



Office of
Communities
Children's Guardian

Submission to NSW Community Services

DISCUSSION PAPER

Child Protection:
Legislative Reform
Legislative proposals

Ms Maree Walk
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Dear Ms Walk

Children's Guardian submission to NSW Community Services on the Discussion Paper: Child Protection Legislative Reform Legislative Proposals (the discussion paper).

I welcome the opportunity to comment on the discussion paper regarding proposals for legislative reform legislative change, with a view to transform the child protection system in NSW, to improve services and lives.

Please find my submission attached.

I look forward to further discussions with Community Services about particular proposals for legislative reform.

Any inquiries with respect to these comments should be directed to Mr David Hunt, Director Operations on 8219 3600 or david.hunt@kidsguardian.nsw.gov.au.

Yours sincerely



Kerryn Boland
Children's Guardian
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Introductory Comments

The Children's Guardian supports the Discussion Paper's themes of creating a stronger and safer child protection system by reducing the number of children in care, making decisions about permanency as early as is practicable, doing better for vulnerable adolescents, and harnessing the capacity of local community and government partners to deliver services to the most vulnerable.

The reform process provides the government and its non-government partners with an opportunity to enhance the safety, permanency and well-being of children and young people. Most importantly, it represents a real chance to make sure care and protection and adoption legislation clearly align with the developmental timeframes of children and young people.

The Discussion Paper provides, at page 1, "This government is committed to repositioning the child protection system to put families, not systems, first". While the interests of families are obviously important the Children's Guardian considers the child must be at the centre of the child protection system – their interests must be at the heart of decision making and their developmental timeframes should inform systems for children when they enter care.

There exists a significant body of research and evidence in the neuroscience, psychological and child development disciplines which indicates that healthy child development depends on how a child experiences relationships, in particular their attachment to a primary care giver. These relationships begin at birth and are most critical in the first 5 years of life.

There are many programs and models both here in Australia and overseas that use this evidence as a base for interventions. One such model is The New Orleans Intervention Model (NIM), developed by Professor Charles Zeanah from the School of Medicine at Tulane University, USA. Selected children less than 5 years who are found by the courts to be in need of care and protection are referred to NIM and receive an attachment assessment. This is done in collaboration with a foster carer, the birth parent and involves concurrent case planning by protective services. The foster carer and parent are supported with interventions/services to address the identified needs of the child.

In New Orleans there is statutory time limit stating when a decision has to be made by the courts regarding a permanent placement for the child. These statutory limits reflect critical child development timeframes. The court's decision is informed by the attachment assessments and outcomes of the NIM interventions.

Since the introduction of the NIM program a subsequent evaluation study found that there was an increased freeing for adoption or other permanency arrangements compared to previous interventions. Where restoration did occur, there was a significant reduction in the number of those children renotifying to protective services. This was also the case in relation to

subsequent siblings. Importantly the evaluation concluded that on virtually all mental health measures, whether a child was adopted or restored, their outcomes were similar to the general population.¹

This is only one illustration of a child centered intervention where the law underpins the absolute importance of making good decisions quickly for the “child’s best interest” and long-term future.

The challenge is to how best to align a child’s development timeframe within statutory child protection services. Changes to the law or better use of existing law play an important role in setting the framework for case planning and decision making that encourages and embeds a “child focus”.

Section 1 – Promoting good parenting

Proposal 1 – Mandatory parenting capacity orders

Parenting capacity orders would be able to be made during care proceedings and as standalone orders where the need for care and protection has not yet been established. As such, parenting capacity orders have the potential to fill a gap between voluntary arrangements and the statutory care system or, where a child is already in the statutory care system, assist the Court in assessing parental capacity and the prospects for restoration.

There needs to be a clear threshold for applying for such orders, with the proposed test of a “need to improve parenting” being excessively broad. There needs to be a clearly identified parental deficiency that has placed, or has the potential to place, a child or young person at risk of significant harm.

It is not clear from the Paper who would have standing to apply for such orders where care proceedings have not commenced. There needs to be clarity as to whether such orders would be sought by Community Services (CS) and/or NGO early intervention and family support services. NGO applications for compulsory orders might damage their relationship with a family they are providing services to and therefore impede their ability to effectively deliver those services. For this reason, consideration should be given to applications for such orders being restricted to CS.

It is assumed that, once care proceedings have commenced, section 75(1B) of the *Children and Young Persons (Care and Protection) Act 1998* (the Care Act) would be broadened. It is assumed that, except under the *Mental Health Act 2007*, or *Mental Health (Forensic Procedures) Act 1990*, or where the

1. Charles H Zeanah, M.D., Julie A Larrieu PHD et al *Evaluation of a Preventive Intervention for Maltreated Infants and Toddlers in Foster Care*, *Journal of the American Academy of Child & Adolescent Psychiatry* Volume 40, Issue 2 , Pages 214-221, February 20, 2001

parent otherwise lacks capacity, there would be no power for the court to order medical treatment of a parent.

There appears to be a gap in section 75 of the Care Act in that a court cannot order persons to undergo assessment to determine if a particular treatment or other program is appropriate for them. This gap should be addressed. Compulsory assessment should also be available under section 54 of the Care Act and to inform the making of appropriate parenting capacity orders where a child has not yet been assessed as being in need of care and protection.

Mandatory orders may be appropriate for some parents, but other parents, particularly those with chronic drug, alcohol and/or mental health issues, may find it difficult to comply with such orders. In these circumstances, the making of such orders may create an additional burden on parents that further impedes their ability to care for a child or support restoration. The orders are likely to be most effective for parents who have had limited contact with the care and protection system.

