



Shaping a Better Child Protection System

DISCUSSION PAPER - OCTOBER 2017





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List of abbreviations

ADR	Alternative dispute resolution
CSC	Community Service Centre
DRC	Dispute Resolution Conference
FACS	Family and Community Services
FGC	Family Group Conferencing
Legal Aid	Legal Aid NSW
NGO	Non-government organisation
OOHC	Out-of-home care
PSP	Permanency Support Program
ROSH	Risk of significant harm
STCO	Shorter term court orders

Minister's Foreword

I invite you to contribute your views about proposed legislative amendments which will support the NSW Government's commitment to improving the lives of vulnerable children and their families. These proposals will also help shape a better child protection system in NSW.



Securing the safety, permanency, and wellbeing outcomes of vulnerable children and young people is a significant area of responsibility for the Government. The Department of Family and Community Services (FACS) and its partners operate within a highly dynamic environment, and are constantly striving to find new ways to improve their ability to provide comprehensive and high-quality support to vulnerable children, young people and their families.

In 2014, the NSW Government introduced the Safe Home for Life Reforms. These reforms set the scene for major change in how we think about children and families that come into contact with the child protection system.

The reforms included both policy and legislative change to support a greater focus on permanency through guardianship and open adoption for children in out-of-home care (OOHC). The reforms also set timeframes for decision making with regard to restoration of children in OOHC to their families.

These reforms were important building blocks towards a better future for vulnerable children and families. This year we have achieved a record number of open adoptions for children from OOHC and we have seen a reduction in the number of children entering care. These are important milestones for the sector and provide an impetus to continually review reform and improve our work to support vulnerable children and families.

In 2016, the NSW Government announced record funding for Their Futures Matter in response to the findings of the independent review of OOHC in NSW led by David Tune AO PSM.

Their Futures Matter takes a whole-of-government approach to ensure that effort and funding across government is focused on interventions that will improve the long-term outcomes for children and families at the earliest opportunity.

The Permanency Support Program (PSP), developed as part of Their Futures Matter, is currently being rolled out across NSW. The program consolidates the NSW Government's commitment to securing permanent and safe homes for vulnerable children and young people through the development of a new service and funding model to reduce the number of children in OOHC and improve the quality of services. This will enable vulnerable children and their families to be supported so they can stay with or go home to their families. Where it isn't safe for children to go home to their families, then focus will be directed to achieving a permanent home through guardianship or open adoption, with long-term OOHC considered as a last resort.

This discussion paper outlines a set of proposed amendments to the *Children and Young Persons (Care and Protection) Act 1998*¹ ('the Care Act') and the *Adoption Act 2000* (The Adoption Act), which are being considered to support the implementation of these reforms.

Some of the proposals outlined in this paper will challenge the way we have been doing things in NSW. We examine how adoptions and Children's Court proceedings could be streamlined and simplified, how the use of shorter term orders could promote permanency for children and whether child protection services could be improved by mandating response timeframes. It is hoped they will generate lively debate and reflection that ultimately contributes to improved services for vulnerable children and families. The participation and unique insights of the people who work within the service sector and, most importantly, the children and families we serve is imperative.

I am proud of the many reforms that have been achieved in child protection in recent years. However, we must remain nimble in adapting our responses as new best-practice evidence emerges both through continuous quality improvement, evaluations, research and reviews, as well as through the experiences and knowledge of frontline practitioners. This ensures our sector will continuously improve, as it must if we are to do our best for our children. The forthcoming final report of the *Royal Commission into Institutional Responses to Child Sexual Abuse* will also provide an opportunity to reflect on and further improve child protection practices in NSW.

I urge you to contribute your views and I look forward to an ongoing conversation with the community as the Government continues to work to improve its ability to respond to the needs of vulnerable children and families.

The Hon. Pru Goward MP
MINISTER FOR FAMILY AND COMMUNITY SERVICES
October 2017

¹ The Care Act can be accessed at <https://www.legislation.nsw.gov.au/#/view/act/1998/157/whole>

Introduction

1.1 Child Protection in NSW

Child protection is a complex area of work with responsibilities spanning across several government agencies, the non-government sector, communities and families.

Recognising the inherent challenges associated with child protection and the increasing number of children and young people reported at risk of significant harm, FACS continues to improve its capacity to respond to the growing demand.

The number of completed caseworker face-to-face assessments has almost doubled over the last five years, and caseworker vacancy rates have halved in the same period. The number of safe and permanent homes for at-risk children has increased, and in 2016-17, the number of children and young people entering OOHC fell by approximately 900 on the previous year.

Recent changes to adoption laws, additional resources, and a focus on improving and streamlining the adoptions process has resulted in a 93 per cent increase in the number of children and young people in foster care being permanently adopted, from 67 in 2015-16 to 129 in 2016-17.

The 2016 *Independent Review of Out of Home Care in NSW* confirmed that, while the current system responds to immediate crisis, it does not adequately address the complex needs of vulnerable children and families, improve their outcomes, or arrest the devastating cycles of intergenerational abuse and neglect.

The review found that:

- the system is not client-centered; it is designed around programs and service models instead of the needs of vulnerable families
- vulnerable children and families have needs that cross the boundaries of government agencies
- FACS holds primary accountability for very vulnerable children and their families with little influence over the drivers of vulnerability or the levers for change
- expenditure is crisis-driven, not well-aligned to the evidence and does not effectively target clients.

Based on these findings the review concluded that system reform is necessary to achieve the fundamental level of change required. The NSW Government has committed to this system reform via Their Futures Matter. Their Futures Matter outlines a cohesive and accountable system where client outcomes, strong evidence and needs-based supports are delivered based on the needs of children and families. It brings together all government agencies, non-government organisations and the community to deliver the right supports to vulnerable children and families. This reform will also be supported by several other initiatives aimed at improving safety, permanency and wellbeing outcomes for the most vulnerable children.

1.2 Where we are moving to

We are continuously shaping the system as we learn more about trauma recovery, the importance of connection and the need for permanency and stability in children's lives.

We are building on earlier reform to improve permanency. The system overall needs to reflect effort at every stage of the child and family's journey from the first risk of significant harm report through to the appropriate forever home for that child.

To support this, we will increasingly use family finding and family group conferencing to identify the strengths of the family system to support parents to change and help keep their children safe. We will aim to do this ahead of court orders so that we can minimise the time caseworkers spend doing court work, and help families avoid the court process where possible.

Understanding a family's strengths early will give us the opportunity to identify who in the family system might parent the child if the parents can't change to meet the needs of the child. This will allow assessment that is more comprehensive, and early engagement that will support more children going straight into guardianship with a family member rather than into OOHC.

Where children do come into care we will have a much better understanding of the placement type they need. We will recruit people into the system to meet the needs of children - prospective adoptive parents, restoration carers and people who can provide emergency care.

We will make decisions in timeframes that support the shortest time in care possible with the least moves. Our work will build connections for children with their family and with those who will become their family. We will also help build relationships between birth and adoptive families to support ongoing communication and connections for children.

1.3 Legislative Reform Agenda

Legislative amendments to the Care Act and the Adoption Act are being considered to better support safety, permanency and wellbeing outcomes for the reforms currently underway.

Section 2 of this discussion paper outlines ways the government is committed to family preservation and restoration. The section explores how the concept of restoration could be amended to better reflect the breadth of family systems and how FACS' work with other government departments and non-government organisations (NGOs) could be strengthened to provide services to families. We look at how improvements can be made to ensure that FACS responds earlier to support families and how Alternative Dispute Resolution can be used more frequently. Additional amendments are proposed that will enhance the current child protection system in NSW by providing a clear definition of what constitutes a children's service and exempt mandatory reporters from making a report when they are already working with a family.

Section 3 outlines how the NSW Government plans to provide more children and young people in OOHC with a safe and loving home for life, to improve their social, emotional, health and education outcomes, and to maintain their cultural and spiritual identity. One of

the primary means the Government is seeking to demonstrate its commitment to achieving better permanency outcomes for children, is through the use of shorter term court orders so that children are not left to “drift” in the OOHC system and all effort is focused on achieving a permanent home for life. Other proposals include streamlining Children’s Court and adoption processes so they are simpler and more efficient and making changes to how OOHC is provided to ensure that children can be restored more quickly. The section proposes additional amendments to protect the identification of children who are under the parental responsibility of the Minister or in OOHC, and ensure stability for children whose guardians have passed away.

