protection context as a condition of a PRC (section 1.2. of this discussion paper provides further information on PRCs), it would attract the same consequences as the breach of any other condition of a PRC, that is, a demonstration to the Court that the child meets the threshold of being in need of statutory care and protection.

**PROPOSAL 1:**
**Introduce stand-alone parenting capacity orders to require parents to attend a parenting capacity-building or education course**

**Question 1 (a):**
Do you think parenting capacity orders would be an effective mechanism to address escalating risk in both an early intervention and child protection context? Are there other mechanisms that might be equally or more effective?

**Question 1 (b):**
What factors do you think the Court should consider before making a parenting capacity order?

**Question 1 (c):**
What should be the consequences for failing to comply with a parenting capacity order?

### 1.2.2 PARENT RESPONSIBILITY CONTRACTS

As a last resort for parents who are on the cusp of having their child or young person placed in OOHC, the Care Act allows the Director-General to enter into a PRC with the primary caregiver/s of a child or young person.

A PRC is an agreement aimed at improving the parenting skills of the primary caregiver/s, the parent-child relationship and encouraging parents to accept greater responsibility for the care of

[16] This is already the case with applications for assessment orders, Care Act, section 55(2)
[17] Care Act, section 71

their child or young person. It is about giving a parent the best chance to improve their capacity to look after their children while recognising that the child may be on the cusp of being removed if this capacity is not improved prior to further deterioration in the safety of the child. Appendix 3 on page 71 contains further information about PRCs.

Departmental analysis shows that PRCs have not delivered results as expected because they have not been utilised to the extent originally envisaged. Approximately 168 PRCs were recorded between 2007 and 2011.[18] This analysis also found that between March 2007 and mid-June 2009, there were 2,327 state-wide 'PRC opportunities'[19], yet only 32 PRCs had been developed and, of those, 18 had been breached.[20]

Reasons set out in this analysis for the limited application of PRCs included:

- challenges in implementing new initiatives with caseworkers operating in complex and pressured work environments[21]
- the common practice of lawyers to advise parents not to enter PRCs, given the serious consequences that may follow a breach of a PRC[22]
- unfamiliarity with the PRC scheme amongst FACS (CS) staff, legal personnel, and external stakeholders (service providers, NGOs, client support groups).[23]

A recent pilot program in FACS (CS) introduced new practices to focus caseworkers on preservation and restoration with placement of a child in OOHC as a last resort.[24] This pilot showed that a greater use of PRCs occurs when positioned within a targeted scheme to help children either stay at home or return home.

A number of other factors have contributed to the successful use of PRCs within the pilot program. These factors go some way in addressing the above-mentioned reasons for limited application of PRCs across FACS (CS). These factors include:

- the use of PRCs as a casework tool to assist families work toward preservation (rather than a legal tool used to commence court proceedings)
- utilisation of the very clear and simple format of PRCs to outline the case plan for families including services and supports to be provided, goals to be achieved and tasks to be completed, all within set timeframes
- briefing Legal Aid NSW to ensure Legal Aid solicitors understand the preservation focus of the pilot prior to providing independent advice to parents
- creating a formal referral system where FACS (CS) legal officers can directly refer parents to a solicitor within Legal Aid for independent advice prior to signing a PRC. This allows for discussion, review and amendment of PRC conditions to meet the needs of all parties. It ensures the PRC is a useful and workable arrangement for both parents and caseworkers.

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18 This figure relates to numbers of children and not to families

19 A 'PRC opportunity' was defined as a case meeting with the following criteria: risk and/or harm had been substantiated, harm consequent had been assessed as serious, harm probability was likely, child or young person had been assessed as safe in the immediate assessment, level of future risk had been assessed as medium, and protective action by FACS (CS) was required

20 D Walsh, *Why can't we just do it*?, Department of Community Services Work Based Project, 26 June 2009

21 Ibid

22 Anecdotal information provided to FACS (CS). The serious consequence is that in any proceedings for breach of PRC, the onus is on the parent/carer to rebut the automatic presumption that their child or young person is in need of care and protection

23 D Walsh, *Why can't we just do it*?, Department of Community Services Work Based Project, 26 June 2009

24 Known as the 'Family Preservation and Restoration Pilot' or 'Short Term Care Orders Pilot Project'

Together with proposed legislative changes to PRCs outlined below, FACS (CS) will strengthen the use of PRCs to reduce the number of children and young people entering OOHC by:

- facilitating a cultural change within FACS (CS) that shifts the mindset of child protection caseworkers toward preservation and restoration (Section 2 of this discussion paper describes other means whereby the government proposes to improve long-term nurturing arrangements for children and young people)
- requiring child protection caseworkers in appropriate matters to attempt to use PRCs with parents prior to commencing care proceedings
- building better relationships with Legal Aid NSW to build an appreciation that this is a tool to help parents build parenting capacity and by this means, increase the chances of parents signing PRCs after receiving independent advice.[25]

The legislative changes that are proposed to modify PRCs to make them more useful and effective are:

## Duration of a Parent Responsibility Contract

The existing six-month maximum duration of a PRC does not allow enough time for parents to adequately address identified risk issues and demonstrate a change in their parenting. New behaviours take time to embed and a longer period of time will allow primary care-givers to:

- enrol, complete and demonstrate learning and skills acquired from courses or counselling
- undergo drug testing and then show a sufficient period of abstinence or change in drug using behaviour
- complete rehabilitation courses.

This extra time cannot, however, be to the detriment of the child or young person by retaining them in an increasingly detrimental environment. It will be important to ensure the duration of a PRC is appropriate in each particular case, considering the risk of harm to a child or young person who remains with a parent who is struggling to meet their needs.

## Parent Responsibility Contracts Relating to Unborn Children at Risk of Harm

While there is provision within the Care Act for reporting risk of significant harm in relation to unborn children, there are few mechanisms to direct such parents to engage in services that will help them reduce the risks their children face.

A person who has reasonable grounds to suspect, before the birth of a child, that the child may be at risk of significant harm after his or her birth, may make a pre-natal report.[26] The Care Act also currently provides for identifying, reporting and assessing risk of significant harm which is likely to arise once a child is born, as well as for exchange of information in relation to pre-natal reports.

The extension of PRCs to unborn children will provide an important tool for improving the chances that a particular child will be adequately cared for once born.

[25] FACS (CS) is committed to working with the legal community to strengthen the PRC scheme as part of the reform agenda

[26] Care Act, section 25

## Proposal 2: Strengthen Parent Responsibility Contracts

It is proposed to modify PRCs so they can be used within early intervention programs to address escalating risk where a parent/s has become disengaged in early intervention support and a child protection response is likely to be needed in the near future. It would function the same way as other PRCs in that it would seek agreement from a parent/s to meet certain conditions to improve the safety of their child. The parent would be supported by the early intervention service provider to meet these conditions. If breached, the Court may issue the parent/s a parenting capacity order which requires the parent/s to attend a parenting capacity program or other treatment or therapy according to the risk factors present in that family to increase their parenting skills.

To improve the use of PRCs within a child protection context, it is proposed to extend the maximum duration of a PRC from six to twelve months to give parent/s more time to address identified risk issues and demonstrate a change in their parenting.

It is proposed that the PRC scheme be extended to apply to parents of unborn children to provide a 'last chance' option if other early intervention and voluntary options have been exhausted, to allow a family to demonstrate that they can reduce the likelihood that when born, their child will be in need of care and protection and potentially the subject of an application before the Children's Court.

**PROPOSAL 2:**
**Strengthen the PRC Scheme by:**

**(a) introducing a new modified PRC for use in early intervention programs to support disengaged parents**
**(b) extending the duration of a PRC from six to twelve months to enable a parents to attend intensive parenting courses or therapeutic treatments and demonstrate abstinence from substance misuse so children can stay at home with them safely**
**(c) introducing PRCs for parents with an unborn child at risk to help improve their parenting capacity in preparation for the birth of their child**
**(d) requiring FACS (CS) to attempt to use PRCs with parents prior to commencing care proceedings in appropriate matters**

**Question 2 (a):**
Do you think there is a place for PRCs in early intervention programs?

**Question 2 (b):**
If so, what should the consequences of a breach of a PRC in an early intervention context be?

**Question 2 (c):**
Do you agree that PRCs will be improved by extending timeframes, broadening their scope to include unborn children and mandating their use prior to commencing care proceedings in appropriate matters?

**Question 2 (d):**
Are there any other ways that PRCs may be improved to help parents keep their children out of OOHC?

## 1.3 WAYS TO BETTER ADDRESS RISK THROUGH ALTERNATIVE DISPUTE RESOLUTION

Parental capacity to address identified child protection concerns can also be strengthened through approaches which actively engage families in the development and implementation of strategies to address those concerns. Enabling parents to take a lead role in identifying solutions is empowering and maximises the likelihood that those concerns will be resolved for the benefit of the child.

Models for engaging parents include various forms of alternative dispute resolution (ADR) which are currently used in the NSW child protection system both as a diversionary mechanism to avoid matters going to court, and also after court proceedings have been initiated, to resolve or narrow the issues in dispute before a full hearing. The aim of ADR is to assist those involved to communicate better with one another, and to reach informed decisions about the care and protection concerns. ADR is an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them.[27]

There are presently four models of ADR operating at different stages of the child protection system – Family Group Conferencing (FGC), Care Circles (targeted to Indigenous families and operating in Nowra and Lismore), Dispute Resolution Conferences (convened by a Children's Registrar of the Children's Court) and external Court-ordered ADR (of which the external care and protection mediation pilot in the Bidura Children's Court is an example). Proposals to amend the Care Act to provide a sounder legislative footing for ADR and thus promote its greater use at all stages of the child protection continuum are canvassed in Section 3 of this discussion paper.

Recent evaluations of the use of ADR in child protection show high levels of satisfaction by participants. In particular, qualitative feedback from the evaluations of FGC and Care Circles, Dispute Resolution Conferences and the external care and protection mediation pilot demonstrates the value of including extended family members and professionals in an ADR setting to assist in developing strategies to provide better care for the child and thus avoid further child protection interventions.[28]

FGC was the only model of ADR which was trialled to take place before court proceedings are initiated. The other forms of ADR - Care Circles, Dispute Resolution Conferences and external mediations ordered by the Court – take place after court proceedings have begun.

FGC in particular, gives families a greater opportunity to have a say in identifying solutions to address issues. Conferences are chaired by an independent trained facilitator and bring together the child, the child's immediate and extended family, service providers and FACS (CS) staff to develop a plan (known as a Family Plan) to address identified child protection concerns. Conferences are held in informal and neutral settings and the process is entirely voluntary and confidential. It is a form of ADR that has been used by NGOs, in particular, to give families a greater opportunity to participate in the decision-making process and empower families to develop, implement, manage and action Family Plans to address the child protection concerns. As families have ownership of these plans, the chances of success are significantly improved.

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[27] National Alternative Dispute Resolution Advisory Council, *Maintaining and enhancing the integrity of ADR processes – From principles to practice through people*, February 2011, p.9

[28] Cultural & Indigenous Research Centre Australia, *Evaluation of the Aboriginal Care Circle Pilot: Final Report,* prepared for the NSW Department of Human Services, Community Services and the NSW Department of Justice and Attorney General, June 2010; Australian Institute of Criminology, *Evaluation of the Family Group Conferencing pilot program,* Canberra, 2012 *forthcoming*; ; Australian Institute of Criminology, *Evaluation of Alternative Dispute Resolution initiatives in the care and protection jurisdiction of the NSW Children's Court*, Canberra, 2012 *forthcoming.*

A forthcoming report of the evaluation of FGC, undertaken by the Australian Institute of Criminology (AIC), notes high levels of satisfaction by family members and FACS (CS) staff involved in FGC in the NSW child protection system.[29] Participants reported that the conferences assisted families to develop workable solutions to ensure the safety and wellbeing of the children and helped to build more positive working relationships between FACS (CS) and the family. Other research has found that FGC generally has had positive effects on family relationships, helping improve communication within the family, reducing family conflict and therefore making children safer.[30]

It is considered that the present obligation on Community Services to establish "the alternatives to a care order that were considered before the application was made and the reasons why those alternatives were rejected"[31] is insufficiently explicit. A clear legislative imperative should exist to require Community Services to involve the family in decision-making about the care and protection of the child or young person. This can be done by imposing on Community Services an obligation, prior to the commencement of care proceedings, to establish in all cases either that a FGC was utilised and was unsuccessful or why a FGC was not utilised prior to commencement of care proceedings.

Unlike Care Circles, however, FGC has currently only been used in the early stages of the child protection continuum as an intervention mechanism. Matters that are before the Children's Court are presently ineligible to be referred to FGC. The exclusion of court matters from FGC was an issue that was raised by many stakeholders in the evaluation of the program. Acknowledging that there are differing views about the suitability of FGC for court matters, which are canvassed by the AIC in its forthcoming evaluation report, a blanket exclusion may be too prescriptive. It is proposed to consider the use of FGC for court matters as well as non-court matters. The use of FGC before care proceedings commences can be achieved without the need for legislative amendment. Presently, within the Care Act, the Children's Court is able to direct parties to attend a dispute resolution conference, a Care Circle or an external mediation. If FGC is suitable, the Court could be empowered to direct parties, in appropriate cases, to attend FGC.

## Proposal 3:

It is proposed to consider the suitability of FGC as a means of better engaging the child's family in all care proceedings either in addition or as an alternative to the current models of ADR and thereby seek to resolve child protection concerns at an earlier stage than is presently the case and in a way designed to enlist as much support as possible to assist compliance with resulting court orders.

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29 Australian Institute of Criminology, *Evaluation of the Family Group Conferencing pilot program,* Canberra, 2012 *forthcoming*

30 L Huntsman, *Family group conferencing in a child welfare context – A review of the literature,* Research Report June 2006, Centre for Parenting and Research, NSW Department of Community Services, p. 8

31 Care Act, section 63

**PROPOSAL 3:**
**Consider the suitability of FGC for care matters to better engage families to resolve child protection concerns.**

**Question 3 (a):**
Should there be an obligation upon Community Services to refer care matters to a FGC prior to commencing care proceedings and, if so, what should be the nature of this obligation?

**Question 3 (b):**
Should the Court be able to refer parties to FGC in addition to or in place of a dispute resolution conference?

**Question 3 (c):**
What kinds of matters do you think would be appropriate for FGC in the context of care proceedings?

## 1.4 WAYS TO BETTER PROTECT CHILDREN AND YOUNG PEOPLE FROM POTENTIAL RISK OF HARM

### 1.4.1 PROHIBITION ORDERS

A prohibition order can be made by the Children's Court to prevent behaviour that could potentially harm a child or young person who is the subject of care proceedings.[32] It restricts the right of a parent (or other person) to do something that a parent would normally be able to do.

Prohibition orders may, for example, prohibit:

- a parent having contact with a child or young person outside formal arrangements
- contacting or approaching the carer of a child or young person
- discussing, publishing or broadcasting information connected with care proceedings
- denigrating a parent or other party in the presence or knowledge of the child or young person
- a change of residence of the child or young person or removal from the jurisdiction
- conduct in relation to health and medical issues.

The Court will make a prohibition order to ensure the care and protection of the child or young person. It is therefore important that the order be complied with.

Currently, the Children's Court does not have the power to enforce a prohibition order. There is therefore no great incentive for a parent (or other person) to comply with the order, other than that the Court may take the breach into account in further proceedings about the care and protection of the child. Prohibition orders are often ignored and there is little that can be done to call parents to account for the breach. This means that children and young people continue to be exposed to potential risks that the Court has sought to minimise or prevent.

[32] Care Act, section 90A

Similar orders in other jurisdictions are enforceable. For example, breach of a 'prohibited steps order'[33] in the United Kingdom can attract the imposition of a fine or period of imprisonment. [34] Similarly, the Family Court of Australia can take remedial measures if a person is found to have contravened an order without reasonable excuse, including referring parties to a post-separation program, making an order compensating a parent for lost time with a child, or adjournment of proceedings to allow for the lodgement and hearing of an application to amend the parenting order.[35] The Family Court may also impose the following sanctions for breach of an order:

- community service orders[36]
- bonds with conditions that may include a person attend an appointment with a family consultant, attend family counselling, attend family dispute resolution or be of good behaviour[37]
- in the most serious cases – imprisonment for up to twelve months.[38]

## Proposal 4: Enforceability of prohibition orders

It is proposed to introduce an enforcement regime for prohibition orders (that supplements those orders already carrying a fine when breached) to not just ensure the safety and protection of children and young people but also to provide a further means of altering parental behaviours. An enforcement regime will better ensure that persons against whom prohibition orders are made comply with the orders, and held to account when they fail to do so. An enforcement regime for prohibition orders will also serve an educative and rehabilitative function and provide a level of structure and rigour that is often lacking in families involved in care proceedings. The role of penalties is discussed further below in relation to offences under the Care Act.

It is proposed to impose the following sanctions for breach of prohibition orders:

- fines
- community service orders
- compulsory attendance at parenting capacity programs, counselling or drug and alcohol rehabilitation.

**PROPOSAL 4:**
**Incorporate sanctions for breaches of prohibition orders that include:**

- **fines**
- **community services orders**
- **compulsory attendance at parenting capacity programs, counselling or drug and alcohol rehabilitation**

**Question 4:**
What measures should be introduced to enforce prohibition orders under the Care Act?

[33] *Children Act 1989 (UK)*, section 8(1). This empowers the Court to make an order imposing a restriction on the exercise of parental responsibility
[34] *Magistrates' Courts Act 1980* (UK)
[35] *Family Law Act 1975*, section 70NEB
[36] *Family Law Act 1975*, section 70NFC
[37] *Family Law Act 1975*, section 70NFE
[38] *Family Law Act 1975*, section 70NFG

## 1.5 WAYS TO IMPROVE HOW WE RESPOND TO SERIOUS ABUSE AND NEGLECT OF CHILDREN AND YOUNG PEOPLE

### 1.5.1 NEGLECT AND ABUSE OFFENCES IN PARENTAL RESPONSIBILITY

In serious cases of parental neglect or abuse it may be appropriate to prosecute offenders and impose criminal sanctions. The most serious cases, particularly where permanent or fatal injury is caused to a child, tend to be dealt with under the general criminal legislation where the maximum penalty is a term of imprisonment.

