Shaping a Better Child Protection System: Discussion Paper

Legal Aid NSW submission to the Department of Family and Community Services

November 2017

323 CASTLEREAGH ST

HAYMARKET NSW 2000 / DX 5 SYDNEY

Legal Aid NEW SOUTH WALES

Table of Contents

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 29 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Family Law Division provides information, advice, minor assistance, and representation services in care and protection matters, adoption and NSW Civil and Administrative matters as well as family law.

The Legal Aid NSW Family Dispute Resolution Service also organises Family Dispute Resolution conferences for family law matters, and mediations for some care and adoption matters.

If you have any questions in response to this submission, please contact:

Nicola Callander
Solicitor in Charge
Care and Protection
Family Law Division
Ph: (02) 4908 6117
E: nicola.callander@legalaid.nsw.gov.au

Louise Pounder
Manager, Strategic Law Reform Unit
Policy, Planning and Programs
Ph: (02) 9219 5063
E: louise.pounder@legalaid.nsw.gov.au

Earlier family preservation and restoration

Permanent Placement Principles – the concept of restoration

Q1. What does the concept of restoration mean?

Q2. How could the Care Act be amended to better reflect the breadth of family systems and structures within our community?

Q3. 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?

Restoration means the physical placement of a child or young person with his or her parent(s). We note that "parent" is defined under the *Children and Young Persons (Care and Protection) Act 1998* ("**Care Act**") to mean "a person having parental responsibility for the child or young person" and so potentially encompasses a range of persons other than biological parents. However we consider that the language of realistic possibility of restoration to parent/s appropriately retains that relationship as the primary focus. Broadening the concept of restoration would reduce the importance of the parents' role, and place parents on an equal footing with other family or kin.

Legal Aid NSW is also of the view that the Care Act reflects the breadth of family systems and structures within our community. Section 10A of the Care Act provides that a child's primary placement should be with a parent, and if that is not practicable or in the best interests of the child, then under a guardianship order with a relative, kin or other suitable person. Relative and kin are broadly defined in the Act as follows:

> **"relative"** of a child or young person means any of the following:
>
> (a) a parent, step-parent, or spouse of a parent or step-parent, of the child or young person,
>
> (b) a grandparent, brother, sister, step-brother, step-sister, cousin, niece or nephew, uncle or aunt (whether by blood, marriage, affinity or adoption) of the child or young person,
>
> (c) a person who has parental responsibility for the child or young person (not being the Minister, the Secretary or a person who has parental responsibility other than in his or her personal capacity),
>
> (d) a person who has care responsibility for the child or young person under the *Adoption Act 2000* (not being the Minister, the Secretary or a person who has care responsibility other than in his or her personal capacity),
>
> (e) in the case of a child or young person who is an Aboriginal or Torres Strait Islander--a person who is part of the extended family or kin of the child or young person.

> **kin** of a child or young person means a person who shares a cultural, tribal or community connection with the child or young person that is recognisable by the child or young person's family.

However if government considers that an amendment is necessary, section 83 could be amended to expressly require consideration of placement with family and kin once the Court had determined there is no realistic possibility of restoration to parents. This is in effect what currently happens and would enshrine the section 10A principles by requiring the Court to actively consider extended family, kin or other suitable persons. Legal Aid NSW would see an amendment of this kind as consistent with the FACS Family Finding model,[1] and may increase the emphasis on the importance of this aspect of casework to outcomes for children. For example, section 83(3) could be amended to provide that where the Secretary assesses that there is no realistic possibility of restoration of a child or young person to their parents, the Secretary must prepare a permanency plan either:

- recommending placement with a relative, member of kin or community or other suitable person(s), or
- indicating that there is no suitable person,

and submit that plan to the Children's Court for consideration.

The following kind of information could also be required in all care plans and not just cultural care plans:

- details of all known family and kin
- all enquiries made of members of family and kin about options for the long term placement of the child or young person
- details of the child or young person's community
- all enquiries made of the community about options for the long term placement of the child or young person
- all enquiries made of other persons significant to the child or young person about long term placement options for the child or young person (school teacher, soccer coach, foster parents of siblings, GP)
- details of all assessments undertaken, and
- outcomes of all assessments undertaken.

In our view, this would be in keeping with an increased focus on placing children with extended family and kin, and would help ensure that all necessary enquiries and assessments have been made in casework.

In response to Question 3, Legal Aid NSW notes the following safeguards already provided for in the Care Act:

[1] Family and Community Services, 'Family trees to provide home for kids in care' https://www.facs.nsw.gov.au/about_us/news/family-trees-to-provide-home-for-kids-in-care accessed 29 November 2017

- assessments through the Children's Court Clinic
- the supervision of a placement
- undertakings by carers
- the Minister to share parental responsibility, and
- the making of consecutive orders, so that parental responsibility can vest at a later date.

We also suggest that consideration be given to amending section 82 so that more than one report can be provided (report on suitability of arrangements concerning parental responsibility). Section 82 reports are also discussed in our response to Questions 27 and 28 below.

Response timeframes

Q4. Should there be mandated timeframes for responses to ROSH reports by FACS or other agencies? If so, why? If not, why not?

Q5. 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?

Q6.What benefits and risks for families may arise from mandating response timeframes?

Legal Aid NSW would support mandated timeframes for responses to risk of significant harm reports. We would be interested to know whether there are currently any response timeframes set out in policies or guidelines, whether these are being met, and if not, the reasons behind non-compliance.

The likely benefit of mandated timeframes would be that child protection concerns would be assessed and responded to in a timely manner, and potentially earlier than is currently the case.

One possible risk of introducing mandated timeframes may be a lowering in the quality of the response provided. This risk could be mitigated by clear casework guidelines which, for example, allow draft reports to be lodged which require further information but which maintain urgency and priority when children are considered to be at risk of significant harm. There could also be provision for independent monitoring of the quality of response.

Actions taken before court proceedings

Q7. What are your views about strengthening the obligation for FACS to always consider the use of ADR where there are child protection concerns?

As a general principle, Legal Aid NSW would support strengthening the obligation to consider the use of ADR. For example, if FACS filed proceedings without having attempted ADR first, FACS could be required to give an explanation as to why ADR has not been attempted. This would be similar to the requirement to file a certificate under section 60I of the *Family Law Act 1975* (Cth) ("**Family Law Act**") before commencing family law proceedings, or an affidavit regarding the non-filing of the section 60I certificate. We are concerned that efforts are not being made to arrange Family Group Conferences (**FGC**) until after Children's Court proceedings have commenced.

If amendments are made to strengthen this obligation, it would be important to ensure that ADR is being implemented in an effective and appropriate way, which meets the needs of children and their families. In this regard, we note that the evaluation of FGC in NSW that is cited in the Discussion Paper was conducted at a time when FGC was a pilot and the sample size was quite small. Given that five years have elapsed, and FGC has been rolled out more broadly, we would be interested to know whether another evaluation has been conducted or planned. Some of the concerns that we have observed in relation to the use of FGC include:

- Inconsistent quality and independence of facilitators: We would like to see an improvement in the overall skills and experience of FGC facilitators. A high standard and depth of experience is imperative in order to properly address power imbalances and safety issues. In our view, using facilitators who are Family Dispute Resolution (**FDR**) Practitioners would be the best course, given their training and experience dealing with vulnerable families, and situations of violence and conflict.
- Role and attitude of some child protection staff: We are aware that some FACS staff come to the FGC process with a fixed idea of what families must do, instead of allowing families to develop an appropriate family plan that meets identified concerns.
- Clarity around the purpose of FGC: The Discussion Paper states that FGC "assists caseworkers to more clearly identify what the case plan goals are **concerning permanency**" (emphasis added). However our understanding of FGC's purpose is to develop a plan to address immediate child protection concerns (as well as process-oriented goals around relationship-strengthening and empowerment of families). There needs to be clear agreement and guidelines around the purpose of the forum.
- Clear information for families: Through the FGC process, a family should have a clear understanding about what the concerns are, what issues need to be

addressed and the timeframes for doing so, how those concerns will be addressed, and what will happen if concerns are not addressed within timeframes.