Together, these legislative amendments will work towards *Shaping a Better Child Protection System* in NSW.

1.4 Invitation to comment: Have your say

You are invited to read this discussion paper and provide comments on the legislative reform proposals which underpin the NSW Government’s reform agenda.

Questions to guide comments have been included throughout the paper. A complete list of questions is provided at the end of the paper. You may wish to comment on only those matters of particular interest or on all of the questions raised in this discussion paper.

FACS will also be conducting targeted workshops with key stakeholders as part of the consultation process.

The feedback contributed through this consultation process will help to ensure the proposed legislative amendments are drafted so as to maximise their benefits to children and young people in NSW, and to align the amendments as closely as possible with other relevant legislation, policies and processes.

There are three ways you can submit your feedback:

- 1. Online:** Follow the link on the Have Your Say website to the online submission form
- 2. Email:** childprotectionDP@facs.nsw.gov.au
Subject: ‘Shaping a Better Child Protection System’
- 3. Mail:** Shaping a Better Child Protection System Commissioning Division
Department of Family and Community Services
4-6 Cavill Avenue
Ashfield NSW 2131

Have your say by 5pm on 30 November 2017.

Important note: release of submissions - *All submissions will be made publicly available. If you do not want your personal details or any part of your comments to be published, please indicate this clearly in your response.*



Earlier family preservation and restoration

Our first preference is to work to keep families together as much as possible before the need for a court order of any kind. We believe that with the right help, guidance and support, where families are willing they can change so that their children are no longer at risk.

It is widely recognised that a stable home environment supports children and young people to develop healthy relationships throughout their lives. Further, a healthy sense of identity, belonging and being loved unconditionally is essential to a child's health, development and dignity. FACS has invested heavily in Family Finding and Family Group Conferencing (FGC), which aim to strengthen partnerships between family members and encourage greater parental decision making about the safety and wellbeing of their children.

The NSW Government has recently commenced several reforms, including Their Futures Matter, PSP and Targeted Earlier Intervention programs, which are aimed at enhancing the child protection system's focus on permanency and stability through broad-based support towards strengthening family functioning for the long term. The Government announced in March 2017 that a range of NGOs would deliver internationally proven intensive family preservation and restoration programs, Multi Systemic Therapy for Child Abuse and Neglect and Functional Family Therapy-Child Welfare, to work with families where there has been physical abuse or neglect. These services commenced in August 2017.

For all children, particularly Aboriginal children, we will work more with extended family and kin because we know the importance of keeping children and young people connected to their family, culture and community. Research has found that restoration is less likely to be achieved for Aboriginal children than non-Aboriginal children who have been removed from their parents². This emphasises the need for a greater focus on intensive family preservation programs before a court order is made, and where appropriate, restoration supports within a service system that best meets an individual family's needs.

A 2013 review of the literature on restoration identified a number of key practice messages, including the importance of adopting a collaborative and evidence based approach to service delivery that involves government, non-government and the Aboriginal community sector. The literature review also identified 'an association between parental engagement and successful restoration, with meaningful involvement of parents in case planning increasing the likelihood of successful restoration, and potentially decreasing re-entry into OOHC'³.

These changes will see FACS and NGO caseworkers and therapists build better relationships with children and families so that they can best determine how to make a family safe, include them in decision making, and create change that ensures each child has a safe and permanent home where they can thrive.

2 Delfabbro, P., Barber, J. & Cooper, L. (2003). "Predictors of Short-Term Reunification in South Australian Substitute Care", *Child Welfare*, 82(1), pp.27-51

3 Prasad, N. & Connolly, M. (2013). "Factors that affect the restoration of children and young people to their birth families", *Transition Program Office*, p.26.

Legislative proposals to support the NSW Government's commitment to family preservation and restoration are detailed below.

2.1 Permanent Placement Principles - the concept of restoration

Permanent placement under the Care Act means a long-term placement following the removal of a child or young person from the care of a parent or parents that provides a safe, nurturing, stable and secure environment for the child or young person.

Permanency planning involves finding permanent relationships that can help children feel safe, connected, and secure no matter where they live. Permanency planning is based on the philosophy that every child has the right to a permanent and stable home, preferably with the child's own family⁴. The primary focus of permanency planning is to prevent children "drifting in care"⁵. In other words, permanency planning reduces the likelihood of children experiencing continual change in their care arrangements which can result in repeated loss of social and community relationships. Instability in a child or young person's living arrangements can impair their ability to form deep and lasting attachments with carers, family and peers⁶. These attachments are critical for promoting a child's emotional, psychological, social and cultural development. The developmental impact of instability on children and young people can be severe and long-lasting, manifesting in emotional and behavioural problems, poor educational outcomes, poor physical and mental health⁷ and high levels of internalising and externalising behaviours.

Restoration is not defined in the Care Act. It is a process, rather than an event; it is about a family coming back together. Under section 10A, restoration is limited to birth parents and adoptive parents (sections 10A(3)(a), 83(9)).

FACS recognises the importance of a child's need for lifelong connection, and prioritises restoration wherever possible. For many families in the community, however, the concept of restoration is more expansive than is envisaged in the Care Act.

For many families, especially grandparents, the idea of being part of the care system is not accepted. Grandparents are traditionally part of the child's family system and view their grandchildren's inclusion in the state's care as inappropriate.

In Aboriginal communities, children can be raised by their biological parents, by kin and the entire community. The raising, care, education and discipline of children becomes the responsibility of everyone. This includes direct primary care, decision making, supervising larger groups of children and informing peers about each others' children⁸. However, it is important to note that Aboriginal child rearing practices are complex and that significant variation can be seen between communities⁹.

4 Pelton, L. (1991). "Beyond Permanency Planning: Re-structuring the Child Welfare System", *Social Work*, 36,337– 343.

5 Brydon, K. (2004). "Barriers to permanency planning: what the literature suggests", *Children Australia*, 29(3).

6 Cashmore, J. (2000). 'What the research tells us: Permanency planning, adoption and foster care'. *Children Australia*, 24, 17 – 22.

7 Neil, E., Beek, M., & Schofield, G. (2003). "Thinking about and managing contact in permanent placements: The difference and similarities between adoptive parents and foster carers". *Clinical Child Psychology*, 8, 401 – 418.

8 Lohar, S., Butera, N. & Kennedy, E. (2014). "Strengths of Australian Aboriginal cultural practices in family life and child rearing", Melbourne: Australian Institute of Family Studies.

9 Ashton, A., Hawting, J. & Harrison, J. (2011). "Growing Up Our Way – Aboriginal and Torres Strait Islander Child Rearing Practices Matrix", North Fitzroy : Secretariat of National Aboriginal and Islander Child Care .

Consideration is being given to the concept of “restoration” within the Care Act, and whether the legislation adequately provides for the breadth of family systems and structures within our community. If a child or young person is to be restored to relatives or kin, a court order would still be required to ensure that the person to whom the child is restored can exercise parental responsibility for that child or young person.

Q 2.1

1. What does the concept of “restoration” mean?
2. How could the Care Act be amended to better reflect the breadth of family systems and structures within our community?
3. If the Care Act was amended to better reflect the breadth of family systems and structures within our community what additional safeguards should be required to ensure children and young people are protected?

2.2 Response timeframes

FACS has significantly improved the rate of face-to-face assessments of risk of significant harm (ROSH) reports from 21 per cent in 2010-11 to 32 per cent in the March 2016-17 quarter. This is due to FACS’ ongoing focus on improving caseworker numbers, retention and capacity, meaning that caseworkers are seeing more children than ever before. Where FACS is unable to provide a face-to-face response many families may receive a response from other services.

However, it is clear that demand for child protection services continues to increase. The impact of domestic and family violence, sexual abuse, mental illness, health, drug and alcohol issues in our communities are pervasive in driving the increase.

In order to ensure that the NSW Government and its non-government partners are able to focus efforts and provide appropriate responses earlier for those children and young people who are most at risk, it is timely to consider whether there should be mandatory timeframes for responding to ROSH reports, through amendment to the Care Act or related policies and guidelines. This could complement other reforms to achieve improved permanency, safety and wellbeing outcomes for children and young people.

Currently, the Child Protection Helpline (Helpline) receives information from mandatory reporters and members of the public who ring to report significant child protection concerns. The nature of these reports varies greatly. Helpline caseworkers assess this information and decide whether the child or young person identified in the report is at risk of significant harm. Once the ROSH threshold is met, the information received at the Helpline is transferred to a Community Service Centre (CSC) for further assessment.