It is recommended that the Court be required to consider, before making a parenting capacity order, whether the making of such an order may impede a parent's capacity to provide care or, where care proceedings have commenced, may impede restoration.

It should also be noted that particular types of service that support parenting capacity may not be available in all areas (particularly rural and remote areas) and that it may take time for a parent to be admitted into a particular service. This needs to be considered both in making orders and determining the appropriate response where an order may be breached.

The consequences of breach of an order would presumably depend on the nature of that breach and the circumstances of the child or young person, but there should be a requirement for the Court to advise of the possible consequences of breach, both in terms of care proceedings being commenced or in the making of final orders.

There may be confusion in making a mandatory order a condition of a Parent Responsibility Contract (PRC) which is, by its very nature, an agreement between two parties. Rather, the two processes might sit side by side, with consideration being given to the breach of any order in determining whether the PRC should continue or care and protection action should be taken.

As noted under Proposal 2, the Children's Guardian believes that any breach of a voluntary PRC should be considered in determining whether to make a more formal parenting capacity order.

Consideration needs to be given to an appropriate appeal mechanism for such orders.

Proposal 2 – Strengthen the Parent Responsibility Contract (“PRC”) Scheme

These proposals are strongly supported, although the assessment system will need to be able to distinguish between those cases requiring formal care and protection action and those cases that are appropriately dealt with by way of a PRC and/or a parenting capacity order.

PRCs can be used as a diversionary option in those cases where care and protection concerns exist that fall short of requiring a child or young person to be taken into OOHC.

Section 38E(4) of the Care Act, which creates a rebuttable presumption that a child is in need of care and protection if there is any breach of a PRC, appears at odds with the diversionary nature of the proposal. If minor or technical breaches lead to a presumption of care and protection action, then parents’ legal representatives may discourage them from entering into a PRC. The presumption has the potential to unnecessarily bring children and young people into the care and protection system.

Also, if breach of a PRC is to be considered in the making of a parenting capacity order, which itself is predicated upon the child not having met the threshold for care proceedings, then the presumption may operate to bypass parenting capacity orders, which may be a more appropriate option.

It is suggested that the current presumption is reconsidered and that decisions about the need for care and protection are informed through the normal assessment process. Breach may be a factor in considering whether a child is in need of care and protection, but it should not of itself be sufficient to establish the presumption.

There have been some views expressed that PRCs are not contracts in the legal sense of the word and that alternative names might be used, such as “Agreed Protection Plan”. The Children’s Guardian believes that a legalistic approach should not be taken in deciding the most appropriate name for PRCs and that the name should clearly reflect parental responsibility, as that is the focus of PRCs. “Parent Responsibility Agreement” might be considered.

The legislation should require the parent to be clearly advised of PRC requirements (with clear timeframes and assistance given to link to services that a parent must receive under the PRC) and possible consequences of breach, including the making of a parenting capacity order or the entry of the child or young person into the OOHC system.

Proposal 3 - Consider suitability of Family Group Conferencing (FGC) for care matters to better engage families to resolve child protection concerns

The use of FGC is supported for appropriate cases, but there should be no requirement for CS to refer matters to FGC before commencing care

proceedings. Care proceedings may need to be commenced urgently and the safety of children and young people at risk of significant harm cannot be compromised while an FGC is arranged.

Section 37 of the Care Act is likely to be sufficient in requiring CS to consider FGC as an option.

The Court should have the power to refer appropriate matters for FGC and section 65A(2)(a) of the Care Act would already appear to enable this. However, the Court should not order a return to parental care pending a FGC being held until such time as the court determines appropriate care responsibility arrangements through its normal processes.

FGCs may be useful in care proceedings to assist in the development of care plans (including for aspects of parental responsibility being shared between a parent and other persons) and for contact, as well as providing a framework for working towards restoration, where appropriate.

FGCs will be most effective if extended family and persons who provide, or who may provide, services for the child or young person and their families are invited to participate in FGCs.

Proposal 4 - Enforceability of Prohibition Orders

The Children's Guardian supports the proposal as prohibition orders may restrict parental behaviour that may have a significant adverse impact on the safety, welfare and wellbeing of a child. Where the court has made an order that is directly targeted at risk factors, and the parent wilfully breaches that order, there must be the capacity for meaningful enforcement action. Imprisonment may be an appropriate sentencing option for extremely serious breaches, or for repeated breaches (as it is for serious breaches of Apprehended Violence Orders, which have similarities to prohibition orders).

Proposal 5 - Introduce alternative sentencing options (other than fines)

The Children's Guardian believes that further consideration might be given to the impact that these proposals may have, particularly as many of the types of sentencing options proposed may be able to be given effect by the making of parenting capacity orders in the care jurisdiction.

The Discussion Paper considers the deterrent effect of increased penalties. The use of sentencing as a deterrent is most relevant to premeditated acts, not omissions. Neglect is an omission to provide an appropriate level of care – neglectful parents are unlikely to consider, or be motivated by, increased criminal penalties for neglect. Similarly, abuse in a family context is often situational, rather than premeditated, with the perpetrator unlikely to consider the possible criminal consequences of their actions before committing an abusive act.

The focus of the Paper appears to be “serious cases of parental neglect or abuse”. The *Crimes Act 1900* already contains a number of criminal offences with which parents may be charged for serious cases of abuse and neglect and the courts have a wide range of sentencing options for those offences.

