Child Protection Legislation Reform

Legislative Proposals

Legal Aid NSW submission to

Department of Family and Community Service

March 2013

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 economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 women's domestic violence court advocacy services.

The Legal Aid NSW Family Law Division provides advice and representation to clients in family law, de facto relationship, care and protection and child support matters. Lawyers from the Family Law Division also represent children in family law and care and protection proceedings. The Division delivers a range of community legal education services at the Legal Aid NSW Sydney Central Office and in most regional offices.

Legal Aid NSW welcomes the opportunity to provide these comments and further input once a draft Bill has been prepared. Should you require further information, please contact kylie.beckhouse@legalaid.nsw.gov.au by telephone on (02) 9219 5789.

SECTION 1: PROMOTING GOOD PARENTING

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

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

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

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

RESPONSE:

Question 1(a)

Legal Aid NSW endorses the proposed introduction of stand-alone parenting capacity orders which require a parent to attend a parenting capacity program or other treatment, therapy, course or program to address escalating risks. Legal Aid acknowledges that Court ordered parenting capacity orders, whereby a child remains in the care of the parent whilst the order is carried out, may be an appropriate way of ensuring that the removal of a child is a last resort.

Legal Aid NSW considers it appropriate that such orders be available as a stand-alone application. Consideration should be given, however, to the Children's Court also having the power to make such orders in the context of care proceedings[1]. Such orders should, however, only be available in care proceedings as a condition of a child remaining with, or being restored to, the care of a parent.

Legal Aid NSW understands that the Children's Court proposes that the pathway for stand-alone applications for parenting capacity orders be as follows:

(a) The matter is referred to a Registrar, who will convene a dispute resolution conference;

(b) In the event of agreement, a Children's Registrar will have the power to make orders by consent;

(c) In the event that a matter cannot be resolved via a dispute resolution conference, the matter will be referred to a magistrate for determination.

[1] Namely, applications under s 61 and/or 90 of the C&P Act

Legal Aid NSW agrees that this is an appropriate means for such applications to be determined, provided that the dispute resolutions conferences continue to be lawyer assisted. Legal Aid NSW notes that the emphasis on having such disputes resolved by way of alternate dispute resolution is consistent with the requirement that proceedings not be conducted in an adversarial manner[2].

In the case of a stand-alone application, consideration needs to be given to whether the Court could require that a care application be filed in relation to a child if it forms the view, on the evidence and/or as a consequence of the parents' attitude towards the application, that the proposed parenting capacity order will be insufficient to protect the child.

Legal Aid NSW recommends that there be power for the Children's Court to order that a report be filed within a set period of time following the order being made, with such report to address compliance with the order. Wherever practicable this report should take the form of a written statement from the service accessed by the parent in accordance with the parenting capacity order. Legal Aid NSW considers that the knowledge that the Court is to be advised of a parent's compliance (or lack thereof) will motivate a parent in most instances to ensure that the requirements of the order are met.

Due consideration will need to be given to the Court's powers where, upon receipt of such a report, it is not satisfied that there has been appropriate compliance with the order.

Legal representation

Legal Aid NSW considers it imperative that the parent who is the subject of the parenting capacity order have access to legal representation. The orders impose a significant obligation on a parent, from which serious consequences may flow as a result of non-compliance.

If such matters are to proceed to a dispute resolution conference, it is imperative that such conferences continue to be legally-assisted. The presence of a legal representative at dispute resolution conferences assists to address the power imbalance that exists between the parent and FACS.

If parents are disempowered in the mediation process, there is a real likelihood that they will either:

(a) simply agree to orders which they cannot or do not comply with or understand, in order to finalise the matter and extricate themself from a situation; or

(b) become unnecessarily oppositional or defiant.

The second reason that Legal Aid NSW strongly advocates for legal advice and representation to be available in such matters is because we consider that the provision of independent legal advice about the nature and effect of the orders, and the potential consequences which may flow from a breach, will reaffirm for the parent the importance of complying with the order.

[2] Section 93, C&P Act

The introduction of any such order must therefore be accompanied by appropriate funding being made available to ensure that parents have access to legal advice and representation.

Use of parenting capacity orders in an early intervention context

Legal Aid NSW can see the benefit of such orders in a child protection context, and gives qualified support to the proposal that they may be utilised to mandate engagement with an early intervention service in appropriate circumstances.

Legal Aid NSW does hold some concerns, however, about the practicalities of utilising such orders in an early intervention context. Serious consideration needs to be given to the role that the NGOs will play in both the determination to seek a parenting capacity order and in bringing the application itself.

It is the view of Legal Aid NSW that where an application for a parenting capacity order arises as a result of a parent's poor engagement with that service, it will be necessary for direct evidence from an appropriate person within the employ of the NGO detailing the nature of their involvement with the family and the basis for their recommendation that the parenting capacity order be made in the terms proposed. Placing the NGOs in such a role may impact on their capacity to meaningfully engage with the parent in future.

Legal Aid NSW holds reservations in relation to the notion that NGOs may have standing to be able to apply directly to the Court for such orders. It gives rise to a potential conflict for the agency who is working with the family to be the one commencing action against them. There is the potential for the matter to escalate (for example, if there is non-compliance with the order) and it is unclear whether matters would be handed over to FACS at that point in which case there would not be a continuity of parties in the matter. Legal Aid NSW strongly opposes the notion that a NGO could take action in the Children's Court in relation to the breach or enforcement of an order as this should be the sole domain of the statutory child protection authority. Finally, another reason that Legal Aid holds concerns about a NGO commencing and conducting litigation in the Children's Court is due to the fact that the model litigant guidelines to which FACS are subject do not extend to NGOs commencing or carrying on litigation in the Children's Court.

Question 1(b)

Legal Aid NSW considers that there should only be jurisdiction to apply for a parenting capacity order in circumstances where there have been attempts to have the parent voluntarily engage within an identified service and those attempts have been unsuccessful, either as the parent has refused to engage, or the parent has agreed to engage but their engagement is unsatisfactory.

It must be demonstrated that the order is necessary to protect the child from an unacceptable risk of harm. The order sought, and the obligations it seeks to impose, must be proportional and relevant to the actual risk.

A parenting capacity order should only be made in specific terms. It is not acceptable that an order simply state that the parent attend "a parenting course". The order should provide for the actual course, the service provider and a timeframe within which that service should be engaged. Where there is a cost associated, the order should specify who bears the onus of such costs. In the event of any disagreement, the Court should have jurisdiction to direct how such costs are to be met, noting that

an order should not be made imposing a cost upon a parent which they cannot reasonably meet.

In bringing their application, the Director-General should be required to specifically identify the precise nature of the order he or she is seeking (in terms of the actual service to be engaged) as well as provide sufficient evidence that the service is available and may be readily accessed by the parent.

There should be an availability to seek expert evidence to support, or oppose an order. Examples of expert evidence may include a drug and alcohol assessment going to the need for residential treatment or a psychiatric assessment going to the question of what, if any, mental health intervention may be required for a parent.

There must be a threshold test that needs to be met prior to making such an order. This may be that a child is in need of care and protection pursuant to section 71 of the C&P Act. Alternatively, it may be appropriate that separate threshold criteria are specified by the legislation. An example of alternate threshold criteria are:

a) That there is a serious risk to the child or young person that is likely to be reduced by a parent, caregiver or the family engaging with an identified service or program; and

b) That the parent is unlikely to engage in that service or program without an order being made.

The factors which the Court should consider prior to making an order are:

1. Whether it is in the child or children's best interests to make such an order

   For example: a parent's attendance at a residential treatment program might not be in a child's best interests if it would separate the parent and child or cause the parent to lose their Department of Housing accommodation.

   The inclusion of this consideration would ensure that decision making was consistent with the principles underpinning the administration of the Act as set out in section 9 of the C & P Act.

2. Whether there is sufficient evidence to support the necessity for an order in the terms proposed

   For example: if there are concerns about a parents or caregivers drug use, the Court would need to be satisfied both that a parent has a drug problem which is impacting on the care of the child and that the service proposed is sufficient to address the identified issue.

3. Any competing proposals for how any issue may be addressed

   For example: a situation may arise in which FACS is advocating residential rehabilitation whereas the parent is proposing community-based treatment. In such circumstances, the Court will need to determine what level of intervention is appropriate in terms of the order.

4. Whether it is reasonable and practicable to require a parent to comply with the order

For example: it will be a relevant consideration that a parent or caregiver in a regional area is being asked to travel large distances to attend a course when they do not have access to a car or public transport. It would also be a relevant consideration if the parent had to fund the cost of the service and they were unable to do so.

5. Whether it would be futile to make such an order

For example: if a parent is refusing to comply with the order, or if it is evident on the evidence or by the parent's conduct that they will not comply with the order, then such order is likely to be futile and there is no utility to the order being made. In such circumstances, alternatives interventions will need to be considered.

Question 1(c)

Legal Aid NSW considers that there needs to be a consequence for failing to comply with a parenting capacity order, to ensure that such orders are of any utility.

In determining the appropriate consequence, regard must be had to the fact that proceedings for the welfare of children are protective and not punitive. To that end, there should be a greater emphasis on putting in place a framework which ensures that an order is complied with in the first place, as opposed to taking action when a breach occurs.

Legal Aid NSW considers that a requirement that a report be filed with the Court addressing a parent's compliance with the orders, together with the provision of legal representation to parents at the time the order is made, will be mechanisms which assist in ensuring compliance.

In circumstances where a breach does occur, Legal Aid NSW considers that the appropriate consequence in most instances will be the institution of care proceedings. There should, however, be a discretion for the Court to take no action in circumstances where a breach is proved but is of a minor or technical nature, or the Court otherwise considers that in all the circumstances no action is necessary. There should also be a mechanism for the Court to accept undertakings from a parent where a breach is proved but where a care application itself is not necessary.

The fact that a parenting capacity order has been made but not complied with is evidence in any later care proceedings, both in terms of prior alternative action taken by FACS and in terms of the Court's assessment of whether the parents will be able to satisfactorily address the child protective concerns.

Procedure for breach

It is imperative that the procedure for taking action in relation to a breach is formalised in either the Act or the Regulation. In particular:

(a) An application alleging a breach must specify the precise nature of the breach;

(b) There should be opportunity for a parent to be heard in relation to the breach. There should be no requirement that a parent be required to answer the breach on the first return date, but should be given sufficient opportunity to formulate a response by way of an affidavit;

(c) Where a breach is admitted, a defence of reasonable excuse should be available.

Legal Aid is concerned that an allegation of a breach of a parenting capacity order will be used by caseworkers as a basis to exercise their emergency powers to remove or assume care of a child. Except in circumstances where it is demonstrated that a child is at imminent risk of serious harm, the correct procedure must be for a breach notice to be filed by the Court and be determined prior to the removal of a child.

PROPOSAL 2: Strengthen the Parent Responsibility Contract (PRC) Scheme by:

a. introducing a new modified PRC for use in early intervention programs to support disengaged parents

b. extending the duration of a PRC from six to twelve months to enable a parents to attend intensive parenting courses or therapeutic treatments and demonstrate abstinence from substance misuse so children can stay at home with them safely

c. introducing PRCs for parents with an unborn child at risk to help improve their parenting capacity in preparation for the birth of their child

d. requiring the Department of Family and Community Services (FACS), Community Services (CS) to attempt to use PRCs with parents prior to commencing care proceedings in appropriate matters.

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

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

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

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

RESPONSE

PRC's arise in the context of FACS wanting to ensure that children and young persons receive such care and protection as is necessary for their safety, welfare and well-being. It is the experience of Legal Aid NSW from our delivery of dispute resolution processes in this jurisdiction, that this principle is the core focus for all parties participating. It is important that any process, whether centred around a parent's capacity or the performance of their child-rearing responsibilities, has as its central focus the child.

Terminology

Legal Aid NSW holds concerns about the terminology "parental responsibility contracts".

These documents are not in the nature of contracts, insofar as they do not create legal obligations nor do they comprise of an offer, acceptance and consideration. The extent to which they are currently entered into voluntarily and create mutual obligations are debatable. For these reasons Legal Aid NSW recommends the use of a more child focussed title such as “child protection agreement”.

For the purpose of this submission, however, we will continue to refer to them by the current terminology of parental responsibility contracts ("PRCs").

Advising clients against entering into PRCs

In the discussion paper, one of the reasons identified for the low uptake in relation to PRCs is due to a common practice to advise parents not to enter PRCs, given the serious consequences that may follow a breach of a PRC[3].

Legal Aid NSW is concerned that under the current legislative scheme there is no incentive for a parent to enter into a PRC as a result of the consequences that may follow if a breach is *alleged*. In particular, upon the filing of a breach notice by the Director-General, a child is presumed in need of care and protection[4]. The effect of this provision is to transfer the onus from the Director-General to prove that a child is in need of care and protection to the parent, who is required to prove that a child is not in need of care and protection.

It is of significant concern that such serious ramifications flow not from a finding by the court that a breach has occurred, but by an assertion by the Director-General (by way of a breach notice) that a breach has occurred.

Legal Aid NSW is pleased to support reforms to this area. We are concerned that under the current legislative framework, a parent who endeavours to cooperate with FACS by entering into a PRC, but who ultimately does not satisfy the requirements of the agreement, ends up in a worse position than a parent who refuses to cooperate in the first place.

Any such reforms will need to address the perception amongst some legal practitioners that PRCs are utilised not as a casework tool, but rather have the primary purpose of gathering evidence for use in later care proceedings. In particular, there is a perception that in some instances the PRC is entered into with the presumption that it will ultimately be breached or not otherwise meet its objectives, in which case the evidence of the breach will ground the basis for a care order.