As noted in the introduction, FACS is seeing more families face-to-face than ever before.

However, more can be done to ensure that families receive a face-to-face assessment earlier than is currently the case, so that early decisions can be made about the support a family needs to address the child protection concerns that brought them to the notice of FACS.

Some jurisdictions legislate timeframes to respond to child protection reports. For example in Illinois, the Department of Children and Family Services is required to determine, within 60 days, whether a child protection report is “indicated” or “unfounded” and report it to a central register. Where it is not possible to initiate or complete an investigation within 60 days the report may be deemed “undetermined” provided every effort has been made to undertake a complete investigation. The Department of Children and Family Services may extend the period in which such determinations must be made in individual cases for additional periods of up to 30 days each for good cause shown.

In New York State, all suspected incidences of child abuse and maltreatment are to be reported to the Office of Children and Family Services through the Statewide Central Register of Child Abuse and Maltreatment. These reports are forwarded to the appropriate local social services district for investigation. District staff must begin investigating each report of alleged abuse or maltreatment within 24 hours of receiving the report. District staff are required to complete a preliminary safety assessment within seven days of the reported abuse or maltreatment. In addition, the staff must complete a full investigation within 60 days of receiving a report of abuse or maltreatment.

Mandated investigatory timeframes would be resource intensive and if introduced would require additional resources in NSW.

Q 2.2

4. Should there be mandated timeframes for responses to ROSH reports by FACS or other agencies? If so, why? If not, why not?
5. What would you consider to be an appropriate timeframe for assessments to be conducted, a case plan to be developed and appropriate support services to be put in place to keep the family together?
6. What benefits and risks for families may arise from mandating response timeframes?

2.3 Actions taken before court proceedings

Alternative Dispute Resolution (ADR) is a process whereby an impartial person helps people reach an agreement. ADR aims to improve outcomes for children and young people by engaging families so that they can communicate better with one another, resolve or narrow issues in dispute and reach informed decisions about care and protection concerns.

Section 37 of the Care Act provides that in responding to a report, the Secretary is to consider the appropriateness of using ADR processes that are designed to:

- ensure intervention so as to resolve problems at an early stage
- reduce the likelihood that a care application will need to be made
- reduce the incidence of breakdown in adolescent-parent relationships
- work towards the making of consent orders where an application for a care order has been made.

Examples of ADR methods currently used in the NSW child protection system include FGC, Dispute Resolution Conferences (DRCs) and mediation conducted by Legal Aid in relation to contact disputes.

Use of FGC early in the child protection process, prior to an application to the Children's Court, assists caseworkers to more clearly identify what the case plan goals are concerning permanency. Participation in FGC is voluntary; parents/carers must give their consent for a FGC referral to be made. FGCs are run by independent facilitators who are trained mediators or FGC accredited facilitators with diverse experience in working with families, including children, young people and Aboriginal families and communities. FACS manages a state-wide FGC facilitator panel which currently has 98 facilitators.

FGC is a family-focused, strengths based form of ADR which aims to strengthen partnerships between family members and encourages greater parental decision making and responsibility. FGC also aims to improve relationships between child protection agency professionals and family members, provide a culturally appropriate means of resolving child protection concerns and rebuild family ties, especially in families that may have stopped communicating or drifted apart¹⁰.

Research into the effectiveness of FGC has been generally positive. Previous evaluations of FGC programs operating in Australia and overseas have found:

- the majority of families have been able to develop appropriate Family Plans that address the identified child welfare concerns and meet the requirements of the child protection agency
- families are more likely to engage in services identified through conferences
- children/young people have increased contact with their extended family
- families report an improved working relationship with the child protection agency¹¹.

FGC helps inform case planning and aims to provide an opportunity for families to develop their own plan to keep their children safe. When working with Aboriginal and Torres Strait Islander families, FGC promotes self determination through increased family participation in decision making.

10 Chandler & Giovannucci (2009); Olson (2009) as cited in Boxhall, H., Morgan, A. & Terer, K. (2012). "Evaluation of the Family Group Conferencing Pilot Program", *Australian Institute of Criminology*.

11 Huntsman (2006); Lowry (1997); Olson (2009); Shore et al. (2002); Sundell & Vinnerljung (2004) as cited in Boxhall, H., Morgan, A. & Terer, K. (2012). "Evaluation of the Family Group Conferencing Pilot Program", *Australian Institute of Criminology*.

Once Children's Court proceedings have commenced, sections 65 and 91D of the Care Act allow the Children's Court to refer matters to DRCs. A DRC is a process in which the parties to proceedings, with the assistance of the Children's Registrar, identify the issues in dispute, develop options, consider alternatives, and try to reach agreement about what is in the best interests of the child or young person. DRCs aim to produce child protection decisions that are better informed, more responsive to the unique needs of each child, and more likely to be implemented as all parties have been involved in the decision making process.

DRCs are facilitated by a Children's Registrar who is legally qualified and is independent of any party. Approximately 1300 DRCs are conducted each year in NSW. In 2012, the Australian Institute of Criminology conducted a process and outcome evaluation of the DRC model in order to assess the implementation and effectiveness of ADR in the care and protection jurisdiction. The evaluation found high levels of satisfaction among participants. It also found that for a large proportion of matters referred to a DRC, the issues in dispute were either likely to be resolved or at least narrowed, and that a significant number of matters resulted in agreement on final orders¹².

Mediations can be used to assist people to reach agreement about what contact arrangements will be put in place for a child or young person who has been the subject of care and protection proceedings. Legal Aid facilitates these mediations. If necessary, these mediations can be ordered by the Children's Court under section 65A of the Care Act.

Although ADR is already used in a number of scenarios, consideration is being given to placing a stronger obligation on FACS to consider using ADR in every instance, to address child protection concerns at an earlier stage in order to divert a greater number of matters away from the court process. This would mean prior to court a family would be offered an FGC to assist them come up with their own response to mitigate child protection concerns.

Under current legislation, prior to any decision to remove a child or young person, FACS must first decide whether the provision of other services will be sufficient to adequately reduce the identified risk to the child and preserve the family unit. The need to consider alternative action before making a decision to remove a child from their family is necessary to ensure compliance with the principle of least intrusive intervention (section 9(2)(c)).

Examples of less intrusive, alternative options include: responses to sections 20 and 21 Requests for Assistance to support the diversion of children and young people from the statutory system into appropriate services; family preservation services; Parent Responsibility Contracts; Parent Capacity Orders and forms of ADR, such as FGC.

The Care Act contains an express provision that when making a care application, FACS must furnish details to the Children's Court of the support and assistance provided for the safety, welfare and well-being of the child or young person, and the alternatives to a care order that were considered before the application was made and the reasons why those alternatives were rejected (section 63).

Consideration is being given to whether FACS' obligation to provide evidence of prior alternative action should be strengthened. Some options could include requiring evidence of the use, or consideration, of some form of ADR. However, in cases where FACS assesses that

12 Morgan, A., Boxall, H., Terer, K. & Harris, N. (2012). "Evaluation of alternative dispute resolution initiatives in the care and protection jurisdiction of the NSW Children's Court (Report 118)", *Australian Institute of Criminology*.

a child is at immediate risk of serious harm, then appropriate action will be taken to remove the child from the place of risk.

Q 2.3

7. What are your views about strengthening the obligation for FACS to always consider the use of ADR where there are child protection concerns?
8. Does the Care Act provide enough clarity in relation to the use of ADR at various stages of the child protection process? If not, how could it be improved?
9. What measures could be implemented to improve support for participants in the FGC process?
10. In what circumstances do you consider the use of ADR is appropriate or inappropriate?
11. What is considered to be sufficient prior alternative action before taking action to remove a child from their family?

2.4 Service provision

The Care Act allows the Secretary of FACS or the Children's Court to request another government department or agency, or government-funded NGO, to use best endeavours to provide services to a child or young person or their family (sections 17, 18 and 85).

The types of services that might be requested under these sections include health services, mental health services, drug and alcohol support or counselling services, domestic and family violence support services, parenting support programs, child care, education services or other relevant support services. The current legislative provisions may be used to either facilitate the child or young person's access to the service, or to have them prioritised for urgent attention.

The original intention of the best endeavours provision is for agencies to exercise a genuine and considered effort to respond to requests for services to promote the safety, welfare and well-being of the child or young person.

The Their Futures Matter reform recognises that the traditional approach to service provision for vulnerable children and families has not been adequate in responding to the needs of children and families with complex needs.