The Care Act also contains a number of offences for abuse and neglect where behaviour falls significantly short of the concept of "good enough parenting".[39] These are set out in Appendix 3. The only sentencing option currently available to a court for a child abuse or neglect offence under the Care Act is a fine. Sentences for child abuse and neglect offences under the Care Act and Crimes Act are set out in Appendix 4 on page 72 and Appendix 5 on page 73 respectively.

Offences in both the care and criminal jurisdiction recognise that the criminal law can have a role to play in cases of serious child abuse and neglect.[40] Criminal penalties send a clear message that such behaviour towards children is not countenanced.[41] The prosecution of child abuse and neglect offences, particularly in the more serious cases where serious harm has occurred, can assist to deter and prevent abusive and neglectful behaviour, and thereby promote greater parental accountability. Significantly, these offence provisions also have an educative role in terms of setting out societal expectations and norms.[42] The prosecution of an offender can therefore serve a number of purposes:

- denounces abusive or neglectful conduct
- punishes the offender
- acts as a deterrent, to prevent the offender and others from committing the same offence
- protects the community
- promotes the rehabilitation of the offender
- recognises the harm done to the victim and the community.[43]

Statistics indicate that offences under the Care Act have not been widely prosecuted over the past four years.[44] It appears that the function of the offence provisions to date has been to punish parents when they have gone "too far". One reason for the limited use of the offence provisions is the few sentencing options available. A wider range of sentencing options will more effectively serve the purposes of deterrence and rehabilitation, consistent with the objective of improving parental capacity and accountability.

This paper proposes a number of reforms to improve the way in which we prevent and respond to serious abuse and neglect of children and young people. In developing these proposals, consideration has been given to the circumstances in which fines, community service orders and other sentencing options may be in the best interests of families and children. These proposals are

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39 First penned by D W Winnicott in *The Maturational Process and the Facilitative Environment,* 1965. Referred to in M Hoghughi and A N P Speight, 'Good Enough Parenting for all Children – a Strategy for a Healthier Society' *Archives of Disease in Childhood*, vol. 78, 1998, pp. 293-296

40 Australian Law Reform Commission and the NSW Law Reform Commission, *Family Violence a National Legal Response*, Australian Law Reform Commission Final Report 114 and NSW Law Reform Commission Final Report 128, October 2010

41 P Rosenthal, 'Physical Abuse of Children by Parents: The Criminalization Decision', *American Journal of Criminal Law*, vol. 7, no. 2, 1979, pp. 141-169

42 Australian Law Reform Commission and the NSW Law Reform Commission, *Family Violence a National Legal Response*, Australian Law Reform Commission Final Report 114 and NSW Law Reform Commission Final Report 128, October 2010

43 *Crimes Sentencing Procedure Act 1999* (NSW), section 3A

44 Judicial Commission of New South Wales, *Judicial Information Research System: Sentencing Statistics*

also informed by an investigation of the ways in which court orders can have an educative and deterrent effect to promote greater parental accountability.

## Fines

The only penalty option currently available to a court for a child abuse or neglect offence under the Care Act is a fine.

In its report, *The Effectiveness of Fines as a Sentencing Option*, the NSW Sentencing Council identified the impact of fines on marginalised sections of the community. Persons who could be found guilty of abuse and neglect offences under the Care Act will often fall within this category. The Report noted that the imposition of a large fine on an already disadvantaged person simply opens the door to further interaction with the criminal justice system, with consequent negative impacts for family life, employment, individual morale and often, the wider community.[45]

Other limitations of fines under the Care Act are:

- a fine alone does not address the underlying issues that have caused the offending
- there is potential for the family of the offender, including the child victim, to be punished too. For example, where a child is seriously neglected, imposition of a fine may impose further financial hardship on the family affecting its ability to meet the child's basic needs
- a fine may also have a disproportionate effect on a family who is already socially or economically disadvantaged.

In a recent case involving a child who was left unattended in a motor vehicle, the magistrate found that imposing a fine was not in the best interests of the child, the parent or the community because it would in effect hurt the child.[46]

There will be some instances however where the option of imposing a fine is useful in achieving the aims of the provisions. In a survey of NSW Magistrates conducted by the NSW Sentencing Council in 2007, respondents generally considered that fines were an effective sentencing option where a person is convicted of a fairly trivial offence for which a court does not consider any other sentencing option to be appropriate.[47]

Ninety-six per cent of NSW Magistrates also believed that the Court should be able to impose a community service order type sanction as an alternative to a fine, provided adequate supervision and safeguards are realistically available.[48]

## Diversion of Offenders to Education, Treatment, Rehabilitation or Community Service

Alternatives to fines will provide a broader range of responses for courts when sentencing offenders under child protection laws. A range of sentencing options will allow sentencing courts to impose a penalty or make an order that best matches the circumstances of a particular case, including community service, training, counselling or treatment, or certain restrictions on offenders' behaviour, as an alternative to or in addition to a fine.

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45 NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices*, Interim Report, October 2006, 2.245

46 Magistrate Railton, Transcript of proceedings in Gosford Local Court, 22 November 2011

47 Ibid

48 Above n 33, 46

This approach is consistent with the findings of the NSW Sentencing Council in response to concerns about the impact of fines on disadvantaged members of the community. They suggested fine option orders be considered,[49] permitting an offender to apply to the Court to work off the fine by way of a community service order.[50]

Alternatives to fines can be found in other NSW legislation. For example, the *Education Act 1990* provides that if a parent is found guilty of an offence of failing to cause a child to attend or enrol at a school or be registered for home schooling, the court may make a community service order instead of imposing a fine.[51]

Community service orders punish offenders by placing restrictions on their time and liberty and requiring them to carry out community work. They also promote rehabilitation by allowing offenders to remain in the community and by addressing, through development programs, factors which have contributed to offending.[52] Community service orders are cost effective while at the same time providing for offenders to make reparation to the community through unpaid community work.[53]

Other forms of rehabilitation relevant in the care and protection jurisdiction may include therapy, counselling, drug and alcohol treatment and skills development. The aim of these measures as a sentencing option is to prevent future reoffending by addressing the behaviour that led to the offence.[54] This approach recognises that some criminal offences are to some extent determined by social pressures, psychological difficulties or situational problems of various kinds.[55] Rehabilitation may also allow the family unit to be maintained while ensuring that adequate steps are taken to protect children from harm.

## Imprisonment as a Sentencing Option

Child welfare legislation containing abuse and neglect offences in other Australian jurisdictions provides for the imposition of a term of imprisonment for some offences.[56] In NSW, as in other Australian jurisdictions, imprisonment is regarded as a sentence of "last resort".[57]

One of the benefits of including imprisonment as a penalty option in care legislation is that it makes other sentencing alternatives, such as community service orders, available to the court. These alternatives consist of a range of community-based and non-custodial sentencing options such as community service orders and orders for participation in programs designed to address offending behaviour. However, as discussed above, it is also possible to make these sentencing options available for offences under the Care Act without reinstating imprisonment. Imprisonment as a penalty option also gives rise to bail applications and hence to bail conditions which are highly flexible, and able to be tailored to individual circumstances.

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49 Fine option orders are available in Queensland for court-imposed fines under the *Penalty and Sentences Act 1992* (QLD), Pt 4, div 2, have been operating in Canada since 1975 and have been endorsed by the Sentencing Commission of Scotland.

50 NSW Sentencing Council, The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices, Interim Report, October 2006, 2.245

51 *Education Act 1990*, section 23(5)

52 NSW Law Reform Commission*, Sentencing,* Report No 79, 1996, at 5.1

53 Corrective Services NSW, *Offender Management in the Community*, viewed 19 September 2012, <http://www.correctiveservices.nsw.gov.au/offender-management/offender-management-in-the-community#service_orders>

54 A Ashworth, Rationales for Sentencing, in M Maguire, R Morgan and R Reiner (eds), *The Oxford Handbook of Criminology, Fourth Edition*, 2007, p. 994

55 Ibid

56 *Children and Community Services Act 2004* (WA); *Children's Protection Act 1993* (SA); *Children, Young Persons and their Families Act 1997* (Tas)

57 Section 5(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). This reflects the established common law principle; also see Way v The Queen (2004) 60 *NSWLR* 168 [115]

The previous NSW child welfare legislation provided for imprisonment as a penalty for some offences.[58] In its review in 2008, the Wood Inquiry recommended that imprisonment not be reinstated as a penalty for child abuse or neglect offences because it was not in the best interests of the child.[59]

There is no compelling case for reintroducing imprisonment as a penalty for abuse and neglect offences in the Care Act, especially given that there are alternative options available under the Crimes Act for prosecution in more severe cases where imprisonment is a specified penalty.

### Proposal 5: Giving broader sentencing options than just a power to fine

The Care Act contains a number of offences for abuse and neglect where behaviour falls significantly short of the concept of "good enough parenting". The only sentencing option available to a court for a child abuse or neglect offence under the Care Act is a fine. Statistics indicate that offences under the Care Act have not been widely prosecuted over the past four years,[60] and one of the reasons for this may be because there are few sentencing options available. A wider range of sentencing options will more effectively serve the purposes of deterrence and rehabilitation, consistent with the objective of improving parental capacity and accountability.

It is proposed to introduce alternative sentencing options to child abuse and neglect offences such as community service orders and educative and therapeutic services or rehabilitation.

**PROPOSAL 5:**
**Introduce alternative sentencing options (other than fines) to child abuse and neglect offences such as community service orders and educative and therapeutic services or rehabilitation**

**Question 5:**
Do you agree that there should be alternatives to fines for the child abuse and neglect offences under the Care Act and, if so, what type of orders would be appropriate?

58 *Child Protection Act 1987* (NSW), repealed

59 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* , 2008

60 Judicial Commission of New South Wales, *Judicial Information Research System: Sentencing Statistics*

# SECTION 2: PROVIDING A SAFE AND STABLE HOME FOR CHILDREN AND YOUNG PEOPLE IN CARE

This section outlines proposals to better respond to the needs of children and young people in OOHC and achieve the best permanency outcomes.

They will:

- **Change the objects of the Care Act** to better reflect the need for permanency and introduce a **permanency hierarchy**
- Provide a greater focus in legislation on achieving permanency and adoption by **introducing timeframes for reaching a decision about the feasibility of restoration**
- Introduce **self-regulation of supported care placements** and a **two-year cap on the duration of supported care placements** to achieve greater permanency for these children and young people
- Improve permanency for children in relative or kinship care with the **introduction of long term guardianship arrangements** and **repealing of sole parental responsibility orders**
- **Introduce concurrent planning** to support timely permanent placements for children in OOHC
- **Make the open adoption of children and young people in OOHC easier and quicker** where this is in the best interests of the child and **streamline adoption processes for authorised carers**
- **Confer to the Children's Court jurisdiction to make adoption orders** where there are child protection concerns
- **Merge the NSW Standards for Statutory OOHC and the NSW Adoption Standards** to enhance the permanency planning capacity of NGOs
- **Improve the involvement of birth parents in planning for the adoption of their child**
- **Provide additional grounds for the dispensing of parental consent to adoption** in certain circumstances
- **Limit the circumstances where a parent must be notified of an adoption application** regarding their child or young person when they cannot be located.

The emphasis of the proposed reforms is on ensuring that children in OOHC are placed in a safe, nurturing and stable home environment, which is able to meet their long-term needs.

## 2.1 A SAFE AND STABLE HOME FOR ALL CHILDREN

Every child has the right to a permanent and stable home, preferably with his or her own family.

Children and young people require a stable foundation from which their relationships, identity, values, and cultural awareness can develop. Stable long-term placements also allow children and young people to feel a sense of belonging and stability which provides for continuity of relationships in the family, school and other settings, and promotes attachments to caregivers.[61] In most cases this should occur with their birth family. For children and young people who cannot live with their birth family, a stable foundation can also be provided through a range of permanency planning options that provide the child with a continuous long-term placement.

[61] Emlen, 1977, cited in A N Maluccio, 'Permanency Planning a redefinition', *Australian Child & Family Welfare Journal.* Vol. 9, No.2 Winter, 1984, p.3, cited in *NSW Office of the Children's Guardian (May 2004) Permanency Planning Issues Paper* Version 1.0

Research demonstrates that continuity of attachment ties is essential to the overall development of a young child, and that when children and young people are separated from their birth families, stable foundations must be re-established as soon as possible either with their birth family or with an alternative long-term family. A rupture of attachment ties is a traumatic event in a child's life, with major short-term and long-term consequences such as cognitive problems, psychological and behavioural problems, and delays in development.[62]

NSW seeks to pursue permanent alternative care arrangements for those children and young people who cannot be successfully restored to their birth parents. This increases certainty and improves stability for the child or young person. It means a greater focus on and removal of barriers to earlier decision making about the viability of restoration and alternatives such as open adoption and guardianship.

In 2007 NSW adopted the *Permanency Planning Policy* to improve placement stability and outcomes for children and young people in OOHC. Permanency planning in NSW is defined as the making of a plan that aims to provide a child or young person with a stable placement that offers long-term security in a timely manner that meets the needs of the child, and that avoids the instability and uncertainty arising through a succession of different placements or temporary care arrangements.[63] Permanency planning includes considering a range of permanent placement options for children including restoration, long-term placement with relative or kinship carer and adoption.

The rate of children and young people in OOHC has continued to increase since 2007. As at June 2011, 65 percent of children in OOHC were under the parental responsibility of the Minister. Children and young people are also staying in care longer. At 30 June 2011, 71 per cent of children and young people had been in care for two years or more, an increase from 60.4 per cent from 30 June 2009.

The current system is not sustainable and there is potential to secure better permanent care options for children and young people who enter the OOHC system.

## 2.2 WAYS TO IMPROVE PERMANENCY

### 2.2.1 PRINCIPLES OF PERMANENCY IN LEGISLATION

Legislating a greater focus on achieving permanency and adoption in the Care Act is one way of better facilitating adoptions and other permanent care arrangements for children in OOHC.

The Wood Inquiry specifically looked at the tension in operational practices between the principles of permanency and least intrusive intervention.[64] The proposals contained in this section are consistent with the findings of that inquiry.

The Children's Court plays a critical role in ensuring the early identification of permanency options including adoption. It is proposed that this be reinforced by requiring the court to only make an order for long-term parental responsibility to the Minister if it is not possible to make an order for a long-term stable placement under a long-term guardianship order or adoption.[65]

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62 Y Gauthier, G Fortin and G Jeliu*, Clinical Application of Attachment Theory in Permanency Planning for Children in Foster Care: The Importance of Continuity of Care. Infant Mental Health Journal,* vol. 25, no. 4, 2004, pp. 379-396; and V Fahlberg, *Attachment and Separation,* British Association for Adoption and Fostering, London, 1982

63 Care Act, section 78A(1)

64 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW,* 2008, pp 417-423

65 This is similar to the approach in the Queensland *Child Protection Act 1999* (Qld) section 59(7)(b).

The government also seeks to enshrine in the objects of the Care Act a preferred hierarchy of placement options.

## Hierarchy 1: Family Preservation/Restoration

Family preservation/restoration is the government's preferred placement option for all children and young people in care. Children and young people require a stable foundation from which their relationships, identity, values, and cultural awareness can develop. In most cases this should occur with their birth family. It is in the best interests of the child to first consider restoration with his or her birth parent or parents as the first option for permanency.

Prioritising restoration is consistent with the United Nations Convention on the Rights of the Child.[66] Article 8 of the Convention compels States and Parties to respect the right of the child to preserve his or her identity, including nationality, name and family relations without unlawful interference. Article 9 ensures that a child is not be separated from his or her parents except when authorities subject to judicial review determine that such separation is necessary for the best interests of the child. Prioritising restoration for children and young people in OOHC is also consistent with the least intrusive intervention principle of the Care Act.[67]

If successful restoration is not a viable option for a child or young person, alternative long-term placement options must be considered to avoid the detrimental impact on children of failed attempts at restoration with birth parents, a drift in the care system and unplanned multiple placements.

## Hierarchy 2: Long-Term Guardianship to Kin or Relative

For children who cannot live with their birth parent/s, a placement with a relative or member of the same kinship group as the child or young person should be considered as the second placement preference.

Children in OOHC should be placed, wherever possible, with families where they can experience the benefits of loving and skilled parenting, continuity and a sense of belonging.[68] Research suggests that maintaining family and community links, by placing children with relative/kinship carers and/or placing siblings together and by maintaining the child in his or her community, led to a significant increase in placement stability.[69]

In addition to providing a loving and stable placement for children, relative and kinship care can assist children to develop an understanding of their own family, history, culture and identity.

Placement with relative or kinship carers provides children with a stable, long-term nurturing placement similar to adoption; however, adoption by relatives is not generally favoured in contemporary adoption practice because of the confusion it creates between familial roles and legal status. For example, if a child is adopted by their grandmother, the adoption would mean that the child's grandmother becomes their legal mother. This means that adoption is favoured in cases

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66 *United Nations Convention on the Rights of the Child*, 1990, Article 8 and 9

67 Care Act, section 9(2)c

68 J Thoburn, The risks and rewards of adoption for children in the public care, *Child and Family Law Quarterly,* vol. 15, no. 4, 2003, pp. 391-401

69 A Zinn, J DeCoursey, R George and M Courtney, *A study of placement stability in Illinois*. Chicago: Chapin Hall Center for Children, 2006

where it is in the child's best interests to be cared for by a non-relative. Improving permanency options for relative and kinship care arrangements is discussed in further in this section.