From the perspective of Legal Aid NSW, the reason why PRCs have worked more effectively in the context of the short term care orders pilot is because PRCs have been used as a casework tool with the emphasis and objective being for the child to remain in the home. The pilot itself gives reassurance that the PRC is not being used for a collateral purpose other than casework focussed upon family presentation.

[3] Page 13.
[4] Section 38E, *Children and Young Persons (Care and Protection) Act* 1998.

Any reforms must also consider the consequences that flow from an allegation that a PRC has been breached. Noting that care proceedings are protective, rather than punitive, the effect of an alleged breach should be care proceedings in appropriate circumstances. A breach should not be determined by the filing of a breach notice by FACS but upon a determination by the Court on the available evidence.

Legal Aid NSW proposes that a breach be determined in the same way proposed in relation to a parenting capacity order, set out at pages 6-7.

Drafting of PRCs

It is imperative that PRCs be appropriately drafted, with sufficient particularity and measureable outcomes. Legal Aid is concerned with the generality of many of the terms of PRCs to date. The PRC should set out precisely what is required and impose a timeframe. For example, a requirement "to attend for drug and alcohol counselling" is insufficient. An appropriate clause of the agreement will be:

> "to attend drug and alcohol counselling with [a person/service] on a weekly basis or as otherwise directed by [that person/service] with such counselling to commence on or before [date]".

Further, clauses such as "work cooperatively with..." or "be a protective ally in relation to… " should be avoided as they are vague and subjective.

In developing the PRC, the responsibility should fall on the caseworker or NGO to identify the appropriate service or support which is in turn identified in the PRC. The onus should not be on parents to identify the service or support themselves.

It is recommended that FACS develop, in consultation with other stakeholders, a set of model clauses for PRCs. This would provide consistency for caseworkers and would ensure that all involved in negotiations were clear about the parameters. It would also ensure that the preparation of PRCs were less time consuming and any negotiations around the proposed clauses (arising from poor drafting) would in turn be limited.

Legal advice

Parents should have access to legal advice prior to entering into a PRC. It is vital that a parent is provided with independent advice as to the effect of the agreement which they are entering into and the potential consequences that may follow if they breach an agreement.

In 2011 Legal Aid NSW established a stand-alone legal service within its family law division called the ‘Early Intervention Unit’ (EIU). The EIU was funded under the National Partnership Agreement on Legal Assistance Services which requires Legal Aid Commissions to implement strategies to resolve legal issues as early as possible and to keep people out of the court system.

The aim of the EIU is to provide effective family law services to clients who have difficulty accessing legal services in family law. The services provided are limited to advocacy, minor assistance, advice, legal information and community legal education. No case representation services are provided - if a matter subsequently progresses through the court system, the matter is referred out of the EIU to either a private practitioner or in-house lawyer for case representation.

The EIU service is ‘firewalled’ from the rest of Legal Aid NSW so it can assist a greater range of clients who previously may have been ineligible for assistance due to conflicts.

The EIU provides outreach advice services across NSW with a focus on areas that have been identified as having large unmet legal needs and disadvantage. Many of the outreach services have been co-located in Aboriginal Legal Services, Migrant Resources Centres and Family Relationship Centres across NSW. Whilst Legal Aid NSW has identified the benefits of providing early intervention legal services of this nature to parents engaged with prevention and early intervention services (such as Brighter Futures), to date we have had insufficient resources and funding to do so.

Legal Aid NSW supports the government’s emphasis on the preservation and placement of a child in OOHC as a last resort. As the Discussion Paper acknowledges, FACS through the short-term order pilot actively engaged with Legal Aid NSW to increase understanding of the preservation focus. Legal Aid NSW welcomes the opportunity to continue this partnership with FACS. If funded to do so, we see our Early Intervention Unit as a potential provider of these types of preventative legal services into the future.

Question 2 (a)

Legal Aid NSW considers that there may be a role for PRCs to play in early intervention programs.

A common complaint of parents entering into the care system is that they do not understand what is expected of them, nor do they understand what steps and services they need to access in order to address the concerns held in relation to their children. A written document which clearly and succinctly sets out the steps that a parent is to take and the goals they are to meet is seen as beneficial in helping a parent to understand what is required of them.

Legal Aid NSW considers that there should be a differentiation between PRCs used in a child protection context and those used in an early intervention context. The main difference being that the latter should not be registered with the Court, nor should the same consequences flow from a breach.

The same requirements in terms of drafting and access to legal advice should be applicable in both instances.

Question 2 (b)

Legal Aid NSW does not consider it appropriate that PRCs used in an early intervention context be registered with the Children's Court. Further, the same consequences should not flow from a breach of a parental responsibility contract in an early intervention context to that which flows in a child protection context.

Where a PRC is entered into with a NGO early intervention provider, the consequence of the breach should be that FACS is notified. It will then be for FACS to determine what the appropriate action to be taken is, including whether to commence proceedings in the Children's Court.

The fact that a PRC was entered into with an early intervention provider should be admissible in any later care proceedings as evidence of prior alternative action.

An allegation that the PRC had been breached would also be admissible as being relevant to the question of the parent's capacity to address the child protection concerns.

Question 2(c)

Extending the timeframe of PRCs

Legal Aid NSW supports, in principle, extending the maximum term of PRCs from 6 months to 12 months, provided that sufficient and regular monitoring and support is provided to parents within that timeframe to ensure that the objectives of the PRC are met.

If extended over a 12 month period, the PRCs need to be sufficiently flexible to take account of, and address any changes for the family during the period of the PRC (for example, the birth of a new child, illness, relationship breakdowns etc).

Including unborn children in PRCs

Legal Aid NSW supports, in principle, the use of PRCs for expectant parents.

Legal Aid NSW holds significant concerns about the number of newborn babies removed at birth, particularly from young, first time parents. It is our experience that in most instances little if any casework support or direction is currently provided during the pregnancy in an attempt to prevent a child being removed into care.

It is our position that a PRC with a pregnant mother must be developed within mediation. Legal Aid recommends that a pilot similar in terms to the "Signs of Safety" model used in Western Australia be undertaken. Legal Aid also supports the use of Family Group Conferencing models for these matters.

Caseworkers must enter into the mediation and the PRCs with the intention of working meaningfully with the parent, and not merely as an evidence gathering exercise. Plans should be put in place to reduce any risks identified to an acceptable level prior to the birth of the child.

A decision to remove a child following birth where a PRC has been developed should only occur in circumstances where there has been consultation, and to the extent possible, concurrence with all the services and professionals involved.

Legal Aid NSW considers it should be a mandatory requirement that a pregnant parent receives legal advice prior to entering into a PRC. Legal representation should be available to any parent participating in a mediation in which a PRC is developed.

Mandating the use of PRCs prior to commencing care proceedings

Legal Aid NSW supports in principle a requirement that the use of PRCs be mandated prior to the commencement of care proceedings. There will, of course need to be exceptions to that rule, such as urgency. Where a matter proceeds to Court without a PRC, the obligation should be on the Director-General to satisfy the Court that the making of a PRC would not have afforded sufficient protection for a child.

Legal Aid NSW is concerned, however, to ensure that PRCs are used with the sole intention of working with a family to address the child protection concerns. They

should not have a collateral purpose of obtaining evidence against the parents for use in later care proceedings.

The PRCs should require a parent to take steps to bring them to an acceptable level of parenting. The requirements the PRC imposes on a parent must be reasonable and reflect the identified concerns. A PRC should not set a parent up to fail by imposing onerous or unreasonable obligations upon them.

Legal advice should be available to parents before they enter into a PRC. This is going to have cost implications for Legal Aid NSW which will need to be considered in terms of any reforms. We again recommend the appropriateness of considering the introduction of legal services with an early intervention focus.

Question 2 (d)

The parents who would likely be asked to enter into PRCs will present with multiple and complex issues and needs, in addition to those of their children. Issues including literacy and numeracy, homelessness, mental health, addiction, violence and trauma will be present in most of the families subject to PRCs. These parents will require a great deal of practical support and motivation to remain engaged with programs while caring for children and attempting to meet the daily challenges of their often troubled lives.

The PRC must therefore become a two-way agreement, with FACS or NGOs documenting the real and practical way parents and families will be supported (as opposed to monitored) to assist them to comply with the terms of the PRC.

Such support should be clearly drafted into the language of the PRC. This is in contrast to the current model whereby a PRC is merely a list of often inconsistent and unattainable tasks for the parents to complete, with no consideration of the support to be provided.

Documented support should include (but not be restricted to):

- Any referrals made for the parents and any assistance FACS (or NGO partners) can provide to a parent to access a service
- Financial assistance to be provided to fund services
- Provision of childcare to allow parents to attend programs
- Provision of assistance to access permanent housing or crisis accommodation
- Assistance with bin hire, carpet cleaning, furniture replacement etc if required; and
- Transport assistance to ensure children attend school or family members attend appointments.

PROPOSAL 3: Consider the suitability of Family Group Conferencing (FGC) for care matters to better engage families to resolve child protection concerns.

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

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

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

RESPONSE

Question 3 (a)

Legal Aid NSW strongly supports the use of alternate dispute resolution in relation to care proceedings. Family Group Conferencing ("FGC") is considered to be an appropriate model to utilise prior to the commencement of proceedings.

Legal Aid NSW acknowledges the use of FGC as a useful means of engaging at-risk families in a genuine ADR process uncontaminated by the adversarial nature of court proceedings and without the stigma of a process controlled and engineered exclusively by FACS. It also is a model that encourages the participation of extended family members into decision making for the child at risk. It is our experience that many family members who are seeking to join care proceedings as third parties do so as they feel they have been ignored or disregarded in previous decision making processes relating to the child.

Whilst Legal Aid NSW is supportive of the use of FGCs as an early intervention tool, we question whether it would be practicable to convene a conference in every matter prior to commencing care proceedings. Legal Aid NSW would recommend that it would be more appropriate for guidelines to be developed around when FGC should be utilised.

Question 3 (b) and (c)

Legal Aid NSW does not support the proposition that parties could be referred to a FGC during care proceedings, either in addition or as an alternative to dispute resolution conferences or external mediation processes.

Dispute resolution conferences and/or external court-referred mediation processes are proving to be an effective form of alternate dispute resolution in care proceedings. We cannot see any advantage to referring a matter to a FGC once the matter is before the Court. In coming to this position, we note the intention to increase the use of FGCs prior to Court proceedings. We anticipate, therefore, that most matters which have come before the Court have also been the subject of a FGC unless deemed inappropriate.

Dispute resolution conferences are based upon a conciliation model which is geared towards resolving the matter before the Court and bringing proceedings to finality. We consider this form of alternate dispute resolution to be more appropriate once a matter is the subject of court proceedings.

Dispute resolution conferences operate on a lawyer assisted model. This not only helps to address the power balance between FACS and the parent but also ensures that any agreement reached is not resiled from following ADR. One of the ways in which dispute resolution conferences differ from preliminary conferences is that there is a requirement that all parties are legally represented which addressed the previous situation which would arise regularly in which an agreement was reached but then abandoned following receipt of legal advice.

There is a real risk that if a matter is referred to a FGC during litigation, any gains will be lost once one or more parties seeks legal advice.

Further, extended family and interested persons can generally participate in a DRC even when they are not parties. This commonly occurs, particularly where that relative is playing a role in the care of the child. The Australian Institute of Criminology's evaluation of these processes highlighted not only the success of the model to matters in court but also the ability of the processes to involve large numbers of participants.

Legal Aid NSW is also concerned that Family Group Conferencing during court proceedings would cause a greater delay than occurs with a referral to dispute resolution conference. The Australian Institute of Criminology's evaluation of the Family Group Conferencing Pilot Program found that the referral process and pre-conference preparation was time consuming and needed to be reduced[5]. The evaluation further revealed that despite a clear stipulation that conferences should occur no longer than six weeks after the making of a referral, the average time required to arrange and facilitate a FGC was eleven weeks. Of the twenty-nine Conferences that were convened during the study five required a period of fifteen weeks or longer to arrange.

A delay of between six and fifteen weeks during the course of care proceedings is undesirable and is contrary to the stated intention to resolve matters within strict timeframes.

Legal Aid NSW supports the involvement of legal representatives in alternate dispute resolution processes, once they are in the court system. As we fund the attendance of several legal representatives in each matter we are also aware of the cost impact. Dispute resolution conferences are presently limited in duration to 2 hours. They have been found to reduce hearing time. However, no such conclusions can be drawn from the Australian Institute of Criminology's evaluation of the Family Group Conferencing Pilot Program and we remain concerned about the cost impact of introducing them during care proceedings.

[5] Recommendation 12

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

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

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

RESPONSE

Legal Aid NSW notes that the utility of a prohibition order made pursuant to section 90A of the *Children and Young Person (Care and Protection) Act* 1998 is undermined by the fact that there is no remedy available in the event of a breach. This in term limits the protectiveness of such an order on behalf of a child. It is for this reason that Legal Aid NSW endorses the introduction of sanctions where a breach has been found.

It is the experience of Legal Aid NSW there is divergent judicial opinion and practice around s.90A orders, including a lack of clarity in relation to:

- The question of against whom a s 90A order can be made;
- For what purpose they are to be made;
- The nature and scope of conduct capable of being prohibited;
- What notice is required to be given to the person against whom an Order is sought?