The reform is based on a whole of government approach to service provision and has introduced structured governance and accountability across the service system. This includes the establishment of a dedicated commissioning entity, which will have a single view of services and supports for vulnerable children and families across portfolios, government departments and the sector.

To support this vision for whole of government service provision for vulnerable children and families, it is proposed that the obligations on government departments, agencies and funded NGOs to provide services to children and families also be strengthened in legislation.

Changes may include broadening best endeavours to cover the provision of a wider range of services, such as early intervention and family preservation services, or strengthening the obligation to use best endeavours to provide services to a child, young person or family. For example, FACS or the Children's Court may request a drug and alcohol rehabilitation service provider to prioritise access to a parent, to enable the parent to address their drug or alcohol addiction to facilitate a sustainable restoration.

Q 2.4

12. How can FACS more effectively access the capabilities of other government agencies and funded NGOs to provide services to vulnerable children and families?
13. Are the current 'best endeavours' provisions adequate to ensure timely service provision for vulnerable children and families?
14. What changes could be made to the 'best endeavours' provisions to align with a whole of government approach to service delivery to vulnerable children and families?

2.5 Definition of children's services

Mandatory reporters are people who, in the course of their professional work or other paid employment, deliver health care, welfare, education, children's services, residential services, or law enforcement, wholly or partly to children (section 27).

From 1 January 2001, the Care Act defined a 'children's service' as:

'A service that provides education or care (other than residential care), or both education and care, whether directly or indirectly, for one or more children under the age of 6 years and who do not ordinarily attend school (disregarding any children who are related to the person providing the care)'¹³.

A specific exclusion to this definition (amongst others) was:

'lessons or coaching in, or providing for participation in, a cultural, recreational, religious or sporting activity, or private tutoring.'

¹³ *Children and Young Persons (Care and Protection) Act 1998* (NSW), section 200(1)

The definition of a ‘children’s service’ covered the following service types:

- centre based children’s services
- family day care children’s services
- home based children’s services
- mobile children’s services.

On 1 December 2012, the definition of a ‘children’s service’ was removed from the Care Act when NSW adopted the Children (Education and Care Services) National Law. The National Law provides the legislative framework for a national approach to the regulation of education and care services provided to children under 13 years of age. The services covered by the National Law include:

- Long day care
- Preschool
- Family day care and
- Out of School Hours Care Services.

The *Children (Education and Care Services) Supplementary Provisions Act 2011* covers children’s services not covered by the National Law. These include:

- Home based education and care services
- Mobile education and care service
- Occasional education and care services
- Budget based funded services.

Consideration is being given to removing the ambiguity about mandatory reporters working in ‘children’s services’, by clarifying the definition of ‘children’s services’ in the Care Act to broadly reflect the definition in the *Children (Education and Care Services) National Law (NSW)* and *Children (Education and Care Services) Supplementary Provisions Act 2011*.

Q 2.5

15. Should ‘children’s services’ be limited to education and care services for the purposes of mandatory reporting, or should the term have broader application? If so, why? If not, why not?

16. What additional ‘children’s services’ should be captured for the purposes of mandatory reporting?

2.6 Alternative pathway for mandatory reporters to make reports to FACS

In many instances FACS will refer families to other government and non-government services to ensure appropriate supports are put in place to assist families to keep their children safe. Mandatory reporters in these organisations are often working intensively with a family in situations where child protection risks for the children in that family arise from time to time during the provision of their services.

Under the Care Act, mandatory reporters have a duty to report to the Child Protection Helpline where they suspect a child is at risk of significant harm. In the context of working with families where there are child protection risks, these mandatory reporters are required to and will re-report to the Helpline children who are already known to FACS as being at risk of significant harm.

Consideration is being given to allowing an exception to the existing mandatory reporting requirements for those mandatory reporters who are working intensively with families following a referral from FACS. Where those mandatory reporters have assessed that the supports they are providing are sufficient to mitigate the child protection risks in a family, rather than reporting the risk to the Helpline in the traditional way, these mandatory reporters could satisfy their reporting obligations by sending a streamlined electronic report to the Helpline noting the child protection risks and what is being done to mitigate those risks.

This should lead to a reduction in the number of matters re-reported to the Helpline in circumstances where the child protection risks are known to FACS and allow FACS resources to be focused on responding to families who are not receiving support services. Mandatory reporters will also not be required to re-report matters in circumstances where the risks are well known to FACS and the services being provided are directed at reducing the child protection risks within a family.

Additional guidance and training would be provided to mandatory reporters about when it would be appropriate to submit a streamlined electronic report and when it is necessary to make a report to the Helpline in the usual way.

Q 2.6

17. Should mandatory reporters be exempted from making a traditional report to the Child Protection Helpline where supports are in place to mitigate child protection risks? If so, what additional safeguards should be in place?

Streamlining court processes and orders

The NSW Government is committed to supporting families to stay safely together, but when that is not possible we need to ensure children have a safe and loving home for life. We know the outcomes for children are much better when they have a stable and safe home and the earlier we can get this right for them, the better. The changes proposed make sure that FACS' work is firmly focused on each child's experience.

3.1 Streamlining court processes

3.1.1 Registered Care Plans and Guardianship Orders

A care plan, developed by agreement with the family in the course of ADR, may be registered with the Children's Court (section 38). A care plan that allocates parental responsibility to any person other than the parents of the child or young person, with the agreement of the parents, takes effect only if the Children's Court makes an order by consent to give effect to the proposed changes in parental responsibility (section 38(2)).

Guardianship orders aim to provide greater stability for children and young people when the Children's Court makes a decision that they cannot live with their parents. A guardianship order remains in force until the child or young person is 18 years. It may be made in favour of a relative or kin or other suitable person, only where an assessment has been made that a carer is able to meet the long term needs of a child without case management from FACS or an NGO.

Consideration is being given to ensuring the legal framework is clear and unambiguous on its face, that the Children's Court is able to make guardianship orders by consent under section 38. The legislative requirements for the making of a guardianship order would still need to be met, the Children's Court satisfied that the proposed order will not contravene the principles of the Care Act and that the parents understand the provisions of the care plan, have freely entered into it, and all the parties have received independent advice.

Prior to the making of a guardianship order by consent, prospective guardians would still be required to undergo all necessary suitability assessments, including obtaining a Working With Children Check clearance. Guardianship orders are also only proposed after cultural considerations have been assessed and included in the guardianship assessment.

Q 3.1.1

18. Should the Care Act contain a specific provision enabling the Children's Court to make guardianship orders by consent? If not, why not? If so, what safeguards should be put in place?

3.1.2 Court's ability to vary interim orders

During Children's Court proceedings the Court usually makes interim orders which are to be followed by the parties while the proceedings are on foot. These interim orders may be made in relation to a number of issues including who has parental responsibility for the child or how contact is to be facilitated with the child's family. There are times when these orders need to be varied but the Care Act is silent on how parties can apply for an interim order to be varied.

In 2010 the Supreme Court¹⁴ provided a judgment which suggested that the proper avenue for parties to vary an interim order is through an application under section 90 of the Care Act. An application under section 90 is an additional application that requires the court to grant leave which often lengthens care proceedings.

A later decision of the Children's Court¹⁵ held that it is not essential that the provisions of section 90 of the Care Act must be used on every occasion that a party seeks to vary an existing interim order.

The intersection between these two decisions has caused confusion about how parties should apply to vary interim orders and whether it is necessary to make an application under section 90 of the Care Act. Legislative amendment would clarify the position.

Q 3.1.2

19. Should all parties to care proceedings be able to apply for interim orders to be varied without making an application under section 90 of the Care Act? If so, why?

3.1.3 Shorter term court orders

As we move forward with diversionary programs ahead of children coming into care we will be better placed to understand the permanency direction for these children.

Where a family has been through Family Finding and FGC and a diversionary program such as Multi Systemic Therapy Child Abuse and Neglect or Functional Family Therapy Child Welfare and the child/children are removed, a better understanding of the long term placement for the child will be known.

Families who despite being offered these services have demonstrated that they are unable to change will have had their opportunity and decisions will be focused on the best permanency placement for the child. To support this shorter term court orders (STCOs) will give agencies a set time to achieve the permanency goal for the child.

STCOs may also be beneficial where restoration to an alternative family member is the goal. FACS has previously tested the efficacy of using STCOs with families in a pilot project focused on preservation and restoration, with some positive outcomes.