The best interests of children and young people are central to care proceedings, but the criminal justice system does not have that focus and is a blunt instrument for promoting the safety, welfare and wellbeing of children and young people. In some circumstances, and particularly for conduct that does not result in care and protection action or meet *Crimes Act* thresholds, the commencement of criminal proceedings against parents and the imposition of sentences may be contrary to the best interests of children and young people.

This was acknowledged by the Special Commission of Inquiry into Child Protection Services in NSW, which recommended the Care Act no longer provide for sentences of imprisonment for parental abuse and neglect offences, with the offences under the Care Act designed to provide a safety net for conduct that does not meet *Crimes Act* thresholds. The Inquiry indicated a broad opposition to sentencing options “likely to exacerbate any underlying risk issues”. This is consistent with the Care Act’s focus on the best interests of children, not the punishment of offenders.

Consideration should be given to the manner in which increasing the frequency of criminal prosecutions for offences under the Care Act, or the penalties for those offences, may impact on the effective operation of the care jurisdiction and the safety, welfare and wellbeing of children and young people.

Section 43A(2) of the *Crimes Act* establishes an offence, carrying a maximum penalty of five years imprisonment, for persons with parental responsibility to intentionally or recklessly fail to provide their child with the necessities of life, if the failure causes a danger of death or serious injury.

The *Crimes Act* also covers a range of offences against the person that would cover physical injury (assault and other offences against the person), sexual abuse (indecent and sexual assault offences), unlawful removal of a child and neglect – some of these offences have a child-specific focus.

To the extent that particular conduct should attract broader criminal sanctions (e.g. the leaving of a baby in a motor vehicle), consideration might be given to providing for these offences under the *Crimes Act* or *Summary Offences Act 1988*, rather than in the Care Act.

To the extent that conduct falls within s227 or s228 of the Care Act, but outside the *Crimes Act*, it is likely to be at the lower end of the spectrum of criminal conduct where the discretion not to prosecute would be more likely to be exercised and more serious sentencing options would be less likely to be considered by a court.

Creating additional penalties under the Care Act may increase the likelihood of the most appropriate charges not being brought, create penalty distortions in respect of the more serious offences under the *Crimes Act*, and create confusion in the broader community as to the separation between the criminal and care jurisdictions.

It is not made sufficiently clear in the Paper that criminal offences would need to be heard in a criminal jurisdiction (generally the Local Court), rather than being heard in the Children's Court's care jurisdiction (i.e. these matters could not be determined as part of care proceedings). This may involve separate criminal and care proceedings, with different burdens of proof. There are increased costs associated with running dual proceedings. Children and young people may also be required to give evidence in two sets of proceedings, which may be stressful, given that providing evidence in the criminal jurisdiction is more stressful than giving evidence in the care jurisdiction.

Increasing criminal prosecutions, or providing for higher penalties, may also reduce the willingness of parents to make admissions in care matters, which may increase conflict and costs in the care jurisdiction. They may also be less willing to enter into PRCs, consent to parenting capacity orders, or otherwise agree to participate in programs to support their parenting capacity, as their legal representatives may tell them that this may be given some evidentiary weight in criminal proceedings.

It is also noted that many of the types of sentencing options being contemplated may be able to be progressed (but not as a sentence) in the Children's Court's care jurisdiction, if parenting capacity orders can be made during care proceedings and as standalone orders before a child has been assessed as being in need of care and protection.

The appropriateness of community service orders outside *Crimes Act* offences should also be considered. The requirement to undertake community service, as opposed to some activity directly connected to parental capacity (e.g. drug and alcohol counselling), may reduce the capacity of a parent to care for their child and potentially impede restoration.

The Children's Guardian acknowledges that fines are often not an appropriate sentencing option for disadvantaged persons and would have no objection to more specifically targeted sentencing options for Care Act offences that relate to parental capacity (e.g. referral for drug and alcohol treatment).

It is not clear that the proposals to increase the range of penalties for offences under the Care Act (beyond those that address parental capacity) will have the desired positive impact - and there may be some potential for the proposals to be counterproductive in promoting the best interests of children and young people.

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

Proposal 6: Permanency for children and young people in OOHC

General comments

While the importance of permanency is already recognised in the Care Act (in particular sections 9(2)(e), 78A and 83-85A), the Children’s Guardian strongly supports an increased focus on permanency, with decisions to be made at the earliest practicable stage. The Children’s Guardian supports the objects and principles of the Care Act referring to safety, permanency and wellbeing.

There is a considerable body of evidence, in both Australia and internationally, that permanency helps children and young people to build secure attachments with the people who care for them and the communities in which they live. Delaying permanency decisions increases the risk that children and young people will undergo multiple placements and drift in care.

Permanency should not just be seen as an issue for children and young people in relative/kinship care or foster care, but also for children and young people placed in residential OOHC. However, for children and young people under 12, the continuing appropriateness of residential placements should continue to be subject to regular ongoing review by the Children’s Guardian.

Preferred hierarchy of placement options

The Discussion Paper proposes a hierarchy that must be considered, rather than a hierarchy that requires attempts to be made to give effect to each level of the hierarchy. For example, a decision might quickly be made that adoption is not in a particular child’s best interests, without any attempt having been made to progress adoption. The decision as to which permanency option should be pursued must be informed by the best interests of the child or young person.

In this context, it is appropriate that permanency plans not involving restoration provide information on why guardianship or adoption will not be pursued as part of the permanency plan.

The individual circumstances of each child or young person will need to be considered in determining permanency arrangements – for example, adoption would not generally be pursued for an older child (and should not be able to proceed for children aged 12 and over without the child’s consent, as is currently the case, unless the Court is satisfied that the child lacks capacity to consent).