Legal Aid NSW recommends that section 90A be drafted to give greater clarity to the issues of whom a section 90A order can be made against and in what circumstances. If it is intended that s 90A orders can be made against a person who is not a party to the proceedings, then the legislation should specify the circumstances where this may occur. Provision also needs to be made for such persons to be given notice of the proposed order and the opportunity to be heard.

The legislation should also impose a requirement for the s 90A application to be personally served in order for it to be enforceable.

Legal Aid NSW considers that there should be sufficient options available when imposing a penalty for a breach of a section 90A order. The Court's power should include the power to vary any care order upon the finding that the breach has occurred.

Attendance at a compulsory program may be appropriate in relation to a parent. Community service orders and potential imprisonment may be appropriate for repeated or significant breaches of an order. Fines will rarely be an appropriate remedy having regard to the socio-economic status of the overwhelming majority of

people who are likely to be the subject of an order. The Court should, of course, retain a discretion to impose no penalty even if a breach is found.

If penalties in the form of criminal sanctions are to be imposed, consideration will need to be given as to whether a breach constitutes a criminal offence and whether such matters should be determined by the Children's Court or the Local Court.

Legal Aid NSW further submits that consideration should be given to conferring on Children's Court magistrates the power to make apprehended violence orders against adults and for the protection of children who are the subject of care proceedings in appropriate circumstances. The power to make AVOs would be particularly useful in matters involving family violence.

Legal Aid NSW considers that there may be increased confidence of a child returning or remaining in a home, both on the part of FACS and of the Court itself, if orders could be made for the protection of the child, either by way of a section 90 prohibition order and/or an AVO that could be enforced.

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

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

RESPONSE

Legal Aid NSW agrees that fines are not the most useful or appropriate penalty for offences of child abuse and neglect under the C & P Act.

If the child is to remain in the care of the offending parent, the imposition of a monetary penalty has an indirect impact on the child by taking money from the family budget. Where the parent is on a Centrelink benefit or a low income, the financial impact can add further strain to an already struggling household.

A requirement that a parent attend parenting education or some other form of therapeutic service or rehabilitation program would appear to be a more appropriate option, that would in turn benefit the child.

Bonds may occasionally be a useful means of ensuring compliance with an order to attend a program as a result of a conviction for an offence under the C&P Act. It is noted that section 70 NFE (4) of the *Family Law Act* 1975 sets out conditions that may be imposed on a bond (ordered as a consequence of finding that a parenting order had been convened without reasonable excuse) include:

(a) to attend an appointment (or a series of appointments) with a family consultant; or
(b) to attend family counselling; or
(c) to attend family dispute resolution; or
(d) to be of good behaviour.

Community service orders may be another appropriate option where the offence is at the more serious end of the scale.

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

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

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

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

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

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

INTRODUCTION:

Permanency planning

Legal Aid NSW takes the view that all decisions about permanency planning for children must be based on the following fundamental principles:

1. Where children cannot safely live with their birth parents, the state is empowered to intervene into the lives of children and families, and to permanently place children into new family settings. Such powers by their very nature involve the intrusion of the state into the most fundamental aspects of family life, and therefore must be exercised with caution and balance; and

2. As a signatory to the United Nations Convention on the Rights of the Child, Australia is bound to ensure that its domestic legislation is reflective of that instrument. The existing legislation has been drafted with those principles in mind.

Options for Permanence

Both in Australia and internationally, there exist a number of legal options available to effect permanent placements for children. These include:

- Long term foster care
- Guardianship (also known in the UK as Special Guardianship)
- Family Law Act 1975 orders (for 'live with' and 'parental responsibility')
- Adoption

There is nothing inherently 'better' about one form of permanence over another. Each child has their own unique needs, and the best form of permanency for that child will be dictated by their own unique circumstances.

There is no evidence to suggest that adoption is always the 'best' form of permanency.

There is considerable evidence for the view that a child's sense of permanence and identity in a placement is far more important to children than the legal basis of the placement[6].

As the Discussion Paper correctly identifies, long term foster care has meant a 'drift in care' with too many placement moves for some children. In the experience of Legal Aid NSW staff placement breakdown may often be related to the child's age and behavioural difficulties at time of entry into care. Adoption is unlikely to provide an answer to these issues.

It has always been possible for foster carers to apply for orders which remove them from the foster care system (in NSW, through sole parental responsibility orders under section 149 of the Care Act). As the Discussion Paper notes, this has not been common. Legal Aid NSW encourages more consideration of the under use of these mechanisms. It is possible that to some degree, the low take up rates may be due to lack of awareness amongst foster carers of the options available to them.

A number of jurisdictions in Australia and internationally make provision for a form of 'guardianship'. In the UK, Special Guardianship Orders ("SGOs") were introduced by the *Adoption and Children Act 2002,* and came into force in 2005.

Legal Aid NSW has considered an abundance of research on the outcomes of adoption practices in a variety of jurisdictions. That research informs us of the following:

- Adoption does not necessarily lead to more 'secure' placements for children. Research suggests that there is no difference in breakdown rates between adoption and long term foster care[7];

- Adoption is not suitable for all children, and specifically may not be appropriate for:

    - Older children;

    - Children with ongoing and significant relationships with birth parents;

    - Children with high risk of placement breakdown due to history of abuse and attachment trauma, whose carers may need the added support of the foster care system in order to gain access to resources and professional support;

    - Children with disabilities;

    - Children in separated sibling groups.

[6] See Lahti (1982); Thoburn (1990); Cashmore (2001)
[7] Sellick and Thoburn (1996), p68; Treseliotis (2002), p25

- The outcomes for adopted children are not uniformly positive. Thoburn's research highlights a range of risks. She notes that adopted children very often express uncertainty around issues of identity. Adoption can also involve a risk of placement breakdown and associated trauma of rejection, distress around loss of relationships with birth family, a sense of displacement and inability to fit into either culture, low self-esteem, and failure to achieve potential.[8]

- Adoption practices are not universally supported either. Indeed, internationally, the only two countries who have wholeheartedly embraced the use of adoption for 'looked after children' are the UK and the USA. Outside of those counties, there appears to be an overwhelming view that adoption is excessively intrusive and inappropriate.[9] Warman and Roberts for example have noted that in many European countries, such as Sweden, there is a resistance for the English 'obsession with establishing 'possession' of a child'.[10]

The recent Senate Committee Report into *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012) has led to a series of apologies in Parliaments across the country. The report contains a number of salutary lessons which should be closely borne in mind in any law reform discussion, particularly:

- The profound effect which adoption can have on both children and their parents, by virtue of the loss of birth family ties;

- The importance of providing parents with respect, dignity and procedural fairness in proceedings relating to either (a) removal and (b) adoption of their children against their wishes.

Whilst it is appropriate to identify that adoption is not a concept culturally accepted in Aboriginal culture, there is no sense in confining this to Aboriginal families. In the experience of Legal Aid NSW most families, regardless of cultural background, have difficulty accepting the adoption of children against the wishes of their biological family. The legacy of the stolen generation and forced adoption practices in Australia has been profound, and leads us to recommend caution around this approach.

Adoption involves the most invasive form of intervention in family life possible, namely the permanent legal severance of all legal ties between a child and his or her birth family. Whilst Legal Aid NSW does not dispute the benefits of adoption for some children, nor opposes the practice, the general comments made above underpin our view that it is not a practice that should be viewed as part of a hierarchy of options for the placement of children.

The proposal for a permanency hierarchy

Legal Aid NSW supports the introduction of a legislative framework that recognises family reunification as the primary goal of the care and protection system and the first option for consideration by the NSW Children's Court.

Where reunification with a parent is not possible, then placement with an appropriate family member should be preferred over a placement with a non-relative.

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[8] Thoburn, p395
[9] See Parkinson (2003); Warman and Roberts (2003); Selman and Mason (2005)
[10] Warman and Roberts (2003)

Legal Aid NSW opposes the inclusion of adoption as an option in the hierarchy. Given what we know from history, decisions relating to adoption cannot be made hastily, and require a period of successful placement testing prior to any final order being made. It is our firm view that the time for deciding whether a child should be made the subject of an adoption order is not during primary care and protection proceedings. Adoption should only be considered once a child is established in a long term foster care, with a carer with whom they have developed a strong bond. Adoption should not be considered in circumstances where there is any suggestion that a child may be able to successfully return to its birth family.

It is the experience of Legal Aid NSW that when primary care proceedings are concluded children then begin to come to terms with considerable changes in their lives. They might be processing the fact that they will not be returning home to their birth families and dealing with the consequent grief and loss involved in this transition. They may be meeting their long-term carer for the first time. This is not an appropriate time to be considering adoption.

There are other impacts of including adoption in the hierarchy that concern Legal Aid NSW. We are concerned that it would lead to an increase in contested matters. Presently few matters proportionally are litigated to the conclusion of a defended hearing. Many parents consent to a final order, advised that they still have open to them the option of returning to court by way of a section 90 Application some time in the future. A parent is unlikely to concede to a finding that there is no realistic possibility of restoration knowing that an adoption will result.

Legal Aid NSW recognises that in some instances, FACS may have determined at the time of the primary proceedings that adoption is the long time goal for a child. This may be particularly so where the parents have had a number of children removed from their care and a long history of unresolved issues.

Legal Aid NSW suggests that consideration be given to a legislative regime that mandates the Children's Court to make recommendations about the suitability of adoption for the children involved. The court would be assisted by caseworkers also identifying in the child's Care Plan that adoption may be an appropriate outcome. The determination of whether that adoption should proceed, however, should be made in the context of separate and later proceedings.

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

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

RESPONSE:

Legal Aid NSW agrees that efficient and timely decision making is important. We acknowledge that early decisions for children enhance the prospects of long term placement stability. However, it is imperative that all decisions are made on a case by case basis, tailored to the needs and best interests of each individual child. It is our view that mandatory timescales and blanket rules have the potential to lead to poor outcomes for children.

Section 94 of the Care Act requires the Children's Court to proceed as expeditiously as possible in order to minimise the effect of the proceedings on children and to finalise decisions concerning the long-term placement. The Children's Court already imposes time standards on the resolution of matters.

The timescale involved in Children's Court proceedings will be determined by a range of matters including but not limited to:

- the time required to gather evidence;
- the time involved in conducting an expert assessment required as to parenting capacity or risk assessment;
- the time taken to identify and assess potential family and kinship carers;
- the number of witnesses;
- the availability of witnesses, especially expert witnesses;
- the nature of the issues involved; and
- the length of hearing involved, and the court's ability to provide judicial time to hear the matter.

If the Children's Court were constrained by mandatory timescales, there would a serious risk of unsafe decisions being made. For example, Courts may feel constrained by the legislation to:

- prevent parties adequate time to file their evidence,
- refuse applications for expert assessments,
- refusing adjournments to parties who, for example, join the proceedings late, or need time to appeal a refusal of legal aid,
- limit the available court days for hearing, even where this leads to risks of the evidence not being properly heard.

It is the experience of Legal Aid NSW that some magistrates already decline assessment applications on the basis of delay, even where the application is made by the child's representative. It is our concern that such practices could increase under mandatory timescales with the result being that the Court may not have before it the best evidence when reaching a decision.

Such an approach risks focussing on processes rather than the quality of outcomes.

It is accepted that benchmark targets may be useful to ensure efficiency in court processes. Legal Aid NSW understands that such benchmarks are adopted in the United Kingdom jurisdictions, where the benchmark of 40 weeks is accompanied by the introduction of a comprehensive Case Management Practice Direction which ensures the efficient conduct of proceedings by all parties to the proceedings. Without a 'whole of process' response requiring efficiencies from all parties, a benchmark that targets judicial timeframes alone will not be effective.

Should a mandatory decision timeframe be introduced, Legal Aid NSW is of the view that it must allow judicial discretion to depart from it in appropriate circumstances. It is not possible to exhaustively set out the circumstances in which such discretion be exercised, but relevant considerations will be:

(a) Where there are a large number of parties and/or complex family structures;

(b) Where expert evidence is required and cannot reasonably be obtained with the period required under the time standards;

(c) Where one or more parties have a disability;

(d) Where interpreters are required, especially where such interpreters are not readily available;

(e) Where an illness (particularly mental illness where a parent is detained in a mental health facility), pregnancy or other significant life events impacts on a parties availability to participate in proceedings for a period.

The capacity of the Children's Court Clinic to meet the mandatory timeframes proposed will also need to be considered. It is the view of Legal Aid NSW that the Clinic is an invaluable resource in care proceedings but it needs to be resourced to meet any mandatory timeframes imposed.

CASE STUDY 1

Legal Aid NSW appeared as the independent legal representative for three siblings in care proceedings both in the Children's Court and on appeal to the District Court.

The children had the same mother. There were two different fathers. All three parents were deaf and required Auslan interpreters. In addition one parent required a relay additional interpreter as he was proficient in Chinese sign language, not Auslan.

The Children's Court had significant difficulty securing the services of a sufficient number of suitably qualified Auslan interpreters for the hearing and interpreters were required to be flown in from regional NSW and interstate for the hearing.

The listing of hearing dates was contingent upon the availability of the multiple sign language interpreters. The hearing itself ran much slower than it ordinarily would have had interpreters not been required.

CASE STUDY 2

Legal Aid NSW appeared as the independent legal representative for three children in care proceedings brought primarily due to the mother's intellectual disability.

Despite having a documented intellectual disability the mother received no support from ADHC. She had no family or support network. She did not abuse drugs or alcohol, nor did she neglect or harm her children. She had separated from the father of the children due to domestic violence. In bringing their application, FACS sought an order that each of the children be placed in the parental responsibility of the Minister until they attain the age of 18 years. This was opposed by the mother and the children's representatives.