- Identify future placement options: The FGC should also identify who else in the family might be able to care for the child if the child cannot remain with his or her birth parents. It would help achieve this outcome if caseworkers were required to provide a brief summary of concerns to the family prior to the FGC, so the family has a clear idea what they need to focus on and what concerns the plan needs to address. We also suggest that Family Finding could commence at this stage.

- Assistance for families: We suggest the FGC process would be improved by an obligation on FACS to consider, at this stage, what agencies or services may be able to assist families to address identified issues, and to request such services. We are aware that section 17 of the Care Act provides that FACS may request services from other agencies, and that section 34 requires FACS to take whatever action is necessary to safeguard or promote the safety, welfare and well-being of the child or young person, including requesting support services for the family. However, we see potential benefit in a more targeted, mandatory obligation to consider and request relevant services at the FGC stage. This issue would also be addressed by a model of interagency cooperation and commitment around child protection, as discussed below. Otherwise, we are concerned that the FGC process expects a family to change or address issues with existing resources, which is usually unrealistic.

- Independent advice for participants: There should be a greater emphasis on parties getting legal advice before, during or after FGC. Arrangements or agreements made by families early in the process are likely to have long term impacts on any future agreements made, in addition to setting the tone of the relationship the family has with FACS. As a minimum standard, consideration should be given to a mandatory requirement for families to have independent legal advice prior to signing any plan or agreement. This is particularly important in matters involving both child protection and family law issues.

- Declining to participate in a FGC: It should be clear that no adverse inferences can or should be drawn from a parent or family's decision not to participate in a FGC.

Q.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?

In our view, the Care Act could provide greater clarity in relation to the use of ADR at various stages of the child protection process. We suggest that it should be mandatory to consider ADR under section 37. In our view, the wording of section 37 is very general and high level in nature. It refers to the purposes for which ADR processes are designed, rather than providing structure and guidance around the use of those processes.

We consider that it might be useful to have some legislative guidance around the scope, role and purpose of FGC. In our view, FGC can be a very effective early intervention tool and should be used in all cases where the circumstances allow. However, as noted above, we consider it important for parents and primary care givers to have access to an independent source of information and legal advice, and this should be mandatory before parties sign plans and agreements.

Once the Secretary has formed a view that children are in need of care and protection and that removal may be imminent, Legal Aid NSW considers that a legally assisted model of ADR should be employed. This is certainly the case once an application for a care order has been filed, at which time children and young people should also be legally represented in ADR.

We also note that section 65A of the Care Act, which gives the Children's Court the power to order that the parties to a care application participate in an ADR process, is not currently used. Children's Court Practice Note No. 3 requires the consent of the President for parties to attend ADR pursuant to section 65A, as opposed to a dispute resolution conference with a Children's Registrar pursuant to section 65.[2] Legal Aid NSW suggests that the consent of the President should no longer be a requirement, and that this avenue of ADR be utilised more often.

Legal Aid NSW FDR Practitioners conduct mediations in the District Court and in adoption matters in the Supreme Court, in addition to Family Dispute Resolution conferences in the family law courts. Legal Aid NSW also manages and conducts all ADR for contact disputes post-final care orders. In 2016/2017, the Legal Aid FDR Service conducted 2,801 conferences across the family law and care and protection jurisdictions. Legal Aid FDR practitioners have a wealth of experience dealing with families in trauma, high levels of conflict, matters involving domestic violence and physical and psychological injuries to children, including sexual assault.

We are of the view that there may be occasions when it is culturally more appropriate to conduct ADR other than in a Court room setting, where dispute resolution conferences take place, and that ADR pursuant to section 65A may be preferable. Our ADR services for Aboriginal families has highlighted the strengths of this approach.

Q9. What measures could be implemented to improve support for participants in the FGC process?

Please see our response to Question 7, above.

[2] Children's Court Practice Note No. 3: Alternative Dispute Resolution Procedures in the Children's Court, Clause 17.1, available at: http://www.childrenscourt.justice.nsw.gov.au/Documents/pn3adr.pdf

Q10. In what circumstances do you consider the use of ADR is appropriate or inappropriate?

We consider ADR to be appropriate for a range of situations and circumstances. We discuss below some areas where we see greater scope for the use of ADR.

Contact

Contact is complex and requires clear understanding about expectations and the co-operation of parties. It can sometimes involve obtaining or clarifying expert advice, and can require co-operation and information sharing by both FACS and an NGO, and can involve external service providers. At present, Legal Aid NSW only conducts mediations where there has been a breakdown in contact arrangements after final orders have been made. We see more scope for negotiating contact arrangements through ADR, on both an interim and final basis.

We are concerned that there is not sufficient focus in care and protection matters on sibling contact and a child's contact with extended family. This can involve the same complexities. ADR can provide a means of bringing parties together to work out contact arrangements and in many cases, is better able to manage this aspect of the care arrangements for a child than a court.

Teenagers in Out of Home Care (OOHC) who self-place

ADR could also provide a means of negotiating care arrangements for a child or young person who has self-placed with a parent or significant other, where concerns remain about their welfare. It could, for example, provide a forum for a range of people, including the child/young person, his or her extended family, and FACS to openly discuss and make arrangements about safety mechanisms for the child/young person, the medical and education needs of the child/young person, and financial support and payments.

Serious and persistent conflict

Legal Aid NSW also sees more scope for ADR to be used when there is serious or persistent conflict between parents and a child or young person, and there is a request for assistance to FACS pursuant to section 113 of the Care Act. We note that the Care Act provides for ADR at section 114. We suggest reviewing the use of ADR at this stage, as it could provide a means of improving outcomes for families where there is persistent conflict. We again highlight the breadth of experience of FDR Practitioners in dealing with families in conflict.

As a general comment, Legal Aid NSW recommends for consideration the paper written by Anthony Vassallo during his time as a Children's Court Registrar, in which he

considered the benefits and limitations of ADR in the child protection sphere including specifically commenting on mediation with Aboriginal families.[3]

Two positive examples of ADR in child protection proceedings are set out below.

Case Study: Mrs Johnson and Kai

Legal Aid NSW acted as the Independent Legal Representative (ILR) for a child, Kai, in an appeal to the District Court by his paternal grandmother, Mrs Johnson, against orders placing Kai in long term OOHC with parental responsibility to the Minister until Kai turned 18 years. Kai had been placed in foster care with his older half-brothers (on his mother's side), despite Mrs Johnson being assessed as suitable. Legal Aid NSW supported Kai staying in OOHC as the sibling relationship (and cultural considerations) made it a better long term option. The judge hearing the appeal requested that Legal Aid NSW arrange a DRC. The appeal was adjourned for this to occur and the conference was held at the Children's Court.

The conference was attended by Mrs Johnson and the carers of the children. The discussion was emotional and frank, and the warmth and generosity of the foster carers convinced Mrs Johnson to abandon the appeal and instead enjoy regular and liberal contact with her grandson. A recent section 82 report has confirmed that the care arrangements are going well and the relationship between the foster carers and Mrs Johnson, created at the conference and built upon since, is strong. They communicate directly and arrange liberal contact informally, in addition to the regular contact set out in the Care Plan.

Case Study: Kevin and June

Legal Aid NSW appeared as ILR in the Children's Court for two siblings, Kevin and June. The children were removed from their mother, Eve, after intensive supports and a period in supported accommodation did not sufficiently address Eve's significant parenting issues. The children were placed with a maternal aunt and uncle, but it was proposed that parental responsibility remain with the Minister long term.

Eve opposed this arrangement and sought that parental responsibility be allocated directly to her sister. At the very least Eve wished for parental responsibility for contact to be allocated to her sister.

[3]Anthony Vassallo, Mediation in Care Matters – an Review of the Outcome Literature, available at:

http://www.childrenscourt.justice.nsw.gov.au/Documents/2011%20clnv%20mediationincarematters.pdf

Legal Aid NSW held a dispute resolution conference and the aunt and uncle attended, supported by a solicitor. At the conference, with the assistance of their solicitor and the Registrar, the aunt communicated to her sister, Eve, that for the time being they did want FACS to remain involved. They did not want decision making responsibility and were happy to accept the support from caseworkers. The matter settled that day. In Legal Aid NSW's view, the conversation, and Eve's ultimate concession, was only possible because of the conference.