### Hierarchy 3: Adoption

The third placement preference for a child in OOHC is adoption. International research has found greater advantages to adoption compared to long-term care in terms of placement stability, emotional security, sense of belonging and general well-being.[70]

Adoption is a legal process, is long-term and permanent. All legal rights and responsibilities of parents are transferred from the birth parents to the adoptive parents.

Adoption can ensure children have stability and continuity of relationships. A successful adoptive placement provides a child with continuity of relationships with nurturing parents and the opportunity to establish positive lifetime relationships. It is essential for all children and young person's development that they experience a sense of permanence in their lives. For children or young people who cannot live with their birth family, relatives of kinship group, adoption provides a child or young person with a family for life.

With the current practice of open adoption arrangements, the child or young person may retain their emotional and genetic links with significant prior relationships, including their birth family. Adoption today embraces issues of identity, openness and the value of a child or young person's cultural and racial heritage.

Open adoption should be the first permanent option considered for children and young people who cannot live with kin or family and will otherwise spend their childhood in OOHC. Although children and young people thrive in stable and permanent places, 34 percent of children and young people in care have experienced three or more placements in their current care period. Children who grow up in state care find it more difficult than their peers to successfully transition to adulthood and are vulnerable to unemployment, homelessness and social isolation.

For some children in OOHC, adoption may not be the best permanent arrangement. Adoption is not usually considered culturally appropriate for an Aboriginal child, as the concept is not recognised in traditional child rearing practices and customs. In traditional child rearing custom the whole family and community contribute to the raising of a child rather than parenting responsibilities resting only with biological parents. Past practices of forced removals of Aboriginal children and its consequences also contribute to a negative view of adoption.

There is an alternative view that while adoption should not occur for the majority of Aboriginal children (for reasons discussed above), Aboriginal children and their Aboriginal birth parents should not be entirely denied the option of adoption, which is available to the wider community. Aboriginal people and the needs of their children are diverse and there may be some circumstances in which adoption may be the best placement option for a child and their birth parents.

To respect these different views, the *Adoption Act 2000* ("Adoption Act")[71] requires that Aboriginal people should be given the opportunity to participate with as much self determination as possible in decisions relating to the placement for adoption of Aboriginal children. A person consenting to the

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[70] E C Lloyd and R P Barth, 'Developmental outcomes after five years for foster children returned home, remaining in care, or adopted' *Children and Youth Services Review,* vol. 33, 2011, pp. 1383-1391; J Triseliotis, 'Long-term foster care or adoption? The evidence examined', *Child and Family Social Work* vol. 7, 2002, pp 23–33,

[71] Adoption Act, section 35

adoption of an Aboriginal child must be offered adoption counselling by an approved Aboriginal person with experience in working with Aboriginal children[72] and given information about alternatives to adoption.[73]

An Aboriginal child is not to be placed for adoption unless the making of an adoption order is clearly preferable in the best interests of the child to any other action that could be taken to care for the child.[74] The Aboriginal child placement principles must also be followed.[75]

As previously mentioned, adoption by relatives is also not generally favoured in contemporary adoption practice because of the confusion it creates in familial roles and status. Improving permanency options for relative and kinship care arrangements is discussed later in this section.

Where adoption is the agreed goal to improve a child or young person's life, it is important that the process is expeditious for all concerned as well as guaranteeing fundamental rights. The reforms outlined later in this section propose a number of legislative changes that will support early decision making about adoption and ensure there is no undue delay where an open adoption is in the best interests of the child or young person.

### Hierarchy 4: Parental Responsibility to the Minister

Placing a child in OOHC in the long-term parental responsibility to the Minister is the final preference in the hierarchy of permanent placement options. Despite significant reforms being undertaken to statutory OOHC as part of the transfer of case management to the NGO sector, other placement options described above provide better outcomes for children and young people compared with placements in the long-term parental responsibility of the Minister.

Data suggests that the longer a child is in care the greater the likelihood of multiple placements.[76] Research has found that multiple placements harm a child's potential for full emotional, psychological and social development. Failed restoration to the parents and multiple foster placements can adversely impact on children, leading to disadvantaged, isolated young people with low self-esteem.[77]

The difficulties children suffer as a result of multiple placement moves in care have been subject to numerous research articles and reports. These problems include difficulties children and young people have in maintaining or forming relationships with their carers, family and peers, lack of participation and information about the decisions that are made about their lives, emotional and behavioural problems, poor educational outcomes, and poor physical and mental health.[78]

In addition, children in OOHC can often feel stigmatised[79] thus general agreement exists among researchers on the importance of stability and the need for a greater sense of permanence for children who cannot live with their family. For those children who remain in OOHC, early identification of a long-term carer who is able to provide a stable and permanent placement in which the child can thrive is essential.

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72 Adoption Act, section 64

73 Adoption Act, section 57

74 Adoption Act, section 36

75 Adoption Act, section 35(2)

76 Information Management Branch, Planning and Corporate Performance Directorate, Family and Community Services, Community Services, New South Wales Government, Annual Statistical Report 2010-2011, January 2012, p56.

77 J Cashmore and M Paxman M, *Wards leaving care: A longitudinal study*, NSW Department of Community Services, 1996

78 J Cashmore, 'What the research tells us: permanency planning, adoption and foster care', *Children Australia* vol. 24, no. 4, 2000, pp 17-22

79 Ibid

## Proposal 6: Permanency for children and young people in OOHC

Legislating a greater focus on achieving permanency and adoption in the Care Act will better facilitate adoption and other permanent care arrangements for children in OOHC.

It is proposed to incorporate in the objects and principles of the Care Act statements about:

- the promotion of safety *permanency* and wellbeing (the current objects and principles refer to safety *welfare* and wellbeing)
- avoiding instability and uncertainty arising from a succession of different placements or care arrangements
- avoiding the harmful effects on a child of delay in making decisions and taking action
- the greater need for early decisions to be made to find stable and permanent placements for infants and younger children[80]
- the preferred hierarchy of permanency being:
    1. family preservation/restoration
    2. long-term guardianship to kin or relative
    3. adoption
    4. parental responsibility to the Minister.

To ensure the hierarchy of permanent placement options is applied in all cases, it is proposed that permanency plans not involving restoration include a proposal for pursuing guardianship or adoption or a reason as to why these will not be pursued. Express consideration of these options should also be required when reviewing permanency plans involving restoration.

The hierarchy of permanent placement options for children in OOHC reflects current practice. The Care Act requires a decision to be made about restoration before other placement options are considered. However, under the proposed reforms the Children's Court will only be able to make an order for long-term parental responsibility to the Minister in circumstances where it is not possible to place the child in a more stable long-term placement such as relative or kinship care or adoption.

The reforms will further protect the best interests of the child and ensure that children in OOHC receive the best possible permanent placement that will support their development and positive outcomes for their future.

[80] It is not intended to override the statutory codification of Re: Rhett [2008] 1 *Children's Law News* at 1, which is found in Care Act section 83(7A)

**PROPOSAL 6:**
**Achieve greater permanency for children and young people in OOHC by:**

**(a) incorporating permanency into the objects of the Care Act including the preferred hierarchy of permanency being:**
1. **Family preservation/restoration**
2. **Long-term guardianship to relative or kin**
3. **Adoption**
4. **Parental responsibility to the Minister**

**(b) requiring that the Court can only make an order for parental responsibility to the Minister if adoption or long-term guardianship is not possible**

**(c) requiring permanency plans not involving restoration to include the pursuit of guardianship/adoption or reasons why they should not be pursued**

**Question 6:**
Are there other measures for achieving greater permanency in the Care Act that should be considered?

### 2.2.2 TIMEFRAMES FOR ACHIEVING RESTORATION

The Care Act requires that as part of the preparation of a permanency plan, an assessment of the child's circumstances be made as to whether there is a *realistic possibility* that the child can be restored to his or her parents[81].

While the principles of the Act[82] emphasise that there is a time imperative for finding permanent placements (especially for younger children), the legislation does not prescribe a specific timeframe in which the possibility for restoration must be considered.

There is considerable evidence to suggest early decision making about long-term placement, including restoration to family, results in better outcomes for children and young people, both in immediate terms and for life after care. Research shows that the timeframe for decision making is critical to the success of the stability of placements. This timeframe is particularly important for young children, as the first two years of a child's life have been identified as the most critical for the development of attachment relationships.[83]

Expert opinion is that for younger children, in particular, a decision about restoration should not take longer than six months. Similar timeframes have been recommended and or implemented in other jurisdictions in Australia[84], the United Kingdom[85] and the United States[86]. The UK Government has

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81 Care Act, section 83

82 Care Act, section 9(e)

83 R S Marvin and P A Britner, 'Normative development: The ontogeny of attachment', 1999, in J Cassidy and P Shaver (eds.), *Handbook of attachment: Theory, research, and clinical applications* (permanency planning. 44-67), New York/London: Guildford Press, cited in Y Gauthier, G Fortin and G Jeliu, 'Clinical Application of Attachment Theory in Permanency Planning for Children in Foster Care: The Importance of Continuity of Care',*Infant Mental Health Journal*, vol. 25, no. 4, 2004, pp.379-396

84 The Victorian Department of Human Services proposed policy on "*Concurrent and Permanency Planning for Children in Out-of-Home Care* states that a decision about the likelihood of restoration of the child to the birth family should be made within six months of the child entering OOHC. The child must be permanently placed with either their birth family or a permanent care family by within twelve months of entering OOHC. Regular four-monthly reviews are held thereafter. L Rodda *Concurrent and Permanency Planning for Children in Out of Home Care* (Draft policy). Statutory Services, Child Protection and Juvenile Justice Branch, Department of Human Services, Victoria, 2001

85 The United Kingdom's National Adoption Standards 2003 state that *"a plan for permanence should be made for each child within six months of being continuously looked after, and delivered promptly".*

86 In the United States it is required by Federal legislation under *The Adoption and Safe Families Act of 1997* that a definitive permanency plan for the child must be made within a twelve month timeframe. K Barbell and M Freundlich, *Foster*

recently proposed legislation to establish a six-month timeframe for resolving child protection cases so that children are placed in permanent arrangements within that period.[87]

### Proposal 7: Timeframes for decisions on restoration

To ensure that children in OOHC are provided with secure long–term placements in a timely manner, it is proposed to mandate the following timeframes for reaching a decision about the feasibility of restoration before another a permanent option must be pursued:

- within six months for children less than two years
- within twelve months for children older than two years.

This ensures that where restoration is not in the best interests of the child, another permanent placement is found for the child at the earliest opportunity.

**PROPOSAL 7:**
**Legislate restoration timeframes – within six months for children less than two years and within twelve months for children older than two years**

**Question 7:**
Do you agree with the restoration timeframes proposed?

## 2.2.3 PERMANENCY AND SELF-REGULATION OF SUPPORTED CARE PLACEMENTS

Supported OOHC is an effective time-limited care arrangement where parental responsibility has not been pursued due to reasons specific to the child or young person's circumstances even though the child or young person is in need of care and protection and alternative arrangements are in place for them to be cared for by an authorised carer. The role of the Children's Guardian in these circumstances is only to accredit the supervising designated agency including their procedures for authorising the carer.

Most often, supported carers are relative or kinship carers. Many carers, especially grandparents, have suggested that their role is insufficiently recognised in supported OOHC.

At present, all supported OOHC arrangements are required to have a care plan imposed by FACS (CS) and reviewed annually by FACS (CS).[88]

Comments have been received that care planning and review is an unwarranted intrusion into the lives of kinship arrangements. Grandparents do not want FACS (CS) setting out a care plan for children they are raising as part of their family.

### Proposal 8: Enhancing family involvement in supported OOHC

To provide relative carers of children in supported OOHC with greater autonomy in caring for children and reduce the amount of government intervention NSW proposes a 'self-regulation' model.

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*Care Today*, Casey Family Programs, Washington D.C., 2001, viewed on 19 September 2012, <http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/policy-issues/foster_care_today.pdf> p16

87 'Children and Families Bill to give families support when they need it most', Press Notice, 9 May 2012, viewed on 19 September 2012, <http://www.education.gov.uk/childrenandyoungpeople/families/adoption/a00208753/childrens-bill-family-support>

88 Care Act, section 155

Instead of FACS (CS) developing a care plan and assessing the child and young person's placement each year, the supported carer will report to FACS (CS) on how they are addressing the needs of the child or young person who is in need of care and protection at an annual meeting. The kin carer will prepare a self-assessment of the current care arrangement, receive information about available services from FACS (CS) and satisfy accountability requirements for on-going payment of the care allowance.

If, after a period of two years, the child or young person is still unable to live safely with his or her parents and FACS (CS) determines that the placement is stable and in the child's best interests the relative will be encouraged to seek more permanent legal orders to continue caring for the child.

This model of 'self-regulation' will shift control from FACS (CS) to the grandparent/relative carer and give carers greater autonomy and recognition.

Where relative carers are placing children at risk then this will be a matter for mandatory reporting.

**PROPOSAL 8:**
**Enhance supported care placements by introducing:**

- **self-regulation of supported care placements by some supported carers to limit the intrusion of FACS (CS) in stable relative and kinship placements**
- **a two-year cap on the duration of supported care placements to achieve greater permanency and stability through permanent legal orders for these children and young people**

**Question 8 (a):**
Is 'self-regulation' of supported OOHC a positive step forward? Can you see any problems with this approach?

**Question 8 (b):**
What would be the key elements of the self-regulation model for supported OOHC?

### 2.2.4 PERMANENCY IN RELATIVE AND KIN CARE

Adoption is not always the preferred option for children and young people in OOHC. Adoption of children by their relatives is generally not favoured in contemporary adoption practice because it disrupts family and genealogical relationships. Before making an adoption order in favour of a relative, the Court must be satisfied that the adoption order is clearly preferable to any other action that could be taken by law in relation to the child.[89]

Adoption is generally not the preferred permanency outcome for Aboriginal children. The Adoption Act specifically recognises that adoption is a concept that is absent in customary Aboriginal child care arrangements.[90]

The Adoption Act[91] states that an Aboriginal child is not to be placed for adoption unless the Director-General is satisfied that the making of an adoption order is clearly preferable to any other action that could be taken by law in relation to the care of the child. Any decision regarding the placement of an Aboriginal child for adoption must be taken in consultation with a local Aboriginal community welfare organisation.[92]

[89] Adoption Act, section 29
[90] Adoption Act, section 35(1)
[91] Adoption Act, section 36
[92] Adoption Act, section 33

Relative and kinship care is used extensively as a permanent placement option for children in OOHC. At 30 June 2011, 9,253 (51 per cent) of children and young people in OOHC were in relative and kinship placements. Of these:

- 3,741 were in statutory OOHC where parental responsibility is held by the Minister[93]
- 3,305 were in supported care where parental responsibility is held by the relative[94]
- 2,323 were in supported care where there are no court orders re-allocating parental responsibility.[95]

At 30 June 2011 there were 6,060 Aboriginal children and young people in OOHC[96].

Some NGOs and carers have argued for a new approach to relative and kin care that takes it outside the OOHC regulatory framework. It has been said that relative and kin carers find monitoring by the State of their family arrangements intrusive and contrary to notions of extended family care of a child.[97] Whilst relative and kin carers welcome financial assistance and casework support at times, they would like greater security and clarity about their capacity to make day-to-day decisions about the child's health, education and general welfare without intrusion by the State.

## Guardianship Orders as a Permanent Care Option

Guardianship orders are a form of third party parental responsibility order that transfer all duties, powers, responsibilities and authority that parents are entitled to by law, to a nominated person/s considered appropriate by the court. Third party parental responsibility may be ordered in the event that a parent is unable to care for a child, and as such parental responsibility is transferred to a relative.[98]

Guardianship to a third party reduces the need for statutory involvement but it does not involve the permanent cutting of legal ties to birth parents and other family members. The practical effect is that the carer takes on full parental responsibility, making all decisions about the care of the child, until the child reaches eighteen years. A Guardianship order need not change the name of the child and so maintains this connection that is so important for Aboriginal children.

Guardianship orders are used successfully in some Australian and overseas jurisdictions to provide a permanent care option for children and young people for whom adoption is not in their best interest. See Appendix 6 on page 73 for further information on the use of Guardianship orders in other jurisdictions.

## Proposal 9: Guardianship orders

The introduction of a guardianship order in the Care Act would provide a clear pathway for transferring full parental responsibility for the child or young person to a relative or kinship carer and confirm that the child or young person is not in OOHC.

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93 Information Management Branch, Planning and Corporate Performance Directorate, , *Annual Statistical Report 2010-2011*, Family and Community Services, Community Services, New South Wales Government January 2012, p.53

94 Ibid, p.51

95 Ibid

96 Ibid, p.48

97 For example, A Yardley, J Mason and E Watson, *Kinship Care in NSW – Finding a Way Forward,* Association of Child Welfare Agencies, November 2009, *viewed on 19 September 2012, <http://www.acwa.asn.au/downloads/publications/Kinship_Report_080110.pdf>*

98 Australian Institute of Health and Welfare, *Child Protection Australia 2010-11,* Child Welfare Series Number 53*, 2012, viewed on 19 September 2012, <http://www.aihw.gov.au/publication-detail/?id=10737421016>*

Guardianship orders could be an alternative pathway for:

- supported care placements
- statutory relative and kin care placements where the Minister holds parental responsibility
- other circumstances where adoption is not preferred.