The mother's sought an adjournment of proceedings to obtain an expert assessment of her capacity and her ability to care for the children to be undertaken by an expert with expertise in intellectual disabiilty. This was refused by the Court due to time constraints, and a Children's Court Clinic Assessment was ordered as it could be obtained more quickly than the expert assessment. That Report identified strengths in the mother's parenting but the Court was not persuaded and the children were not restored.

The matter was appealed to the District Court where the mother's application for an expert assessment was granted. The expert evidence confirmed that this mother had the capacity to care for her children with supports in place to ameliorate the deficiencies created by her intellectual disability. The expert's assessment was also sufficient to provide ADHC with the assessment it needed to allow services to be extended to her. The children were successfully restored to her care.

CASE STUDY 3

Legal Aid acted for the mother in Children's Court proceedings relating to her 5 children which commenced in 2009. At the time that the application was made, the children remained in the care of the mother.

It was the Department's case that the children should be found in need of care and protection on the basis that they had been exposed to neglect and domestic violence whilst in the care of the mother. It was further asserted that the mother had a demonstrated inability to engage with, and benefit, from services and supports.

After a defended Establishment hearing, the children were found to be in need of care and protection and they were removed from the care of the mother. The children were initially placed with the paternal grandmother and her partner. The maternal family opposed this placement on the basis that the grandmother's partner had a history of perpetrating child sexual assault and posed an unacceptable risk. This was ultimately conceded by FACS and the children were transferred to the care of another paternal family member. This second placement was strongly opposed by the mother and her family whose concerns included that the children were being inadequately supervised, were being allowed unauthorised contact with the birth father, were being subjected to physical discipline and that the placement was not culturally appropriate.

During the course of proceedings, the mother gave birth to a new child with a different father. The child was assumed into care following his birth and placed with a member of his paternal family. This placement was supported by the maternal family.

A Children's Court Clinic Assessment was ordered in the matter. Due to the complexity of the matter, including the large extended family and the complex familial dynamic the assessment report took a significant period to complete. That assessment suggested that restoration of the mother's younger children could be realistic.

FACS filed care plan recommending that all 6 children be placed in the long term parental responsibility of the Minister.

The matter was listed for final hearing over four days in September 2010. The matter was unable to be completed within the time allocated and was listed for a further four (4) days, one of which was lost due to a practitioner being ill.
Whilst the matter was still part heard, one of the children (aged 5) died as a result of an untreated ear infection.

The mother brought proceedings pursuant to section 90 of the C&P Act, seeking to secure the removal of the four surviving children from that placement. That application was unsuccessful, resulting in the independent legal representative seeking relief under the parens patriae jurisdiction of the Supreme Court. That application was ultimately dismissed.

The matter thereafter continued before in the Children's Court, occupying at least ten further hearing days.

The matter was ultimately finalised, some two years after it commenced, by the mother conceding the restoration of the children and FACS agreeing to facilitate more flexible contact.

PROPOSAL 8: Enhance supported care placements by introducing:

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

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

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

RESPONSE

Question 8 (a)

Legal Aid NSW views with caution any move toward 'self-regulation' of supported OOHC. Whilst it is acknowledged that relative and kinship placements should have a degree of self-determination appropriate to their individual circumstances, they should not be devoid of oversight.

Legal Aid NSW is concerned with the proposal that FACS would cease to develop a care plan and undertake an annual assessment of the child's placement in lieu of the supported carer reporting to FACS on how they are addressing the needs of the child or young person at an annual meeting, with the question of whether the child is being placed at risk by the carer a matter for mandatory reporting.

Legal Aid NSW considers that a proper course would be for FACS to continue to supervise children in supported OOHC placement until this was no longer necessary. There should be a mandatory minimum period of supervision.

A placement may not be meeting a child's needs but not yet at a threshold of warranting a report that the child is at risk of significant harm. Legal Aid NSW does not consider that the mandatory reporting guidelines of themselves provide sufficient protection and should not absolve FACS' responsibility to ensure that a child's OOHC placement is in his or her best interests.

It is to be remembered that many of the children who enter into the care system have suffered significant abuse and trauma which manifests itself in complex emotional and behavioural challenges. These emotional and behavioural disturbances can place pressure on placements and significantly contributes to placement breakdowns in some instances. Supervision and support of placements by FACS can prevent placements reaching a crisis point.

Removing oversight and accountability from kin carers gives rise to potential for abuse and neglect of children continuing after orders are made. It also potentially deprives carers of an avenue of support and guidance in their care of children who have been placed in their care.

The greatest risk in relaxing the oversight of kin carers is that kin placements will become a de facto restoration to the birth parents and a thwarting of the intention of the court order.

The provision of unsupervised and unlimited contact with birth parents would also be a serious risk. Conversely, the refusal of kin carers to allow any meaningful contact with parents and other extended family members could also arise.

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

(a) introducing long-term guardianship orders
(b) repealing section 149 of the *Care Act* that provides for sole parental responsibility orders as this provision is underutilised.

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

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

RESPONSE

Legal Aid NSW supports the introduction of long-term guardianship orders as one option available to the Children's Court when making orders for the permanent care of children.

Lessons from the UK

It is important to learn from the lessons of other jurisdictions which have successfully introduced forms of guardianship.

In the UK, the success of Special Guardianship Orders (SGOs) has been linked to a number of key aspects of that model. In particular:

- Special Guardians are entitled to an assessment for eligibility for financial support packages. In reality, the negotiation of these packages has been fundamental to the preparedness of carers to accept SGOs (rather than remain in the foster care system).[11] Legal Aid NSW therefore endorses the Discussion Paper's proposal to make financial support available to guardians. However, it is not reasonable to restrict eligibility for payments to existing carers who come back to Court to seek orders. Payments should also be available to carers who volunteer during primary care proceedings, to remove potential disincentives to those carers in accepting guardianship orders.

- Special Guardians are entitled to seek ongoing advice and support from the local authority. In circumstances where children often have high emotional and behavioural needs, and are likely to suffer the long-term results of poor parenting in early years, carers (particularly older kinship carers) are likely to find parenting challenging. Access to ongoing support and advice is important in assisting carers to manage parenting challenges and to deal with potentially conflicted relationships with birth parents.

[11] Hall (2008) "Special guardianship and permanency planning", *Child and Family Law Quarterly*, vol 20, no 3, p371.

Question 9(a)

Legal Aid NSW agrees in broad terms to the circumstances in which a guardianship order would apply, except that we consider that there is no basis for excluding children in existing foster care placements from the potential benefits of a guardianship order. Without the option of applying for a guardianship order, foster carers must retain their existing rights under section 149 to apply for sole parental responsibility, as otherwise they would lose that option altogether unless able to apply for adoption.

Question 9(b)

In relation to the matters proposed to be included as a feature of the guardianship order, Legal Aid NSW does not support the proposal that the consent of the managing agency that last supervised the placement should be required for a court to grant an application for leave to vary or rescind a guardianship order.

The issue of whether leave to rescind or vary an order is an issue which is ultimately determined by the Children's Court. It is proper that the person who is identified as the guardian of the child under the order be required to be served with any such application and have a right of appearance.

The question of an agency's consent should not be a pre-condition to the Court granting leave.

Proposed features of a guardianship order

Should the government proceed with this reform, Legal Aid NSW seeks consultation on the mechanics of the legislation. We are of the view that the following matters would need to be addressed in any legislative amendments:

- How does this type of order differ from the current legislative framework that allows the allocation of parental responsibility to "another suitable person" pursuant to s.79(1)(a)(iii) of the *Children and Young Persons (Care and Protection) Act* 1998.

- What powers are attached to a guardianship order i.e. is it effectively an order for sole parental responsibility where the guardian would be in a position to make decisions on such matters as passports, overseas travel, and major medical treatment?

- Will any assessment process undertaken of the guardian be subject to scrutiny by the Children's Court?

- What provisions of the Care Act will the guardian be subject too – for example, undertakings?

- Will there be a mechanism to vary or rescind a guardianship order – if so, what?

- Once a guardianship order is made, is it intended as a 'child welfare order' thereby ousting the jurisdiction of the Family Law Act (per section 69ZK)?

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

(a) streamlining the assessment of authorised carers and prospective adoptive parents
OR
(b) creating a new category of "concurrent carer" who is authorised as both a long-term carer and prospective adoptive parent.

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

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

RESPONSE

Question 10(a)

Legal Aid NSW supports this proposal. The recruitment of a category of 'concurrent carers' is a positive step, if done in addition to the current foster and kin care recruitment practices. In particular, it is noted that a benefit will be derived by a child who is not forced to move from a short term placement to a permanent placement upon a determination that there is no realistic possibility of restoration to a parent.

The fact that a child is in a concurrent placement should not, however, be a factor considered by the Court in determining whether restoration to a birth parent is a realistic possibility. Concurrent carers should not have standing to intervene in primary care and protection proceedings concerning the child.

Legal Aid NSW recommends that a targeted education campaign is needed to ensure that concurrent carers understand that the primary objective is restoration to a parent. The education campaign would also ensure that concurrent carers are fully informed as to the likely timeframes for determination of a matter as well as the ability of a parent to appeal or seek variation of an order.

Legal Aid NSW is not opposed to the streamlining of authorised carers and prospective adoptive parents, so that a single assessment considers any persons suitability both as a long term carer and an adoptive parent. This should not remove the requirement, however, that an assessment be undertaken of the child's relationship with the carer prior to the adoption proceeding.

Question 10(b)

Legal Aid NSW supports any measures that may have the effect of reducing multiple placement changes for children and young people. However, we are not sure that reforms to the administrative mechanism of carer assessment would reduce multiple placement changes for children and young people in OOHC.

From our perspective, one of the greatest factors contributing to the multiple placement of children in OOHC is the policy framework of NGOs. Under the current

model NGOs refuse to recruit or locate a "long-term" carer until after the Children's Court has made a final order.

This policy leads to children being moved between crisis and short-term placements whilst the matter is before the Children's Court.

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

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

RESPONSE

Legal Aid NSW opposes this reform and submits that it is appropriate and necessary for jurisdiction to remain solely within the inherent jurisdiction of the Supreme Court.

Our objection to the reform is two-fold. Firstly, the gravity of a decision to permanently sever a child from their family is one that only a superior court should consider. The second objection is one of practicality. The volume of work in the NSW Children's Court makes it impossible for adoption matters to be given proper consideration. To attempt to deal with adoption matters in the Children's Court would eliminate any chance of resolving primary care applications within the timeframes proposed.

Supreme Court

Adoption Orders represent a profound and permanent interference with the natural legal relationship between a child and his or her birth family. Given the nature of these orders, the jurisdiction to make them should be reserved only to a court of superior record.

Comparable international adoption models recognise the status of adoption as requiring reasoned and careful consideration by a superior court.

One of the benefits of the Supreme Court determining adoption matters is that there is finality in the decision. There is no appeal as a matter of right from an adoption order made by the Supreme Court. In order to appeal a decision to the Court of Appeal, leave is required[12]. The decision to make an adoption order over opposition from a child's birth parents involves trauma, not only for the birth parents but for the prospective adoptive parents who have been awaiting the determination, as well as the child themselves (to the extent that they are aware of the proceedings). Having avenues of appeal that would be available as a result of the matters not being determined by a superior court of record would delay the finality and promote uncertainty for all involved.

Further, Legal Aid NSW understands that it is not intended to remove adoption applications (not involving children in OOHC) from the jurisdiction of the Supreme Court. Legal Aid NSW does not support this division.

[12] *Supreme Court Act 1970,* Section 101(2)(f)

Children's Court

From a practical perspective, adding adoption applications to the Children's Court's existing workload would have the potential effect of significantly expanding its workload. It is questionable that the Court has the ability to withstand an increase to its existing workloads.

Further, in regional areas the Local Court sits as the Children's Court. In such locations, care matters are routinely dealt with by generalist Local Court magistrates as opposed to specialist Children's Court magistrates. These same generalist magistrates would presumably have the power to make an adoption order.

If the order were to be made by the Children's Court, then it follows that there would have to be an automatic right of appeal. Legal Aid NSW strongly opposes any legislative provision that would prevent any form of final order made by the Children's Court, including an adoption order, from being appealable as a matter of right.

It is presumed that a significant portion of parents would exercise their right to appeal an adoption order, regardless of whether legal representation was made available to them. There is nothing to be lost by an appeal in such circumstances. If the appeal pathway continued to be Children's Court to District Court and then (with leave) to the Court of Appeal, adoption proceedings could be significantly delayed, with significant cost implications for all agencies concerned.

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

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

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

RESPONSE

Legal Aid NSW accepts that foster carers should not necessarily have to undertake the same application and assessment process as the process in place for selecting prospective adoptive parents.

Legal Aid NSW does not oppose, in theory, an amendment to the *Adoption Act* 2000, with it providing different approval pathways for prospective adoption parents and foster carers who are seeking to adopt a child who has been in their long term care.

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

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

RESPONSE:

Legal Aid NSW does not presently take a position with respect to the merging of the *NSW Standards for Statutory OOHC* and the *NSW Adoption Standards.*

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

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

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

RESPONSE

Question 14(a)

Legal Aid NSW strongly supports the proposal to permit birth parents to be parties to an Adoption Plan even when they have not consented to adoption orders.