Q11. What is considered to be sufficient prior alternative action before taking action to remove a child from their family?

We would be hesitant to prescribe what constitutes sufficient prior alternative action before initiating the removal of a child from their family. What is sufficient will depend on the circumstances of each case, such as the gravity of the concerns, the urgency of the matter, the age of the child, whether FACS are able to monitor the situation and the supports available to the child and the family.

In our response to question 7 we outlined some suggestions about how FGC could be improved. We consider that some of the matters raised in that section equally apply to considerations about prior alternative action. Legal Aid NSW suggests the following requirements:

- Clear communication to families about child protection concerns: A family should where practical have been warned about the options being considered by FACS. Parents should have a clear understanding about what the concerns are, what issues need to be addressed and the timeframes for doing so, how those concerns will be addressed, and what will happen if concerns are not addressed within timeframes.
- Identification of future placement options: FACS should have made meaningful attempts to identify who else in the family might be able to care for the child if the child cannot remain with his or her birth parents. Our lawyers often see cases where FACS has had a number of notifications about a child, but do not assess or consider family placements. This means that the children must go into OOHC while family are assessed. The classic and common example is removal from a mother at birth, when FACS have had the opportunity to do assessments up to the birth and when the mother is in hospital. Legal Aid NSW submits that, when there is a suitable person with whom a child or young person could be placed, that assessment should commence as a case work priority so that parallel planning can be undertaken in the event that a child or young person cannot be restored to their parents. There should be a greater emphasis on Family Finding prior to removal.
- Assistance for families: An obligation should be imposed on FACS to consider, at this stage, what agencies or services may be able to assist families to address

identified issues, and to request such services. We are aware that section 17 provides that FACS may request services from other agencies, and that section 34 requires FACS to take whatever action is necessary to safeguard or promote the safety, welfare and well-being of the child or young person, including requesting support services for the family. However, we see potential benefit in a more targeted, mandatory obligation to consider and request relevant services prior to removal.

- Independent advice for participants: Arrangements or agreements made by families early in the process are likely to have long term impacts on any future agreements made, in addition to setting the tone of the relationship the family has with FACS. As a minimum standard, consideration should be given to a mandatory requirement for families to have independent legal advice prior to removal. This is particularly important in matters involving both child protection and family law issues.

Our lawyers have observed other instances where the prior alternative action is clearly not sufficient, and it may be helpful to provide some guidance in the legislation about alternatives that should be considered. This could include:

- Family group conferences, with the added obligations of Family Finding and identification of government agencies and/or services who can offer support
- Parental Responsibility Contracts (PRC)
- Parent Capacity Orders (PCO).

Legal Aid NSW assisted FACS with the re-drafting of the PRCs to ensure agency support was identified, and agencies had signed up to offer particular services. This was to be confirmed by way of a letter to the agency in order to create obligations on both parents and the agencies undertaking to support them. Legal Aid NSW considers that a model of this kind should be adopted from first contact with families and prior to, or part of, any ADR with families, including FGC.

Case Study NSW: Annie

Legal Aid NSW acted as an ILR for Annie, aged three months, who was removed from her 17 year old mother Emma, and placed in OOHC. At the time of the removal, Emma was in a Red Cross program and was breastfeeding.

Annie's maternal grandparents informed FACS that they wanted to be assessed to care for Annie, and filed an application to be assessed as kinship carers and supervisors of the mother's contact the following month.

A Children's Court Clinic report was filed two months later, recommending restoration to Emma, provided that she continued to live with her mother (the maternal

grandmother) for a period of two years. The Clinic report did not raise any concerns in relation to the grandmother.

A Care Plan was filed a further three months later, recommending that Annie be placed in OOHC under the parental responsibility of the Minister until 18 years of age, with contact for the mother and maternal grandmother twice a year. The OOHC provider noted at the back of the Care Plan that, in the event the child was not placed with family, they would look at adoption.

After concerns were raised by Legal Aid NSW and the Children's Court about that Care Plan, FACS undertook an assessment of the maternal grandparents, who were subsequently approved as long term carers for the baby. On the first day of the hearing, and after lengthy negotiations, FACS agreed to look at restoration and place the child in the care of her maternal grandmother while Emma engaged with services.

Legal Aid NSW considers that, if further prior alternative action had been taken to assess the maternal grandparents and work with the family prior to Annie's birth, it may have been possible to avoid Annie being removed or proceedings being commenced.

Service provision

Q12. How can FACS more effectively access the capabilities of other government agencies and funded NGOs to provide services to vulnerable children and families?

Q13. Are the current 'best endeavours' provisions adequate to ensure timely service provision for vulnerable children and families?

Q14. 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?

Legal Aid NSW considers that sections 17 and 18 of the Care Act are limited, and do not ensure timely service provision, nor reflect a whole of government approach to service delivery to vulnerable children and families. We acknowledge that they provide FACS with limited ability to secure appropriate service provision to families where there are child protection concerns. From our experience in care litigation, the issue of service provision to families is also somewhat opaque: that is, it is not always clear, in material filed in proceedings, which government organisations are supposed to be providing services, what services are being provided, who is paying for the services, how the parents know about the services, or what support they are receiving to engage with services, either before or post filing.

We agree that these provisions in the Act could be strengthened. More importantly, they could also be supported by a policy and service delivery framework focused on ensuring targeted and integrated support to vulnerable children and families by relevant agencies.

We see merit in the Safety Action Meeting model that is used for victims of domestic violence deemed to be at 'serious threat' under the NSW Government's *Safer Pathway Program*. Safety Action Meetings are chaired by a senior police officer with the following agency government members: NSW Police Force, NSW Health, FACS (housing and child protection), the Department of Education, and Corrective Services NSW. Non-government members are decided locally by the chair and the Local Coordination Point. Representatives from each agency or service must have the authority to make decisions at the table. The meetings focus on what agencies and services can do to protect the victim, not what the victim must do. The agency or service working most closely with a victim will communicate with the victim about the Safety Action Meeting, and bring their concerns and wishes to the table. Members are required to jointly develop a Safety Action Plan, which is a list of actions aimed at reducing the threat to a victim's safety.

Safety Action Meetings would be a useful model to consider adapting for vulnerable children and families. In our view, there would be considerable benefit in having a similar forum with relevant service providers at the table to share information and commit to actions where there are child protection concerns. It would provide a better model for whole of government service delivery than the current "request for assistance" and "best endeavours" framework that is enshrined in the Care Act. It would also be a means of clarifying expectations around service delivery, and increasing accountability.

Child protection conferences in England provide another example of a model that facilitates whole of government service delivery in child protection. Child protection conferences are called when the Local Authority has investigated concerns about child abuse and they believe the child is suffering, or likely to suffer, significant harm. Child protection conferences will often include a range of human service agencies and/or services, such as health services (including adult and child mental health services), housing services, alcohol and substance misuse services, and domestic violence services. Their purpose is to: bring together and analyse information about the child and the parent's capacity in an interagency setting; make judgements about whether the child is suffering or likely to suffer significant harm; and decide what decide what future action is required in order to safeguard and promote the welfare of the child.[4]

Legal Aid NSW considers that any such conference should occur prior to any court proceeding with the objective of keeping children out of the child protection system. The conference would have real potential as an early intervention tool that could form part of the suite of actions to be used under section 34 of the Care Act. It could be held in conjunction with other processes, such as a FGC. Another option would be to hold the conference or meeting when a PRC is negotiated or a PCO is made to compel parent/s to

[4] HM Government *Working together to safeguard children. A guide to inter-agency working to safeguard and promote the welfare of children* (2015) 43

undertake certain things prior to filing for a care order. This would create obligations on service providers to support parents in their endeavours, and provide a forum for monitoring and reviewing a family's progress and circumstances. Legal Aid NSW would be pleased to discuss this proposal further with FACS and to explore whether and how such a model could achieve whole of government service delivery to these vulnerable children and families.

Legal Aid NSW is aware of a program on the Central Coast called "Supporting Students Supporting Families" which brings FACS, the Department of Education and the NSW Police Force together to discuss children who are at risk. This is another model that could potentially be considered and built upon.