The circumstances in which a guardianship order would be considered in preference to adoption include:

- the child or young person is in a stable and self supporting relative or kinship placement and there is no realistic possibility of restoration
- a guardianship order would better support a child or young person's cultural identity and cultural connections.

It is proposed to introduce a guardianship order within the Care Act with the following features:

- order to 18 years transferring all the duties, powers, responsibilities and authority of a parent to a relative
- application for guardianship made by a relative with a stable care relationship with the child or young person or brought by a designated agency with the carer's consent
- a child or young person who is the subject of a guardianship order must be in need of care and protection with no realistic possibility of restoration but not necessarily in OOHC
- parental consent not required but parents must be informed of the application and have a right to be heard during proceedings
- orders can be subject to applications for rescission but only with the leave of the court and the consent of the agency that last case managed the placement
- guardians are entitled to ongoing financial assistance for the child or young person where it was being provided immediately prior to the order being made
- orders may include conditions regarding family contact
- orders concerning Aboriginal children and young people must be subject to consultation with the child or young person's Aboriginal community and other principles arising from experience gained from implementing the Aboriginal Placement Principles including the requirement for robust cultural support plans, where appropriate
- annual check to confirm that the placement is ongoing and that payments should be continued
- because the child or young person is part of a family there will be no leaving or after care arrangements.

**Proposal 9:**
**Provide permanent care to children and young people when adoption is not in their best interest by:**

**(a) introducing long-term guardianship orders**

**(b) repealing section 149 of the Care Act that provides for sole parental responsibility orders as this provision is underutilised**

**Question 9 (a):**
Do you agree with the circumstances to which guardianship orders would apply?

**Question 9 (b):**
Are there other matters that should be included in the proposed features of a guardianship order for NSW?

### 2.2.5 CONCURRENT PLANNING AND DUAL AUTHORISATION OF CARERS

Children who cannot be restored to their birth parent/s can often spend a longer time in OOHC and experience multiple placement moves which can be detrimental to their security and well-being. Concurrent planning seeks to eliminate delays in attaining permanent family placements for children in OOHC.

In cases where there is a significant risk that restoration of a child or young person is not be feasible, concurrent planning involves placing a child or young person with foster carers who are also approved adoptive parents. The arrangement offers children and young people in OOHC greater stability and the opportunity to form secure relationships with permanent adoptive parents while the possibility of restoration with their birth parents is being considered.

If restoration is not possible, the child or young person remains with their carers and can be adopted by them. Multiple placement moves and delay in finding a permanent placement for the child are also avoided, ensuring greater stability and continuity of relationships for the child.

In NSW, the Wood Inquiry noted that there were "*…issues raised concerning the need for concurrent planning for children and young persons entering OOHC. Often when children or young persons are removed from their families they can have multiple placements while the matter is before the court"*.[99]

Recommendation 16.1 of the report stated further that "*DoCS OoHC/NGO OoHC caseworkers should become involved with children and young persons in OoHC at an earlier stage than final orders and have a responsibility to identify and support the placement of the children and young people, where it has been determined that there is not a realistic possibility of restoration."*[100]

Concurrent planning has been used in some foster care adoption agencies and local councils in the UK for children under two years of age where it is more than likely that the eventual plan will be adoption but there is still a chance that restoration may be successful. These children are placed with prospective adoptive parents who are also authorised as long-term out-of-home carers.[101] The UK Government recently announced its intention to introduce widespread use of concurrent planning for children in foster care.[102]

Several jurisdictions in the US and UK have evaluated concurrent planning practices. In Colorado, children with fewer placements, and for whom the concurrent plan was clearly identified, achieved more timely permanence.[103] In Kentucky, most children in the project experienced fewer placement changes; however inconsistencies in caseworker skills led to less timely permanency outcomes.[104] In the UK, the results of three concurrent planning projects demonstrated that children moved into permanent homes faster, and with fewer moves, than the comparison groups.[105]

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99 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW, 2008,* p. 638

100 Ibid, p 639 and 687

101 *Concurrent Planning Project*, Coram, Viewed on 19 September 2012, <http://www.coram.org.uk/assets/downloads/Concurrent_planning_recruitment_online_revised_contacts1.pdf>

102 Department for Education, United Kingdom, *An Action Plan for Adoption: Tackling Delay*, March 2012, p.14

103 C Potter and S Klein-Rothschild, Getting home on time: predicting timely permanence for young children, *Child Welfare,* vol. 81, no. 2, 2002, pp 123-150

104 M Martin, A Barbee,B Antle B and B Sar, B, 'Expedited permanency planning: Evaluation of the Kentucky adoptions opportunity project',*Child Welfare*, vol. 81, no. 2, 2002, pp 203-224

105 E Monck,J Reynolds, and V Wigfall, 'Using concurrent planning to establish permanency for looked after young Children', *Child and Family Social Work*, vol 9, 2004, pp 321-331

There is nothing within the Care Act or Adoption Act that prevents concurrent planning in NSW. The process might, however, be assisted by facilitating a more streamlined approach to the authorisation of prospective adoptive parents as foster carers. Currently, the criteria and process for assessing and approving a prospective adoptive parent is quite distinct from the criteria and process for assessing and approving an authorised carer.

In other jurisdictions where concurrent planning occurs these two assessment processes come together, so that persons who are interested in adopting indicate whether they are willing to be a carer in the child protection system with a view to adopting if restoration is not possible. It would also be possible to legislate for prospective adoptive parents to be automatically approved as out-of-home carers.

This would hopefully assist in attracting more carers willing to take on permanent care and will assist in speeding up adoption processes once restoration has been ruled out.

Consideration could also be given to a new category of "concurrent carer", who is authorised as both a long-term out-of-home carer and a prospective adoptive parent.

This is a model used in some parts of the UK for children under two years of age to minimise the number of placements a child must go through before adoption and maximise the attachment of the child to one family.[106]

### Proposal 10: Concurrent planning

It is proposed to facilitate a more streamlined approach to the authorisation of prospective adoptive parents as foster carers. This could be achieved via a number of ways:

- legislating for prospective adoptive parents to be automatically approved as out-of-home carers, or
- introducing a new category of "concurrent carer", who is authorised as both a long-term out-of-home carer and a prospective adoptive parent.

**PROPOSAL 10:**
**Introduce concurrent planning to support timely permanent placements for children in OOHC by either:**

**a) streamlining the assessment of authorised carers and prospective adoptive parents**

**OR**

**b) creating a new category of "concurrent carer" who is authorised as both a long term carer and prospective adoptive parent**

**Question 10 (a):**
Would the dual authorisation of adoptive applicants as foster carers better facilitate concurrent planning in NSW?

**Question 10 (b):**
Are there other options that could be implemented to avoid the occurrence of multiple placements?

[106] E Monck,J Reynolds and V Wigfall, *The Role of Concurrent Planning,* British Association for Adoption and Fostering, 2003

## 2.3 WAYS TO STREAMLINE ADOPTION

A snapshot of current adoptions data is provided at Appendix 7 on page 74.

### 2.3.1 PERMANENCY FOR CHILDREN AND YOUNG PEOPLE IN OOHC – THE JURISDICTION OF THE COURTS

The Care Act establishes the statutory basis whereby decision making about the removal of a child or young person from their parents without their consent and consequent allocation of parental responsibility rests with the Court. In addition, the Supreme Court has a number of discrete functions relevant to children. Nothing in the Care Act limits the Supreme Court's jurisdiction, as a superior court, to exercise jurisdiction that may be necessary for the administration of justice in New South Wales.[107] In respect to child welfare, the Supreme Court has a general 'welfare' jurisdiction derived from the common law – referred to as a 'parens patriae' jurisdiction. This jurisdiction is exercised by the Supreme Court, in exceptional circumstances, where some form of protective order is urgently required and there is no other available court process.[108] The process of permanently transferring all legal rights and responsibilities for being a parent, via adoption, the Supreme Court has the jurisdiction to determine and makes adoption orders under the Adoption Act.

From a public policy perspective, the question that arises is, if adoption is one of the range of options to be considered at an early stage of permanency placing planning for a child who can not live with their family, would it be more appropriate to transfer the jurisdiction for making adoption orders to the Children's Court or (recognising that not all adoptions relate to children in OOHC) should the Children's Court have a concurrent jurisdiction?

The Children's Court may be the more appropriate forum for adoption applications and orders where there are child protection concerns given:

- it draws on the Children's Court's expertise in determining care and protection matters and what are the most appropriate placement arrangement where a child can not be reunited with his or her family
- only contentious questions of law should be dealt with by a superior court, and therefore only appeals against an adoption order made by the Children's Court should be dealt with by the Supreme Court
- having one court to deal with all types of care arrangements streamlines court processes and should result in adoption being considered in the range of permanency arrangements at an earlier stage in placement to the benefit of the child
- for children in long term and stable out of home care placements, the Children's Court may be considered more appropriate and accessible for foster parents who wish to adopt a child who is in their care
- it is consistent with the practice in many other states that an inferior court be responsible for granting an adoption order.[109]

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107 *Supreme Court Act 1970,* section 23

108 *Re Elizabeth (2007) NSWSC 729 at [17]*

109 For other jurisdictions the court making an adoption order is: Victoria – Supreme Court or local court; Queensland – Children's Court; Western Australia – Family Court of Western Australia; South Australia – Youth Court of South Australia; Australian Capital Territory – Supreme Court; Northern Territory – local court; Tasmania – Children's Court.

### Proposal 11: Transfer jurisdiction for adoptions from the Supreme Court to the Children's Court

It is proposed that the Children's Court be conferred jurisdiction to make adoption orders where there are child protection concerns.

**PROPOSAL 11:**
**That the Children's Court be conferred jurisdiction to make adoption orders where there are child protection concerns**

**Question 11:**
Do you agree that there are benefits in conferring adoption jurisdiction to the Children's Court?

## 2.3.2 MAKING CARER ADOPTIONS EASIER

The Adoption Act sets out a process for selecting prospective adoptive parents.[110] This involves an expression of interest[111] followed by an application[112]. The process works well where the child is not known to the adoptive parents before they are selected.

It is not always relevant, however, where a child is already in the care of the prospective adoptive parent, which is the case for many OOHC adoptions. In cases such as these approval processes could be streamlined for existing authorised carers who seek to adopt the child in their care. It will also be important to examine the recruitment and authorisation processes for prospective carers, many of whom may go on to adopt the child in their care.
Other differences in selection criteria may also be appropriate for OOHC adoptions. For example, currently, a couple may only adopt a child if they have been living together for a continuous period of two years[113]. There may be circumstances where it is appropriate for long-term carers of a child or young person to adopt jointly even if they have been separated, if the child has become part of the family before the separation takes place and there are other children in the family.

### Proposal 12: Streamlining process for existing carers to become adoptive applicants

It is proposed to fast-track OOHC adoptions by removing unnecessary administrative burdens that are not relevant where a child has been living as part of the adopted family for a long period. This includes amending the Adoption Act to better recognise that authorised carers should not be required to undertake a full assessment and authorisation as a prospective adoptive applicant.

**PROPOSAL 12:**
**Amend the Adoption Act to better recognise that authorised carers should not be required to undertake full assessment and authorisation as a prospective adoptive applicant**

**Question 12 (a):**
What other elements should be fast-tracked for OOHC adoptive applicants? Are there particular requirements and restrictions on adoption that should be relaxed for OOHC adoptions?

**Question 12 (b):**
Are there other differences for OOHC adoptions that should be reflected in the Adoption Act?

110 Adoption Act, Chapter 4, Part 3
111 Adoption Act, section 42
112 Adoption Act, section 43,44
113 Adoption Act Chapter 4, Part 1, section 28

### 2.3.3 STANDARDS FOR OUT-OF-HOME CARE AGENCIES THAT ENHANCE PERMANENCY PLANNING

Agencies must be accredited by the Children's Guardian in order to provide OOHC services. The *NSW Standards for Statutory OOHC* state the requirements for accreditation to provide OOHC services. They also provide a framework for driving continuous improvement in the quality of OOHC services.

The Children's Guardian also accredits non-government providers of adoption services. Agencies seeking adoption accreditation must demonstrate compliance with the *NSW Adoption Standards*.

With the increasing delivery of OOHC services by the non-government sector, non-government OOHC service providers are critical partners in ensuring greater permanency for children and young people in care, including adoption. Additional payments are available to agencies that achieve permanency for a child through adoption.

#### Proposal 13: Streamlining agencies to offer OOHC and adoption services

It is proposed that the *NSW Statutory OOHC Standards* be reviewed to promote a more holistic agency approach and enhance the permanency planning capacity of non-government services, from restoration to adoption. This will include work to merge the *NSW Standards for Statutory OOHC* and the *NSW Adoption Standards* into one set of integrated standards. Processes will be streamlined and an agency will be able to provide OOHC and adoption services. Distinctive requirements for OOHC and adoption will be maintained for agencies not wanting to seek dual accreditation such a residential care providers, Aboriginal agencies or smaller providers.

**PROPOSAL 13:**
**Enhance the permanency planning capacity of non-government services by merging the *NSW Standards for Statutory OOHC* and the *NSW Adoption Standards***

**Question 13:**
How can the *NSW Standards for Statutory OOHC* be enhanced to better promote permanency planning, from restoration to adoption, for children and young people in OOHC?

### 2.3.4 BETTER MECHANISMS FOR BIRTH PARENTS TO BE INVOLVED IN FUTURE PLANNING FOR AN ADOPTED CHILD

Current adoption practice recognises that although adoption ends a child's legal relationship with birth parents, the emotional and genetic relationships remain. Adoption today embraces issues of identity, openness and the value of a child's cultural and racial heritage.

All new adoptions in NSW are "open adoptions". This means there is honesty and openness about the adoption and the child's background and birth family, rather than secrecy. The child may retain their links with significant prior relationships, including their birth family. Mechanisms that enable birth parents to participate in future planning for the child support this approach where it is in the best interests of the child.

Options to facilitate involvement of birth parents in the adoption process include allowing non-consenting parents to be parties to an adoption plan and greater use of alternative dispute resolution in adoption proceedings so that parents are fully engaged in planning for matters such as contact arrangements.

Currently non-consenting birth parents may be informally included in the adoption planning process, particularly in circumstances where they agree that adoption is in their child's best interests, but they do not wish to take the step of providing formal legal consent. This may be for many reasons including the significance of the consent, the emotional issues related to providing consent and concerns about the impact that their consent may have on the child.

This proposal will make it possible for non-consenting parents to be a party to their child's adoption plan, where they are interested in planning for their child's future, including matters such as how contact with the birth family will continue, and it is in the best interests of the child for them to be a party to the adoption plan.

### Proposal 14: Improved family involvement in adoptions

It is proposed to amend the Adoption Act to improve the involvement of birth parents in planning for the adoption of their child including allowing non-consenting parents to be parties to an adoption plan and greater use of alternative dispute resolution in adoption proceedings so that parents are fully engaged in planning for matters such as contact arrangements.

**PROPOSAL 14:**
**Amend the Adoption Act to improve the involvement of birth parents in planning for the adoption of their child including allowing non-consenting parents to be parties to an adoption plan and greater use of alternative dispute resolution in adoption proceedings so that parents are fully engaged in planning for matters such as contact arrangements**

**Question 14 (a):**
What is the optimum mechanism for non-consenting parents to be parties to an adoption plan?

**Question 14 (b):**
How could alternative dispute resolution best work to engage parents in adoption proceedings?

## 2.3.5 NEW GROUNDS FOR DISPENSING WITH PARENT'S CONSENT FOR ADOPTION OF A CHILD

For children and young people in OOHC who cannot be restored or permanently placed with a relative, adoption is the preferred placement because of the benefits the child or young person receives from a permanent, stable and nurturing family.

The number of OOHC adoptions in NSW has increased in recent years; however barriers to increasing the number of OOHC adoptions remain. The adoption of children from OOHC requires complex casework to engage all parties to the adoption. In addition, significant work is required to fulfil the substantial legislative requirements to achieve an adoption order. For example, a formal, informed consent from the following individuals is required:

- both a birth mother and birth father or the evidence to support a dispensation of their consent/s
- a child, to their own adoption, should they be over 12 years of age[114], or the evidence to support a dispensation of their consent
- a child's authorised carers or any other person, should they have previously been allocated any aspect of parental responsibility (PR) for the child, and

[114] In 2010-11, approximately 41 per cent of OOHC adoptions were for young people over twelve years, and the majority demonstrated the capacity to consent to their own adoption

- the Minister (for all children under 12 and where a child over 12 has not given their sole consent).

While all casework in this area can be difficult, engaging birth parents can be particularly so as it frequently involves exploring unresolved grief and loss issues. Where parents have been disengaged or cannot be located, significant efforts are needed to re-locate parents, often after long periods without contact, and then engage them in the adoption process. Fulfilling these requirements can cause significant delay in the making of an adoption order for a child in OOHC, ultimately delaying permanency for the child or young person.

The Adoption Act[115] currently allows the Court to dispense with parental consent to the adoption of a child by authorised carers where the child has a stable relationship with the carers and the adoption of the child by those carers will promote the child's welfare. Nevertheless, the adoption can only proceed after all reasonable efforts have been made to locate and inform parents about the plan for adoption and encourage their participation to develop an adoption plan. This can cause significant delays where a parent has had no dealings with the child or the designated agency for many years.

### Proposal 15: Streamlining adoption processes

It is proposed to amend the Adoption Act to provide for additional grounds for dispensing with parental consent. Other provisions for dispensing with consent that might be included to enhance adoption opportunities for children in care are:

- grounds relating to the parents' ability to care for and protect the child e.g. parent incarcerated for an offence against the child, or the parent repeatedly refused or neglected to comply with parental duties and reasonable efforts have failed to correct these conditions
- where a parent cannot be located, despite having given an undertaking to keep FACS (CS) informed of their whereabouts
- where there is no realistic possibility that the parent will be able to resume full-time care of the child or young person because reasonable efforts have failed to correct the conditions leading to the child or young person's placement and it is in the best interests of the child or young person to make the decision now.