¹⁴ *Re Timothy* [2010] NSWSC 254

¹⁵ *Re Mary* [2014] NSWChC 7

The Care Act does not specifically provide for shorter term orders. The legislation is geared towards permanency planning and making expeditious decisions about whether there is a realistic possibility of restoration.

FACS is required to make an assessment of realistic possibility of restoration in the first instance and the Court then decides whether to accept that assessment. The Court must consider the circumstances of the child or young person, and whether the parents are likely to be able to satisfactorily address the concerns that have led to the removal of the child or young person from their parents' care. It is at the time of the determination that the Court must make the assessment i.e. there must be a realistic possibility of restoration at that time, not merely a future possibility. The possibility must not be fanciful, sentimental or idealistic, or based upon 'unlikely hopes for the future'. It cannot be a mere hope¹⁶. With the current reform this possibility will be far clearer.

All children need a safe, secure, stable and loving family who can support them to rise to their potential. STCOs that allocate parental responsibility to the Minister for shorter periods of time will encourage the parties to work towards permanency by pursuing restoration, guardianship orders or open adoption within a determined timeframe.

Moving away from longer term orders allocating parental responsibility to the Minister until 18 years will direct caseworkers towards thinking and taking action, as early as possible, about the permanency needs for the child and whether restoration, guardianship or open adoption may be appropriate. Where the permanency plan is guardianship or open adoption, an order for two years will provide a timeframe more expedient than a long term order where no further work for permanency has traditionally been undertaken.

Rather than placing a child in long term OOHC until 18, STCOs would put the focus on continued case planning for permanency until it is achieved within the designated timeframe.

Other jurisdictions have introduced short-term order legislation. In March 2016, Victoria introduced a family reunification order, under which the Department of Health and Human Services has parental responsibility for the child (except for the making of major long-term issues). Parents will have 12 months to demonstrate that they can safely care for their child. After this period, the Court can grant an additional 12 months if it is satisfied that family reunification can be achieved in that time. This amendment was made in response to the *Protecting Victoria's Vulnerable Children Inquiry* in 2012, which found that the average five year duration wait for a permanent order to be granted was too long to ensure a child's safety and wellbeing.

A STCO might also benefit teenagers who enter the OOHC system. Generally, the Children's Court will make final orders allocating parental responsibility to the Minister until 18 years. It is not uncommon for these teenagers, at the age of 15-17 years, to self-place with a parent. In these circumstances, FACS is required to make an application to rescind or vary the order because of the impact of section 137(1A). Under this section, a parent cannot be given care responsibility for the young person because the Court has previously determined that there is no realistic possibility of the child being restored to their parents.

¹⁶ See *Re Saunders and Morgan & Anor v Department of Community Services*, 12/12/2008, NSWDC, Unreported, Johnstone DCJ, 11-14.

Q 3.1.3

20. In what ways would STCOs better support realisation of permanency outcomes for children and young people? If not, why not?
21. Will permanency outcomes be improved through greater use of STCOs? If not, why not?
22. Should the Care Act contain an explicit provision enabling the Children's Court to make STCOs as a final order i.e. orders allocating parental responsibility to the Minister for FACS for shorter periods?
23. If yes, should they be defined differently based on permanency case plan goal (restoration, guardianship, open adoption)?
24. What might be an appropriate upper time limit for a STCO?
25. What would be appropriate matters for the Children's Court to take into account when making a STCO on the basis that there is a future possibility of restoration e.g. parents demonstrate commitment to undergo counselling / therapy to address concerns that led to the removal of their children?
26. Does the test of 'realistic possibility of restoration' need to be amended? If so, how? If not, why not?

3.1.4 Report on suitability of care arrangements

A report to the court on the suitability of arrangements concerning parental responsibility for a child or young person must include an assessment of progress towards the achievement of a permanent placement. If the Children's Court is not satisfied with the arrangements outlined in the report, it may invite the parties to bring an application to vary or rescind the orders allocating parental responsibility (section 82).

If the Court is not satisfied that proper arrangements have been made, its power is limited by section 82(3) to inviting the parties to make an application to rescind or vary care orders under section 90. The parties may decline to do so, in which case the Children's Court does not have power to rescind or vary the order, or make a new order allocating parental responsibility on its own motion. It is often the Independent Children's Lawyer who accepts the Court's invitation to have the matter reconsidered. Prior to 2009, the Children's Court was able to relist a matter on receipt of a section 82 report.

Consideration is being given to enabling the Children's Court to relist a matter, if it is not satisfied with the assessment of progress in implementing the care plan or the steps that

have been taken towards the achievement of a permanent placement. This necessitates a reconsideration of the history of the provision, and the role of the Children's Court within that.

Anecdotal evidence from the period prior to the 2009 legislative amendments indicates that there was a proliferation of section 82 matters being relisted by the Children's Court, which had significant implications for practitioners. The role of the Children's Court under section 82 of the Care Act was the subject of a lengthy discussion by the Special Commission of Inquiry which ultimately concluded that:

- 'The Inquiry takes the view that the Children's Court appropriately has decision making power in relation to matters requiring a judicial response. The ability to monitor the decisions it makes is entirely consistent with this approach. However, the Children's Court is not and should not be an oversight body. The Children's Guardian and the Ombudsman ably fulfil that role.
- The Inquiry is of the view that the Children's Court should have the power to order that a written report be made to it and, if not satisfied that proper arrangements have been made, to re-list the matter with notice to the parties to the original proceedings in order to give any of them an opportunity to make an application pursuant to s.90 or for any other ancillary or incidental order. However, if no party wishes to apply for an order varying any of the orders made, the matter should be taken no further. In the absence of a moving party, the Children's Court cannot act. It would be an odd outcome if the Court, based on nothing more than the s.82 report, and in the absence of any party indicating a desire for some alteration or calling evidence, determined to alter the existing state of affairs.
- The Children's Court should develop rules concerning the timing, provision of notice, confidentiality and procedure to ensure that reports are made to it in a timely fashion, that all parties are provided with a copy of the report and that the process by which a date is set for any hearing is also clear¹⁷.

Since this time most children in OOHC in NSW are now case managed by NGOs. It is suggested that in these circumstances it is appropriate for the Children's Court to have the power to relist matters, if they are not satisfied with care arrangements, but not rescind or vary the order, or make a new order allocating parental responsibility, on its own motion.

The Children's Court relists a matter if the section 82 report reveals that a permanent placement has not been located and there is no plan or casework solution in place to address this. The Court may also relist a matter if there is a significant problem with an aspect of the care arrangements being provided, for example if a child has a significant medical condition and the report raises concerns that the child is not being provided with appropriate medical care.

Expanding the role of the Children's Court to enable the Court to relist matters when they are not reasonably satisfied that proper arrangements have been made for the child or young person, could bring the following benefits:

- It would provide the Court with oversight to ensure orders are made in the best interests of the child.
- The Court would be able to satisfy itself that the permanency plan has been effected.

17 Wood. J. (2008). "Report of the Special Commission of Inquiry into Child Protection Services in NSW", vol.2, paras 11.256- 11.258.

- It could circumvent the need for future litigation. For example, one mention might be sufficient to establish that contact is back on track.
- It would operate as a safeguard in circumstances where a parent's ability to file a section 90 application has been circumscribed.

Q 3.1.4

27. What should the role of the Children's Court be if it is not satisfied that proper arrangements have been made for the care and protection of a child or young person?
28. Should the Children's Court be given the ability to relist matters following receipt of a section 82 report where it forms the view that proper arrangements have not been made for the care and protection of the child or young person? In what circumstances should the Children's Court be given this power? If not, why not?
29. If a matter has been relisted by the Court, what subsequent powers should the Court be given?
30. Should the Court be able to request further evidence from a party about its efforts to implement the care plan and its progress towards achieving a permanent placement, including reasons for delay in achieving these goals?

3.1.5 Contact orders and guardianship

There are circumstances where a party may want the Children's Court to make a contact order, instead of relying on the contact arrangements set out in the Care Plan. The Children's Court may make contact orders setting out how often, and for how long, a person can spend time with a child or young person. Contact orders may also set out whether the contact has to be supervised (section 86).

When a guardianship order is made, the child or young person will still have contact with their parents, family and important people in their life, as outlined in their care or case plan or court orders. If there is a court order outlining contact arrangements, this order must be followed as a minimum, unless an application is made to the Children's Court by the guardian or parent to change it. Alternatively, the frequency of contact can be increased by mutual agreement between the parent and the guardian.