Definition of children's services

Q15. 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?

Q16. What additional 'children's services' should be captured for the purposes of mandatory reporting?

Legal Aid NSW agrees that this ambiguity should be addressed. In the interests of consistency, we agree it would be sensible to adopt a definition of children's services based on the definition in the *Children (Education and Care Services) National Law* and the *Children (Education and Care Services) Supplementary Provisions Act 2011*. On the basis of the available information, we do not see a reason to broaden the definition or the mandatory reporting obligation to other services to children, such as private tutoring and coaching services.

Alternative pathways for mandatory reporters to make reports to FACS

Q17. 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?

Legal Aid NSW is concerned about the proposed exemption from traditional reporting for mandatory reporters who are working intensively with families following a referral from FACS. The Discussion Paper states that where those mandatory reporters "have assessed that the supports they are providing are sufficient to mitigate the child protection risks in a family ... 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" (p20).

In our view, this would create a risk that fresh incidents of risk or fresh concerns may not be reported to FACS. It would potentially create a parallel system of risk assessment and

reporting, which vulnerable children and families may fall through. We consider that only FACS should determine what constitutes a risk of significant harm, and that this should not be at the discretion of a service provider, who may have different training and interests. For instance, a service provider may be reluctant to make a call to the Helpline in relation to a family they are working with, as it may imply that their services or supports are not adequate. Determining whether to make a call to the Helpline or send a streamlined report is also likely to be difficult for some service providers who may be in a therapeutic relationship with the parents or children. If reports are not called in, it may also be difficult for FACS to build a case, as it will not have the same access to information as under current arrangements.

If an alternative pathway is established, Legal Aid NSW submits that it would be critical to ensure a system of oversight of reports being made via that pathway and a system for cross checking. However, our primary position is that decisions about risk and intervention should remain with FACS.

Streamlining court processes

Registered Care Plans and Guardianship Orders

Q18. 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?

A guardianship order, like an adoption order, is a long term legal arrangement that can provide a permanent outcome for a child or young person. Legal Aid NSW respectfully submits that the emphasis should be on doing it well, not doing it quickly.

Legal Aid NSW understands that what is being proposed is something similar to section 38(2) of the Care Act, in that if parties agree to a guardianship order, the Children's Court could make the order without a care or section 90 application, and without the need to make a finding that there is no realistic possibility of restoration.

It is not clear whether the proposal would mean that the suitability requirements remain the same, or whether the court would ensure strict compliance with the legislation and that orders must be in the best interests of children. However we understand from the FACS roundtable consultation with legal stakeholders that these aspects of a guardianship order would not change.

Legal Aid NSW would not support this proposal. In the absence of a formal application, we are concerned that parents may not be located, consulted, served and afforded an opportunity to participate or object to such orders being made. There may also be issues around consultation with family members and siblings about contact. We also query whether the proposal could mean that orders are made in the absence of the child's lawyer, given that the regulations allow for an officer of a delegated agency to witness a

child's consent to a guardianship order.[5] This would raise concerns about children's wishes being obtained and their participation in the process.

If the proposed change is made to the Care Act, it is imperative that these concerns are addressed in order to ensure that the court can be satisfied that the guardianship order is the most appropriate order and that all parties are afforded procedural fairness.

We note that there is already provision for orders to be made by consent following an application being filed with the court. We therefore query the need for this change. The change appears to be driven, in part, by a desire for a quicker process. However, we question this rationale.

We also see little detriment to the subject child if the process of obtaining a guardianship order takes a little longer, as the child has in most cases already been placed with their proposed guardian (and has likely been there for some time). It is important that procedural fairness is afforded to all parties and that they have had the benefit of independent legal advice. To date, the use of section 38(2) Care Plans is rare and we have doubts about whether there would be an increase in uptake if guardianship applications were able to be dealt with the same way.

In circumstances where families are able to negotiate arrangements about where and with whom children live, and contact arrangements for children, the Family Court provides an alternative avenue for the making of parenting orders. This might provide a more appropriate option than a guardianship order under child protection legislation in some circumstances. Orders made by the Children's Court are already registered in the Family Court, in some cases with the requisite consent under section 69ZK of the *Family Law Act 1975* (Cth), for example if the child is moving interstate.

Court's ability to vary interim orders

Q19. 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?

Yes, Legal Aid NSW would support amendments that enable all parties to apply for the variation of interim orders, without making an application under section 90 of the Care Act. The case law cited in the Discussion Paper highlights that the current situation is unclear.[6] Some Magistrates will require a section 90 application, which creates additional hurdles for parents, can prolong the proceedings and cause misunderstanding and unnecessary distress.

[5] See Children and Young Persons (Care and Protection) Regulation 2012, cl 23B(2)(a)
[6] *Re Timothy* [2010] NSWSC 254 and *Re Mary* [2014] NSWChC 7.

Case Study: Edward

Legal Aid NSW acted for a father, Edward, in circumstances where his baby was removed from the care of the mother and placed with him. Initially an interim order was made granting sole parental responsibility for the baby to the Minister. The child was found to be in need of care and protection, with no criticism of Edward. At that time, Legal Aid NSW made an oral application seeking a change in the interim order for parental responsibility in favour of the Edward. All parties were put on notice that this application was to be made.

Following submissions, the Children's Court indicated that a formal application would be required if the father wanted to change the interim order. Instructions were obtained to file an order, but during the proceedings those instructions changed. Ultimately a final order was made allocating Edward sole parental responsibility with a period of supervision, with the child remaining in his care.

In terms of the form of the application, we would suggest that the Care Act require a written application supported by evidence, with a discretion to hear and act on an oral application if that is in the child or young person's best interests.

Shorter term court orders

Q.20. In what ways would STCOs better support realisation of permanency outcomes for children and young people? If not, why not?

Q21. Will permanency outcomes be improved through greater use of STCOs? If not, why not?

Q22. 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?

Q23. If yes, should they be defined differently based on permanency case plan goal (restoration, guardianship, open adoption)?

Q24. What might be an appropriate upper time limit for a STCO?

Q25. 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?

Q26. Does the test of 'realistic possibility of restoration' need to be amended? If so, how? If not, why not?

Legal Aid NSW has concerns about a shift to shorter-term care orders (**STCO**) which will require children to be placed in short-term placements. When children are placed in short-

term placements, there is an increased risk that those children will experience multiple placements and greater instability as they await a permanent outcome.

The Australian Institute of Family Studies, in their recent resource sheet, *Children in Care* (October 2017) summarise the research relating to the outcomes for children who experience placement instability:

Studies have found that continued instability is associated with poor educational, employment, social and psychological outcomes, as well as behavioural and emotional problems. Experiencing multiple placements can also influence a young person's capacity to develop and maintain relationships.[7]

One of the founding principles of the 2014 reforms was creating permanency for children by making final orders in timeframes that worked for children. This represented a move away from children being in short term placements, effectively waiting for parents to address deficits in their parenting. The reforms recognised that many children suffered trauma as a result of multiple placements.

Legal Aid NSW appreciates that the intention of the STCO proposal may be to encourage parents to work towards permanency within a determined timeframe, in order to give stability and long-term security to children as early as possible.

At present, we observe that FACS often seeks a finding of no realistic possibility of restoration, and for final orders to be made quickly. Many of our parent clients struggle with the short timeframes typically given to them to demonstrate progress in their parenting capacity after proceedings have commenced. Parents often experience a period of grief in the first six months following the removal of their child, and are unable to demonstrate adequate behaviour change in this period. We therefore agree that in some cases, a longer period, such as one to two years, might provide a more focused and appropriate timeframe in which parents and FACS can work together towards achieving restoration or another permanency outcome.