**PROPOSAL 15:**
**Amend the Adoption Act to provide for additional grounds for dispensing with parental consent, including grounds where:**

**(a)** **the parent is unable to care for and protect the child e.g. the parent is incarcerated for an offence against the child, or the parent repeatedly refused or neglected to comply with parental duties and reasonable efforts have failed to correct these conditions**

**(b)** **a parent cannot be located, despite having given an undertaking to keep FACS (CS) informed of their whereabouts**

**(c)** **there is no realistic possibility that the parent will be able to resume full-time care of the child or young person because reasonable efforts have failed to correct the conditions leading to the child or young person's placement and it is in the best interest of the child or young person to make the decision now**

**Question 15:**
What should be the additional grounds for dispensing with parental consent?

[115] Adoption Act, section 67(1)(d)

### 2.3.6 PARENT'S INVOLVEMENT IN ADOPTION PROCEEDINGS

In open adoption practice, the best interests of the child must always be the paramount consideration. It is important that in making an adoption decision that a proper balance is reached between rights of the parent/s to be heard and the interests of a child not being unduly destabilised and undermined by unmeritorious applications contesting the decision.

It can take a significant amount of time in some OOHC adoptions to locate a birth parent to advise of an initial adoption application and, then if the parent cannot be found, for the Supreme Court to direct that further steps be taken to locate the parent before an order is made. This can create lengthy delays for the child's adoption application. There are situations where it may be in the child's best interest to proceed with the adoption where the parent cannot be located within a specific time period. In such a case the adoption would proceed and parents would have a right to be heard on the matter should they request.

#### Proposal 16: Removing a parent's right to be advised of an adoption

Consideration should be given to limiting the right of a parent to be advised of an adoption in the following circumstances:

- the child is over twelve years of age and has given their sole consent – the proposal is to allow the views of the parents to be heard where they request this, but not to impose any obligation to advise the birth parents of the application where they cannot be located within a specific period of time or permit them to be joined in the adoption proceedings. The status quo will continue to apply to children under 12 years of age given they are unable to provide sole consent to their own adoption.
- the Children's Court has taken away parental responsibility from that parent in care proceedings and found that there is no realistic possibility of restoration – the proposal is to remove the requirement to advise the parents of the application where the parent cannot be located within a specified period of time and to remove the need for parental consent but to allow the parents the ability to be joined or to be heard on the application.

**PROPOSAL 16:**
**Limit the parent's right to be advised of an adoption in the following circumstances:**
**(a) where the child is over 12 years of age and has given their sole consent, or**
**(b) the Children's Court has taken away parental responsibility from that parent in care proceedings and found that there is no realistic possibility of restoration**

**Question 16:**
Do you support limiting the role of parents in adoption proceedings in this way?

# SECTION 3: CREATING A CHILD FOCUSED SYSTEM

A key goal of the NSW Government's reform agenda is to shape the child protection system to be more responsive to the needs of children and young people and changes in familial circumstances. To this end, a number of reforms to the regulatory framework have been proposed to improve casework practise to better protect children and young people in care, to facilitate the speedy resolution of contact and other child welfare disputes and to enhance the adaptability and flexibility of certain court orders to better meet the needs of the child or young person.

To shape the system to better fit the needs of the child, it is proposed to:

- **enable contact arrangements to be made through case planning** where there is no possibility of restoration and provide **better guidance to designated providers when making contact decisions**
- **create a more flexible system for resolving disputes about contact** between birth parents and their children and young people in OOHC
- **give the Children's Court the power to enforce contact orders and arrangements**
- **clarify and consolidate in the legislation provisions relating to the regulation of special medical treatment for children and young people**
- provide better protections to children and young people in OOHC by **minimising the improper use of social media in a child protection context**
- **address current limitations to the Court's powers to make parental responsibility and supervision orders**
- **enable AbSec and CREATE to access personal information** to permit fulfilment of their objectives
- **enable private medical professionals to be able to share with other relevant agencies personal information and health information about children, young people and families without client consent** where this relates to the safety, welfare and wellbeing of a child or young person.
- **require government to report on the deaths of children and young people known to FACS (CS)**
- **clarify the reporting requirements regarding children living away from home without parental consent**.

## 3.1 CONTACT ARRANGEMENTS FOR CHILDREN IN CARE

Developing safe and effective contact arrangements that meet the individual needs of children and young people where there is no possibility of restoration is a priority. Contact should be sufficiently flexible to meet the changing needs of the child and young person within the context of the changing circumstances of their family. While contact needs to be regular and frequent when assessing restoration prospects, ongoing frequent contact may not be in the child or young person's best interest where restoration has been ruled out and the child or young person is being settled into a new permanent family arrangement.

Contact is not always beneficial and in some instances can have negative effects on children. Research shows many children experience behavioural difficulties, loyalty conflicts and anxiety before and after contact and, in cases of unsupervised contact children can be exposed to further abuse.[116] Caseworkers and foster parents also report beliefs that contact can be disruptive, causing

[116] J Selwyn, Placing older children in new families: changing patterns of contact, in Neil, E. and Howe, D. (eds) *Contact in*

behavioural problems to worsen and threatening children's coping and adaptation to their foster homes.[117] When children's behaviour indicates that contact is reawakening the feelings associated with earlier trauma the benefit of contact must be seriously questioned.[118]

Further, contact for infants can be particularly problematic. Of particular concern is the exposure to multiple carers and the constant disruption to a daily routine.[119] For infants who have been abused or neglected, the distress from frequent and unsatisfactory contact can make it more difficult for them to recover.[120]

## Contact arrangements in NSW

The Care Act gives the Children's Court the power to make an order in relation to contact.[121] The Children's Court may:

- stipulate minimum requirements concerning the frequency and duration of contact between the child and young person and his or her parents, relatives or other persons of significance to the child or young person
- order that contact with a specific person be supervised and the frequency of that contact
- make an order for no contact with a specified person, if contact with that person is not in the best interests of the child or young person.

Currently if the Court makes a contact order and the circumstances of the child or young person and their family change so that the order is no longer appropriate, the order can only be varied or rescinded by the Children's Court in accordance with section 90 of the Care Act. In making such an application, the applicant first must show there has been a significant change in relevant circumstances.

Contact arrangements are currently considered and documented in case plans and reviewed regularly to reflect changes in children or young people's circumstances. Where agreement can't be reached, the Court will make an order for contact. A contact order is only sought by FACS (CS) when all methods for reaching agreement have failed.

If at a later date the child or young person's circumstances change, FACS (CS) or the designated agency cannot change the contact arrangement where it would be contrary to a contact order made by the Children's Court, Family Court or Federal Magistrates Court.

If no contact order has been made then FACS (CS) or the designated agency has responsibility for determining and arranging contact consistent with the principles of the Care Act.

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*Adoption and Permanent Foster care: Research, theory and practice,* London: British Association for Adoption and Fostering, 2004

117 F E Mennen and M O'Keefe, M, Informed decisions in child welfare. *Children & Youth Services Review*, vol. 27, 2005, pp. 577-593.

118 E Neil and D Howe (eds.), *Contact in adoption and permanent foster care.* London. British Association for Adoption and Fostering, 2004

119 M Narey, Contact Arrangements for children: A Call for Views, *Consultation on the Review of contact arrangements for children in care and adopted children and on the placement of sibling groups for adoption* Department for Education, UK,, 2012

120 G Schofield and J Simmonds, Contact for infants subject to care proceedings, *Adoption and Fostering*, vol. 35, no.4, 2011, pp.70-74.

121 Care Act, section 86

## Current Issues

Court-ordered contact arrangements are inherently insufficiently flexible and can lead to unnecessary tensions within the families who are caring for the child or young person without any commensurate benefit for the child or young person. The inherent inflexibility arises because to change a court order it is necessary to bring a new care application. That process is not sufficiently responsive to accommodate the changing lifestyle of a maturing child or young person and the needs of the child or young person's caring family. The background and evidence of these claims was considered by Wood Inquiry which concluded that where there is no realistic possibility of restoration of a child or young person to their birth family then "the Court should have no power with respect to making orders as to contact."[122]

In considering the issues central to contact certain key principles can be drawn from current research to inform these deliberations.

Some of these key principles are:

- children and young people in OOHC are entitled to a safe, nurturing, stable and secure environment[123]
- good quality contact in conjunction with other positive professional intervention is likely to assist the child or young person. Conversely, poor quality contact had for the sake of contact is likely to further damage the child or young person[124]
- contact may assist reunification and will enhance successful restoration to a birth family.[125] The child or young person's long term placement can be impaired by levels of contact that are unwarranted in a situation where restoration is not to occur
- contact is important in maintaining cultural identity. In addition there is a positive correlation between contact with at least one biological parent and the child or young person's current wellbeing.[126] There is no optimal level of contact and the contact need not be personal face-to-face contact to achieve these same outcomes
- the circumstances of a child or young person will change so that contact arrangements should be flexible. When making decisions about frequency of contact, primary factors to consider are; the age of the child or young person, the case plan goal, for example, assessment, restoration, permanent care or adoption and the safety of the child or young person.[127]

These principles highlight that ideally, any contact model should be safe, minimally intrusive and appropriate to the child or young person's needs. It should also be responsive to change and easily administered.

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122 J Wood, *Special Commission of Inquiry into Child Protection Services*, 2008, paragraph 11.227

123 Care Act, section 9(2)(f)

124 R Sen and K. Broadhurst, 'Contact between children in out-of-home placements and their family and friends networks: a research review.',*Child and Family Social Work,* vol. 16, no. 3, 2011, pp. 298-309

125 S Taplin, *Is all contact between children in care and their birth families 'good' contact?* NSW Centre for Parenting & Research, Department of Community Services, 2005; L M Mcwey, A Acock and B E Porter, The impact of continued contact with biological parents upon the mental health of children in foster care', *Children and Youth Services Review*, Vol. 32, 2011, pp.1338-1345

126 L M Mcwey.and B E Porter, 'The impact of continued contact with biological parents upon the mental health of children in foster care', *Children & Youth Services Review,* vol. 32, 2011, pp.1338-1345

127 Department of Community Services*, Practice Tool: Reference for contact for children and young people in OOHC*, 2010

## 3.2 WAYS TO IMPROVE CONTACT ARRANGEMENTS

### 3.2.1 THE BENEFITS OF CASE PLANNING OVER COURT ORDERS

Contact arrangements are best agreed by way of the case planning process rather than through court orders. Removing the role of the court in making orders where there is no possibility of restoration will avoid additional stress on children and young people from returning to the Children's Court and will ensure that contact arrangements remain flexible and responsive to the needs of the child or young person. This provides for a system that is responsive to the needs of the child or young person, allows for flexible responses and permits involvement of all people interested in the well-being of the child or young person.

### Proposal 17: Planning rather than ordering contact

The proposal is that in all cases where the court has determined there is no possibility of restoration, contact arrangements made through case planning could be introduced. Instead of the Court having power to make contact, the care plan filed with the Court[128] will document the proposed contact arrangements and those arrangements will be able to be varied to suit the needs of the child or young person as they grow and develop rather than returning to the Children's Court each time a child or young person's situation requires the issue of contact to be revisited.

This approach is supported by current evidence-based guidelines for Magistrates in relation to orders about contact which were developed as a result of the Wood Inquiry recommendation. These Contact Guidelines issued by the Children's Court address the issue of whether a contact order should be made by the Court or contact should be addressed through case planning:

> *"It may be preferable to ensure that plans for contact are clearly set out in the Care Plan without contact orders being made. If there are no orders relating to contact then it allows arrangements to be varied to suit the needs of the child as they age, rather than returning to the Children's Court each time a child's situation changes requiring the issue of contact to be revisited."*[129]

**PROPOSAL 17:**
**Where there is no possibility of restoration, contact arrangements are to be made through case planning**

**Question 17:**
Do you support contact arrangements being made through case work where there is no possibility of restoration?

### 3.2.2 COMMON FRAMEWORK WITH A FOCUS ON CASE PLANNING OVER COURT ORDERS

Relying predominantly on case planning where there is no consistent approach between designated agencies on determining contact could be problematic. While it is the case that the *NSW Standards for Statutory OOHC* provide a standard for *Family and Significant Other*s and assessment criteria for designated agencies in relation to maintenance of family relationships, these standards are at a very high level and do not provide any assurance about decision-making in individual cases. There is no

128 Care Act, section 78
129 *The Children's Court of New South Wales, Contact Guidelines*, 2011

common framework about contact available to designated agencies to guide them in formulating appropriate contact regimes.

In contrast, FACS (CS) has its own policies and guidelines for determining contact.[130] Contact principles referred to in FACS (CS) tools and guidelines are as follows:

- in determining contact arrangements the paramount consideration is the safety, welfare and wellbeing of the child or young person
- contact between a child or young person in OOHC and their family and significant others will vary over time and according to the needs, age and views of the child
- arrangements for contact between a child or young person and any people significant to them are to be agreed by way of the case planning process
- the case plan goal will, in most cases determine the contact arrangements that are considered
- children and young people are to be given an opportunity to voice their views about the type and frequency of contact
- all reasonable efforts are to be made for contact to preserve the name, identity, cultural and religious ties of Aboriginal and Torres Strait Islander children and young persons and those from Cultural and Linguistically Diverse Backgrounds.

Magistrates, also, are supported by the *Children's Court Contact Guidelines* noted above.

### Proposal 18: Consistent approaches to contact

Given the current transfer of OOHC to the NGO sector it is proposed to introduce a common framework on contact decisions to ensure consistency and appropriate minimum standards across the sector.

Both the Children's Court Contact Guidelines and FACS (CS) policies and practice tools may provide a useful base on which to build a common framework for determining contact arrangements through casework.

**PROPOSAL 18:**
**Develop a common framework about contact arrangements between children and young people and their birth families to guide designated agencies when making contact decisions**

**Question 18:**
What should be the key elements of a common framework for designated agencies in determining contact?

## 3.2.3 RESOLVING CONTACT DISPUTES

While case planning should resolve the majority of decisions about contact, there will always be some decisions that are intractable to such a solution.

The Wood Inquiry recommended that the power of the Children's Court to make contact orders be limited to those matters where the Court has accepted the assessment of the Director-General that

[130] FACS (CS) *Guide to Deciding the Frequency of Contact* provides guidance to caseworkers on the frequency of face-to-face contact between the child and their parents by age of child and the case plan goal, and the *Practice Tool – Reference for contact for children and young people in OOHC* describes the approach to planning contact arrangements

there is a realistic possibility of restoration. For cases where restoration is not considered a realistic possibility, disputes instead would be dealt with through ADR mechanisms.[131]

During the passage of legislation through Parliament in 2009 to enact Wood Inquiry recommendations, concerns were raised about how disputes about contact might be effectively resolved if the Court were no longer able to make contact orders. A commitment was made that the provisions would not commence until ADR pilots were undertaken and evaluated to determine which, if any, was the most suitable for resolving contact disputes.

An evaluation of the Dispute Resolution Conferences and the Legal Aid external care and protection mediation pilot in the NSW Children's Court was recently undertaken by the Australian Institute of Criminology. The pilots, whilst not limited to contact disputes, will address which ADR model works best to deal with disputes in the care and protection jurisdiction, as well as the level of demand for a review mechanism for matters in which ADR is not able to resolve disputes. These projects are discussed further in section 1.3 of this discussion paper.

During the first half of 2011, FACS (CS) met with external stakeholders to discuss contact, and how an alternative model for resolving contact disputes might look.

Issues that have been identified include the concern that where the Children's Court retains power to make contact orders where there is no realistic possibility of restoration, designated agencies will continue to face difficulties finding long-term carers for children in these situations. This is because:

- if the orders are too prescriptive, then it may be difficult to find carers who are able to cope with the demands placed on them under the orders (for example orders that require the carers to facilitate contact on a weekly or fortnightly basis either to one party or multiple parties, or travelling long distances to facilitate the contact)
- if the orders are too inflexible, it will mean that the parties will need to continually bring applications to the Children's Court to vary the contact orders, as the child or young person's circumstances change when he or she grows older
- the cost of proceedings before the Children's Court are prohibitive for carers.

An ADR Expert Working Party, comprised of stakeholders in the care and protection jurisdiction, considered two alternative models for resolving contact disputes in cases where the Children's Court has determined that there is no realistic possibility of restoration and when ADR has been unsuccessful in resolving the dispute:

**Model 1**
Once ADR has been attempted and has not been able to resolve a contact dispute the Children's Court would retain the power to make final order regarding contact.

**Model 2**
Once ADR has been attempted and has not been able to resolve a contact dispute parties would have the option of proceeding to either the Administrative Decisions Tribunal (ADT) (if the Minister for Community Services had parental responsibility) or the Family Court (if a third party had parental responsibility).

[131] J Wood, *Report of Special Commission of Inquiry into Child Protection Services in NSW*, vol 1, 2008, p. 442

Model 2 assumes that decision making about contact is an administrative task and that resolution of such disputes should be matter of administrative review. It is for this reason that the ADT is recommended as an effective review mechanism. It is also noted that the ADT already exercises jurisdiction to review certain reviewable decisions relating to OOHC.

The Family Court may also be an appropriate forum to resolve contact disputes as the Court not only has the jurisdiction to make appropriate contact orders, but can also regulate the enforcement of those orders. Where the issue is not about care and protection, but about contact arrangements, there is no need for continuing State intervention. There are already procedures in place under the *Family Law Act* to require parties to try and resolve disputes through the use of ADR before bringing proceedings under that Act. Also, because any orders made in these proceedings are under Commonwealth legislation, those orders can be readily enforced if any of the parties move interstate.