While the hierarchy will hopefully encourage early decisions as to a child or young person’s suitability for guardianship or adoption, there will be a need for the relevant Court to determine that particular guardianship or adoption arrangements are in the child or young person’s best interests. In the case of

adoption, the Court is generally required to be satisfied as to placement stability and that the adoption will promote the child's welfare - such considerations might also appropriately apply in the making of a guardianship order. This means that some children and young person may be placed under the parental responsibility of the Minister for the period of time it takes to determine these matters.

(i) Restoration

Consistent with the current Care Act, restoration should be the preferred option where in the child or young person's best interests.

(ii) Long-Term Guardianship to Kin or Relative

Relative and kin care is supported as the next preferred option, subject to there being a comprehensive assessment process to determine that a particular relative is the most appropriate carer, with fit and proper person assessment part of the broader assessment (although sometimes fit and proper person assessments may occur shortly after an emergency placement and, in such cases, the continuation of the placement should be conditional on a fit and proper person clearance).

A child should not be placed with a relative simply because the person is a relative and the relative is prepared to accept the placement. The assessment process needs to focus on how the relative will care for the child, having regard to any relationship they may have with the parent from whom the child was removed.

The Carers Register, currently being developed by the Children's Guardian, will require agencies to demonstrate that such assessments have been carried out for children and young people in OOHC with relative or kin.

There also needs to be an assessment of the placement and its ongoing suitability before a guardianship order is made – issues with the placement may have arisen between the child being placed with relative or kin and the Court considering the making of a guardianship order.

The Discussion Paper's consideration of guardianship has a particular focus on Aboriginal and Torres Strait Islander people, but guardianship should be an option for all relative and kin, given adoption by relatives is not consistent with adoption best practice, given the confusion in familial roles this can create.

Guardianship may also be an appropriate option for older children who have long-term successful care arrangements with a foster carer, but where they also have a meaningful relationship with a birth parent and do not wish to consent to adoption for that reason. There should therefore be capacity for children and young people under the parental responsibility of the Minister to come back before the Court for the making of guardianship orders. Section 90 of the Care Act could be used for this purpose.

(iii) Adoption and parental responsibility to the Minister

As the Children's Guardian noted in its submission to the Special Commission of Inquiry into Child Protection Services in NSW, the care and protection system should facilitate domestic adoptions as a permanency outcome. This means that consideration of adoption as a permanency outcome needs to take place at the very earliest stages of planning. This does not generally occur in the current system, with Barnardos being the notable exception.

Developing effective pathways from OOHC to adoption will require considerable cultural change within the community services sector. There will need to be a significant investment in education and training to support the proposed changes.

Similarly, there will need to be investment in, and the capacity building of, adoption services. This will take time. There may therefore be a risk of delays in progressing some adoptions after any amending legislation takes effect.

The consent to an adoption in respect of children and young people under the parental responsibility of the Minister may, under current delegations, only be given by CS and Barnardos. Any other agencies wishing to arrange OOHC adoptions would need to do so with Community Services consent, which has the potential to create bottlenecks in the adoption process.

Agencies that demonstrate they can meet the *NSW Adoption Standards* and have had their systems reviewed by both Community Services and the Children's Guardian should be provided with similar delegations of parental responsibility to facilitate the adoption of appropriate children for whom they have arranged the provision of statutory OOHC.

The Children's Guardian agrees with the principle that adoption is generally inappropriate for Aboriginal children and young people, but there are cases where an Aboriginal parent supports adoption and the *Adoption Act 2000* should continue to support that, while providing Aboriginal birth parents considering adoption with relevant information and cultural support.

While the Children's Guardian strongly supports the increased use of open adoption for children and young people in OOHC, there may be some practical difficulties in placing it above, rather than alongside, orders of parental responsibility to the Minister in the hierarchy of permanency options.

If the Court lacks sufficient information to determine that adoption is appropriate at the time it makes care and protection orders, then children and young people will need to be placed under the parental responsibility of the Minister. It may subsequently be determined that adoption is an appropriate option and there needs to be a pathway for children subject to long term OOHC to transition to adoption. As noted above, a child or young person might also be placed under the parental responsibility of the Minister while

placement stability and welfare issues associated with a proposed adoption or guardianship order are assessed.

Proposal 7 – Timeframes for decisions on restoration

Sections 9(2)(e) and 94 of the Care Act require permanency to be progressed and determined expeditiously.

It is noted that the timeframes are not those required for restoration to occur, but for a decision to be made about the realistic possibility of restoration. In this regard, in *Re Leonard*, Mitchell SCM said:

*“It may be important to keep in mind, too, when considering “realistic possibility of restoration” that section 83 is cast in the present rather than the future tense. The realistic possibility needs to be shown as existing at the time of the hearing even if the appropriate time for effecting the restoration has not yet arrived...”*²

In order for the 6 and 12 month timeframes to be imposed, the Director-General and the Court must have sufficient information before them to determine restoration. There needs to be sufficient flexibility to enable the Court to extend these timeframes where it is not satisfied that it has sufficient information to make such a determination (see section 83(7)(a) of the current Care Act) and the making of such a determination within the timeframe is not in the best interests of the child or young person.

There is also the potential for these timeframes to make alternative dispute resolution (ADR) or the imposition of parenting capacity orders during care proceedings impracticable. Consideration might be given to enabling the Court to link these timeframes to the completion of any ADR proceedings or the making of a parental capacity order during care proceedings. This would encourage both CS and birth parents to participate in ADR and parents to comply with parental capacity orders.