However in our view, a preferable means of achieving this would be for the Children's Court to adjourn matters for a longer period (say between six months and up to two years) when it sees potential for parents to work towards restoration and where some significant progress has already been made towards that goal. This would enable FACS and the parents to undertake relevant work to address the parents' capacity to safely care for the child, and then come back before the Court at a later date for further or final orders. This is akin to what would happen in the Family Court. We acknowledge there is a risk that this

[7] Citations omitted but are as follows: Johnson, G., Natalier, K., Liddiard, M., & Thoresen, S. H. (2011), *Out in the world with no-one: A qualitative study of the housing pathways of young people who have recently left state out-of-home care*. In Mendes, P., Johnson, G., & Moslehuddin, B. (Eds.) *Young people leaving state out-of-home care*, (pp. 116-139). North Melbourne: Australian Scholarly Publishing, and Australian Institute of Family Studies, Chapin Hall Center for Children University of Chicago, & NSW Department of Family and Community Services. (2015), *Pathways of Care Longitudinal Study: Outcomes of children and young people in Out-of-Home care in NSW. Wave 1 baseline statistical report*. Sydney: NSW. Department of Family and Community Services.

may be seen as affording parents time to address issues at the expense of stability and security for the child. However, we see potential for the Court's oversight to encourage active engagement by all parties, and to keep parties accountable. The fact that proceedings have been adjourned, and interim orders made, may also be more likely to get 'buy-in' from parents than if final orders were made. It would also avoid the need for the Court to make a determination that there is a realistic possibility of restoration on the basis that it is hoped or anticipated that a parent will achieve the goals set for them.

We also see challenges in making STCOs on the basis that there is a future possibility of restoration, and the likely changes to the concept of "realistic possibility of restoration" that such orders would necessitate. For example:

- The Care Act would need to define in some way 'how much' or 'how far' a parent needs to do to justify a STCO with the goal of restoration
- Caution would need to be exercised in any watering down of the tests, because if the threshold is too low, this may interfere with FACS' ability to apply for a further care order at the expiration of the STCO.

In order to work effectively, the basis on which longer adjournments are made would need to be made very clear, so that parents understand why the matter has been adjourned, and what they need to do in the adjournment period. The care plan recommending restoration would need to include expected actions and outcomes. It is likely that there would need to be an amended final care plan at the time that final orders are made. There could also be a requirement for a report similar to a section 82 report, updating the court on the progress of the parent(s).

As a general matter of supporting practice, we also recommend that FACS undertake parallel case planning for children in OOHC. At present, casework appears to be focused on one goal (eg restoration) and if that outcome does not eventuate, it is only then that a new goal is made and worked towards. This inevitably delays permanency outcomes for children.

In respect of the proposal that there be a STCO where guardianship or adoption is the case plan for a child, Legal Aid NSW does not support this proposal. We do not consider that the proposal provides a benefit to children or their carers. It will remain necessary for a separate application to be made for a guardianship or an adoption order at a future stage in the child's life. It will be difficult to properly estimate the required length of a care order at the time of the initial care proceedings. If circumstances change, or a greater period of time is required before that new application can be brought, the child and the family will be subject to additional unnecessary litigation to extend the STCO. There is also a risk that casework may be rushed as the expiration of a STCO nears, at the expense of the quality of that casework. There is also a risk that the knowledge that a child is only subject to a STCO will increase uncertainty and instability in the minds of children and their carers.

While it may be beneficial for there to be a clear timeframe in which the case plan goals of children are achieved, we suggest that this can be better achieved through casework practice rather than through STCOs.

Report on suitability of care arrangements

Q27. 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?

Q28. 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?

Q29. If a matter has been relisted by the Court, what subsequent powers should the Court be given?

Q30. 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?

Legal Aid proposes that if a section 82 report is not been provided to the court on the due date, there should be a rebuttable presumption that proper arrangements have not been made for the child and the matter should be relisted by the court.

We consider that the Children's Court should 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. This power should also be available to the court on receipt of a section 76 report (that is, a report on a period in which a child in need of care and protection is under the supervision of the Secretary).

If a matter has been relisted by the court, we agree that the court should 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.

We cannot see what other subsequent powers the court should be given once a matter has been relisted in these circumstances. However, consideration could be given to retaining the role of the children's lawyer until after such time as the section 82 has been received and in the event the court relists the matter. This would mean that in the event that the court was not satisfied in relation to the arrangements for the child, or the response of the parties to the court's concerns, a party[8] could be directed to file (or in the case of a

[8] See our comments in relation to the child as a party to proceedings under "Other Issues", at the end of submission.

direct legal representative,[9] seek instructions to file) an application under section 90 (variation or rescission of care orders).

We note that the regulations provide that a finding by the court that proper arrangements have not been made pursuant to section 82(3) is a factor that indicates a significant change in circumstance for the purposes of section 90(2) of the Care Act.[10]

Contact orders and guardianship

Q31. What alternatives are available to overcome issues of contact supervision where an allocation of parental responsibility by guardianship order is being sought?

Q32. How could the current contact order provisions be enhanced to better support guardianship?

Q33. Should the Children's Court be empowered to make contact orders for the life of a guardianship order?

In response to Questions 31 and 32, we would support removing the limitation on FACS' supervision of contact in guardianship.[11] Legal Aid NSW does not consider that FACS should necessarily take this role in all guardianship arrangements, but we do not think it is appropriate or helpful for the Care Act to preclude this possibility altogether. We assume there will be some instances where FACS may be willing to supervise contact for a period of time, and that this commitment may encourage some suitable persons to act as guardian, and bed down arrangements before the guardian assumes responsibility for contact.

Another practical measure to overcome issues of contact supervision in guardianship would be to incorporate into the Guardianship Financial Plan specific provision for the funding of supervised contact by a supervised contact service. Our solicitors have observed FACS do this in some matters, but not others.

We would also advocate for more government funding of supervised contact centres generally. The lack of available contact centres for long term contact arrangements is a significant problem (in family law matters as well) and may well present in the adoption context, with the increasing number or adoptions in NSW.

In response to Question 33, Legal Aid NSW would support the Children's Court having the power to make contact orders for a longer period than 12 months, including for the life of the guardianship order. This may not be appropriate in all cases, but we see merit in allowing the Children's Court flexibility and discretion in this area. In many guardianship matters the Court will be in a position to make orders for contact on a medium to long term

[9] A legal representative for a child who is required to act on the instructions of their client, see section 99A of the Care Act.
[10] *Children and Young Persons (Care and Protection) Regulation 2012*, cl 5.
[11] *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 86(2).

basis, and in these cases it should not be necessary for parties to come back before the Court in 12 months' time. Enabling more long-term contact orders to be made in guardianship matters would be consistent with the approach to contact arrangements that is generally taken in adoption matters and in family law proceedings. These are all scenarios in which long term orders are made setting out the care arrangements in relation to contact for children.

We are also concerned that there are other limitations arising from the making of a guardianship order that are not in the best interests of children. Guardianship orders cannot be accompanied by an ancillary or supporting order for the provision of support services to the child or young person under section 74 of the Care Act. Further, under 2017 Ministerial Guidelines, children subject to a guardianship order are ineligible for the provision of assistance after leaving OOHC under section 165.[12] While Legal Aid NSW supports the permanent placement of children with family, kin and other suitable persons subject to a guardianship order, we question whether it is appropriate to specifically exclude supports for children in these arrangements. We also suggest amendments to enable these orders to be made in guardianship matters, and an amendment to the Ministerial guidelines regarding assistance after leaving OOHC.

Section 73 of the Care Act also makes provision for orders to be supported by undertakings, except in the case of guardianship orders. Legal Aid NSW submits that there may be circumstances in which long term orders can be supported and strengthened by undertakings and set out below a relevant case example. Legal Aid NSW would therefore recommend that this prohibition also be lifted.

Case Study: Lyn and Charlotte

Legal Aid NSW acted for two children: Lyn, 6 years of age and Charlotte, 2 years of age. The children were removed from the care of their mother and her partner after Lyn presented to hospital with suspected non-accidental injuries. Charlotte was placed with her father, and Lyn was placed with her maternal grandparents.

At the hearing, the parties were able to resolve the matter by agreeing to orders for Lyn's father to be allocated parental responsibility for Lyn, and for Charlotte's grandparents to be allocated parental responsibility for Charlotte. The Minister retained parental responsibility for contact for both children for 12 months. Contact orders were made ensuring the children would continue to have supervised contact with their mother, as well as regular contact with each other.