It is not yet clear what the level of demand may be, if any, for a review mechanism for cases where ADR is not able to resolve contact disputes.

At the time, the majority of stakeholders in the ADR Expert Working Party expressed their support for Model 1, that is, in circumstances where contact disputes are not resolved through ADR, the Children's Court is the most appropriate forum for resolution.

If the power to make contact orders when there is no realistic possibility of restoration is retained by the Children's Court, then the concerns about lack of flexibility and responsiveness of the orders remains, unless strict time limits are imposed in these circumstances. For example, limiting the Court's power to making contact orders for a maximum period of two years post final care orders.

### Proposal 19: Resolving contact disputes

It is proposed to improve the resolution of contact disputes by requiring ADR to be used to settle disputes and introducing a review mechanism for disputes in either the Children's Court (Model 1) or the ADT or Family Court (Model 2) where ADR has been unsuccessful.

**PROPOSAL 19:**
**Improve the resolution of contact disputes by:**

**(a) requiring ADR be used to settle contact disputes**

**(b) where ADR is unsuccessful, contact disputes will be resolved in the Children's Court or the ADT or the Family Court**

**Question 19 (a):**
How should disputes about contact be resolved if they are not able to be resolved through ADR?

**Question 19 (b):**
If Model 1 is the preferred option and the Children's Court retains the power to make final orders about contact where there is no realistic possibility of restoration, should such orders be of a limited duration? For what time period?

**Question 19 (c):**
If Model 2 is the preferred option and the Children's Court does not retain the power to make final orders about contact where there is no realistic possibility of restoration do you agree that:

- where the minister or a designated agency has parental responsibility, the ADT be empowered to review the contact decision and make contact orders and
- the Family Court is the best forum for making contact orders if a third party has parental responsibility?

### 3.2.4 ENFORCING CONTACT ORDERS

Where a party does not comply with a contact order then there is no current specific provision to enforce the order. Where the arrangement is made under a court order then a breach of any court order may result in the use of generic powers to enforce it. Whilst this mechanism is not entirely satisfactory, it does provide some level of recourse if contact orders are breached. If contact arrangements are made through casework practice without a court order, as proposed in cases where there is no possibility of restoration, it is important that these are also complied with. To ensure that all parties, including designated agencies, comply with contact orders or arrangements it is considered appropriate to give the Children's Court the capacity to enforce them.

As previously noted, at present, the Care Act does not provide the Children's Court with any specific powers for the enforcement of contact orders. If a party wishes to enforce a contact order of the Children's Court they need to take action in another jurisdiction.

For example, a party could seek to enforce a contact order of the Children's Court by commencing proceedings under the *Family Law Act*. However this is a complex process and would not be a viable option in many cases.

Children's Court orders may also be enforced by the Supreme Court, or when a contact order prevents contact with a particular person for reasons of apprehended violence, an apprehended violence order could be obtained through the Local Court.

### Proposal 19: Enforcing contact orders

It is proposed that the Children's Court have the power to enforce contact orders and arrangements.

**PROPOSAL 20:**
**That the Children's Court has the power to enforce contact orders and arrangements**

**Question 20:**
Should there be mechanisms for enforcement of contact agreements or orders and what should these be?

## 3.3 WAYS TO CREATE A CHILD-FOCUSED SYSTEM

A number of miscellaneous amendments to the Care Act are also proposed as part of the current reform agenda to create a child-focused system.

### 3.3.1 ALTERNATIVE DISPUTE RESOLUTION

The use of ADR has been a feature of the child protection regulatory framework in NSW but more so since the Wood Inquiry reforms came into effect. The Care Act provides for the use of ADR at any

point where it might reasonably assist the needs of children, young people and their families to resolve issues in dispute.

ADR can be used as an early intervention strategy, a planning tool, as an alternative to a care application in the Children's Court, or during the course of a care application.

One of the aims of ADR in child welfare settings is to assist those involved in family breakdown to communicate better with one another, and to reach informed decisions about some or all of the care and protection concerns for their children and young people.

Due to the significant benefits that it brings, ADR is being actively promoted and used much more widely in the child protection jurisdiction, and that trend is likely to continue. The forms of ADR currently used include:

- FGCs
- Dispute Resolution Conferences[132]
- Care Circles[133]
- external court-ordered mediation services, such as external care and protection mediation pilot currently being trialed in the Bidura Children's Court (Bidura Pilot).[134]

### Proposal 21: Improving the use of ADR

To support the use and effectiveness of ADR in the care jurisdiction it is proposed to transfer the existing provisions relating to ADR from the Children and Young Persons (Care and Protection) Regulation 2012 ("Care Regulation") to the Care Act. A number of amendments are being proposed including:

- providing a broad definition of ADR to include all current models of ADR, including external Court-ordered mediation and Care Circles, and potential new models in the future
- setting out the roles, obligations and protections of convenors of ADR processes
- introducing clear parameters about the confidentiality of ADR processes and the limitations on the admissibility of information disclosed during ADR in any subsequent court proceedings.

**PROPOSAL 21:**
**Establish a comprehensive legislative framework for the use of ADR in the child protection sector dealing with a range of matters including definitions, role, obligations and protections of convenors, confidentiality of ADR processes, and the limitations on the admissibility of information or documents disclosed during ADR in any subsequent court proceedings**

**Question 21:**
What key provisions do you think should be included in the legislative framework for ADR?

[132] Ordered by the Court under section 65, and convened by ADR-trained Children's Court Registrars. These have replaced preliminary conferences

[133] These are available for Indigenous families and are convened by a Children's Court Magistrate. They currently operate in Nowra and Lismore

[134] Care Act, section 65A

### 3.3.2 SPECIAL MEDICAL TREATMENT

The Care Act currently:

- sets out the process for the medical examination of children and young people in need of care and protection
- provides when and how emergency medical treatment can be carried out on all children or young people (not just those in OOHC)
- defines certain medical treatment as special medical treatment and sets out the circumstances when a medical practitioner may carry out special medical treatment on a child aged under 16 years. Medical treatment includes any medical procedure, operation or examination, or any other medical treatment declared by the regulations as special medical treatment.

Special medical treatment includes treatment of a child:

- to remediate a life-threatening condition that will or is likely to have the effect of permanently making a child infertile
- for the purpose of contraception or menstrual regulation declared by the regulations[135]
- in the nature of a vasectomy or tubal occlusion, or
- that is declared by the regulations to be special medical treatment.[136] Certain drugs of addiction, certain experimental procedures, and administering psychotropic drugs to children in out of home are declared by the Regulation as special medical treatment.

The Care Regulation provides that an authorised carer can only consent to the child being prescribed psychotropic medication for controlling behaviour where the treatment forms part of a behaviour management plan that is approved by the designated agency. The purpose of having a behaviour management plan in place and approval/consent by a designated agency is to prevent children being medicated for control of behaviour without adequate medical supervision, monitoring and evaluation and support from their caseworker.

Consultation as part of the review of the Care Regulation 2000 revealed some confusion about how to apply the legislative and regulatory provisions relating to special medical treatment. In particular, there were mixed views on what are appropriate safeguards for administering psychotropic medication to a child in statutory OOHC.

One view is that the requirement for a behaviour management plan is unnecessary and should be repealed as it creates an additional barrier to children in OOHC to access medical treatment in a timely manner and perpetuates a stigma in relation to mental health treatment. An alternative approach to safeguard these children would be to develop evidence-informed guidelines that address the comprehensive management of children and young people in OOHC with challenging behaviours and would include information on the role of medication. In addition, foster carers could be given additional guidance on how to give informed consent to any medications being administered to a child or young person in their care so they are clear on certain minimum information they should seek from prescribing doctors such as what are the clinical indications for the medication; what are its known side effects, if any; and when should the child or young person next visit the medical practitioner for a review of the medication.

The other view is that the regulation should be strengthened and extended to apply to all psychotropic medication given to children in OOHC irrespective of whether it is prescribed for

[135] No regulations have been made

[136] Care Act, section 175(5). Note, the section covers all children, not just children in need of care and protection

diagnosed physical condition (for example, epilepsy), psychiatric condition or for controlling behaviour. From a casework practice perspective the distinction between medication used to control behaviour or to treat a psychiatric or physical condition is unclear and has caused much uncertainty and confusion. One view is that the confusion would be resolved by removing the distinction. Alternatively it would be incongruous to require behaviour management plans for the treatment of epilepsy.

Other issues that have been raised in respect to special medical treatment for children in OOHC are:

- who should prepare a treatment plan or behaviour management plan or treatment plan (if any) and what should be included in such a plan? For example, should the ''plan' be limited to medical/pharmacological interventions and be prepared by a medical practitioner or other specialist? Or should it be more holistic plan and set out a range of interventions and activities that promote the child's development and be developed by a social worker or psychologist?
- in what circumstances and who should have responsibility for providing consent? Should it be the authorised carer with prior approval by a principle officer of a designated agency or should it be responsibility of a senior officer of FACS (CS) acting under delegation of the Minister to provide consent?

## Proposal 22: Improving the regulation of medical treatment

Given the significant social impact of these provisions, a reformulation of the legislative and regulatory framework relating to special medical treatment is proposed, to provide great clarity and guidance to service providers, authorised carers, health professionals and families. Key components of this proposal are:

- consolidating the current regulations and long standing general exemption into the legislation clarifying the requirements for carrying out special medical treatment on children

**PROPOSAL 22:**
**Clarify and consolidate in the legislation the provisions relating to the regulation of special medical treatment for children and young people**

**Question 22 (a):**
What additional safeguards, if any, should be in place for the provision of special medical treatment to a child in OOHC? Should these be required through legislation or through administrative arrangements such as guidelines?

**Question 22 (b):**
In relation to the administering of psychotropic medication to children in OOHC:

- who should give consent and in what circumstances?
- should there be a requirement for a treatment plan or behaviour management plan when the medication is being prescribed? If so, should such plans be required for all medical conditions or only for controlling behaviour?
- What kinds of alternative safeguards might be implemented in lieu of a legislative requirement for plans?

### 3.3.3 MINIMISING THE IMPROPER USE OF SOCIAL MEDIA IN A CHILD PROTECTION CONTEXT

The increasing use of social media websites like Facebook and YouTube has rapidly changed the way in which we interact and communicate. Social media features in the lives of most children and young people and is part of their social interaction and development. It can be a positive way to access information, record memories and build and maintain relationships. However, improper use of social media can also expose people to risks, particularly vulnerable people such as children in care, their parents and carers, and sometimes professionals working in the child protection or OOHC sectors.

The Care Act prohibits the publication of the names and identifying details of a child or young person who is a witness, the subject of care proceedings or is reasonably likely to be mentioned in Children's Court proceedings. This applies before, during and after care proceedings have concluded. However, it has become apparent that these restrictions prescribed by section 105 are not effectively preventing the disclosure or publication of names of children and young people in OOHC on websites nor does the Care Act provide adequate protections to FACS (CS)' staff from being 'named and shamed' on websites.

In some United States jurisdictions[137] there is legislation not just making it an offence to groom a child but also to make it an offence for an identified sex offender from using social media at all. This seeks to overcome evidentiary difficulties of establishing whether conduct is grooming behaviour.

#### Proposal 22: Responding to social media issues

To ensure that children and young people, and staff, who are involved in the child protection system are adequately protected from being further victimised or stigmatised by being named or identified in any publication or broadcast, it is recommended that the Care Act be strengthened to allow for easier prosecution of those who post unlawful information on the internet.

**PROPOSAL 23:**
**Minimise the improper use of social media in a child protection context by strengthening provisions in the Care Act to prevent the unlawful publication of names and images of children and young people on social media sites and to prevent the publication of offensive or derogatory material about FACS (CS) workers which are intended to harass.**

**Question 23 (a):**
In what other ways can children and young people be protected from unlawful publication of information and images on social media sites?

**Question 23 (b):**
Should it be an offence to publish offensive comments designed to harass child protection workers on social media sites?

**Question 23 (c):**
Should it be an offence in the Care Act for a convicted sexual offender of children to use social media?

[137] For a discussion on the constitutional basis for this legislation see: *Doe v Prosecutor*, 2012 WL 2376141 (SD Ind)

### 3.3.4 A SIMPLIFIED SCHEME OF PARENTAL RESPONSIBILITY ORDERS

The present scheme for parental responsibility orders under the Care Act is complex and cumbersome. As a result, orders are frequently made that are difficult to understand and administer, or that put in place unworkable frameworks for the allocation of parental responsibility between the Minister, parents and third parties.

While the existing regulatory scheme envisages that orders allocating all aspects of parental responsibility to the Minister will only be made where the Minister is to have a substantial role in the care of the child or young person, in practice such orders are frequently made where the State's involvement will be minimal. For example, parental responsibility orders are often made to the Minister either solely or shared[138] where the only involvement of FACS (CS) is in relation to:

- contact
- financial matters
- education and medical treatment shared with a third party.

A further limitation is that, the Care Act does not specifically cater for the making of sequential orders, such as parental responsibility to the Minister for two years, and then allocations of parental responsibility to a parent or a third party thereafter until the child or young person turns eighteen years, with the first twelve months being supervised by FACS (CS).

A lack of clarity as to the allocation of parental responsibility can often result in difficulties for a person who has not been party to the proceedings in determining what legal aspects of parental responsibility have been allocated and the legal status of the child or young person. For example, where there are substantial allocations of aspects of parental responsibility to others, it may be unclear whether the child or young person is in OOHC and what the rights and responsibilities of a designated agency to supervise the placement are, as well as the duration of that supervision if it is unclear how long particular orders will last.

#### Proposal 24: Simplifying parental responsibility orders

It is recommended that the relevant provision in the Care Act be replaced with a simplified scheme setting out the arrangements for allocating parental responsibility, including a formal power to make a 'self executing' order, whereby parental responsibility is with one person for a period of time and then passes to another at the end of that period.[139] While the Act does not limit the Court's jurisdiction in this regard and, in fact, the Court has made such orders on occasions, a review and consolidation of the scheme of parental responsibility orders presents an opportunity to make express provision for self-executing orders in the Care Act.

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138 Care Act, section 79

139 Care Act, sections 79 and 81

**PROPOSAL 24:**
**Simplify the current scheme of parental responsibility orders by:**

**(a) streamlining parental responsibility orders that may be made by the Court to make it easier to identify who holds which aspect of parental responsibility for a child or young person**

**(b) introducing a 'self-executing' order whereby parental responsibility is with one person for a period of time and then passes to another at the end of the period**

**Question 24:**
In what other ways do you think that parental responsibility orders can be improved?

### 3.3.5 SUPERVISION ORDERS

The Children's Court may make an order placing a child or young person in relation to whom a care application has been made under the supervision of the Director-General. As with any other care order, the Court may not make a supervision order unless first satisfied that the child or young person is in need of care and protection.[140] In making a supervision order, the Children's Court must specify the reason for the order, its purpose, and the length of the order.[141]

The Care Act currently provides for a supervision order to be made for a maximum timeframe of twelve months[142], with the possibility of extension for a further twelve months. An extension may be made on the application of FACS (CS), or on the Court's own motion after parties have had an opportunity to be heard. However, an extension may not be given if the initial order lapses.

A supervision order gives supervisory responsibility for a child or young person to the Director-General but does not change parental responsibility. It permits the child or young person to continue to live with their family but under close supervision of FACS (CS). Supervision orders are especially useful to support pathways to restoration.

### Proposal 25: Improving supervision orders

It is proposed to permit an automatic extension of supervision orders for a further period of twelve months where the Court has not received a supervision report before the expiry of the initial order. This will ensure that supervision orders continue uninterrupted in circumstances where the Court considers it appropriate.

**PROPOSAL 25:**
**Allow Supervision Orders to be extended for a further twelve months where the original order has expired and no report has been filed for the Court's consideration**

**Question 25:**
Should the maximum timeframe for supervision orders be 24 months? Why or why not?

[140] Care Act, section 76(1)
[141] Care Act, section 76(2)
[142] Care Act, section 76(3)

### 3.3.6 WORKING WITH ADVOCACY BODIES

Under the Care Act, [143] FACS (CS) is able to furnish a prescribed body with information relating to the safety, welfare and wellbeing of a particular child or young person or class of children or young persons or direct a prescribed body to furnish the Director-General with information relating to the safety, welfare and well-being of a particular child or young person or class of children or young persons.

The Aboriginal Child, Family and Community Care State Secretariat (AbSec) is an incorporated not-for-profit community organisation that provides child protection and OOHC policy advice to the government and non-government sector on issues affecting Aboriginal families involved in child protection and the OOHC system. AbSec also advises on funding decisions related to service provision by local Aboriginal community controlled organisations that provide or seek to provide Aboriginal child protection and associated services and auspices the Aboriginal State wide Foster Care Support Service. This service provides a free telephone advice and advocacy service for the carers of Aboriginal children and also assists local communities in establishing Aboriginal foster carer support groups.

The CREATE Foundation is a body that works on behalf of children and young people (0-25 years) who have an OOHC experience. CREATE is a national organisation that aims to "connect and empower" children and young people in OOHC and help them to make decisions about their lives. CREATE also provides training and policy advice to OOHC providers.

It is proposed to amend the Care Regulation to make CREATE and AbSec prescribed bodies for the purposes of section 248. This amendment will allow FACS (CS) or the holder of any register of carers to provide solely to AbSec and CREATE the names and contact details for authorised carers and children and young people in OOHC which will allow CREATE and AbSec to provide authorised carers and children and young people in OOHC with information about the services AbSec and CREATE can provide to them.