It is inappropriate that a parent who opposes an adoption is deprived the opportunity to be a party to an adoption plan. This in turn prevents a parent seeking the registration or enforcement of the adoption plan itself. On one view, the exclusion of a parent from the adoption plan is a punitive measure against parents as a consequence of withholding consent.

A parent who opposes an adoption is not disinterested in the arrangements for their children. They can and should be afforded the opportunity to contribute in the adoption plan.

There are many reasons why a parent may oppose an adoption. It is the experience of Legal Aid NSW that whilst some parents can accept the reality of the adoption order being made, they want the decision to be that of the Court and not themselves. They do not want to be a party to a decision to permanently relinquish the care of their child and their legal standing as their parent. In such circumstances, it should be open to parents to neither consent nor oppose an order being made.

Question 14(b)

Legal Aid NSW strongly supports the use of alternate dispute resolution in relation to adoption matters. Legal Aid NSW has facilitated mediations in adoption matters, with very positive results.

Adoption proceedings can be very disempowering for birth parents. That feeling of disempowerment can at times contribute to a parent's decision to oppose an adoption order. Alternate dispute resolution in such matters can be empowering for parents. It can provide them with a forum that assists them to understand what the practical consequences for their child will be if an adoption order is made. It also affords them the opportunity to have a direct dialogue with the prospective adoptive parents, which in some instances may assist to allay their fears about the proposed adoption.

Legal Aid NSW considers that it is vital that alternate dispute resolution in adoption matters is conducted independently and away from the court. The prospect of ADR being successful in such circumstances is generally enhanced by the parent being legally represented.

As part of our mediation program, Legal Aid NSW has access to a number of highly skilled mediators who are accredited Family Dispute Resolution Practitioners and who have undertaken specialist training to provide alternate dispute resolution services in care and protection matters. Legal Aid considers that the mediations that we are able to facilitate in care and protection matters are best suited and most appropriate to all the parties involved. Mediations can be convened at short notice without consequential delay to the Court proceedings.

Subject to appropriate funding being made available, Legal Aid NSW have capacity to extend this program. The cost of facilitating mediations can be provided upon request.

Case study 4

Legal Aid NSW acted for the father in adoption proceedings before the Supreme Court.

Our client was the father of a 5 year old child, J who was the subject of Children's Court orders placing him in the parental responsibility of the Minister. J was placed with foster parents who were seeking to adopt J.

The father accepted that J was stable and happy with his carers and that he was being well cared for, however he felt unable to consent to the adoption order. Legal Aid facilitated a mediation, in which the father, paternal grandmother, the prospective adoptive parents and J's caseworkers participated. The father and FACS were legally represented at the mediation.

At the mediation, the adoption plan was discussed and an agreement reached on a number of issues, including that J would retain the father's surname as his middle name and that contact would occur with both the father and the parental grandmother 4 times per year and that in addition, they could attend some sporting or recreational activities that J participated in. The father's ultimate position was that whilst he did not consent to the adoption, he would not offer any evidence in opposition to it.

As the father did not consent to the adoption, the legislation prevented him from being a party to the adoption plan, even though he had actively participated in its development.

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

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

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

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

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

RESPONSE

Legal Aid NSW does not support any amendment to the grounds upon which a parent's consent to an adoption can be dispensed with. Section 67 of the *Adoption Act* 2000 provides for a number of grounds on which parental consent can be dispensed with. Legal Aid opposes any expansion of these grounds.

Legal Aid NSW considers that the circumstances in which a parent is unable to care for and protect the child is sufficiently covered by section 61(1)(c) as currently drafted, which provides:

> "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"

This provision likewise covers the circumstances where there is no realistic possibility that a parent will be able to resume full-time care of the child or young person because reasonable efforts have failed to correct the conditions leading to the child or young person's placement and it is in the best interests to make the decision now.

Further, Legal Aid NSW considers the situation where a parent cannot be located to be sufficiently covered by section 67(a) of the *Adoption Act* 2000 which provides for the consent of a parent to be dispensed with where they cannot, after reasonable inquiry be found or identified.

Legal Aid NSW considers it appropriate that FACS should have to make reasonable enquiry to locate a parent in order to serve them with an adoption application. It is a common feature of all litigation, and a basic tenant of natural justice, that the applicant has to effect service upon a respondent unless an order for substituted service, or an order dispensing with service, is obtained.

The onus should not fall to a parent to keep FACS informed of their whereabouts. Such a requirement is impracticable. Parents who find their children the subject of care proceedings face a number of social and economic challenges. It is unrealistic to expect a parent who:

- has an intellectual disability,
- a mental illness,
- has English as a second language or literacy problems,
- Is transient or
- may be a victim of domestic violence

to regularly contact FACS to update their details in the event that FACS may proceed to seek the adoption of their child. Even if they were to make contact, there is no certainty that their call or contact details will be recorded.

To the extent that the location of parents is an endemic problem, it is recommended that FACS enter into agreements whereby other agencies, such as Centrelink and Medicare, can divulge to FACS contact details that they hold for parents.

PROPOSAL 16: Limit the parent's right to be advised of an adoption in the following circumstances:

a. where the child is over 12 years of age and has given their sole consent, or

b. the Children's Court has taken away parental responsibility from that parents in care proceedings and found that there is no realistic possibility of restoration.

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

RESPONSE

Legal Aid NSW strongly opposes any proposal to limit the right of parents to be informed of the existence of an adoption.

It is unclear what rational basis could be advanced to justify a situation where a birth parent, who could be reasonably located, was not informed of the adoption of their child.

The discussion paper indicates that this proposal is underpinned by the fact that "*it can take a significant amount of time in some OOHC adoptions to locate a birth parent to advise of an initial adoption application and, if the parents cannot be found, for the Supreme Court to direct that further steps be taken to locate the parents before the order is made*"[13].

Legal Aid NSW submits that if difficulties have arisen in this regard, the appropriate manner in which to remedy this issue is for FACS to review:

a. the manner in which it seeks to locate parents; and

b. the quality of their evidence that they are placing before the Court.

[13] Discussion paper, page 42

The *Adoption Act* 2000 already empowers the Court to dispense with the consent of a parent on the basis that, after reasonable inquiry, they cannot be found or identified[14]. Any such application needs to be supported by evidence of the reasonable enquiries that have been made.

If upon receipt of the evidence, the Supreme Court is not satisfied that reasonable attempts have been made then it will adjourn the matter and direct that further attempts be made. If such circumstances are arising, then FACS needs to review the sufficiency of its attempts to locate a parent at the outset and the quality of the evidence put before the Court at first instance.

As previously stated, FACS should explore other avenues for obtaining a parents contact details, the most obvious being via Centrelink records.

Legal Aid NSW further opposes a timeframe in which FACS have to look for a parent. "Reasonable attempts" is not determined by a timeframe during which enquiries are made, but by the sufficiency of such attempts.

Notice to parents generally

It is one of the most fundamental of principles underpinning our justice system that a person has a right to be heard in any judicial matter affecting their rights or interests.

From the perspective of Legal Aid NSW , it is the inalienable right of all natural parents to be informed of the existence of an adoption application made in respect of their child, the effect of which, if successful, would result in the permanent severance of their parental relationship, rights and obligations.

In considering any reform to adoption law in NSW, due regard should be had to the findings of the recent *Forced Adoption* report, which highlighted starkly the effects on both parents and children of denying birth parents procedural fairness. Caution must be exercised to ensure that the mistakes of the past are not repeated.

Not only does the proposal to dispense with notice to parents offend against the basic precepts of fairness and natural justice, it is also contrary to obligations under both domestic legislation and international conventions.

The *C & P Act* provides, that:

> *"if an order places a child or young person under the sole parental responsibility of the Minister, the Minister must, as far as reasonably practicable, have regard to the views of the person who has parental responsibility for the child or young person before the order was made whilst still recognising that the safety, welfare and well-being of a child or young person remains the paramount consideration"*[15]

[14] Section 67(a)
[15] Section 81(2)

And further that:

> *"The designated agency having supervisory responsibility for a child or young person in out-of-home care must inform the parents of the child or young person as to the progress of and development of the young person"*[16]*.*

Further, Australia's *National Principles on Adoption,* state:

> *"13. The adopted person/birth family, regardless of age, has the right to independent representation throughout the adoption process."*
>
> ***"****23. Birth parents have the right to express their wishes and be involved in the planning for the placement of their child."*

Finally, the *International Convention on the Rights of the Child* provides:

> ***Article 9***
> 1. *States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child….*
>
> 2. *In any proceedings pursuant to paragraph 1 of the present article,* ***all interested parties shall be given an opportunity to participate in the proceedings and make their views known****.*

Whether a child's consent is sufficient to dispense with consent

Legal Aid NSW does not accept that a child's consent is sufficient to warrant an exception to the usual rules requiring service on parents and affording them the right to be heard.

Legal Aid NSW acknowledges the right of a child who is the subject of adoption to be heard and to consent to that adoption upon attaining the age of 12. Legal Aid remains concerned that the counselling provided to a child pursuant to section 63 and the consent that follows pursuant to section 55 of the *Adoption Act 2000* is not sufficiently independent from the agency moving the adoption. Such counselling and consent should operate independently from the agency moving the adoption.

Nevertheless, the fact that a child consents to an adoption is not of itself sufficient to remove the requirement to provide notice to a parent of a proposed adoption.

Legal Aid NSW notes that in exceptional circumstances, a child may not wish their birth parents to be notified of their adoption. Such circumstances may include where a child has been subject to significant abuse by that parent, where a parent is incarcerated for an offence against the child, where the Court had deemed that there should be no contact with the parent or where a child has refused all contact with their birth parent over an extended period. Evidence of such wishes may be relevant to a Court's determination of whether a parent should be given notice, but not determinative of the fact.

[16] Section 163

Whether a finding of no realistic possibility of restoration is sufficient to dispense with consent

A finding of 'no realistic possibility of restoration' would never on its own be sufficient to disqualify a parent's right to be served and afforded a right to be heard. Every child under the care of the Minister is the subject of such a finding. A Court may make such a finding in a wide range of circumstances, and often with the parents' concession. Such proceedings may involve a parent experiencing difficulties with mental health, intellectual disability, substance misuse, or domestic violence. However, Legal Aid NSW takes the view that those parents should retain their rights to human dignity and respect, and the right to be heard. To suggest otherwise carries highly punitive undertones which in our submission is most inappropriate.

A parent from whom parental responsibility has been removed by the Children's Court is required to be served, and has a right of appearance, in relation to any appeal and/or any application for variation or rescission of the order[17]. There is no basis to justify such a requirement in relation to adoptions.

In considering these amendments due consideration needs to be given to the fact that many primary care proceedings resolve by way a concession from a parent that there is no realistic possibility of restoration. In making that concession, most parents intend to return to the Court under s 90 of the C & P Act to seek the return of their children, whether or not they do so. A parent is unlikely to give such a concession if the potential outcome is that their child will be adopted in the future without knowledge to them. This may lead to more contested primary care applications and appeals, which could undermine a child's transition to their permanent placement and/or the stability of that placement.

Practical application

Once located, a parent may indeed consent to an adoption order being made, which would expedite the adoption process. Likewise, it may be identified that the parent is deceased in which case their consent or objection is a mute point.

Legal Aid NSW acknowledges that some parents will oppose any form of order, be it a care order or an adoption order, being made. It is also our experience, however, that once parents are provided with sufficient information about the effect of the proposed order, are given access to independent legal advice and given the opportunity to participate in the process (including participating in alternate dispute resolution as appropriate), the possibility of the matter resolving without the need for protracted litigation is enhanced.

The discussion paper refers to the ability of parents to be joined or heard on an application in circumstances where they are not served. This in our view is not realistic. Parents need to know about proceedings before they can ask to be joined.

Finally, the proposal fails to give any consideration to the manner in which a parent would ultimately come to learn of an adoption order which is made without notice to them. Even if a parent were disengaged entirely from a child's life, many children living independently of their birth family seek out their birth parents in adolescents or early adulthood. An adoption order will not prevent a desire for most children to know and learn about their family of origin. In the age of social media, locating birth families is easier than ever before. The trauma of any reunification will potentially be

[17] Section 90, *Children and Young Persons (Care and Protection) Act* 1998.

increased if it is for the child themselves to reveal to the parent that they have been adopted contrary to their knowledge.

CASE STUDY 5

Legal Aid NSW recently appeared as the independent legal representative for a child "P" in proceeding brought by her father under section 90 of the C&P Act and in subsequent appeal proceedings before the District Court.

P was removed from her mother's care at birth. During the substantive Children's Court proceedings, another man was named as P's father. That man questioned paternity but no testing was undertaken and that individual disengaged from proceedings prior to their resolution.

P's mother had older children who had previously been removed and were living with their natural father, "G" pursuant to Children's Court orders. G was not aware of the existence of P. In the substantive proceedings, FACS filed a Care Plan providing for sibling contact although no attempts were ever made by FACS or the designated agency to facilitate that contact.

Final orders were made in relation to P when she was three months of age. At 6 months of age, she was transitioned into her permanent (and proposed adoptive) placement.

When the P was about 2½ years old, the mother disclosed P's existence to G and told him that he was likely P's biological father. The father made contact with FACS and sought DNA testing which confirmed he was P's father. Despite G's requests, no contact was ever facilitated between himself and P leading to him bringing a section 90 application.

The section 90 application occurred at about the same time as FACS and the designated agency were taking steps to formalise P's adoption by her foster carers.

By his section 90 application, G sought the care of P. There were protracted proceedings before the Children's Court in which G was ultimately unsuccessful. He appealed to the District Court, and his application for the care of P was ultimately supported by FACS on appeal.