The court also made orders accepting undertakings from all of the parties, which ensured the family were able to maintain as normal a family structure as possible while addressing the risk concerns which led to the removal of the children (for example,

[12] This assistance is available to children age 15 and young persons on leaving care and is potentially available until they reach 25 years of age

requiring supervision of the mother's contact until she was able to demonstrate that she had addressed those risk concerns).

While guardianship may have been appropriate in this matter, it was not possible because of the need for the Secretary to remain involved in the contact arrangements, and the need for parties to give undertakings to address risk concerns.

Applications to vary or rescind care orders

Q34. In what circumstances do you think that section 90 applications should be limited?

Q35. Are there any circumstances where an exception might need to apply?

Legal Aid NSW does not support limiting parties' rights to make a section 90 application. We understand from the roundtable consultation with legal stakeholders that this proposed amendment is aimed at parents or other parties who bring unmeritorious, hopeless, or vexatious applications. These applications would be small in number. We note that there is already a requirement to obtain leave, and vexatious or unmeritorious applications would not usually progress past the leave stage.

If there was to be an amendment to address this matter, we would be more open to a provision that allows the court to dismiss frivolous or vexatious proceedings, or proceedings where no cause of action is disclosed,[13] rather than a limitation on the types of applications that can be made. Furthermore, any strike out provision or limitation should apply to all section 90 applications, not those by certain parties (such as parents) only.

We also note that a strike out provision would still require FACS to make an application and file evidence in support, which would be no less onerous than responding to a section 90 leave application.

Legal Aid NSW notes the comments about section 90 applications potentially creating delay in adoption matters. We consider that parents should be notified in good time of an intention to file an application for adoption order. If a parent has a strong case for restoration, they should not be prevented from bringing that application because adoption is the case plan for their child.

If an unmeritorious section 90 application is brought while adoption proceedings are on foot, the Supreme Court is not prevented from continuing to consider the adoption application or from making an adoption order. This should remain a matter for determination by the Court, rather than a statutory barrier to any application being brought.

If parents are notified of case planning towards adoption and referred for legal advice in good time, any application under section 90 should be an integral part of case planning leading up to the decision to make an application for adoption. Legal Aid NSW considers

[13] See for example Rule 13.4 of the Uniform Civil Procedure Rules.

it imperative that the merit of any such application be considered prior to an application for an adoption order being made.

Guardianship applications by NGOs

Q36. 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?

No. In our view it is inconsistent with the concept of parental responsibility for FACS not to be involved in the decision whether to bring an application for a guardianship order. We support maintaining the current requirement for FACS' consent to these applications.

However, we would support making the refusal to consent to the bringing of an application for a guardianship order a reviewable decision under section 245 of the Care Act. This would enable the NGO to apply to the NSW Civil and Administrative Tribunal for a review of a FACS decision to refuse consent.

We would also support a prospective guardian being able to apply to NCAT to review a decision by FACS not to consent to the bringing of a guardianship order.

Streamlining adoption orders

Transfer of jurisdiction

Q37. 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?

Legal Aid NSW does not support conferring the Children's Court with jurisdiction to make adoption orders where there are child protection concerns.

We question the rationale or need for the proposed transfer. In support of the proposed transfer, the Discussion Paper refers to the Children's Court's expertise in determining care and protection matters and the most appropriate placement arrangement for children, the creation of a "seamless legal pathway", and streamlining adoption processes. It notes that, in 2016-17, adoption orders took an average of 4.2 years to be completed.

In our view, there is not unreasonable delay in finalising adoption matters in the Supreme Court. The suggestion that orders take an average of 4.2 years to be completed does not accurately reflect the time the Supreme Court takes to deal with the application. We suspect that the 4.2 year figure must be calculated from a date well before the application is filed. In our experience, the Supreme Court prioritises adoptions and they proceed expeditiously once filed. The Supreme Court has agreed to reasonable timeframes to deal with applications.

We would be interested to know the statistics on the percentage of adoptions which are contested and non-contested, and the average timeframes for each. Similarly, we would

be interested to know what FACS considers to be a reasonable timeframe for the making of an adoption order (ie from time of filing to an order being made; what happens before that is a casework issue).

Some adoption matters do take time to resolve, and in some cases this will be appropriate (for example, if adequate casework has not been undertaken). While delay is not ideal for children, we note that it does not impact on placement, as this cohort of children are usually well settled in their "forever homes".

We also question the suggestion that the transfer of jurisdiction would provide a "seamless legal pathway" for children. An application for an adoption order would need to be a separate application made to a court, some time after the conclusion of the care proceedings. We are not aware of any evidence to suggest that the particular forum for that second application makes a difference to children and young people. In most cases, the proposed adoptive parents are not involved in the Children's Court proceedings, nor does a child usually attend the Children's Court (and in most cases they are quite young when care proceedings are on foot). Therefore aside from birth parents, it is unlikely that children would even be conscious of having two different courts involved. Regardless of the forum, there is, and should be, two rounds of proceedings, some years apart.

We do not consider that Children's Magistrates have more appropriate expertise in this area than Supreme Court judges. The Supreme Court has jurisdiction in relation to many types of child protection and family matters, for example: matters brought under the Court's *parens patriae* jurisdiction (including applications for secure care accommodation orders), reviews of decisions made by the Children's Court, family provision and protective jurisdiction matters. The Supreme Court is also vested with jurisdiction under the *Family Law Act*. These matters frequently involve both questions of fact and law. In light of the array of matters over which the Supreme Court has jurisdiction, it is fitting that the Court retain jurisdiction for OOHC adoption, given the gravity of the order the Court is being asked to make.

Similarly, we do not agree that the Supreme Court should only deal with contentious questions of law. In Equity, for example, the Court will often determine questions of fact (including in family provision matters and *parens patriae* matters). Furthermore, the transfer of jurisdiction would create difficulties because the Children's Court could not make the ancillary orders that the Supreme Court often makes in adoption matters, such as declarations of parentage. The Children's Court also cannot currently cross-vest jurisdiction under the *Family Law Act* to make "spend time with" orders.

We acknowledge that approximately half of Australian jurisdictions enable adoption matters to be dealt with in inferior courts. However, in many of those jurisdictions very few adoption orders are actually made. We also are not aware of any studies or research from those jurisdictions that demonstrate benefits from having lower courts deal with adoption. We note that in 2015-2016, NSW had the highest number of known child adoptions in

Australia, and that the majority of known child adoptions by carers (68 of the 70) occurred in NSW.[14]

Finally, the proposed transfer of jurisdiction would create a two-tiered system of adoption. While adoptions for children in out-of-home care would be dealt with in the Children's Court, other adoption matters (Hague, step-parent and relative adoptions) would all still be filed in the Supreme Court. This split is undesirable.

Dispensing with parent's consent for adoption of a child

Q38. 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?

We would not support amendment of the Adoption Act to provide additional grounds for dispensing with parental consent to the adoption of a child. We note that the Act already provides the Court with grounds to dispense with consent in the following circumstances:[15]

a) the person cannot, after reasonable inquiry, be found or identified, or

b) the person is in such a physical or mental condition as not to be capable of properly considering the question of whether he or she should give consent, or

c) if the person is a parent of, or person who has parental responsibility for, the child—there is serious cause for concern for the welfare of the child and it is in the best interests of the child to override the wishes of the parent or person who has parental responsibility, or

d) if an application has been made to the Court for the adoption of the child by one or more persons who are authorised carers for the child:

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

The Court must not make a 'consent dispense' order unless it is satisfied that to do so is in the best interests of the child.

In our view, these grounds are adequate. Section 67(c), referred to above, has been given a broad interpretation by the courts.[16] We are not aware of any cases in which a court

[14] Australian Institute of Health and Welfare "Adoptions Australia 2015-2016", Child Welfare Series No. 65, p27.
[15] *Adoption Act 2000* (NSW), s67.
[16] *Director-General, Department of Community Services (NSW) v D and Others* [2007] NSWSC 762; *Director-General, Department of Human Services; Re DAM* [2011] NSWSC 634 and *Re JRC* [2015] NSWSC 1038.

has been unable to dispense with a parent's consent under one of the above grounds, and has consequently been unable to make an adoption order.