A guardian is responsible for arranging, coordinating and (where required) supervising contact between the child or young person and their family members. A contact order cannot be made requiring FACS to coordinate or provide supervision of contact with birth parents or other relatives.

There are situations where the issue of contact supervision makes it difficult for matters to be progressed to obtain a guardianship order in the Children’s Court. A guardian may indicate that they are unwilling or unable to facilitate or supervise contact with a child’s parent/s due to the parent’s violent behaviour, mental illness or history of alcohol or drug misuse. Aside from the issue of contact supervision, proposed guardians may be assessed as suitable to care for the child under a guardianship order. Consideration is being given to the alternatives available to remedy the issue around contact supervision.

Under section 83(6), if the Children’s Court decides that there is no realistic possibility of restoration of a child or young person to his or her parent, in the first instance the maximum period that may be specified in a contact order concerning the child or young person is 12 months.

Consideration is being given to amending the legislation to enable contact orders to be made for the life of the guardianship order. Removing the 12-month time limit on contact orders when a guardianship order has been made would be consistent with the current practice in adoption. It would provide greater certainty and assurance for parents that they will have an ongoing connection with their child, reduce the likelihood for future disputes and unnecessary strain on guardian/parent relationships, and it may alleviate any barriers to parental consent where a registered care plan is being considered.

Q 3.1.5

31. What alternatives are available to overcome issues of contact supervision where an allocation of parental responsibility by guardianship order is being sought?
32. How could the current contact order provisions be enhanced to better support guardianship?
33. Should the Children’s Court be empowered to make contact orders for the life of a guardianship order?

3.1.6 Applications to vary or rescind care orders

Section 90 of the Care Act allows for an application for the rescission or variation of a care order to be made by: the Secretary; the child or young person; a person having parental responsibility for the child or young person; a person from whom parental responsibility for the child or young person has been removed; or any person who considers himself or herself to have a sufficient interest in the welfare of the child or young person. This latter category includes NGOs who have case management responsibility for a child or young person.

Under section 90, an application for the rescission or variation of a care order can only be made with the leave of the Children’s Court. The threshold test in section 90(2) requires there to have been a significant change in any relevant circumstances since the care order was made or last varied, for leave to be granted to hear the application. The requirement for an applicant to obtain leave by demonstrating “significant change” and that they have an arguable case, safeguards against claims that lack merit or are vexatious in nature.

Even where a significant change in relevant circumstances can be demonstrated, the Court is still required to consider how long the child or young person has been in the care of the current carer, along with the age of the child and the nature of the application.

The Court is required to consider permanency issues both when determining leave to apply, and when making further orders. Section 90 serves an important function, i.e. to ensure that care orders continue to operate in the best interests and permanency needs of children and young persons when surrounding circumstances change significantly over time.

There are times when a section 90 application can become a barrier to placement stability or long term security. One example is the delay caused to adoption proceedings when a section 90 application has been filed in the Children's Court. Consideration is being given to the ways section 90 applications might be limited in order to support permanency for children.

Q 3.1.6

34. In what circumstances do you think that section 90 applications should be limited?
35. Are there any circumstances where an exception might need to apply?

3.1.7 Who can make applications to the Children's Court?

Under the Permanency Support Program, NGOs will be encouraged to support permanency planning, by supporting preservation, working towards restoration, guardianship and open adoption.

As noted above, NGOs can apply under section 90 for a rescission or variation of a current care order as they have a sufficient interest in the welfare of the child or young person. However, FACS is to be notified of the section 90 application and must provide written consent if the NGO seeks an allocation of parental responsibility by guardianship order (section 79B(1)(b)).

Consideration is being given to removing the requirement for FACS to consent to an application for a guardianship order being made by an NGO, in order to streamline the process for obtaining a guardianship order. The NGO would still be required to notify FACS of the making of the application for the guardianship order on the day the application is filed and FACS is entitled to be a party to proceedings (section 79B(6)).

Removing the requirement for FACS to consent to an application for guardianship order being made by an NGO could result in more applications being filed, however there are accompanying risks:

- If the requirement was removed, there would be a risk of conflict in Court between the designated agency and FACS, if FACS does not consent to the application.
- In most cases, the child would either be under the interim parental responsibility of the Minister or subject to a final order allocating parental responsibility to the Minister.

It would be appropriate for the designated agency to obtain the consent of the Secretary – as the nature of the application is to remove parental responsibility from the Minister.

- Leaving the requirement for the Secretary to provide consent enables section 79B(1A) to be left as it is. This provision provides a further safeguard in relation to the application process. It states that the Secretary must not give consent to the making of an application by a designated agency unless satisfied that a person to whom parental responsibility for the child or young person is to be allocated has agreed to undergo, or has satisfied, such suitability assessments as may be prescribed by the Regulations.

Q 3.1.7

36. Should NGOs be able to bring an application for a guardianship order without the written consent of FACS? If not, why not? What other risks might arise from this change?

3.2 Streamlining adoption orders

Children need a forever family. The changes the NSW Government has made will see FACS and NGOs working hard with families to help them change and when this isn't possible, to support children to find loving homes for life through guardianship and open adoption.

Proposals to make the adoption of children and young people in OOHC easier and quicker were canvassed in the *Child Protection: Legislative Reform Legislative Proposals – Strengthening parental capacity, accountability and outcomes for children and young people in State care (2012)* Discussion Paper.

Several of the proposals were not supported by stakeholders at the time¹⁸. Since 2012, the OOHC system has been comprehensively reviewed. As noted above, the 2016 *Independent Review of Out of Home Care* concluded that the OOHC system is crisis driven, and reform is necessary. The Government has demonstrated its commitment to improving the OOHC system and stemming the increasing numbers of children entering OOHC on long term orders through various reforms currently underway. 'Shaping a Better Child Protection System' is the next step in the Government's commitment towards securing more permanent, safe, stable and loving homes for vulnerable children and young people.

Informed by the knowledge that open adoption provides a greater sense of belonging to children than long term foster care, the NSW Government is re-examining impediments to the making of open adoption orders as:

- There is a renewed focus within the NSW Government on achieving better permanency outcomes for children in OOHC with a focus on making permanency decisions as early as possible to ensure the best long term outcomes for children.

¹⁸ Department of Family and Community Services (2012). "A Safe Home for Life: Report on the outcomes of public consultation on the child protection legislative reforms discussion paper 2012"

- The NSW Government is committed to reducing pressure on the OOHC system.
- From 1 July 2017 the NSW Government has offered a means tested adoption allowance to foster parents who adopt children from OOHC, removing the potential economic barrier to adoption for foster carers who wish to adopt children that they have welcomed into their homes.
- From 29 October 2014, the permanent placement principles within the Care Act give preference to adoption before the allocation of parental responsibility to the Minister.

A child or young person's sense of belonging is crucial to their development and is best supported through the provision of a long-term, safe, nurturing, stable and secure environment. At the Open Adoption Forum held by the NSW Government on October 26 2015 young people spoke articulately about their need to feel safe and secure and to belong to a family¹⁹. Successful adoptive placements can provide a child or young person with this kind of family. Successful open adoption also leads to continuity of an adopted child or young person's relationships with nurturing parents and the opportunity to establish positive lifetime relationships.

Reconsidering the forum in which adoption orders are made, whether additional grounds for dispensing with parental consent in adoption matters should be developed, and whether a parent's right to be advised of an adoption should be circumscribed, are steps within that process.

3.2.1 Transferring jurisdiction for OOHC adoptions from the Supreme Court to the Children's Court

In NSW, the Supreme Court has jurisdiction to determine and make adoption orders under the *Adoption Act 2000* (NSW).

Consideration is again being given to transferring the jurisdiction for making OOHC adoption orders to the Children's Court. This proposal was canvassed by the NSW Government in 2012 but it was not supported by stakeholders and it was not pursued. However, the NSW Government noted that the proposal would be kept open to further public debate and consultation as a possible future action²⁰. This discussion paper provides the forum for that public debate and consultation.

In contrast to the proposal made in 2012, the NSW Government is now proposing that if the jurisdiction for making adoption orders is transferred to the Children's Court, adoption orders would only be made by specialist Children's Magistrates.

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 the most appropriate placement arrangement where a child cannot be reunited with his or her family.