As a consequence of the orders of the District Court, P went to live with her dad and her siblings. She was then 5 years of age.

SECTION 3: CREATING A CHILD FOCUSSED SYSTEM

PROPOSAL 17: Where there is no possibility of restoration, contact arrangements are initially made through case planning.

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

RESPONSE

Legal Aid NSW recognises that in some instances, where it has been determined that there is not a realistic possibility of restoration, it will be appropriate for decisions in relation to contact to be made via casework. There are, however, a number of instances in which it is appropriate for contact disputes to be judicially determined.

Legal Aid NSW strongly supports the Children's Court retaining power to make decisions in relation to contact even in circumstances where the Court has found that there is not a realistic possibility of restoration.

Importance of contact between children and birth families

Contact with their extended family is of critical importance to the identity of children and young people in OOHC. Contact with birth family provides children and young people with access to language, culture and shared identity that cannot be recreated in a foster or adoptive placement.

Article 8 (1) of the United Nation Convention on the Rights of the Child ("UNCROC") provides that:

> *"States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relationships as recognized by law without lawful interference."*

Further, Article 9 (3) of UNCROC states that

> *"States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.* "

The preservation of the identity of children and young people in OOHC is crucial to their development and to the success of the foster or adoptive care placement.

Contact orders made by the Children's Court

It is the experience of Legal Aid NSW that the majority of contact disputes are resolved by consent. The Children's Court cannot order FACS to facilitate supervised contact without their consent[18] and we argue that this curtails disputes in relation to contact. This is because, unless a parent can satisfy the Children's Court that contact is not required to be supervised, or unless they propose an alternate acceptable contact supervisor then FACS' proposal in relation to contact succeeds.

As such, any contact order made by the Children's Court that requires FACS to supervise contact has been made with the consent of the agency. It is not an order which has been imposed upon FACS by the Children's Court.

Legal Aid NSW does not agree with the assertion in the Discussion Paper that "court-ordered contact arrangements are inherently insufficiently flexible" [19]. It is the experience of Legal Aid that the orders made by the Children's Court provide for a minimum number of contact visits to occur per year. It is not our experience that contact orders dictate a certain time or day on which contact is to occur. It is common practice for either FACS or the delegated agency to prepare a contact schedule from time to time setting out when and where the visits are to occur.

It is the experience of Legal Aid NSW that the minimum number of contact visits per year rarely, if ever, exceeds 12. It is more common that the minimum number of visits is prescribed to be between two and six contact visits a year. Increasingly, contact arrangements are identified as a notation to the order itself as opposed to being a stand-alone order.

More liberal contact arrangements are only agreed where a child is in a family placement and the carer is willing to facilitate and/or supervise the proposed contact arrangements. Such arrangements would not be imposed on the family member without their knowledge or consent, noting that section 87 of the C&P Act provides that the Children's Court must not make an order that has a significant impact on a person who is not a party to proceedings before the Children's Court unless the person has been given an opportunity to be heard on the matter of significant impact.

It is not the experience of Legal Aid NSW that applications are routinely brought before the Children's Court to vary or rescind final contact orders. Whilst it is not disputed that such applications may arise from time to time, such applications are an isolated occurrence.

Allowing contact to be determined by caseworkers

It is the experience of Legal Aid NSW that caseworkers' attitudes towards contact is largely inflexible. It is seldom that a care plan is filed proposing a variation of more than four (4) contact per visits per year, to be supervised by FACS (or a professional agency engaged by them). This is irrespective of the child's age, circumstances, relationship with the parent, the children's wishes or the type of placement they are in.

The reasons why there may be no realistic possibility of a child being restored to a parent are wide and varied. There will be some circumstances in which limited "identity" contact under professional supervision is necessary to protect the child. In

[18] George v Children's Court of New South Wales & 4 Ors [2003] NSWCA 389
[19] page 45

some circumstances, however, a parent may not be able to meet the needs of a child on a day-to-day basis but can provide for the safety, welfare and well-being during shorter periods of unsupervised contact. Examples include where a parent has an intellectual disability or have been unable to manage a child's special needs.

Staff from Legal Aid NSW have made the following observations about the current processes:

- When preparing care plans, there is often little consideration given to the need for ongoing supervision and/or whether contact can be provided by some other person. Likewise, often consideration of whether the child's safety during contact can be achieved by means other than professional supervision is not given.
- There are other alternatives to the current supervised contact model used by FACS. These include contact occurring in a public place, at a playgroup, a play centre, a Commonwealth funded contact centre or a library.
- It is not uncommon for caseworkers to oppose family members supervising contact – even when the carers of the children are willing to make themselves available to supervise a parent's contact.
- Little consideration is sometimes given for the strong desires of some children to have contact with their siblings who they are separated from. Conversely when it does occur there is arguably not the same need for strict supervision
- The prohibitive cost of professionally supervised contact is another factor that informs decisions as to contact, and the frequency in which it is recommended to occur – rather than the needs of the child.

Legal Aid NSW is concerned that if decision making in relation to contact were determined through casework where there is no realistic possibility of restoration, the end result in nearly every case would be limited identity style contact under professional supervision due to its cost – rather than decision making focussed on what is the child's best interests.

Case study 6

Legal Aid NSW appeared as the independent legal representative for the child L in proceedings before the Children's Court.

During the substantive proceedings, orders were made for L to be restored to the care of the mother. The Orders were made on the understanding that the mother had separated from L's violent father, had maintained independent accommodation and her mental health had stabilised. Sadly the restoration failed and L was placed in long term foster care.

Following the finalisation of the Children's Court proceedings, L's mother gave birth to a baby girl. At the time this baby was born FACS officers were confident the mother could provide adequate care for her daughter and no Children's Court proceedings were commenced.

After successfully parenting her daughter for several months the mother commenced s.90 proceedings to have L restored to her care. Expert evidence obtained during the s.90 proceedings confirmed that the mother was providing excellent care to her daughter and would likely provide similar care to L if he was restored.

Sadly for the mother L had, by the time of the final hearing, been with his foster carers for some 2 ½ years. He was securely attached to them and had no real attachment to his mother.

The Children's Court decided that L should remain in his foster care placement due to the attachment he demonstrated to his carers.

FACS maintained that contact between L and his mother should be supervised and provided on an "identity" basis. Further, in L's Care Plan to facilitating a relationship between L and his sister by way of contact that did not include the mother.

Case study 7

Legal Aid NSW appears as the independent legal representative for a child "S" in proceedings before the Children's Court. The child is placed in an OOHC placement with Barnardos carers.

Due to complex personal difficulties both parents have conceded that there is no realistic possibility of S being restored to their care. Despite their difficulties they have attended every contact visit on time, have conducted themselves appropriately and each contact has been beneficial to the child. There is no evidence that contact has disrupted or distressed the child. It is conceded that the child enjoys the visits with his parents.

FACS filed a Care Plan recommending that contact between S and her parents occur on six occasions each year. The parents opposed this frequency and sought to ventilate the issue at a DRC.

At the DRC S' caseworkers conceded that the figure of six contact visits per year was prescribed by Banardos, and that the child could not remain placed with his current carers if contact was to occur with any greater frequency.

The capacity of parents to advocate with caseworkers in relation to contact issues

Legal Aid NSW is concerned that many of the clients who we represent in care and protection matters do not have the capacity to be able to advocate for themselves in relation to contact.

This is particularly so when the relationship between the caseworker and parent is marked by conflict.

Without some mechanism to oversight casework decisions in relation to contact (including the suspension of contact), there is an appreciable risk that in some instances, decisions in relation to contact will be punitive against the parent.

Case study 8

Legal Aid NSW appeared as the ILR for the child Petra. Petra was removed from her parent's care after an episode of family violence to which police attended. Subsequent evidence revealed that Petra was a selective mute with very high needs. She had not attended school for a period of two years and was not receiving specialised care for her physical and psychological issues.

Pursuant to an interim order allocating parental responsibility to the Minister Petra was enrolled at and commenced attending school.

Despite clear instructions from FACS officers the mother attended at Petra's school and attempted to have contact with the child. This occurred on a number of occasions.

As such FACS sought and obtained a s.90A order prohibiting the mother attending the school or attempting to have unauthorised contact with Petra. FACS allege the mother breached that Order by again attending the school.

A decision was made, at a casework level, to suspend the mother's supervised contact with Petra. In cross-examination the caseworker conceded that "all contact was cancelled due to what FACS regarded as the breaching of the s.90A order"

The Magistrate then asked the caseworker: "So the reason for the cancellation of the contact was because of the breach of rules rather than because of a considered analysis of what Petra's best interests were, is that right?"

The caseworker replied "yes".

After judicial criticism of this unilateral casework decision contact between Petra and her parents was re-instated.

Circumstances in which it may be appropriate for contact to be determined by casework

Notwithstanding what is stated above, Legal Aid NSW recognises that there are some circumstances in which it is appropriate that decisions in relation to contact be left to casework. These include:

- Where a parent has disengaged from proceedings;
- Where a parent's attendance at contact whilst the proceedings have been before the Court has been intermittent and unreliable;
- Where a child is ambivalent about having contact;;
- Where there is no certainty around a parents circumstances and ability to attend for contact (for example, the parent is incarcerated or suffers form episodic bouts of mental illness); or
- Where a parent does not have an established relationship with the child or is seeking to be re-introduced after a long absence in the child's life.

Family placements

According to the Australian Institute of Family Studies, as at 30 June 2010, 56% of all children and young people in OOHC in NSW were placed in family or kinship placements. The allocation of parental responsibility for such children varies on a case-by-case basis. The allocation of parental responsibility will differ on a case by case basis, as follows:

- Parental responsibility to the Minister;
- Parental responsibility to the child's carer;
- Parental responsibility (or aspects of same) shared by the Minister and the carer.

If the Children's Court is seized of jurisdiction to make contact orders where a finding of no realistic possibility has been made, this will have a significant impact in situations in which:

(a) a child is placed with a relative or kin who holds parental responsibility for that child. This will particularly be so if the proposal to introduce Guardianship Orders is adopted; and

(b) a child is placed (or restored) to one parent to the exclusion of the other.

In such instances, there will not be a caseworker allocated to a child once parental responsibility transfers to a person other than the Minister. In the absence of the Court being able to determine appropriate contact arrangements, such decisions will be vested solely in the person holding parental responsibility.

It is not appropriate that decisions in relation to contact be left solely to a relative, kin or parent holding parental responsibility for a child. The reasons for this include:

1. There will be no certainty that the child and their birth family will be maintained, particularly where the carer is not related to the parent. For example, a maternal aunt who has parental responsibility for the child may not be amenable to maintaining a relationship between the child and their father when not obligated to do so via an order.

2. Contact orders can make provision for contact between a child and sibling who they are separately from. For example, it is not unusual to craft a contact order which provides that a child in OOHC has contact with a parent at the same time as that parent is having contact with another child.

3. In some instances, it will be difficult for family members to put boundaries around contact with the children and their birth parents who are insisting on contact. It may also result in the parents intruding on the placement and in turn impact on the child's capacity to settle into the placement. It may also result in the carer being pressured to allow contact other than is in the child's best interest.

4. Negotiations around contact can readily result in disputes and conflict. This can place pressure on the carer of the child and detrimentally effect the child who is exposed to conflict between their carer and their parent.

5. Many kin and relative carers do not want responsibility for making decisions or entering into negotiations about how contact is to occur. They want the protection of an order which sets the parameters for how contact is to occur.

6. Where the Court has determined that there is no possibility of restoration to one parent, but there is to another it is imperative that the Court dictates how contact with the other parent is to occur. This is particularly so in circumstances where the relationship between the parents has been characterised by family violence.

Orders for contact not only dictate how often contact occurs, but they also make provision for whether supervision is necessary (and in appropriate cases, what needs to occur in order for contact to proceed to be unsupervised). Contact orders can also place conditions on contact and may prohibit certain conduct during contact. Contact orders can be accompanied by undertakings from a parent or proposed contact supervisor. Such orders can be particularly important and protective in relation to all contact, and especially so in relation to family or kin care arrangements.

Legal Aid NSW acknowledges that a kin or family member holding parental responsibility for a child in OOHC should have a degree of discretion in relation to contact between the child, their parents and other significant persons. This discretion should, however, be subject to an order made which provides the minimum frequency of contact which is in an individual child's best interests. This order serves as the default position in the event of any disagreement as to how contact is to occur.

Wherever possible, such carers who are available and willing to supervise contact between the child, their parents and other significant persons should be given this responsibility provided that this is consistent with the child's best interests. To this end, Legal Aid NSW recommends that FACS give consideration to introducing some form of training for relatives who are proposed to supervise contact so that they can come to better understand and execute their obligations as contact supervisors. It is hoped that this in turn may lead to an increased use of family members approved as contact supervisors.

Case study 9

Legal Aid NSW appeared as the independent legal representative for the child V in proceedings before the Children's Court.

V was removed from her mother's care at birth and placed with her great-aunt. The mother had two older children who had previously been the subject of Children's Court orders and who were placed in the care of the maternal grandmother.

All three children had been removed due to domestic violence between the mother and her successive partners and the mother's inability to maintain stable accommodation. At no time was there any allegation of violence perpetrated by the mother. There were no concerns as to substance abuse and there was no evidence of mental health disturbance.

The mother initially sought the restoration of V to her care. After a lengthy Dispute Resolution Conference, attended by the mother's aunt and prospective long-term carer for V, the mother conceded that V would not be restored to her care.