The inclusion of AbSec and CREATE as prescribed bodies promotes the general principles of the current legislation, in particular:

a) Section 9 (d) in relation to their role in assisting organisations provide special protection and assistance to children and young persons temporarily or permanently deprived of their family environment
b) Section 11 in relation to the participation of Aboriginal people in the care of protection of their children with as much self determination as possible
c) Section 12 to the extent the services they provide will assist Aboriginal families, organisations and communities participate in decisions concerning placement of their children and young people and in other significant decisions made under the Act.

[143] Care Act, section 248

**PROPOSAL 26:**
**That AbSec and CREATE should have access to personal information to permit fulfilment of their objectives**

**Question 26 (a):**
Should AbSec and CREATE be prescribed to permit the release of otherwise personal information about carers and children to these bodies?

**Question 26 (b):**
Should peak carer advocacy groups have a similar ability to receive information as is being proposed to AbSec and CREATE?

### 3.3.7 WORKING WITH PRIVATE HEALTH PROFESSIONALS

The key role of general practitioners (GPs) in responding to the health, safety welfare and wellbeing needs of children and families was acknowledged during the conduct of the Special Commission of Inquiry into Child Protection services in NSW.

GPs and other private medical specialists and private practice nurses are part of the universal health system which responds to the health and wellbeing of children, young people and their families. These professionals work closely with acute and community health services to provide a primary health care and specialist response. Often in rural areas GPs, in particular, provide the sole or principal primary health care response. Increasing recognition is being given to the role of GPs and practice nurses in the care of vulnerable children and young people.

Allied health professionals are also at the frontline of primary health care, many working directly with vulnerable children and young people. While some allied health professionals are employed in the public health system, many work in private practice.

Like their public health colleagues, medical practitioners, practice nurses, and allied health professionals in private practice have obligations for protecting client privacy under both the *Commonwealth Privacy Act 1988* and the *NSW Health Records and Information Privacy Act 2002* (HRIPA).
Chapter 16A of the Care Act operates as a lawful exception to these privacy laws by allowing certain human service and justice organisations to be able to share personal information that promotes the safety, welfare or well-being of children or young persons.

At present some, but not all, private medical practitioners, nurses and allied health professionals are covered by the information sharing provisions in the Care Act. Their inclusion is dependent on their particular employment and/or business arrangements. Only those who qualify as working in a 'prescribed body' as defined in section 248 are part of the legislation.

It is proposed to amend the Care Legislation and Regulation to make private health professionals prescribed bodies for the purposes of information sharing under Chapter 16A and section 248. This amendment would allow for direct communication between these professionals and other service providers in order to coordinate services and better meet the needs of vulnerable children, young people and families.

The inclusion of these groups as prescribed bodies potentially recognises the significant role they have in responding to vulnerable children, young people and families, in their work at the frontline of the health care system.

**PROPOSAL 27:**
Private health professionals be able to share with other relevant agencies personal and health information about children, young people and families without client consent where this relates to the safety, welfare and wellbeing of a child or young person.

**Question 27 (a):**
Should private health professionals be prescribed to permit them to share with other prescribed bodies personal information and health information about children and young people and their families where this will promote child safety, welfare and wellbeing?

**Question 27 (b):**
If so, should all or only some private health professional groups be prescribed in this way?

### 3.3.8 REPORTING CHILD DEATHS

Transparency and accountability are essential to ensure government intervention to protect children is working to improve their lives.

Whilst no government can stop the death of every child and young person, it is critical that the circumstances that surround child deaths are carefully scrutinised by both the public and those who work in the child protection sector. That way we can learn and make improvements to better protect vulnerable children and young people.

In December 2011, the government delivered the *Child Deaths 2010 Annual Report*, focusing exclusively on the deaths of children known to FACS (CS), including:

- those about whom a report was made to FACS (CS) in the three years preceding the death
- those whose siblings were the subject of a report in the three years preceding the death
- children or young people who were in statutory care at the time of their death.

The report provided information about these children, the responses they received from FACS (CS), lessons that have been learned from review of these cases and initiatives that have been implemented to improve casework practice and the systems that support practice.

The contribution of this report to accountability and reform is too important to be left to the discretion of the government of the day.

### Proposal 28: Reporting child deaths

It is proposed that the Care Act be amended to require the Director-General to prepare an annual report for tabling in Parliament on agency involvement with the families of children and young people known to FACS (CS) who have died. This will ensure information about child deaths is regularly scrutinised and FACS (CS) is constantly learning and improving the way it protects vulnerable children and young people.

This amendment would ensure that the report continues to contribute to public information already available about child deaths, including:

- the NSW Ombudsman's bi-annual reports on the deaths of children from abuse, neglect or in suspicious circumstances

- the Child Death Review Team annual reports on all deaths of children in NSW, regardless of the circumstances.

**PROPOSAL 28:**
**That there be a legislative obligation to report on the deaths of children and young people in OOHC**

**Question 28:**
Do you think FACS should be required by legislation to table an annual report to Parliament on their involvement with the families of children known to FACS (CS) who have died?

### 3.3.9 REPORTING OF CHILDREN LIVING AWAY FROM HOME WITHOUT PARENTAL PERMISSION

The Care Act[144] requires that a person who provides residential accommodation for a child who is living away from home without parental permission must, as soon as practicable, inform the Director-General of the child's whereabouts. The maximum penalty unit for not doing so is 200 penalty units (which is presently $22,000).

The purpose of this provision is to assist avoid wasting the resources of NSW Police and other agencies in searching for children who are safe but may have run away from home and been reported by their parents to the Police as missing.

An unintended consequence of this provision is that it has created a new class of mandatory reporters, that is, people who provide residential accommodation for children, beyond that specified elsewhere in the Care Act.[145]

Further, in the absence of a definition of 'a person who provides residential accommodation' in the Care Act, this provision captures anyone providing accommodation to a child living away from home without parental permission. As well as providers of specialist homelessness services and refuges, this can include relatives and friends who are just trying to assist a child with accommodation and would not be aware of their obligation to report the child to FACS (CS) as temporarily being in their home.

The penalty also seems to be at odds with the previous removal of penalties from the Care Act for mandatory reporters who fail to report in recognition that punitive measures are not the most effective way to encourage reporting from interagency partners, non-government services providers or the public.

Many accommodation services are already funded by FACS (CS) and/or operated by established, reputable organisations. It is considered the majority of these services/organisations are well aware of their reporting responsibilities and do not require the added threat of fines in order to make a report to FACS (CS) when required. Further, whilst the heading of section 122 in the Care Act implies that this section is about mandatory reporting, the text itself implies that the objective is really to provide information to the Director-General of the child's whereabouts to enable resources to be properly directed to searching for missing children.

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144 Care Act, section 122
145 Care Act, section 27

## Proposal 29: Reporting of children living away from home without parental consent

It is proposed to amend the Care Act to:

- clarify that the requirement to report a child who is living away from home without parental consent applies to funded residential providers such as specialist homelessness services and shelters and for-profit businesses. This will minimise government intrusion into private and usually short-term arrangements where family or friends provide accommodation to a child (typically a friend of one of their own children).
- remove the penalty units that apply for not reporting a child who is living away from home without parental consent to align with other reporting requirements under the Care Act.

**PROPOSAL 29:**
**Amend the Care Act to:**
**(a) clarify that section 122 applies to funded residential providers and for-profit business only (not private citizens)**
**(b) remove the penalty in section 122 of the Care Act.**

**Question 29:**
Do you foresee any unintended consequences of clarifying these reporting requirements under the Care Act?

# SECTION 4: GLOSSARY OF TERMS

| | |
|---|---|
| **Adoption Act** | refers to the *Adoption Act 2000* |
| **ADR** | Alternative Dispute Resolution |
| **Care Act** | refers to the *Children and Young Persons (Care and Protection) Act 1998* |
| **Care Regulation** | Children and Young People (Care and Protection) Regulation 2012 |
| **Crimes Act** | *Crimes Act 1900* |
| **CSGP** | Community Services Grants Program |
| **Director-General** | refers to the Director-General, Department of Family and Community Services |
| **Education Act** | refers to the *Education Act 1990* |
| **EIPP** | Early Intervention and Placement Prevention program |
| **FACS** | The Department of Family and Community Services |
| **FACS (CS)** | Department of Family and Community Services, Community Services Division |
| **FGC** | Family Group Conferencing |
| **IFPS** | Intensive Family Preservation Services |
| **IFSS** | Intensive Family Support Services |
| **Minister** | refers to the Minister for Family and Community Services |
| **NGO** | Non-government organisation |
| **OOHC** | out-of-home care |
| **PRC** | Parent Responsibility Contract |
| **ROSH** | risk of significant harm |
| **WA** | Western Australia |

# SECTION 5: APPENDICES

## APPENDIX 1: NSW COMMUNITY, PREVENTION AND EARLY INTERVENTION, AND CHILD PROTECTION PROGRAMS

### COMMUNITY SERVICES

#### Families NSW

*Families NSW* is the NSW Government's whole-of-government prevention and early intervention strategy that aims to provide children with the best start in life. This is achieved by supporting families expecting a baby or with children aged up to eight years. The Strategy is underpinned by a strong body of evidence demonstrating the importance of the early years in a child's development and the long term effectiveness of supporting parents and children during these years.

*Families NSW* is the responsibility of three partner agencies: Family and Community Services, NSW Health and the Department of Education and Communities. Partnerships with local government and community organisations are also an important part of Families NSW.

Each *Families NSW* partner agency has specific roles and responsibilities in relation to the implementation of *Families NSW* at a state-wide and regional level. FACS (CS) provides strategic coordination and leadership of the *Families NSW* Strategy, as well as a range of other population based programs and whole-of government strategies to strengthen families, improve outcomes for children and young people, reduce the number of women experiencing violence and build community capacity.

At a population level, *Families NSW* aims to achieve the following results to give children a good start in life:

- children have skills for life and learning at school entry
- babies are born healthy
- children are physically well and healthy
- children have social and emotional skills appropriate for their age
- children have literacy and numeracy skills appropriate for their age
- mothers have healthy pregnancies
- parents are confident, connected to their community and its services and equipped to support their children's development.

To achieve those results, *Families NSW* focuses on increasing the number of:

- mothers who receive antenatal care before twenty weeks
- mothers who have the information they need to adopt a healthy lifestyle
- mothers with mental health issues who are identified and referred early
- babies who are exclusively breastfed at discharge from hospital and fully breastfed at four and five months
- children who are age-appropriate immunised
- parents with skills in positive parenting

- children reaching social and emotional milestones
- parents who expose their children to early literacy activities
- families who are connected to other families, culture and community
- parents with the ability to assess and recognize family needs and where to seek support and resources Increasing communities' responsiveness and ability to support child development and family functioning.

*Families NSW* funds a range of community-building and targeted initiatives. This is because some services are known to be more effective when universally available while others are known to be more effective when targeted towards particular sections of the community. These include:

- supported playgroups
- parenting programs
- family workers
- partnerships and networks
- community capacity building
- research and development
- universal home visiting (NSW Health)
- schools as community centres (Department of Education and Communities)
- disability early intervention services (FACS (Ageing, Disability and Home Care)).

More information on *Families NSW* can be found at the *Families NSW* website:
http://www.familiesnsw.gov.au

**Community Builders**

The Community Builders program provides funding for a range of services to strengthen communities and build their capacity. These services include:

- community and neighbourhood centres where people can meet and access resources
- services and projects targeting particular groups, for example men/women and cultural groups
- projects to support and build the capacity of communities and community organisations such as mentoring schemes and management training.

The program was developed in response to evidence showing that making communities stronger is an effective way of reducing inequality and disadvantage.

**Child, Youth and Family Support**

The *Child, Youth and Family Support* early intervention service model aims to deliver a broader range of less intensive early intervention services to meet the needs of vulnerable children, young people and families who fall below the threshold for statutory child protection intervention. It targets low to medium risk children, young people and families where presenting problems, if left unattended, would likely escalate to the point where either a more intensive service, such as that provided by *Brighter Futures*, would be required or risk of significant harm is identified.

The primary focus of *Child, Youth and Family Support services* is providing appropriate, short-term supports to address identified issues and prevent escalation of problems. This can include providing for up to three months:

- assistance to a family with budgeting or changing utility providers or plans

- advice and support to a parent/s about how to respond to a child's behavioural issue that is problematic
- advice to a young person regarding the types of jobs that might be suitable given their skills and interests and then providing a referral to a job seeking skills group or local employment support agency
- help accessing parenting capacity programs, parent support groups and counselling services.

Case management is provided to young people and families who require additional and ongoing support to access appropriate services, and will be for an average duration of three months.

**Aboriginal Child Youth and Family Strategy**

The *Aboriginal Child Youth and Family Strategy* is a whole-of-government prevention and early intervention program that supports children aged up to five years, and their families and communities. It provides a range of services that include Aboriginal parenting programs, school transition programs, supported playgroups, family workers and programs to build the capacity of the community to respond to challenges.

**Aboriginal Child and Family Centres**

FACS (CS) is responsible for the delivery of nine integrated Aboriginal Child and Family Centres in NSW as part of the Indigenous Early Childhood Development National Partnership Agreement. Centres are located at Campbelltown, Ballina, Gunnedah, Nowra, Toronto, Brewarrina, Lightning Ridge and two Centres in Blacktown.

The Centres bring together a range of early childhood, health and family support services to improve the overall health and wellbeing of children and support for their families. Services can include supported playgroups as well as parenting programs and adult education opportunities.

## PREVENTION AND EARLY INTERVENTION SERVICES

**Brighter Futures**

*Brighter Futures* is a comprehensive evidence-based support program for families who have not reached the statutory threshold for child protection intervention but require support to prevent their problems from escalating and their children being harmed.

*Brighter Futures* has three core goals:

- to promote healthy development in children
- to promote strong, functional and well-supported families
- to reduce and prevent child abuse and neglect in participating families.

Through *Brighter Futures*, voluntary services are provided by fourteen lead agencies to families with children under nine years of age who are experiencing a range of vulnerabilities, including, domestic violence, parental drug and alcohol misuse and/or mental health issues, as well as child behaviour management problems.

Each family is supported by a caseworker who works with parents to plan for and deliver targeted services that will address particular problems that are impacting on the parent's ability to care adequately for their children that take into account the particular individual, familial, social, cultural

and environmental factors at work around the family. A key feature of the program is that families can access the full range of services and supports through a single entry point.

Services and supports include:

- case management
- quality children's services that meet the development and cultural needs of the child
- home visiting to provide information, practical support and skills to parents in their home, and
- parenting programs to help parents improve their relationship with their children and address a range of issues families face including managing children's behavioural and emotional problems.

An evaluation of *Brighter Futures* found that children from families who successfully completed the program were less likely to go into OOHC than children from families who did not participate. Those families who remained in the program for longer periods of time also had better outcomes.[146]

Since 1 January 2012, non-government Lead Agencies have been entirely responsible for delivery of *Brighter Futures*. The program has also been targeted to more complex families through the revised program vulnerabilities - the same vulnerabilities as for *Strengthening Families*. Referral pathways have also been streamlined with Lead Agencies now determining eligibility for *Brighter Futures*.

**Staying Home Leaving Violence**

The *Staying Home Leaving Violence program* helps women and children escaping domestic violence to remain safely in their homes. Services funded under the program work with the police and courts to remove the violent family member so that if she chooses, the victim and children can stay in the home. Clients receive support services ranging from practical assistance such as installing security measures in their homes and help with financial, legal and personal problems.

**Specialist Homelessness Services**

The *Specialist Homelessness Services program* (previously called Supported Accommodation Assistance Program or SAAP) is a Commonwealth/state funded program which provides funding for a range of support and accommodation services to assist people who are homeless or at risk of homelessness including women and children affected by domestic violence.

These services include case management, support, outreach, advocacy, practical assistance and supported accommodation services, as well as linkages to other services such as health and housing. As part of this Program, Community Services also administers a range of projects funded over four years as part of the *NSW Homelessness Action Plan 2009-13* to prevent and reduce homelessness in NSW.

**Integrated Domestic and Family Violence Services**

The *Integrated Domestic and Family Violence Services program* is a multi-agency, integrated and coordinated response to prevent the escalation of domestic and family violence among high risk target groups and in targeted communities. Coordinated services are provided to clients through a

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[146] Social Policy Research Centre, *The Evaluation of Brighter Futures, NSW Community Services' Early Intervention Program Final Report*. Social Policy Research Centre. University of New South Wales. 2010, viewed on 19 September 2012, <http://www.community.nsw.gov.au/docswr/_assets/main/documents/brighter_futures_evaluation4.pdf>

multi-disciplinary team or are based on clear referral pathways between service agencies such as Police, Health, Family and Community Services and non-government support agencies.

## CHILD PROTECTION SERVICES

### Strengthening Families

*Strengthening Families* is a statutory service delivery option which enables caseworkers to work with families to address the factors which placed their children at risk of significant harm (ROSH).

Eligible families will have children aged under nine years or be expecting a child, who have had a ROSH report and are safe to remain in the home (with a safety assessment outcome of 'Safe' or 'Safe with Plan') and the risk assessment outcome is High or Very High. Priority of access is given to families with one child under three years of age and Aboriginal families. Families are eligible for the program where their children are safe to remain in the home

Design and delivery of *Strengthening Families* is shaped toward the goals of responding to current child protection demand and reducing future demand by:

- increasing the number of families above the ROSH threshold receiving a face-to-face assessment and services from Community Services
- decreasing the subsequent re-reporting rates of children who participate
- decreasing the subsequent rates of entry into OOHC and duration in OOHC for children who participate.

The program recognises that with more time dedicated to working in partnership, and with a commitment to realistic and achievable case plan goals, many families currently not receiving a face-to-face child protection response would achieve increased safety and reduced risk for children at home.