¹⁹ *Department of Family and Community Services (2016)*. "The Future of Open Adoption in NSW. Report from the Ministerial Open Adoption Forum"

²⁰ *Department of Family and Community Services (2012)*. "A Safe Home for Life: Report on the outcomes of public consultation on the child protection legislative reforms discussion paper 2012", p37

- It would provide a seamless legal pathway for children, young people and carers to have adoption applications considered by the Court experienced in their situation and better able to determine the most appropriate placement where a child cannot be reunited with his or her family. There would only be a requirement to have one Court involved, rather than two.
- Evidence based interventions for families strengthen our assessment of parental capacity early in the life of the child protection issue to inform the court's determination on the best placement for the child.
- 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.
- It is consistent with the practice in many other states that an inferior court be responsible for granting an adoption order²¹.

The NSW Government understands that adoption orders have the effect of permanently severing the legal relationship between the child and their birth family and that many stakeholders will hold the view that due to the gravity and permanence of an adoption order that it should be made by a Superior Court. However, the NSW Government is committed to increasing and streamlining adoptions of children from OOHC and ensuring that any opportunity to streamline the adoption processes is considered.

As noted in the Introduction to this paper, there were a record 129 adoptions in NSW of children who had been living in foster care in 2016-17, up from 67 in the previous year. Orders made in 2016-17 took an average of 4.2 years to be completed, a figure the Government hopes to halve in coming years.

Q 3.2.1

37. Should the Children's Court be conferred jurisdiction to make adoption orders where there are child protection concerns? If so, why? If not, why not?

3.2.2 Dispensing with a parent's consent for adoption of a child

As noted above, the number of OOHC adoptions in NSW has increased, however barriers to increasing the number of OOHC adoptions remain. The adoption of children from OOHC requires casework to engage all parties to the adoption. In addition, significant work is

²¹ 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 – Magistrates Court (Children's Division).

required to fulfill 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 age²², 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 for the child, and
- 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 relocate 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.

FACS invests significantly in the Family Finding model in order to meet the challenge of locating and engaging parents who have not been involved in a child's life for some time. Family Finding uses a combination of techniques and technology to locate relatives of children in OOHC, including social media and public records resources. The Family Finding model provides frontline practitioners with strategies and tools to help them identify, engage and build a network of support around children. This is important, as research tells us that meaningful connection to family helps a child living in OOHC to develop a sense of belonging, which we know plays a huge part in their resilience as adults.

As outlined above, FACS has also invested significantly in FGC, as a strengths based form of ADR. FGC aims to place children and families at the centre of planning and decision making, and build respectful relationships with families through open communication. The increased investment in engaging parents early and often in decision making about a child through FGC, is further evidence of the emphasis that FACS places on supporting children to develop a meaningful connection with family as early as possible.

Despite greater emphasis on early and meaningful engagement of birth parents in casework practice through processes like Family Finding and FGC, there are still many instances where a parent is either unable to be located and/or unwilling to engage positively in their child's life. At all times, actions must be taken that are in the best interests of the child. Undue delay in placing a child in a stable and loving home for life in order to continue attempting to locate and/or engage birth parents is not necessarily in the best interests of the child.

The Adoption Act²³ 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.

²² 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

²³ *Adoption Act 2000* (NSW), section 67(1)(d)

The Court must not dispense with consent unless it is satisfied that to do so is in the best interests of the child²⁴. 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, FACS or the NGO case managing the child for many years.

The Government is reconsidering amending 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. For example, if the parent is incarcerated for an offence against the child, or the parent has repeatedly refused or neglected to comply with parental duties and reasonable efforts have failed to address these concerns.
- Where a parent cannot be located, despite having given an undertaking to keep FACS 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 and it is in the best interests of the child or young person to make the decision now.

The investment in intensive family preservation and restoration programs gives parents more opportunity than ever to address child protection concerns that have resulted in the need for intervention. The needs of the child become paramount and research clearly identifies the importance of making decisions in timeframes that meet the needs of the child.

Current NSW legislation recognises the wrongs of past practice. This is believed to be a significant factor in NSW having the highest number of adoptions in Australia and being the lead jurisdiction in Australia undertaking adoptions from care. The legacy of past practice remains a sensitive issue for many people in the community. It is acknowledged that limiting consent requirements, search action for birth parents and opportunities for rights to be exercised could be seen as a reversion to past practice.

Q 3.2.2

38. Should the Adoption Act be amended to provide additional grounds for dispensing with parental consent? If so, what are the grounds upon which dispensing with a parent's consent could be considered? If not, why not?

²⁴ Adoption Act 2000 (NSW), section 67 (2)

3.2.3 Limiting a parent's right to be advised of an adoption

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, a proper balance is reached between the 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.

The Government is reconsidering whether a parent's right to be advised of an adoption should be limited in certain circumstances. Those circumstances might include:

- The child is over 12 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 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 has not engaged in contact with the child for 12 months and is unable to be located.

Q 3.2.3

39. Should a parent's right to be advised of an adoption be limited? If so, how? If not, why not?

40. What is an appropriate period of time to wait for a parent to be located?

3.2.4 Providing clear grounds for birth parents to rely upon when contesting an adoption

The Adoption Act is silent as to the grounds on which birth parents can contest an adoption application before the Supreme Court. This means that, at times, birth parents can contest an adoption based on grounds that are without merit. For example, in situations where a child has been with foster carers for an extended period of time, has formed a strong attachment and there is an established relationship to their carers it is unrealistic for a birth parent to contest that the child be adopted by their carers based on the grounds that they would like the child restored to their care. Restoration is unlikely to be in the child's best interests and having a contested adoption hearing further delays the child's adoption into a safe and loving home.

Allowing parents an unconstrained right to contest the adoption of their children however, acknowledges that:

- an adoption severs parental ties and is considered to be a grave decision
- the principles of procedural fairness dictate that a person should have a right to be heard in relation to a decision which affects their rights and interests
- some birth parents contest (even when their case has little or no merit) because they want their child to know that they didn't relinquish them for adoption and they didn't give up on them.

Consideration is being given to whether the Adoption Act should contain clear grounds outlining when a birth parent can contest the adoption of a child currently under the parental responsibility of the Minister or under a guardianship order made under the Care Act.

Q 3.2.4

41. Should the Adoption Act specify the grounds birth parents can rely on when contesting the adoption of a child under the parental responsibility of the Minister or a guardianship order? If yes, what should these grounds be? If not, why not?

3.3 Changes to OOHC

3.3.1 Facilitating restoration

Statutory OOHC may be provided in respect of a child or young person only by an authorised carer (section 136). Section 136(2) operates as a penalty provision, providing that if a person other than an authorised carer provides statutory OOHC in respect of a child or young person, they are guilty of an offence.

The Care Act provides that if the Children's Court has made a finding that there is no realistic possibility of the child or young person being restored to his or her parents, a parent of the child or young person cannot be given care responsibility for the child or young person, or be authorised as an authorised carer in respect of the child or young person, unless the decision of the Court that there is no realistic possibility of restoration is rescinded under section 90 (section 137(1A)). As mentioned above, this operates as a barrier to early restoration to parents.

Section 136(3) provides an exception to the requirement that only an authorised carer may provide statutory OOHC to a child or young person.

Specifically, it states that section 136 does not prevent a child or young person who has been placed in statutory OOHC, and is the subject of a permanency plan involving restoration, from living with his or her parents, in accordance with the arrangements under a care plan approved by the Children's Court, at any time during the period of six months before the date on which the child or young person is to be restored to his or her parents in accordance with the permanency plan.

Where the Court has approved a care plan involving restoration, it is understood that section 136(3) authorises FACS to place the child back with the parents up to six months earlier than what is provided for in the care plan and orders, without the need to take the matter back to Court. If physical restoration is proposed to take place earlier than six months before the date provided for in the care plan and orders, then a section 90 application would need to be filed.

Consideration is being given to the meaning of “restoration” within section 136(3), with a view to changing the six month time limit to 12 months. The purpose of the proposal is to overcome the legislative barriers operating against restoring children to their parent/s earlier than what is prescribed, where it is appropriate to do so. The proposal is consistent with the focus on family preservation and restoration, and aligns with the proposal for STCOs to support permanency.

Q 3.3.1

42. Should the six month time limit in section 136(3) be changed to 12 months? If so, why? If not, why not?
43. What potential risks to the safety of children and young people are associated with this proposal?
44. What would parents have to demonstrate to FACS before having their child/ren restored to them prior to the expiration of an order allocating parental responsibility to the Minister?

3.3.2 Supported OOHC

The Care Act makes provision for children and young people to be placed in supported OOHC. Sometimes these arrangements are not supported with a court order.