The timeframes should apply to a decision of the Director-General, not a decision of the Court, as the Court must have discretion to request and consider the information necessary to make a final order. However, the Care Act might require the Court to give reasons for not determining a matter within the desired timeframes.

Proposal 8: Enhancing family involvement in supported OOHC

The Discussion Paper notes that the role of the Children’s Guardian, in respect of supported care, “is only to accredit the supervising designated agency including their procedures for authorising the carer.”

The Children’s Guardian accredits agencies as designated agencies against the *NSW Standards for Statutory OOHC*, but does not accredit agencies to

² [2009] CLN 2 at 30

provide supported care or monitor supported care arrangements, which are all arranged, provided or otherwise supported by the Director-General. However, an agency's accreditation as a designated agency enables it to make arrangements for the provision of supported care (see section 138 of the Care Act).

The Children's Guardian considers designated agency policies, procedures and practices for the authorisation of authorised carers, whether they be foster carers or relative/kinship carers. To date, the Children's Guardian's focus has been on carers who provide statutory care, although the authorisation requirements of the *Children and Young Persons (Care and Protection) Regulation 2012* ("the Care Regulation") do not distinguish between statutory and supported care. The Carers Register, currently being developed by the Children's Guardian, will enable the Children's Guardian to monitor the assessment and authorisation of carers who provide supported care.

The Children's Guardian is aware of the concerns of some relative and kinship carers that the state unnecessarily intervenes in their care of children who are their relatives and kin. There is contemporary US research that has concluded that stable placements with relatives or kin do not generally require active case management.³

This is an issue that the Children's Guardian will be working with key stakeholders on in determining how the *NSW Standards for Statutory OOHC* should apply to statutory relative/kinship care arrangements in the future.

Irrespective of the degree of ongoing state intervention, there should be a proper assessment of the suitability of relative and kinship carers, whether they provide statutory care, supported care, or both.

Given the Children's Guardian accreditation, registration and monitoring programs do not further extend into supported care arrangements, this submission does not further comment on proposal 8.

Proposal 9: Guardianship orders

As noted above, guardianship orders might be considered outside relative/kinship care arrangements.

The Discussion Paper proposes guardianship orders replacing sole parental responsibility orders under s149 of the Care Act.

NSW is currently the only Australian jurisdiction that requires parental consent to the making of sole parental responsibility orders, or equivalent orders, for carers.

³ Usher, Lynn, Crampton et al, (2009), "Cuyahoga County (Cleveland) Ohio Site Profile, Annie E. Casey Foundation.

The Children's Guardian has previously advised that it did not support the blanket removal of the requirement for parental consent to the making of sole parental responsibility orders. In the Children's Guardian's view, obtaining informed parental consent is the optimal way of ensuring that birth parents are engaged in the decision to grant guardianship to carers. Such consent will enhance birth parents' commitment to the arrangements and can be an important factor in avoiding breakdown of a relative/kin placement.

However, the Children's Guardian also advised that the Court might be granted the discretion to dispense with parental consent where the court considered this to be in the best interests of the child or young person. The Children's Guardian would support the Court having such a power in respect of guardianship, particularly as guardianship orders may be subject to variation or rescission under section 90 (see further comments below).

Section 149(5) of the Care Act states that an application that relates to a child aged 12 years of age or over, and who is capable of giving consent, should only be able to be made with the consent of the child. The requirement for such a child's consent should also apply to the proposed guardianship orders. The views of younger children should also be sought and considered by the Court in making guardianship orders.

Where a child under the age of 12 has been in supported or statutory OOHC immediately before the making of the order, the consent of the principal officer of the relevant designated agency should be required in the making of a guardianship order.

However, the Children's Guardian does not support the proposal that the agency that last case managed the placement has a right to bar applications being made for the review of a guardianship order under section 90 of the Care Act or such other provisions as may apply in respect of guardianship orders. The Children's Court should be able to consider any application on its merits.

The proposal to bar a birth parent, child or other interested party seeking any review of a guardianship order in the future, without the consent of an agency that may have had no contact with the child or young person for a considerable period of time, would make guardianship similar to adoption in many respects. This may have particular implications for guardianship of Aboriginal children and young people.

It is also recommended that ongoing financial assistance be determined with reference to the support needs of the child or young person, not just whether the guardian was receiving assistance immediately before the making of the order.

Proposal 10: Concurrent Planning

The Children's Guardian recognises that concurrent planning is an approach that can "promote adoption and permanent family placements quicker and

earlier in a child's life"⁴, but is likely to be a viable option for a very small number of prospective adoptive parents. This is because restoration may remain a possibility for children and young people placed with "concurrent carers" and the carers may attempt to frustrate restoration or, if restoration occurs, may be so distressed that they no longer wish to adopt or provide further care.

Concurrent planning and the early placement of children with parents who wish to adopt should only be pursued where adoption services are satisfied that the potential adoptive parents are willing to support restoration, while it remains an option, and are fully aware of and able to emotionally cope with the possibility that adoption will not proceed.

In these circumstances, the proposal is supported, subject to prospective adoptive parents being subject to the minimum checking requirements for authorised carers and such other checks as are necessary to determine their suitability to be adoptive parents (e.g. the person's financial circumstances, in relation to the person's capacity to adequately provide for the child's needs – clause 12(f) of the *Adoption Regulation 2003*). The proposed Carers Register would be used to confirm that the minimum checks required for authorisation as a carer have been conducted, but would not address any further checks required in respect of adoptive parents.