On average, families participate in *Strengthening Families* for twelve months, and require delivery of at least two of the four program elements; quality child care, structured home visiting, parenting programs and casework focused on parent vulnerabilities.

**The Early Intervention and Placement Prevention program**

The EIPP aims to provide support to vulnerable children, young people and families to reduce the likelihood of children and young people entering or remaining in child protection and OOHC.

It consists of three sub programs which provide services along a continuum of family and community needs – from lower-level parenting and youth support to intensive family and youth interventions to prevent children and young people coming into care:

- Child, Youth and Family Support (an early intervention program discussed above)
- Intensive Family Support
- Intensive Family Preservation.

The EIPP builds upon direct-support services for children, youth and families provided by agencies previously funded under the Community Services Grant Program (CSGP). During 2010-11 services funded under the CSGP were transitioned into two streams. One stream, which focuses on services concerned with 'community strengthening' became part of the Community Builders program. The

second stream, which focuses on the provision of services directly to children, young people and families, formed the basis of the EIPP.

*Intensive Family Support Services (IFSS)*

IFSS helps families who are at substantial risk of having their children place in OOHC, but not at imminent risk, to keep their children at home safely.

Key characteristics of the Intensive Family Support program include:

- service delivery primarily in the home or community
- intensive service delivery within the first twelve weeks that will involve caseworkers being available to families 24 hours a day, seven days a week and less intensive service delivery for up to forty weeks
- practical support to improve household living conditions and manage daily household tasks, provide transportation, gain access to government financial support, improve problem solving and financial management/budgeting skills, stabilise crisis situations, access child care and improve family functioning and conflict resolution
- support to improve parenting skills to reduce risk of harm and safety concerns for the child
- coordination of specialist assessments and treatments such as specialist health and mental health, alcohol and other drug services, domestic violence, and disability services.

*Intensive Family Preservation Services*

IFPS includes all the components of the IFSS model but offers higher intensity support to families whose children are at imminent risk of removal.

## APPENDIX 2: PARENTING PROGRAMS

**Availability of parenting courses in NSW**

FACS (CS) has invested heavily in the provision of population-based parenting capacity programs by the non-government sector through *Families NSW*, *Brighter Futures* and EIPP.

NSW Health also provides and funds a large range of universal parenting courses through Early Childhood Centres, local health district offices, Family Referral Services and specialist services such as those for young parents and parents of children with mental health issues.

NGOs also purchase a wide range of parenting programs using a variety of other NSW, Commonwealth and non-government funding sources which are available across the State through family support style services.

There is a range of parenting capacity programs available in NSW. *Triple P* (Positive Parenting Program) is the main program delivered in NSW, although other programs such a *Parent Child Interaction Therapy, 123 Magic, TIPS* (Tips and Ideas on Parenting Skills) Package and *Incredible Years* are also delivered.

There are five different levels of *Triple P* of increasing intensity depending on the issues facing the family and level of parenting education needed. The spectrum ranges from media-based information to parents at low risk to one-to-one intensive 10 week courses with *Triple P* practitioners for parents who are at high-risk of maltreating their children or have complex needs:

- **Level 1**: a universal parent information strategy providing all interested parents with access to useful information through a coordinated media and promotional campaign, as well as user-friendly parenting tip sheets and videotapes which demonstrate specific parenting strategies

- **Level 2**: a brief, one to two session individual primary care intervention or a one to three session large group seminar program providing early anticipatory developmental guidance to parents of children with mild to moderate behaviour difficulties

- **Level 3**: a four session intervention targeting children with moderate behaviour difficulties and includes active skills training for parents

- **Level 4**: an intensive eight to ten session, individual or group parent training program for children with more severe behavioural difficulties

- **Level 5**: is an enhanced family intervention program, deployed in conjunction with Level 4, for families where parenting difficulties are complicated by other sources of family distress such as risk of child maltreatment, parental depression or stress, or conflict between partners.

*Families NSW* is rolling out Level 2 and 4 as they have a population and prevention and early intervention focus, consistent with the universal and population based focus of the *Families NSW* strategy. Since 2007 *Families NSW* has funded the training of over 1200 *Triple P* Practitioners to families with children aged 3-8 years across NSW. Through the Indigenous *Triple P* program, 240 practitioners have been trained state-wide. Approximately 20,000 families have participated in a *Triple P* event in NSW to date.

**Evidence base for parenting programs in early intervention**

There is a large body of research to show that universal and population-based 'behavioural' parenting programs delivered in an early intervention context are effective in changing parenting attitudes and behaviours and in turn improving children's outcomes.[147] They have been found to increase parental knowledge of child development, assist parents in developing parenting skills and normalise the challenges and difficulties inherent in parenting. There is evidence that their positive effects can last up to five years after participation in the program.

A number of studies and randomised control trials have demonstrated that families who participated in parenting capacity programs had:

- a reduction in the prevalence of negative/unhelpful parenting attributions (for example, a parent attributing a child's behaviour to malicious intent)
- a greater ability by parents to use positive/productive discipline strategies rather than punitive strategies
- increased parental competence and self-efficacy

147 L Tully, *What makes parenting programs effective? An overview of recent research*. NSW Department of Community Services Centre for Parenting and Research. Research to Practice Notes, June 2009; NSW Department of Community Services, Centre for Parenting and Research, *Parenting Programs: What makes them effective?* Research to Practice Notes, November 2005. The California Evidence Based Clearinghouse has evaluated a large number of parenting programs for their effectiveness and impact of child outcomes and summarises the scientific evidence for a number of programs especially within the child protection context - see <http://www.cebc4cw.org/topic/parent-training/>, viewed 19 September 2012. The Mental Health Practice in Child Welfare Guidelines Toolkit also provides information on other evidence-based programs and services recommended for use in child protection – see <http://www.casey.org/Resources/Publications/pdf/MentalHealthPractices.pdf> and ,http://www.casey.org/Resources/Publications/pdf/MentalHealthCareChildren.pdf. for evidence-based interventions and promising practices (viewed on 19 September 2012).

- greater parental knowledge/awareness of child development, risk factors for maltreatment, and child outcomes following abuse and neglect.

While there is a lack of research on the effectiveness of parenting programs in a child protection context (i.e. with parents who have or are at high risk of maltreating their child and/or are on the cusp of having their child removed), there is evidence to suggest that they can prevent abuse and neglect.

**Triple P**

As part of the 2011 evaluation of Triple P in NSW a literature review was undertaken which examined a substantial body of literature[148] from over the last ten years in Australia and internationally. It provided a solid evidence-base for parent and child outcomes across different target groups and clearly showed that Triple P had the strongest empirical support of any parenting capacity program with children, supporting consistent and long-term beneficial results for parents and children.

A large study recently conducted in the United States of the universal Triple P parenting program across eighteen counties, found that it was effective in reducing substantial child maltreatment, child OOHC placements and child maltreatment injuries.[149]

Another study found that parenting programs targeting parents who had substantiated reports of child abuse and may not have been seeking help voluntarily result in significant reductions in negative parent-child interaction and lower rates of re-reports for abuse.[150] This study also found that mandating parents to attend courses does not necessarily inhibit the effectiveness of parenting programs.[151]

The literature review found that despite the variety of effective ways of structuring and delivering *Triple P*, the program has largely been engaged, rolled-out and evaluated as a Level 4 intervention, both in Australia and overseas. Furthermore, evaluations of Level 4 *Triple P* have consistently reported reduced dysfunctional parenting styles and improved parental competency over time, together with high levels of parental satisfaction.

A 2009 evaluation of the roll-out of *Triple P* in NSW found significant improvements in children's behaviour and emotional difficulties and parenting behaviours.[152] The majority of parents who had completed *Triple P* through the *Families NSW* roll-out were already known to the welfare system and had a higher than expected rate of developmental and health problems. Despite this, the evaluation still found significant improvements in children's behaviour and emotional difficulties and parenting behaviours.

148 Twenty-two per reviewed publications were investigated the robustness of *Triple P* with specific high-risk populations

149 R J Prinz, M R Sanders, C J Shapiro, D J Whitaker, and J R Lutzker, Population-based prevention of child maltreatment: The U.S. Triple P system population trial. *Prevention Science*. DOI 10.1007/s11121-009-0123-3, 2009

150 M Chaffin, J F Silovsky, B Funderburk, L A Valle, E V Brestan, T Balachova, et al, Parent-child interaction therapy with physically abusive parents: Efficacy for reducing future abuse reports, *Journal of Consulting Clinical Psychology,* vol. 72, 2004, pp.500-510

151 Ibid, at 36

152 A 2009 evaluation of the roll-out of *Triple P* in NSW found significant improvements in children's behaviour and emotional difficulties and parenting behaviours

## APPENDIX 3: PARENT RESPONSIBILITY CONTRACTS

Since 30 March 2007 the Care Act has had provisions allowing the Director-General to enter into a PRC with the primary caregiver(s) of a child or young person.

A PRC is an agreement aimed at improving the parenting skills of the primary caregiver(s), the parent-child relationship and encouraging parents to accept greater responsibility for the care of the child or young person. It's about giving a parent the best chance to improve their capacity to look after their children while recognising that the child may be on the cusp of being removed.

A PRC must:[153]

- be in writing
- be signed by the Director-General and each primary caregiver who is to be party to the contract
- be in the form (if any) prescribed by the regulations
- be registered with the Children's Court
- specify the period (not exceeding six months) during which the contract will be in force and
- specify the circumstance in which a breach of a term of the contract by a primary care-giver will authorise the Director-General to file a contract breach notice with the Children's Court.

Proposed parties to a PRC must be given an opportunity to seek independent advice before signing.[154]

A PRC may contain provisions about attendance of a primary caregiver for treatment for alcohol, drug or other substance abuse, requirements relating to alcohol or drug testing, attendance for counselling and/or participation in parenting courses, including for example courses about behavioural management and financial management.

A PRC does not create a legally enforceable agreement[155] and failure to comply does not give rise to civil liability of any kind.[156] It aims to support parents, not to create disputation. It aims to monitor and strengthen good parenting and discourage and help overcome the behaviour that puts children at risk.

A PRC is voluntary and developed by consent. However, as with many actions there are consequences and breach of a PRC or the refusal of a primary care-giver to enter a PRC may be used in later proceedings to demonstrate both the attempt made to resolve concerns and the failure of the parent to work towards improving the wellbeing of their child.[157]

If a primary caregiver who is a party to a PRC has breached a term of the PRC the Director-General may file a contract breach notice with the Court.[158] Where this happens there is a rebuttable presumption that the subject child or young person is in need of care and protection. This is in contrast to the usual process where FACS (CS) must prove that the child is in need of care and protection.

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153 Care Act, section 38A(2)
154 Care Act, section 38A(4)
155 Care Act, section 38D(3)(a)
156 Care Act, section 38D(3)(b)
157 Care Act, sections 38D(1) and (2)
158 Care Act, section 38E(1)

PRCs are most effective where the parent/s or primary care-giver/s acknowledge their need for support and are willing and able to work over a reasonably short period of time to prevent further harm to their children.

## APPENDIX 4: OFFENCES UNDER THE CARE ACT

The Care Act contains a number of offences for specific behaviours that may put a child or young person at risk and which are to be prosecuted within the objectives and principles of the Care Act rather than as stand-alone crimes under the Crimes Act. These include:

| Section | Offence | Penalty |
|---|---|---|
| 173 | Failure to comply with a notice for a child to be presented to a medical practitioner or hospital to be medically examined | 200 penalty units[159] |
| 227 | Intentionally taking action which results in: physical injury, sexual abuse, emotional or psychological harm causing or likely to cause significant damage, or significant harm to the physical development or health of a child | 200 penalty units |
| 228 | Neglecting (without reasonable excuse) to provide adequate and proper food, nursing, clothing, medical aid or lodging for a child or young person under a person's care | 200 penalty units |
| 229 | Unauthorised removal of a child or young person | 200 penalty units |
| 230 | Tattooing of a child or young person without the consent of the child's parent | 200 penalty units |
| 230A | Body piercing on the genitalia or nipples of a child, or body piercing on any other part of the child's body without consent of the child's parent | 200 penalty units |
| 231 | Leaving a child or young person in the person's care in a motor vehicle without proper supervision for such period and in such circumstances that causes or is likely to cause the child or young person emotional distress or permanent or temporary injury to the child or young person's health. | 200 penalty units |

[159] The value of a penalty unit is currently $110. See *Crimes (Sentencing Procedure) Act 1999* (NSW) section 17

## APPENDIX 5: OFFENCES RELATING TO CHILD ABUSE AND NEGLECT UNDER THE CRIMES ACT

The following table sets out some equivalent offences relating to child abuse and neglect under the Crimes Act:

| Section | Offence | Penalty |
|---|---|---|
| 42 | During or after the delivery of a child, intentionally or recklessly inflicting on a child, whether wholly born or not, any grievous bodily harm | 14 years imprisonment |
| 43 | Intentionally abandoning or exposing a child, without reasonable excuse, under 7 years of age if it causes danger of death or of serious injury to the child. | 5 years imprisonment |
| 43A | Intentionally or recklessly failing (without reasonable excuse) to provide a child under the person's parental responsibility with the necessities of life, if the failure causes a danger of death or of serious injury to the child. | 5 years imprisonment |
| 44 | A person who is under a legal duty to provide another person with the necessities of life, and<br>intentionally or recklessly fails (without reasonable excuse) to provide that person with the necessities of life, is guilty of an offence if the failure causes a danger of death or causes serious injury, or the likelihood of serious injury, to that person.[160] | 5 years imprisonment |

## APPENDIX 6: GUARDIANSHIP ORDERS IN OTHER JURISDICTIONS

### Special Guardianship Orders - Western Australia (WA)

WA introduced Special Guardianship Orders in 2011 to enhance arrangements for permanent care short of adoption. As at 30 June 2011, WA had 187 children and young people on these orders.

A Special Guardianship Order transfers full parental responsibility for the child to the special guardian to the exclusion of any other person. This type of order cannot give parental responsibility for a child to the CEO or a parent of the child. Special Guardians have all the duties, powers, responsibilities and authority which by law birth parents have in relation to their own children. The child is no longer in the CEO's care, meaning the Special Guardian will carry out all parental functions without having to consult the Department. Special Guardianship Orders are intended to provide stable, long term placements and remain in force until the child reaches 18 years of age.

The Department may apply for a Special Guardianship Order or a carer can make a direct application to the Court provided the child is in the CEO's care and the carer has had continuous care of the child for at least two years. A Special Guardianship Order may include conditions about family contact for the child to be implemented by the Special Guardian.

Special Guardians may apply to receive a Special Guardian Order payment, which is similar to the subsidy paid to carers. An annual review is required to confirm a child still resides with the Special

[160] A person cannot be found guilty of both an offence under section 43A and section 44 in respect of the same act or commission, see Crimes Act, section 44(2)

Guardian in order for financial payments to continue. Special Guardians or the child are able to seek assistance from the Department's permanency support team throughout the life of the order.

### Special Guardianship Orders (UK)

Special Guardianship Orders exist under the UK *Adoption and Children Act 2002* as another option for legal permanence. A Special Guardianship Order gives the Special Guardian legal parental responsibility for the child until the child is 18 years old. The child is no longer the responsibility of the local authority.

Special Guardianship Orders are intended for:

- older children and young people in long-term care who may wish to retain some legal ties with their birth family and who do not want to be adopted
- kinship care, where members of the extended family may not want to adopt the child but need more security and clarity about day-to-day decision making
- prospective carers from ethnic groups who may wish to offer a child a permanent family but have religious or cultural difficulties with adoption
- unaccompanied asylum-seeking children who need a secure home but have strong attachments to their family overseas.

A foster carer who becomes a special guardian and who previously received a fostering allowance can receive some remuneration up to two years after the order was made and for a longer period in exceptional circumstances.

Since commencement, the use of Special Guardianship Orders in the UK has grown rapidly from 760 in March 2007 to 1,740 in March 2011.[161] It is reported that the majority of Special Guardians are relatives and that foster carers are deterred by concerns about loss of financial support and the possibility of having to deal directly with the child's birth parents.

## APPENDIX 7: SNAPSHOT OF CURRENT ADOPTIONS DATA

At 30 June 2011 in NSW:

- 17,896 children and young persons were in OOHC
- 70.7 per cent of children had been in OOHC for two years or more and 34 per cent for more than five years[162]
- 41 per cent of all children in OOHC had been in one placement, with 24.7 per cent in two placements and 34.3 per cent in three placements.

The longer a child is in care the greater the likelihood of multiple placements.[163] Aboriginal children and young people in OOHC are less likely to have multiple placements than non-aboriginal children.[164]

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161 *National Statistics on Children looked after by local authorities in England*, Department for Education, UK, 2011, viewed on 19 September 2012, <http://www.education.gov.uk/researchandstatistics/statistics/statistics-by-topic/a00196857/children-looked-after-by-las-in-England>

162 Information Management Branch, Planning and Corporate Performance Directorate, *Annual Statistical Report 2010-2011*, Family and Community Services, Community Services, New South Wales Government, January 2012, p. 55

163 Ibid, p56

164 Ibid, p57

The total number of adoptions in NSW in 2010-2011 was 165 (including 70 intercountry adoptions). There were forty-five OOHC adoptions.[165]

The number of adoption orders made for children in OOHC has doubled in the past four years.[166] New South Wales processes the majority of OOHC adoptions in Australia with less than ten in the rest of the country in 2010-2011.[167]

There are almost 700 children in OOHC for whom adoption is currently being considered or in process.

[165] Department of Families and Community Services, *Annual Report 2011*, New South Wales Government, p. 103

[166] Ibid

[167] Australian Institute of Health and Welfare, *Adoptions Australia 2010–11*. Child Welfare Series Number 52, 2011, p 27