We have particular concerns about the breadth of the proposed grounds set out in the Discussion Paper, such as grounds relating to the parents' ability to care for and protect the child. This would potentially cover all adoption matters involving children in out-of-home care. The proposed grounds shift the focus to the parent's capacity to care for and protect the child. This may increase the likelihood of litigation and the risk of damaging relationships between birth parents and children by focusing on their parental ability rather than the child's circumstances with adoptive parents. This will interfere with the aim of open adoptions as parents may disengage with the process. Requiring a parent to litigate the question of their parenting capacity or the question of restoration (where that question has not otherwise been put in issue in the proceedings) will shift the focus of adoption proceedings back to the past. The more litigious the proceedings, the harder for adoptive parents and birth parents to maintain a relationship after an adoption order is made, which is not inconsistent with the objective of open adoption. It is important to try to build and enhance the relationship between the birth parents and proposed adoptive parents as they will need to manage any post-adoption contact without the assistance or support of the adoption agency.

The Supreme Court has recognised that dispensing with consent is one of the most grave decisions a court can make.[17] Increasing categories to do so should only be done for very substantial reasons, and because there is a 'need' to do so. In our view this need has not been established.

We also note that dispensing with parental consent does not absolve FACS of the need to serve the parents with notice of the adoption.

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

Q39. Should a parent's right to be advised of an adoption be limited? If so, how? If not, why not?

Q40. What is an appropriate period of time to wait for a parent to be located?

Legal Aid NSW does not support the proposal to limit a parent's right to be advised of an adoption.

Currently, it is only necessary to demonstrate that *reasonable* steps have been taken to locate a family member. This might include searching online, issuing requests pursuant to section 16A for information about a parent's last known address, searching the electoral role, searching telephone directories for parents, contacting known family members and writing to Centrelink. These are not onerous steps in the context of such a significant

[17] *Re Adoption of RCC* [2015] NSWSC 813; *Director-General, Department of Community Services (NSW) v D and Others* [2007] NSWSC 762 at [195] (per Brereton J)

decision impacting on the rights of children and parents, and can be undertaken at the same time as other necessary casework is occurring. This should happen in any event, so that parents can be given the Mandatory Written Information, an opportunity to discuss the Adoption Plan, and an opportunity to give consent.

We do not agree with the suggestion in the Discussion Paper that finding a parent causes "undue delay in placing a child in a stable and loving home for life". By the time these steps are taken in adoption casework, the child is generally already placed in a stable home with the proposed adoptive parents.

Furthermore, if there are instances where a parent cannot be located after reasonable steps, the court is able to dispense with their consent (as outlined in our response Question 38 above).

From the perspective of procedural fairness, adoption is one of the most significant steps which can be taken by the State in respect of a child and their parent. Any proposal to dispense with the need to advise a parent of an application has serious implications for procedural fairness and the rights of children and parents.

We have specific concerns with the suggested circumstances where a parent would not be advised of an adoption. For instance, the Discussion Paper proposes that a parent need not be notified if a child over 12 years has consented to their own adoption. The Discussion Paper notes that this is 41% of all adoptions. A birth parent would therefore have no ability to be joined as a party to the proceedings even where there are significant reasons to oppose an adoption. The Court has already made clear that a parents' right to be heard in such cases is limited only to the interests of the child.[18]

The Discussion Paper also suggests that it would not be necessary to advise parents of an adoption where the parent has not engaged in contact with the child for 12 months and is unable to be located. It is our experience that a parent can, for the first time, become reengaged in a relationship with their child when casework for adoption is undertaken. Parents often refer to a "wake up call" – not to oppose adoption, but to again engage in casework and contact and an involvement in their child's life. Reducing efforts to locate parents can deprive a child of a right to know and understand their family and background and have a meaningful relationship with a parent. The Discussion Paper notes *"…* 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" (p 32).

We also note that this provision will also limit the service of applications where FACS are not the applicant. The applicant might be the proposed adoptive carer(s). They will not be a 'model litigant', and might have a difficult relationship with the birth parents.

[18] *Re Susan* (2009) 41 Fam LR 596.

In some cases, the service of the notice of the application upon a birth parent is a vehicle for other family members to become aware of, or seek advice about the adoption proceedings. This is illustrated in the case study below.

Case Study: Mrs Heron

Mrs Heron, a maternal grandmother, has the care of three children, who are in the parental responsibility of the Minister. The children have a half-sibling, Sam, who lives with proposed adoptive parents. The proposed adoptive parents have brought an application for an adoption order (with the consent of FACS). The proposed adoptive parents did not consult Mrs Heron about the Adoption Plan, or future plans for sibling contact. Mrs Heron became aware of the proceedings through her daughter, when she was served with notice of the adoption. Mrs Heron is supportive of Sam's placement with his carers, and only wishes to ensure that there is some meaningful contact between the children.

It is essential that the focus on adoption in Australia remains on open adoption. Open adoption recognises the importance of children understanding their family history and background and having the opportunity to maintain relationships with their birth family. Proposing to limit the involvement of birth parents in the way proposed appears to undermine this goal and the progress that has been made in terms of open adoption. We are concerned that proceeding with this proposal may also undermine the progress which has been made with respect to the acceptance of adoption in Australia. The Discussion Paper itself acknowledges that these proposals may be seen as a reversion to past practice.

Grounds on which birth parents can contest an adoption

Q.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?

Legal Aid NSW does not believe that the Adoption Act should specify or limit the grounds on which birth parents can rely when contesting the adoption of a child under the parental responsibility of the Minister or a guardianship order.

Legal Aid NSW understands that the number of adoption orders made by the Supreme Court continues to rise, and that the majority of applications for adoption orders proceed on an uncontested basis, meaning that neither of the birth parents actively oppose the making of the order.

Unlike care proceedings, birth parents are not automatically a party to adoption proceedings. Whilst birth parents are served with 'Notice' that an application for an adoption order has been made, they are not served with the evidence relied upon in those proceedings, or a copy of the Summons or the specific orders sought. If a birth parent wishes to participate in the proceeding, wants access to information about the

proceedings, or wishes to contest the order, they must file an 'Appearance' within 14 days of being served with the Notice. They must then seek to be joined as a party to the proceedings and orders that they be served with the evidence filed in the proceedings. Once this process has occurred, the birth parent is in a better position to seek legal advice and consider their position.

Specifying the grounds upon which a birth parent can contest the adoption has the potential to serve as a barrier to a parent being able to participate in adoption proceedings as set out above. As the Discussion Paper notes, adoption is a grave decision that permanently severs legal relations between a child and a parent. It is appropriate that parents have a full opportunity to participate in and contest the making of an order if they wish. Affording parents this right to be heard may mean that the parent is more accepting of the outcome. As the Discussion Paper also acknowledges, contesting the adoption also provides, in the minds of some parents, a way of demonstrating to their child that they did not "relinquish" them for adoption.

We also consider it important that the Court retain its discretion in determining adoption applications, noting that the paramount consideration is the best interests of the child.

As a final comment, if this amendment were pursued, it would still be necessary for a Court to conduct a hearing to determine whether a parent can rely on any of those grounds in any event. Therefore there it would be unlikely to streamline the process any further.

Changes to OOHC

Facilitating restoration

Q42. Should the six month time limit in section 136(3) be changed to 12 months? If so, why? If not, why not?

Q43. What potential risks to the safety of children and young people are associated with this proposal?

Q44. 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?

Legal Aid NSW would not object to the six month time limit in section 136(3) of the Care Act being changed to 12 months. We appreciate that an increased time period could give FACS more flexibility and scope for the placement of children, particularly where there has been a breakdown in a placement, and a family is seen as a better option than another short term foster placement.

In response to Question 43, we see a potential risk that a child would return to the care of their parents because it is convenient for FACS, and/or before parents have completed the steps considered necessary to meet their child's needs and for them to be safe. Legal Aid NSW considers that, at the time the court endorses a permanency plan which plans

for a child to be restored at some future date, orders should include provision for a section 82 report prior to the restoration date.

The issue of what parents would have to demonstrate in these cases would have to be made on a case by case basis, but should have already been made clear in a care plan or permanency plan accompanying a court order. It would be difficult for the law to be prescriptive in this area.