It is noted that the *Child Protection (Working with Children) Act 2012* imposes more limited Working With Children requirements for potential adoptive parents and members of their households than are imposed in respect of authorised carers and their households. This anomaly would need to be addressed if prospective adoptive parents were to be automatically approved as carers.

Arranging adoption is highly specialised work and many designated agencies may choose not to provide adoption services. Requiring all designated agencies to provide adoption services may discourage some organisations from providing OOHC. Some designated agencies may instead choose to partner with an adoption agency. In such cases, the designated agency should only be able to authorise a person as a concurrent carer where their partner agency has assessed the person as a suitable adoptive parent. This means some concurrent carers would require authorisations from two agencies.

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

Adoption is a significant decision that fundamentally changes a child or young person's legal status and their identity. Adoption is a final and enduring transfer of parental responsibility, subject to the limited circumstances in

⁴ Sophie Laws, Rebekah Wilson and Sumi Rabindrakumar 2012 *Coram Concurrent Planning Study Interim report, Coram*

which adoption orders may be discharged under section 93 of the *Adoption Act*.

The proposal to confer adoption jurisdiction on the Children's Court raises a number of issues. For example, would there be a need to centralise the Children's Court's adoption function to ensure consistency of decision-making? Would the Supreme Court retain its jurisdiction where there are no child protection concerns and/or for inter-country adoptions? This could create a two-tiered system, with greater scope for inconsistencies in decision making.

It is also possible that providing for formal adoption orders in the Children's Court would provide for a high level of appeals, which may increase the time and cost of some adoptions.

An alternative option might be to specifically enable the Children's Court to make a finding, on the evidence available to it, that an adoption is appropriate and enable the Court to order CS or another adoption service provider to make arrangements for adoption, subject to the Supreme Court's jurisdiction.

Proposal 12: Streamlining process for existing carers to become adoptive parents

See comments under proposal 10.

Proposal 13: Merging the NSW Standards for Statutory OOHC and the NSW Adoption Standards

The Children's Guardian accredits both government and non-government agencies that arrange the provision of statutory OOHC (sections 138 and 181(1)(e) of the Care Act and Division 4 of Part 6 of the Care Regulation). The Children's Guardian is responsible for recommending standards and other criteria for OOHC accreditation for the Minister's approval (clause 48 of the Care Regulation). The then Minister approved, on the Children's Guardian's recommendation, that the *NSW Standards for Statutory OOHC* be the criteria for accreditation as a designated agency.

Section 12 of the *Adoption Act* provides that a charitable or non-profit organisation may apply to the Director-General for accreditation as an adoption service provider. This function has been delegated to the Children's Guardian, but the Children's Guardian has no powers in respect of CS's adoption services.

Section 13 of the *Adoption Act* provides for the Director-General establishing adoption accreditation standards, although clause 5C of the *Adoption Regulation 2003* provides that the standards are the *NSW Adoption Standards*. The Children's Guardian and Minister do not have a role in setting or changing the *Adoption Standards*.

It is recommended that adoption legislation be amended to require the *Adoption Standards* to be approved by the Minister, on the recommendation of the Children's Guardian, as is the case for the OOHC Standards. The Children's Guardian can't integrate the two sets of Standards unless it has a legislative power to make recommendations in respect of the *Adoption Standards*.

It is also recommended that adoption legislation be amended to provide that CS adoption service performance against the *Adoption Standards* is monitored and reported on by the Children's Guardian. There should be no current requirement that CS be accredited in order to be an adoption service provider, as it is the sole provider of inter-country adoption services in NSW.

The Children's Guardian supports merging the *NSW Standards for Statutory OOHC* with the *NSW Adoption Standards* as there is considerable overlap between the two sets of standards. The *Adoption Standards* are also highly prescriptive and process focussed, while the OOHC Standards have a stronger outcomes focus and encourage agency innovation. The integrated Standards should address how agency systems support the transition of appropriate children and young people from OOHC to adoption.

As outlined earlier in this submission, not all OOHC agencies should be required to become adoption service providers. OOHC agencies would only be required to demonstrate their OOHC services met the standards.

If the reforms in this paper are progressed, significant changes will need to be made to both the OOHC and *Adoption Standards* in integrating them and agencies will need to be given sufficient time to adjust their policies, procedures and practices to align with the amended Standards. This may require the Children's Guardian to extend the OOHC accreditation periods of designated agencies so that they may be reaccredited against the new Standards – clause 64 of the Care Regulation enables the Children's Guardian to take such action where of the opinion that changes or proposed changes to the administration of OOHC under the Care Act make such an extension appropriate. The Children's Guardian would spend any such extension period working with agencies in developing a common understanding of the new requirements and the application of the Standards to those requirements.

Ideally, the Children's Guardian should be able to accredit an agency for both its adoption and OOHC services at the same time, which means agencies would need to have a common accreditation period for both types of service. The three non-government adoption service providers that have recently gone through the adoption reaccreditation process have expressed some frustration that they will be required to go through a separate OOHC reaccreditation process, rather than having both types of service assessed at the same time.

The *Adoption Act* does not contain equivalent provisions to extend adoption accreditation periods to accommodate change and that could be used to align OOHC and adoption accreditation periods. It is recommended that this and

other provisions to make the adoption accreditation system more flexible, consistent with arrangements for OOHC accreditation, are progressed if the two systems are to be appropriately integrated. It may be appropriate for the mechanics of adoption accreditation to be provided for by way of regulation, as is the case with the OOHC accreditation scheme.