V's carer, the mother's aunt, was willing to supervise the mother's contact and facilitate a meaningful relationship between V, the mother and her siblings.

Despite this, FACS maintained the view that V's contact had to be supervised by a departmental delegate and restricted to one visit per month.

Decisions that there be no contact between a child and a parent

Section 86(1)(c) of the C&P Act provides that the Court may make an order denying contact with a specified person if contact with that person is not in the best interests of the child or young person.

Legal Aid NSW acknowledges that in some instances of severe abuse, neglect or family violence it is in best interests of the child that the relationship between a child and a parent be terminated[20].

It is the position of Legal Aid NSW that a decision that there be no contact between a child and a parent or other significant person in their life should only be made by the Court and be accompanied by appropriate findings. It is not appropriate that such decisions be made by a caseworker.

A decision to terminate a relationship between a child and a parent by virtue of an order prohibiting any contact is a very significant order which encroaches upon a child's right to know and have a relationship with their birth parent. Such orders need to be carefully considered, having regard to the evidence, which will invariably include expert evidence. Procedural fairness and natural justice dictates that the person affected by that order has the right to challenge such evidence and/or to present evidence in opposition. It's for these reasons that such decisions should only be made by a Court.

[20] For example, Re Z [2011] NSWSC 1141; Re "Jim, Hana and Alana" [2012] NSWChC 15

Roles of child representatives

Every child in NSW who are the subject of care proceedings are independently represented by a legal practitioner[21]. Where a child attains the age of 12, there is a rebuttable presumption that they are capable of directly instructing their representative[22] and unless that presumption is rebutted, directly instruct their legal representative in the proceedings.

In determining contact arrangements, the Court takes into consideration a child's wishes, as relayed by their representative, and places due weight on those wishes as is appropriate in the circumstances.

Where a child is under 12, the role of the child's representative is to assist the Court in making a determination as to what is in the child's best interests[23], which includes arrangements for contact.

Where a child is over 12, they can directly instruct their solicitor to support or oppose any proposal for contact. They can also instruct their legal representative to bring an application on their behalf for contact with a relative or other significant person such as a sibling.

Child representatives play a vital role in ensuring that children in OOHC get to develop and maintain relationships with significant persons to them. This is not just their birth parents, but other significant persons including any siblings who the child may have been separated from. For Aboriginal children in particular, contact can be a means of keeping them connected with their family, community and culture.

In circumstances where caseworkers have failed to facilitate contact between a child and a significant person consistent with the child's best interests, the child's representative can and should seek an order to ensure that it occurs.

Legal Aid NSW is concerned that by removing the Court's power to make contact orders, the children who are the subject of proceedings will themselves be deprived of a voice in relation to arrangements for contact with their birth parents and other significant persons. In doing so, it will undermine a child's right to participate in significant decisions impacting on their life.

Impact on resolution of matters by consent

It is the experience of Legal Aid NSW that many matters before the Children's Court resolve by consent as a result of agreement being reached in relation to contact. The expansion of alternate dispute resolution in the Children's Court has been particularly successful in resolving disputes, particularly where questions of contact are concerned.

A parent is unlikely to be willing to make any concession as to the realistic possibility of restoration to their child if such a concession is accompanied with uncertainty as to what their relationship with their child will be following final orders being made. Conversely, if a parent is guaranteed that they will get to see their child at a set frequency following final orders, they will often be more amenable to entering into negotiations to resolve the matter without the need for a contested hearing.

[21] C&P Act, s 99
[22] C&P Act, s 99C
[23] C&P Act, s 99D

It is the strong view of Legal Aid NSW that if the Children's Court does not have power to make contact orders where a finding has been made that there is no realistic possibility, a significant higher portion of matters will run to a contested hearing than occurs presently. Likewise, alternate dispute resolution in care matters will cease to be of any meaningful utility in the majority of matters as there will be little open for negotiation.

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

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

RESPONSE

Legal Aid NSW supports the proposal that there should be a common framework in relation to contact arrangements for children and young people and their birth families to guide designated agencies when making contact decisions. Legal Aid NSW maintains, however, that designated agencies should only be empowered to make contact decisions in defined circumstances where a child is in a foster care placement and/or if fixed term final contact orders were to be introduced, following the expiration of such an order.

Any framework developed must ensure that administrative decisions around contact must be made in accordance with the principles enunciated in section 9 of the C&P Act and be consistent with the provisions of UNCROC (and in particular, Articles 8 and 9).

Legal Aid NSW considers the key elements of such a framework should include guiding principles in relation to:

(a) The designated agencies responsibilities and obligations to facilitate and support contact between a child in OOHC and their birth family. It should be clear that such obligation extends not only to birth parents, but to siblings, grandparents and other significant people to the child.

(b) The matters are appropriate to take into consideration when making an administrative decision in relation to contact and what matters are irrelevant to the decision making process.

(c) The people who should be consulted prior to a determination being made in relation to contact. This includes the child themselves when they have capacity to form and express such a view.

(d) The need for decisions to be made in a transparent process and the necessity that any person affected by the order should be able to have any such decision internally reviewed.

(e) The frequency with which contact arrangements should be reviewed as part of ongoing case planning. Legal Aid NSW considers it appropriate that such arrangements be reviewed, at a minimum, annually.

(f) The circumstances in which supervision of contact is necessary.

(g) If contact is to be suspended:

a. The circumstances in which contact may be suspended, noting that any decision to suspend contact must be done solely for the protection of the child;

b. The maximum period in which contact may be suspended without further review. Legal Aid considers such period should not exceed 3 months;

c. A requirement that the decision to suspend contact be notified to the person whose contact is suspended with reasons for the decision to be provided.

Legal Aid NSW submits that it is imperative that the framework includes specific provision to guide decision making in relation to contact arrangements for Aboriginal and Torres Strait Islander children to ensure that contact arrangements ensure the child's connectedness to their wider family, community and culture.

Legal Aid NSW considers that it should be mandatory for decisions in relation to contact that are made on an administrative basis to be notified in writing. Such written notice must be accompanied by information as to the manner in which a person dissatisfied with the decision may seek a review of that decision. As stated in answer to proposal 17, Legal Aid considers that the Children's Court should retain jurisdiction to determine disagreements in relation to contact in circumstances where mediation has been unsuccessful in resolving the dispute.

Legal Aid NSW requests that it be consulted in relation to any proposed framework prior to its adoption.

PROPOSAL 19: Improve the resolution of contact disputes by:

(a) requiring alternative dispute resolution (ADR) to be used to settle contact disputes
(b) where ADR is unsuccessful, contact disputes will be resolved in the Children's Court or the Administrative Decisions Tribunal (ADT) or the Family Court.

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

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

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

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

RESPONSE

Question 19(a)

Legal Aid NSW agrees that it is appropriate to impose a requirement that a contact order may only be sought after genuine attempts to resolve the matter by consent through alternate dispute resolution have failed.

In the event that mediation is unsuccessful, Legal Aid maintains its position that the Children's Court should retain the power to determine contact disputes.

It is the view of Legal Aid NSW that contact disputes will arise primarily in the context of the substantive proceedings. From a practical point of view it seems unfeasible that contact disputes could be referred from the Children's Court to another jurisdiction, be it the ADT or a court exercising jurisdiction under the *Family Law Act* 1975.

It is a common occurrence that when contesting restoration, a parent will ask that contact orders be made in the event that they are unsuccessful in having restoration ordered. If a Children's Court Clinic Report or other expert assessment has been obtained, the Court will have before it evidence, amongst other things, of the nature of the relationship between the child and the parent which will be relevant to a consideration of both realistic possibility and restoration.

The magistrate determining the matter will have heard evidence from the parent and other significant people. In doing so, they will make findings of fact and credit which will often be relevant to both the issue of contact and to the issue of both restoration and contact.

Prior to approving the Care Plan, the Court must satisfy itself that permanency planning has been adequately and appropriately addressed[24]. That Care Plan contains FACS' recommendations in relation to contact. It is trite to suggest that a magistrate, in considering whether to approve the care plan, could merely overlook or disregard FACS' proposals for contact contained therein.

The advantage of the Children's Court retaining the jurisdiction to determine contact disputes includes the following:

1. The timely resolution of disputes

As stated above, having heard evidence in the primary care and protection proceedings, the judicial officer will have sufficient evidence before them to determine both the question of realistic possibility of restoration and contact within the same judgment.

If the matter were to be referred to the ADT or be determined under the *Family Law Act* 1975, this would require fresh proceedings being commenced. There is a real possibility that assessments may need to be updated, update evidence will need to be filed and subpoenas re-issued. The judicial officer determining the same matter will inevitably have to re-hear much of the evidence which had been led in the Children's Court.

2. Continuity of representation

In most circumstances, there will be no continuity of representation. This is particularly so in relation to children.

In care proceedings, all children are represented. In family law proceedings, children are only represented if an order is made to that effect. In both instances, Legal Aid appoints the representative from a member of either the Independent Children's Lawyer Panel (for family law matters) or from the Children's Care Panel (for care matters). Not all practitioners are on both panels.

In care proceedings, children over 12 are represented on a model of direct representation. This is not the case in family law matters – all children under 18 are represented on a best interest model of representation.

In ADT proceedings, there is no power under their act to order that the children be separately represented and as such, a Guardian Ad Litem is appointed to guard the child's interest.

Continuity of representation for children is very important for two reasons. Firstly, it limits the number of professionals that a child needs to speak with. Secondly, where there is continuity the one legal representative has a better and more complete understanding of the relevant issues in the case and is therefore better placed to assist the Court in reaching a determination as to what is in the child's best interest.

[24] C&P Act, section 83(7)

3. Continuity of grant of aid

At the conclusion of any Children's Court proceedings, any legally-aided parties grant of aid comes to an end.

If there were still unresolved issues in relation to contact to be determined in a different forum, then a fresh application for aid would need to be made. If contact disputes were to be determined under the *Family Law Act* 1975, then the application would be determined under the Commonwealth funding guidelines. If the matter went to the ADT, the matter would be determined under State funding guidelines, but a merit test would apply.

The requirement for fresh applications for aid to be determined so that contact disputes may be resolved is unreasonable from the perspective of the client and will place an increased burden on the Grants Division of Legal Aid NSW.

It would also inevitably add further delay to the resolution of any disputes in relation to contact and formalisation of arrangements in relation to children generally.

4. Effect on parties in rural and regional areas

In rural and regional towns, the Local Court sits as the Children's Court. Parties in such towns do not have such ready access to either the Administrative Decisions Tribunal, the Federal Magistrates Court or the Family Court.

As such, if the Children's Court were seized of jurisdiction to make contact orders where there was a finding of no realistic possibility of restoration, then people in regional and rural locations would be unfairly disadvantaged. This will not only impact upon the family members. Caseworkers and carers will likewise be required to travel large distances to give evidence in such proceedings in lieu of attending their local courthouse.

Question 19(b)

Legal Aid NSW accepts that where a child is to be placed in foster care long term, it can be difficult for the Children's Court to make long term decisions in relation to contact, that takes account of every eventuality until the child's 18th birthday. This is particularly so where a child is very young and may not have yet transitioned into their proposed permanent placement.

Legal Aid NSW considers that in such instances, it may be appropriate that the Children's Court make an order a final contact order of a shorter duration. We consider an appropriate duration to be about 2 years.

The purpose of the fixed term final contact order would be to set up a regime or status quo in relation to contact following final orders. At the end of the fixed term period, future contact would be negotiated by the parents and FACS or the delegated agency.

One of the advantages of a fixed term final contact order is that it allows contact arrangements to be adapted to the child's age, stage of development, circumstances and wishes at a particular point in time. It also allows contact arrangements to have regard to a parent's circumstance at a particular point in time. For example, if a parent has been successful in maintaining sobriety and contact has been positive it will be open to the caseworker to determine that contact should be expanded or the need for supervision relaxed.

If fixed term final contact orders were to be introduced, there would need to be a mechanism in which a party could reapply to the Children's Court in the event of any disagreement in relation to contact once the order had expired. Legal Aid NSW does not consider that s 90 of the C&P Act provides an appropriate mechanism for a party to seek to agitate a contact issue where the order has expired.

Legal Aid NSW recommends that the re-entry into the Court system in such circumstances be by way of alternate dispute resolution. This is not a dissimilar concept to the requirement that a party seeking to bring proceedings under the *Family Law Act* 1975 for a parenting order must first obtain a certificate by a family dispute resolution practitioner[25].

Subject to appropriate funding being made available, Legal Aid NSW has the capacity to facilitate mediations in such circumstances. Such mediations would be based upon the model adopted for the Bidura External Care and Protection Mediation Pilot.

The Family Dispute Resolution Unit of Legal Aid NSW provides "early intervention conferences" for family law clients where Court proceedings have not yet commenced. At the end of the mediation conference, the mediator makes a recommendation to Legal Aid as to whether a client's grant of aid should be extended to commence proceedings in the event that the litigation was unsuccessful. A similar concept could be adopted in relation to contact disputes. This in turn will assist to prevent unmeritorious contact applications being brought before the Court.

Legal Aid NSW considers that fixed term final contact orders will only be appropriate in circumstances where a child is in a foster care placement, not where they are placed with a relative or kin for the reasons expressed above.

Question 19(c)

Legal Aid NSW does not agree that the ADT is the appropriate forum to determine contact disputes where either the Minister or delegated agency holds parental responsibility.

The role of the ADT is to provide an independent merit review of administrative decisions. It is not a child welfare jurisdiction.