Supported OOHC

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

Legal Aid NSW does not support this proposal. We understand the intention of the proposal to be that a carer would need to get an order from the Children's Court or Family Court (and only if the Secretary intervenes) in order to be eligible for any financial support from FACS.

Some family or kinship placements can only exist because of financial or other support provided by FACS, and it is not practical or appropriate for every carer to obtain court orders. This is particularly the case for older children: if a child is 16 or 17 years, it is not a sensible use of family, government or court time and resources to bring court proceedings. In other cases, obtaining a court order may place family members into conflict, or at the very least result in delay. We provide below two case studies of young clients of Legal Aid NSW who live in supported care arrangements without a court order, which in our view should be able to continue.

Case study: Daniel and Tyrone

Aboriginal brothers Daniel and Tyrone live with their Nan, Gayle, in Sydney in a supported care arrangement. They are 16 and 17 years old. Their mother, Gayle's daughter, passed away. Gayle is on a Centrelink payment and lives in social housing. Daniel and Tyrone are not in care and there are no court orders. Their father lives in regional NSW. FACS pays Gayle a carers allowance as the agency recognises that Gayle requires financial assistance for the placement to be viable.

Case study: Michael

Michael is a 15 year old Aboriginal young person with an intellectual disability, who lives with a relative, Carol, who he refers to as Nan. Carol also cares for Michael's brother, who is 7 years old, and his sisters who are 13 and 17 years old. The children are not in the care of the Minister, but FACS supports and funds the placement. The four children have experienced significant trauma and have money in trust from an act of violence from when they were young. Their mother has substance abuse issues. Carol suffers

significant health issues including lung cancer, heart problems and emphysema and is terminally ill. Carol is on a Centrelink payment and lives in social housing.

Legal Aid NSW recommends that the discretion to support OOHC arrangements without a court order should remain. Failure to do so may either result in unnecessary and unconstructive court proceedings, or mean that some placements with family become unviable.

Better protection of children in OOHC

Identification of children in OOHC

Q 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?

Legal Aid NSW would not oppose such an amendment. We suggest that if section 105 is amended, consideration should be given to amending section 105(3)(b)(i) to include the Supreme Court, so that the privacy of children who are subject to proceedings in that court is also protected.

Children whose guardians have passed away

Q47. 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?

Q48. If so, should there be a time limit placed on the Secretary to undertake those assessments?

Legal Aid NSW acknowledges that amendments should be made to address the uncertainty which may exist for children and families upon the death of a guardian or carer who holds parental responsibility for a child. We also accept that there may be circumstances in which the Secretary should hold care responsibility for children whose guardians or carers have died. However, we would be concerned about the Secretary automatically assuming care responsibility for children in these circumstances. We would prefer that there be a discretion for the Secretary to assume care responsibility in the event that a guardian or carer dies. This would avoid FACS intervening in situations where there is an appropriate family member who is willing and able to assume parental responsibility for the child, and who may have already assumed the physical care of a child.

Legal Aid NSW considers that estate planning in relation to children must form part of case work and planning with all persons who are to have an order in their favour for parental responsibility for children.

If amendments are made to deal with this issue, it would be necessary to consider whether there needs to be any amendment to section 50, which sets out the considerations for the Secretary in determining whether to discharge care responsibility for a child.

Other issues

Amendments to clarify that a child or young person is a party to Children's Court proceedings and the role of guardians

Section 98 of the Care Act gives a child or young person the right to appear and be represented in proceedings in respect of them. However, it does not describe them as a "party" to the proceedings, despite use of the term throughout the Act.

This has given rise to uncertainty about whether a child or young person is a necessary party to proceedings in Children's Court to which they are subject. For example, in *SL v Secretary, Department of Family and Community Services*[19] ('*SL*') Basten JA expressed doubt about whether children were necessary parties to proceedings in respect of them.[20]

In Legal Aid NSW's view, it may be inferred that section 98 makes a child or young person a party as of right. Section 98(3), for example, provides that the Children's Court may grant leave for a person to appear in the proceedings. Like section 98(1), it does not use the term "party". However, section 98(3) is the only mechanism whereby a person, such as a grandparent, may be joined to the proceedings. If the absence of the term "party" were significant, it would mean that there was no mechanism for a person to be made a party and, among other consequences, they would not have a right to a fresh hearing in the District Court pursuant to section 91 of the Act.

However, we consider that it would be beneficial to remove any uncertainty about whether a child or young person is a party to proceedings to which they are subject. (The exception to this is a discrete application for a PCO. In our view, section 91D(2) makes it clear that the only parties to this proceeding are the Secretary and the parent or care-giver who may be subject of the order).

An amendment to clarify this issue should also resolve uncertainty about the role of the child or young person's legal representative. There is a practice of naming the legal representative as a party to proceedings which has been doubted in the superior courts.[21] If the child or young person is the proper party, then this clarifies that it is not appropriate to name the legal representative as a party.

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[19] [2016] NSWCA 124.
[20] [2016] NSWCA 124, [49] (Basten JA).
[21] *Re Jayden* [2007] NSWCA 35, [101]-[103] (Ipp JA, Beazley and Hodgson JJA agreeing).

Finally, some doubt has arisen about the proper approach to appointing a guardian for a child or young person. In most cases, an independent legal representative is appointed for a child who is incapable of giving instructions, in accordance with the framework in sections 99 to 99D of the Act. However in *SL,* Basten JA pointed to the "apparent inconsistency" between this practice and the obligation of the Court to appoint a guardian pursuant to section 98(2A).

In our view, this inconsistency can be resolved if section 98(2A) is read subject to the provisions concerning the appointment of guardians in sections 100 and 101 of the Act. However, this is also something we consider worth clarifying with a minor amendment to section 98.

To address the above issues, we recommend that section 98 be amended to:

- expressly provide that the child or young person is *a party* to the proceedings
- expressly provide that the Court may also grant leave for other persons who, in the opinion of the court, have a genuine concern for the safety, welfare and well-being of the child or young person, to be added *as parties* to the proceedings
- clarify that the Children's Court *may* appoint a guardian ad litem for a party if the Court is of the opinion the party is incapable of giving proper instructions to a legal representative.

Open adoption

Legal Aid NSW would be interested in further reforms to support open adoption, which are not addressed in the Discussion Paper. We still see barriers to the realisation of open adoption, including barriers to other family members being involved in the adoption process and related issues around contact between siblings post-adoption. For example, in the case study of Mrs Heron, outlined above, there are very limited options for Mrs Heron to secure arrangements for contact between Sam and his half-siblings in the future. Mrs Heron will not see the report to the Court concerning the proposed adoption of the child,[22] and will therefore not be aware of the recommendations about sibling contact. There is no duty to consult with Mrs Heron about the Adoption Plan. Further, she cannot be a party to the Adoption Plan and therefore cannot ask for the plan to be registered and later enforce the provisions. If Mrs Heron is unable to reach any agreement about contact, or uncertain that the carers may honour such an agreement, her only option is to seek to join the proceedings and ask the court to cross-vest jurisdiction under the *Family Law Act* to make contact orders.

[22] See *Adoption Act 2000* (NSW), section 91.

The case study of Cassandra, below, highlights similar issues from the perspective of a sibling of children who are to be adopted.

Case study: Cassandra

Cassandra is 14 years old. She is the oldest of five siblings. She is under the care of the Minister and lives in a residential unit. She has had a difficult childhood and a number of different placements. Her two youngest siblings are placed with a carer. The carer has adopted the second youngest sibling, and intends to adopt the youngest soon. The other two siblings are with authorised carers. Cassandra desperately wants to re-establish contact with all of her siblings, and has not seen the youngest two in two years. Cassandra has not been consulted in relation to the adoption of her youngest sibling. There is currently no requirement to notify Cassandra about any adoption proceedings, or consult her about the Adoption Plan. She cannot be a party to the Adoption Plan.

To overcome some of these difficulties, we recommend that the NSW Government reconsider who can be parties to an Adoption Plan. Legal Aid NSW would see benefit in extending the categories of people who can be a party to include siblings, and relatives who are caring for siblings or who have maintained contact with the child. A broader more flexible provision may also be appropriate.