The Children's Guardian would appreciate being provided with the responses to proposal 13 in the Discussion Paper so that it can take that feedback into account in improving the integrated standards.

Proposal 14: Improved family involvement in adoptions

The Children's Guardian strongly supports proposal 14.

Proposal 15: Dispensing with parental consent

The Children's Guardian would query why section 67 of the *Adoption Act* is not sufficient for dispensing with a parent's consent.

Section 67(1)(a) of the *Adoption Act* allows the court to dispense with consent if a parent can't, after reasonable inquiry, be found. It is not unreasonable to expect CS or other adoption service providers to make reasonable inquiries as to a person's location, notwithstanding that "significant efforts are needed to locate parents". Information about parent location would often be readily accessible through checks with CS computer systems, Centrelink, Police and/or electoral rolls. The inability of a person to keep CS informed of their current address cannot be interpreted as an acquiescence to adoption. It should be up to the Court to determine whether reasonable inquiries as to the location of a parent have been made, rather than placing an onus on a parent to keep CS informed of their location, particularly as some parents whose children have been placed in OOHC may find the daily management of their life affairs to be difficult.

Consideration might be given to the *Adoption Act* specifying the minimum requirements for attempting to locate a parent, with such requirements linked to effort, not the elapse of time.

Section 67(1)(d) of the *Adoption Act* provides that parental consent may be dispensed with if an application has been made by the Court for the adoption of the child by one or more persons who are authorised carers for the child and:

- (i) the child has established a stable relationship with those carers, and
- (ii) the adoption of the child by those carers will promote the child's welfare, and
- (iii) in the case of an Aboriginal child, alternatives to placements for adoption have been considered in accordance with section 36.

Section 67(1)(d) requires the Court to be satisfied that the placement is stable and in the child's best interests and it is difficult to see why this should be dispensed with where there are no current serious causes for concern for the

welfare of the child in the absence of an order being made without consent (which is addressed at section 67(3)).

Retaining section 67 in its current form in no way means that early decisions can't be made about the appropriateness of adoption as a permanency outcome in a particular case – however, there may be a period of time required to determine that the proposed adoptive placement is stable and in the child's best interests before an adoption order is made.

This period of time may be short for infants and the Children's Guardian believes that consideration might be given to amending section 67 to facilitate the early recognition of infant bonding with carers.

The Court might also be kept updated with evidence-based research on what constitutes a stable relationship between a child and a carer. This might assist in expediting some carer adoptions.

Restrictions on parental consent and on the circumstances in which parents are to be advised of adoptions, beyond those already provided for in the *Adoption Act*, would likely invite criticism that the government is introducing new forms of "forced adoption".

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

As outlined under proposal 15, the Children's Guardian believes that reasonable inquiries should be made to locate a parent. Section 54 of the Care Act would seem to contain appropriate notice requirements for those cases where a child aged 12 or over gives his or her sole consent to the adoption.

Section 3: Creating a child focussed system

Proposal 17: Planning rather than ordering contact

The Children's Guardian submitted to the Special Commission of Inquiry into Child Protection Services in NSW that section 86 of the Care Act should be amended to allow the Children's Court to make interim contact orders only, with ongoing contact arrangements being determined through case review and planning. The Children's Guardian stated that parties should have a right to apply to the Children's Court for review of contact arrangements if they are dissatisfied with contact arrangements.

The Children's Guardian's submission was based on the fact that contact needs change over time and court orders are not a sufficiently flexible means to manage changing contact needs. The Children's Guardian also notes that contact in adoption matters is addressed through adoption planning.

The Children's Guardian supports contact arrangements being made through case work where restoration is no longer considered an option, but it would seem appropriate to enable the Children's Court to make contact

recommendations that could be varied through the casework process, with disputes about contact arrangements able to be addressed through ADR or, if that fails, through an application for judicial review (see comments under proposal 19).

Proposal 18: Consistent approaches to contact

The Children's Guardian supports the proposal and suggests a common framework is developed.

The Children's Guardian would then reflect the common framework in the information sheets for the integrated OOHC and Adoption Standards, particularly the Standard in respect of "Family and Significant Others".

The key elements of a common framework for contact should be centred on the rights of the child in keeping with the *UN Convention on the Rights of the Child*. The framework must be centred on the child or young person's best interests, including their safety, needs and preferences. In accordance with the principle of participation, as reflected in sections 9(2)(a) and 10 of the Care Act, it is imperative that children and young people be consulted (to the extent of their capacity) and their views and wishes be given due weight in determining contact arrangements.

Proposal 19: Resolving Contact disputes

Where contact disputes occur, ADR should be the first step in resolving them. However, the Australian Institute of Criminology's 2012 evaluation of ADR initiatives found high rates of contact disputes, with a significant proportion of those disputes unable to be resolved through ADR. There clearly needs to be a review mechanism where ADR is ineffective.

While the Administrative Decisions Tribunal (ADT) has jurisdiction in respect of OOHC accreditation decisions, carer authorisations and the removal of an authorised carer's responsibility for the daily care and control of a child or young person (see section 245 of the Care Act), it does not have a general jurisdiction in respect of care and protection matters, which are appropriately a matter for the Children's Court.

The Children's Court is probably a more appropriate body to review contact disputes that arise from care and protection matters, given its experience with care and protection matters, contact issues may be raised in connection with other section 90 matters, and the Children's Court has statewide coverage, while a Family Court jurisdiction would impose additional travel burdens on some persons from rural and remote NSW.

Proposal 20: Enforcing contact orders

There clearly needs to be a mechanism for enforcing contact orders, with the court that is able to review contact matters being the court that should be able to enforce orders.