Whereas the ADT is concerned, amongst other things, of ensuring that the decision maker applied the appropriate principles of the C&P Act in reaching a decision, the Children's Court must actually apply those principles in reaching a determination. This is a marked difference.

[25] Section 60I

Either the Federal Magistrates Court or the Family Court may be the appropriate jurisdiction to determine contact disputes in some instances where a third party has parental responsibility. For the reasons stated above, it is not feasible or practicable for such matters to be determined under the *Family Law Act* 1975 at first instances (that is, in lieu of the Children's Court making the decision in the substantive care proceedings). Where contact orders have been made, and are later sought to be varied, the Family Law Courts may be appropriate in some circumstances, although due consideration needs to be given to the significant financial and emotional burden that will be placed on carers (and in turn the placement) if they are forced into a position of defending contact applications.

In considering this option, it also needs to be remembered that different considerations come into play when determining proceedings under the C&P Act and the *Family Law Act* 1975. In the case of the latter, when making a parenting order (which includes a contact order although such orders are referred to as "spend time orders" under that legislation), the two primary considerations that the Court must take into consideration are:

(a) the benefit to the child of having a meaningful relationship with both of the child's parents; and

(b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence[26].

Contact which occurs for identity purposes is meaningful contact. If the risk to the child can be appropriately managed, a different regime of contact will be ordered to that proposed in the care plan. Carers who take on the care of children on the understanding that contact will occur as per the care plan may be quite unprepared for the reality.

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

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

RESPONSE

Legal Aid NSW agrees that there be a mechanism for enforcement of contact orders. It is also agreed that there should be a mechanism to enforce contact agreements which are made through casework practice without a court order.

Legal Aid NSW supports the proposal that the Children's Court have power to enforce contact orders and arrangements. The power to enforce orders should extend to the power to take action when it is found that an order has been contravened without reasonable excuse.

[26] Section 60CC

Appropriate consequences for breach

There should be consequences where a contact order has been breached, without reasonable excuse by:

(a) FACS and/or a delegated agency; and

(b) By an individual.

It is not suggested that the consequences could be the same in both instances.

Contravention by FACS and/or designated agency

From a practical point of view, the fact that a designated agency is not a party to the care proceedings and therefore to the contact order presents difficulties in terms of the ability to enforce a contact order against them. This is an issue which will need to be given due consideration when advancing this proposal.

Likewise, consideration will need to be given to the situation in which the child's carer refused to make the child available for contact, despite being directed to do so by FACS or the designated agency. In such circumstances it would not be appropriate to proceed against FACS or the agency but some recourse should be available directly against the carer.

Where an order or agreement is breached by a designated agency, the appropriate consequences where the Court finds that a breach occurred without reasonable excuse, the appropriate remedy would be for:

1. Where appropriated and warranted by the circumstances, the magistrate could refer his or her judgment to either:

    a. The Director-General; and/r

    b. The chief executive officer of the delegated agency; and/or

    c. The ombudsman

2. Where it is in the best interests of the child, the Court should have power to order compensatory contact and/or vary the contact order;

3. Order that FACS or the delegated agency pay the applicant's costs of bringing the application. It is only suggested that there be power to order costs where there has been impropriety in either the breach of the order or the conduct of the litigation.

Contravention by an individual

In determining the appropriate powers of the Children's Court where a contact order was breached by an individual, consideration should be given to adopting a scheme similar to that under the *Family Law Act* 1975[27]. Where a Court under that Act finds that an order has been breached without reasonable excuse, the powers of the Court include:

[27] Section 70NEB

1. Order that a contravening party attend at a post-separation parenting program;

2. Order compensatory time;

3. Adjourn the proceedings to allow one or both parties to apply for a further parenting order that discharges, varies or suspends the primary order;

4. Place the contravening party on a bond

5. Impose a fine not exceeding 10 penalty units

6. Order that the contravening party pay the other party's legal costs and/or compensate them for travel and other expenses incurred and wasted as a consequence of the contravention.

Case study 10

Legal Aid NSW appeared as the ILR for three sisters in proceedings before the Children's Court. The sisters were removed from the care of the mother after one of the children suffered a serious unexplained injury.

The two eldest sisters were placed with their paternal grandparents and the youngest was restored to the care of her father, from whom the mother was separated.

Orders were made for the Minister to exercise parental responsibility for contact. All other aspects of parental responsibility were vested in the children's respecting carers.

The final Order contained lengthy and detailed notations setting out the agreed contact regime. This included direct contact facilitated by the Director-General on a monthly basis, plus additional contact as agreed between the mother and each of the children's carers.

The mother now alleges that despite these notations, she has not been afforded the frequency of the contact provided for in the orders.

Sometime after the conclusion of the proceedings the file became "unallocated", and there was no FACS caseworker tasked with monitoring the placements or facilitating the contact.

On enquiring with FACS as to her contact the mother was advised to contact the carers directly. Sadly, due to inherent family conflict, the mother was unable to negotiate contact with the carers, leading to her being compelled to bring a section 90 application as there was no other means of enforcing the agreed contact.

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

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

RESPONSE

Legal Aid NSW strongly supports the use of alternate dispute resolution in care and protection matters.

Legal Aid NSW agrees with the proposal to transfer the existing provisions relating to ADR from the *Children and Young Persons (Care and Protection) Regulation* 2012 to the C&P Act.

Legal Aid NSW supports that there be a broad definition of ADR to include all current models and potential future models. Legal Aid NSW further agrees that it is appropriate that the roles, obligations and protection of convenors of the ADR process and confidentiality provisions be included in the legislation.

Legal Aid NSW requests that we be consulted, in due course, on the proposed drafting of these provisions.

The introduction of alternate dispute resolution in the care jurisdiction has been a significant success and produced some positive outcomes for children and their families.

Legal Aid NSW has made a significant investment in the development and provision of mediation services and care and protection matters. The Bidura Court referred mediation pilot is continuing to receive referrals for mediation with pleasing results. In addition, we have commenced facilitating mediations in District Court appeals and adoption matters. We consider that we have the skills and capacity to expand our alternate dispute resolution services in care and protection matters, subject to appropriate funding being made available.

For alternate dispute resolution to continue to be successful in care and protection matters, it is imperative that the programs continue to be adequately funded. This includes ensuring that there is adequate funding for all eligible parties to be legally represented for the full period necessary to complete the mediation.

One of the key features of the Bidura Pilot and the dispute resolution conferences is the requirement that all parties, including FACS are legally represented. This has resulted in a significant improvement to how preliminary conferences (being the predecessor to dispute resolution conferences) operated. With preliminary conferences gains were scarce because parties did not want to commit to anything without obtaining legal advice. Where gains were made, they would often be lost when a party resiled from their position upon obtaining legal advice.

Case study 11

Legal Aid NSW appeared as the independent legal representative for two children in proceedings before the Children's Court. The children were placed with their grandmother, and it was proposed that she continue to care for them long term.

The parents conceded that there was no realistic possibility that the children be restored to their care and agreed with the proposal for the children to remain with their grandmother.

The matter was referred to Legal Aid's external mediation pilot in relation to the question of the children's contact with their parents. The grandmother participated in the mediation.

At the commencement of the ADR the parents sought contact on a weekly basis, facilitated and supervised by the grandmother. FACS offered contact on a monthly basis professionally supervised by a delegate of the Director-General.

An agreement was reached that the grandmother would undertake child protection counselling to ensure she has a firm understanding of the risks posed to the children by the parents and of the need for close supervision of the contact, following which she could supervise additional contact between the children and their parents.

Case study 12

Legal Aid NSW appeared as the independent legal representative for the child L in proceedings before the Children's Court. Following a defended final hearing the Court determined that L should be placed in the care of her father who was granted sole parental responsibility

The mother was dissatisfied and appealed the matter to the District Court. L's mother commenced appeal proceedings in the District Court. The mother opposed the making of any orders for parental responsibility in order for the common law position of parental responsibility shared between the parents be revived.

The matter was complex and involved expert evidence as to the mental health of the mother and the parenting capacity of the father. There was the potential for several experts to be required for cross-examination.

Prior to the matter being listed for hearing, the parties agreed to participate in a mediation convened by Legal Aid NSW.

At the first conference, it was agreed that a jointly commissioned Children's Court Clinic Assessment should be obtained. The terms of the Assessment orders were negotiated at the mediation.

After the report was received a second mediation was convened at which a final agreement was reached. That agreement included a detailed contact plan providing for a gradual increase the contact between L and her mother, building up to unsupervised contact overnight on weekends and for block periods during school holidays.

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

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

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

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

RESPONSE

Legal Aid NSW does not take a position at this time in relation to whether the safeguards for the provisions of special medical treatment of OOHC should be required through legislation or administrative arrangements.

Legal Aid NSW similarly does not take a position in relation to the provision of psychotropic medications to children in OOHC.

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

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

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

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

RESPONSE

Question 23 (a) and (b)

Legal Aid NSW supports the proposition that the privacy of children in OOHC should be protected. We note that s 105 of the C&P Act prohibits the publication of the names and identifying details of children in OOHC.

Legal Aid NSW appreciates that the increasing use of social media provides ongoing challenges in terms of privacy and containment of confidential information. However, as we are presently unclear as to the extent to which s 105 is proving insufficient to protect the privacy of children in OOHC it is difficult to make and meaningful comment in relation to this aspect of the discussion paper.

Legal Aid NSW is aware of a website which 'names and shames' caseworkers. The same website 'names and shames' solicitors, barristers and judicial officers undertaking care and protection work. Legal Aid has reservations about the extent to which this can be made an offence, noting that most postings are done anonymously and the challenges associated with obtaining sufficient proof to the requisite standard that a particular person committed the offence. We question whether remedies such as injunctive relief, contempt provisions or existing criminal offences may provide sufficient redress in specific cases where there is sufficient proof.

Legal Aid NSW would welcome consultation on any specific draft provisions should it be intended to proceed with these amendments, noting that we have significant reservations that any such provisions may have unintended consequences.

Question 23 (c)

Legal Aid NSW does not agree that the C&P Act should be amended to provide that it is a criminal offence for a convicted sexual offender of children to use social media sites.

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

(a) streamlining parental responsibility orders that may be made by the Court to make it easier to identify who holds which aspect of parental responsibility for a child or young person
(b) introducing a 'self-executing' order whereby parental responsibility is with one person for a period of time and then passes to another at the end of the period.

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

RESPONSE

Legal Aid NSW agrees that the current scheme for parental responsibility orders under the C&P Act is complex and cumbersome and should be the subject of reform.

Legal Aid NSW recommends that the separate scheme for the Court to allocate parental responsibility in favour of the Minister under section 79(1)(b) and section 81 be done away with. This should instead be replaced by a single scheme in which the Court can make one of 5 orders:

1. An order that aspects of parental responsibility be shared between both parents or be allocated to one parent to the exclusion of the other parent

2. An order allocating parental responsibility to one or both parents and to the Minister or another person or persons jointly

3. An order allocating parental responsibility to another suitable person or persons

4. An order allocating parental responsibility to the Minister

5. An order to the Minister and another suitable person or persons jointly.

That section should also make provision for aspects of parental responsibility to be allocated.

Sequential orders

Legal Aid NSW notes the proposal in the discussion paper for the C&P Act to include a formal power to make a sequential or self-executing order.

Whilst we do not oppose this course, we likewise see no necessity for it. Such orders are commonly made without such provision being in the legislation.

Allocating aspects of parental responsibility to the Minister where the State's involvement is minimal

Legal Aid NSW agrees that the cumbersome nature of parental responsibility orders is attributable to a large degree by the fact that the Minister is allocated aspects of parental responsibility, either solely or shared, where FACS' only involvement is in relation to contact, financial matters, education or medical treatment.

This occurs as FACS will not provide financial or other practical support without holding some aspects of parental responsibility. A common example is where parental responsibility is to be vested in a family member, but FACS are to stay involved for a period to facilitate and supervise contact with a birth parent. In order for this to occur, it is understood that they require parental responsibility for the aspect of contact.

To the extent that this is not FACS policy, this perception needs to be addressed.

It would be the preference of Legal Aid NSW for final care orders to be made that provide for FACS to:

- Facilitate, arrange and/or supervise contact;
- Make funding available for therapeutic, medical or other special needs of the children etc

without the need for those aspects of parental responsibility to be vested in the Minister. It is acknowledged that such orders could only be made by consent.

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

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

RESPONSE

Legal Aid NSW is not opposed to the maximum timeframe for supervision orders being extended to 24 months. Legal Aid NSW recommends that if such an amendment is to be introduced, that section 76(4) be amended to provide that if the Court requires a report to be presented to it, that report be filed no later than 3-6 months prior to the expiration of the supervision order. This will enable sufficient time for the report to be received and considered, and if necessary the supervision order extended, prior to the original order lapsing.

Legal Aid NSW strongly opposes, however, a supervision order being automatically extended as a consequence of FACS' failure to file the required report under s 76(4) of the C&P Act. In failing to file the report, FACS is in breach of an order of the Children's Court. There is no justifiable reason why a family should be subject to a further period of supervision arising from FACS breach of a Court order.

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

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

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

RESPONSE

Legal Aid NSW does not take a position in relation these proposals.

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

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

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

RESPONSE

Legal Aid NSW does not take a position in relation these proposals.

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

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

RESPONSE

Legal Aid NSW supports the requirement that FACS table an annual report to Parliament outlining their involvement with families of children known to FACS who have died.

PROPOSAL 29: Amend the *Care Act* to:

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

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

RESPONSE

Legal Aid NSW does not take a position in relation these proposals.