A review of supported OOHC by FACS in 2015-16 resulted in a number of changes to these supported OOHC arrangements. As of 1 December 2016, there is no longer any entry to supported OOHC where there is no court order on foot. Informal care arrangements between relatives, without re-allocation of parental responsibility through a court order do not provide children or young people with safety and permanency.

The changes made as a result of the 2015-16 review also means that there is no entry to supported OOHC with a family law order where FACS has not intervened as a party to court proceedings.

Q 3.3.2

45. Should the Care Act be amended to remove supported care arrangements where there is no court order in place?

3.4 Better protection of children in OOHC

On 23 August 2017 the NSW Court of Appeal upheld a decision by Justice Brereton of the Supreme Court finding that section 105 of the Care Act did not prohibit publishing information identifying that a child or young person was in foster care or under the parental responsibility of the Minister²⁵. The Court held that a publication would only breach section 105 if there was a reference to Children's Court proceedings, non-court proceedings or a report to FACS. This now means the status of most children in care is not protected and can be published in the media.

International and Australian research has shown that children can suffer stigma and distress when it becomes known that they are in OOHC. A child may develop an impaired self-image, be perceived differently, experience difficulties transitioning through adolescence and into adulthood, or experience bullying²⁶. Children in OOHC should be provided with the opportunity to live their lives privately.

Given this recent Court of Appeal decision and its implications for the privacy, safety and welfare of children and young people in OOHC, consideration is being given to broadening the protection provided to children under section 105 to explicitly prohibit publishing information identifying a child or young person as being under the parental responsibility of the Minister or in OOHC.

Q 3.4

46. Should the Care Act be amended to explicitly prohibit the publication of information identifying a child or young person as being under the parental responsibility of the Minister or in OOHC? If so, why?

3.5 Care responsibility for children of guardians who have passed away

Where a child is subject to an order of the Children's Court allocating parental responsibility by guardianship order, and the guardian subsequently passes away, then such order ceases upon the death of the guardian. In these circumstances, parental responsibility for the child will revert by common law to the child's parents. Depending on the circumstances, this may place the child at risk as the finding of the Court that there is no realistic possibility of restoration of the child to his or her parents has not been rescinded. There has been no assessment of the parents' ability to exercise parental responsibility for their child.

If the order allocates parental responsibility jointly to two guardians, then the surviving guardian will hold sole parental responsibility.

Similar principles apply where a person has been allocated all aspects of parental responsibility under section 79(1)(f), and that person passes away.

²⁵ *Secretary, Department of Family and Community Services v Smith* [2017] NSWCA 206

²⁶ See *Secretary, Department of Family and Community Services v Smith* [2017] NSW 6 at 49 for social science research findings.

Consideration is being given to ensuring that, on the death of a guardian or person allocated all aspects of parental responsibility, care responsibility vests in the Secretary while assessments are carried out to determine the most suitable care arrangements for the child.

Q 3.5

47. Should care responsibility for a child vest in the Secretary on the death of a guardian/s, or the death of a carer who has been allocated all aspects of parental responsibility? If not, what other legal arrangements might be in the best interests of a child whose guardian or carer has passed away?
48. If so, should there be a time limit placed on the Secretary to undertake those assessments?

Complete list of discussion questions

1. What does the concept of “restoration” mean?
2. How could the Care Act be amended to better reflect the breadth of family systems and structures within our community?
3. If the Care Act was amended to better reflect the breadth of family systems and structures within our community what additional safeguards should be required to ensure children and young people are protected?
4. Should there be mandated timeframes for responses to ROSH reports by FACS or other agencies? If so, why? If not, why not?
5. What would you consider to be an appropriate timeframe for assessments to be conducted, a case plan to be developed and appropriate support services to be put in place to keep the family together?
6. What benefits and risks for families may arise from mandating response timeframes?
7. What are your views about strengthening the obligation for FACS to always consider the use of ADR where there are child protection concerns?
8. Does the Care Act provide enough clarity in relation to the use of ADR at various stages of the child protection process? If not, how could it be improved?
9. What measures could be implemented to improve support for participants in the FGC process?
10. In what circumstances do you consider the use of ADR is appropriate or inappropriate?
11. What is considered to be sufficient prior alternative action before taking action to remove a child from their family?
12. How can FACS more effectively access the capabilities of other government agencies and funded NGOs to provide services to vulnerable children and families?
13. Are the current ‘best endeavours’ provisions adequate to ensure timely service provision for vulnerable children and families?
14. What changes could be made to the ‘best endeavours’ provisions to align with a whole of government approach to service delivery to vulnerable children and families?
15. Should ‘children’s services’ be limited to education and care services for the purposes of mandatory reporting, or should the term have broader application?
If so, why? If not, why not?
16. What additional ‘children’s services’ should be captured for the purposes of mandatory reporting?

17. Should mandatory reporters be exempted from making a traditional report to the Child Protection Helpline where supports are in place to mitigate child protection risks? If so, what additional safeguards should be in place?
18. Should the Care Act contain a specific provision enabling the Children's Court to make guardianship orders by consent? If not, why not? If so, what safeguards should be put in place?
19. Should all parties to care proceedings be able to apply for interim orders to be varied without making an application under section 90 of the Care Act? If so, why?
20. In what ways would STCOs better support realisation of permanency outcomes for children and young people? If not, why not?
21. Will permanency outcomes be improved through greater use of STCOs? If not, why not?
22. Should the Care Act contain an explicit provision enabling the Children's Court to make STCOs as a final order i.e. orders allocating parental responsibility to the Minister for FACS for shorter periods?
23. If yes, should they be defined differently based on permanency case plan goal (restoration, guardianship, open adoption)?
24. What might be an appropriate upper time limit for a STCO?
25. What would be appropriate matters for the Children's Court to take into account when making a STCO on the basis that there is a future possibility of restoration e.g. parents demonstrate commitment to undergo counselling / therapy to address concerns that led to the removal of their children?
26. Does the test of 'realistic possibility of restoration' need to be amended? If so, how? If not, why not?
27. What should the role of the Children's Court be if it is not satisfied that proper arrangements have been made for the care and protection of a child or young person?
28. Should the Children's Court be given the ability to relist matters following receipt of a section 82 report where it forms the view that proper arrangements have not been made for the care and protection of the child or young person? In what circumstances should the Children's Court be given this power? If not, why not?
29. If a matter has been relisted by the Court, what subsequent powers should the Court be given?
30. Should the Court be able to request further evidence from a party about its efforts to implement the care plan and its progress towards achieving a permanent placement, including reasons for delay in achieving these goals?
31. What alternatives are available to overcome issues of contact supervision where an allocation of parental responsibility by guardianship order is being sought?
32. How could the current contact order provisions be enhanced to better support guardianship?

33. Should the Children's Court be empowered to make contact orders for the life of a guardianship order?
34. In what circumstances do you think that section 90 applications should be limited?
35. Are there any circumstances where an exception might need to apply?
36. Should NGOs be able to bring an application for a guardianship order without the written consent of FACS? If not, why not? What other risks might arise from this change?
37. Should the Children's Court be conferred jurisdiction to make adoption orders where there are child protection concerns? If so, why? If not, why not?
38. Should the Adoption Act be amended to provide additional grounds for dispensing with parental consent? If so, what are the grounds upon which dispensing with a parent's consent could be considered? If not, why not? Should a parent's right to be advised of an adoption be limited? If so, how? If not, why not?
39. Should a parent's right to be advised of an adoption be limited? If so, how? If not, why not?
40. What is an appropriate period of time to wait for a parent to be located?
41. Should the Adoption Act specify the grounds birth parents can rely on when contesting the adoption of a child under the parental responsibility of the Minister or a guardianship order? If yes, what should these grounds be? If not, why not?
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44. What would parents have to demonstrate to FACS before having their child/ren restored to them prior to the expiration of an order allocating parental responsibility to the Minister?
45. Should the Care Act be amended to remove supported care arrangements where there is no court order in place?
46. Should the Care Act be amended to explicitly prohibit the publication of information identifying a child or young person as being under the parental responsibility of the Minister or in OOHC? If so, why?
47. Should care responsibility for a child vest in the Secretary on the death of a guardian/s, or the death of a carer who has been allocated all aspects of parental responsibility? If not, what other legal arrangements might be in the best interests of a child whose guardian or carer has passed away?
48. If so, should there be a time limit placed on the Secretary to undertake those assessments?