Proposal 21: Improving the use of ADR

The Children's Guardian supports the proposal. In identifying key provisions for inclusion in the legislative framework, it would be useful to consider issues of concern raised by the ALRC in regard to ADR in child protection matters in its report on Family Violence:⁵

- the potential for ADR processes to compromise the safety of children;
- the significant imbalances in power between the child and parents, between parents (especially in cases of violence), and between families and government departments and other experts;
- the importance of facilitating the participation of children in ADR processes, where appropriate;
- the challenge of representing the interests of children who sometimes appropriately may not be part of the ADR process, but who are directly affected by it; and
- legal assistance and representation.

Proposal 22: Improving the regulation of special medical treatment

Special medical treatment includes invasive and potentially very serious procedures and medications that may have a significant impact on a child or young person's personality, behaviour and life. The administration of psychotropic medication to children in OOHC is particularly complex.

Clause 26 of the Care Regulation provides that an authorised carer may not consent to any special medical treatment involving the administration of psychotropic medication to a child in OOHC for the purpose of controlling behaviour, unless the treatment forms part of a behaviour management plan (where the child is placed in a residential unit, the principal officer of the designated agency must authorise the behaviour management plan). This Regulation draws a distinction between psychotropic medication administered for the purpose of controlling behaviour from its use for a diagnosed physical or psychiatric condition (which does not require a behaviour management plan).

Clause 45 of the Care Regulation provides for agency behaviour management policy statements and psychotropic drug policy statements to be considered as part of the OOHC accreditation process.

The rationale for requiring approved behaviour management plans in relation to the administration of psychotropic medication for controlling behaviour is to prevent children and young persons being medicated to control behaviour without adequate medical supervision, monitoring, evaluation and review. This purpose is supported by the NSW Standards for Statutory OOHC, in particular Standard 14, which requires that behaviour support and management plans which include the use of restricted practices (such as the administration of psychotropic medication) to control behaviour are authorised and monitored in

⁵ ALRC, *Family Violence/ A national legal response*, ALRC Report 114 (2010).

accordance with “relevant guidelines”. The relevant guidelines – the *Children’s Guardian’s Guidelines for Designated Agencies for Developing a Behaviour Management Policy*, currently require that behaviour management plans which include the use of psychotropic medication for controlling behaviour must have the consent of the person with parental responsibility for the child or young person.

However, at a practical case work level, the difference between the safeguards for administration of psychotropic medication for behaviour management, as distinct from the administration of such medication for diagnosed medical conditions, has resulted in some confusion in relation to when behaviour management plans are required and in relation to consent issues.

The Children’s Guardian addressed issues relating to special medical treatment in the submission to the statutory *Review of the Children and Young Persons (Care and Protection) Regulation 2000*. More recently, the Children’s Guardian has had discussions with CS and the Ombudsman’s office about how the special medical treatment requirements may be simplified and made more transparent.

The simplified process suggested was that there be a comprehensive and holistic plan instead of a ‘behaviour management plan’ for every child who requires psychotropic medication, whether for controlling behaviour or treating a diagnosed condition.

The plan should be informed by clinical expertise, with treatment recommended by a medical professional. It would also include other relevant supports and treatment that professionals have identified to assist with supporting the health and well being of the child or young person - for example, if a young person was diagnosed with post traumatic stress and prescribed anti-depressants, the plan could also include counselling.

The Ministry of Health might further develop guidelines for medical professionals to address the comprehensive management of children and young people with challenging behaviour in OOHC, with separate guidelines and practice directions prepared for designated agencies or carers. The Children’s Guardian, in consultation with CS and other key stakeholders, might update its existing guidelines in the area.

Proposal 23: Responding to social media issues

Section 105 of the Care Act would already appear to apply to publishing or broadcasting identifying material about relevant children or young people through social media.

Division 8A of the *Crimes Act* establishes offences of harassing or intimidating law enforcement officials in the exercise of their duties, but these offences were introduced because of their capacity to obstruct law enforcement officers and undermine the criminal justice system. Any laws designed to prevent

offensive comments being published on social media sites about child protection workers would need to be very carefully developed to ensure that rights to criticism and free speech are not affected.

The *Child Protection (Offenders Prohibition Orders) Act 2004* already allows orders to be made to prevent convicted child sex offenders from using social media. Such conditions may also be imposed through the parole process. This issue would not appear to need to be separately addressed in the Care Act.

Proposal 24: Simplifying parental responsibility orders

The existing provisions of the Care Act would appear clear in this regard. Self-executing orders are possible under the current Care Act, but caution should be applied in making such orders without any requirement for some review of the continuing appropriateness of such an order before it is given effect. It is possible to contemplate some circumstances in which a self-executing order cannot be given effect due to a person's change of circumstance, with the potential for a child to be in a form of legal limbo in such cases.

Proposal 25: Improving supervision orders

An alternative might be enable the Court to make an order for up to 24 months, but to terminate the order at some earlier time. This might remove the need to apply for extensions.

Proposal 26: Working with Advocacy bodies

The Children's Guardian has no objection to these proposals, subject to the information being limited to name and contact details and AbSec and CREATE having effective systems in place to prevent the further disclosure of this sensitive information to third parties.

Proposal 27: Working with private health professionals

The Children's Guardian has no objection to these proposals.

Proposal 28: Reporting child deaths

The Children's Guardian would appreciate further information on possibilities for integrating FACS information with existing reports on child deaths.

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

The proposed reforms appear sensible.