THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLIC/IIC/FLC:PWaj1421378

1 December 2017

Commissioning Division
Department of Family and Community Services
4-6 Cavill Avenue
Ashfield NSW 2131

By email: childprotectionDP@facs.nsw.gov.au

Dear Sir/Madam,

Shaping a Better Child Protection System

Thank you for the opportunity to contribute to the Department of Family and Community Services (FACS) on your Discussion Paper "Shaping a Better Child Protection System" ("Discussion Paper"). The Law Society's Children's Legal Issues, Indigenous Issues and Family Law Committees have contributed to this submission.

The Law Society notes the report on the inquiry into child protection ("Inquiry report") stated that the number of children and young people that need protection by the state is a significant concern that should be addressed collaboratively.[1] We consider that it is crucial that the government review care and protection legislation and policies to provide better long-term outcomes for vulnerable children, young people and families. We strongly support the shift in recent reforms to ensure that FACS and associated agencies should take a person-centred, evidence-based approach.

The Law Society's submissions are informed by the view that the best form of permanency is having children remain with their parents. We support early intervention approaches that provide intensive therapeutic assistance to parents to build parenting capacity. In our view, families should also have early access to legal assistance to assist them to navigate the process. The Law Society's views are also informed by our serious concerns in respect of the over-representation of Aboriginal and Torres Strait Islander children in the care and protection jurisdiction, and the compounding of intergenerational trauma that further removals of children engenders. We submit that more focus on delivering early and continuing intensive, wraparound support that is culturally safe and trauma-informed, including legal support, for Aboriginal families (and in appropriate cases, early diversion to the family law jurisdiction) is likely to result in better outcomes for those children and families.

The Law Society is concerned that the constant churn of reviews and inquiries suggests that there is a lack of an in-depth understanding of what is driving poor outcomes for children and their families. We submit that there is a need for a solutions-focused and evidence-based approach to child protection and child wellbeing. We note that the independent review of the

[1] NSW Parliament, Legislative Council, General Purpose Standing Committee No. 2, *Child Protection* (March 2017) ('Inquiry into Child Protection') <https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/6106/Final%20report%20-%20Child%20protection.pdf>.

out of home care system conducted by Mr David Tune AO PSM found that expenditure is crisis driven and not well-aligned to the evidence, noting that 67% of programs for vulnerable children and families have not been evaluated and a total of $302 million is spent on programs "for which the effectiveness is unknown".[2] We consider it important that the Government release the full findings of the independent review conducted by Mr Tune so that future policy reform may be properly informed.

We also note that Professor Megan Davis is currently carrying out an Independent Review of Aboriginal Children in Out of Home Care, and that this review is due to report next year. We query the wisdom of implementing any reforms before that report is available and suggest that any reforms relating to Aboriginal children and young people should be subject to the review findings.

Similarly, we understand that the NSW Government is conducting the first large-scale prospective longitudinal study of children and young people in out of home care in Australia. We consider that, consistent with the recommendations of the Tune review, how and when the reform contemplated in the Discussion Paper is undertaken should be informed by an evidence-based approach to designing reforms, which will have lasting impacts and secure a better future for vulnerable children and families.[3]

We set out our comments on the Discussion Paper below for your consideration. In particular, we note that the Law Society is very concerned about the proposals regarding streamlining of adoption orders and does not support those proposals that are set out in the Discussion Paper. In our view, the rationale underlying these proposals is not supported by evidence. We note that similar proposals were made in respect of the "Safe Home for Life" reforms, and there was little or no stakeholder support for those proposals then, and the government did not pursue those proposals at that time.[4] Given this, we query why these proposals are currently being revisited.

Further, the Law Society has long held the view that adoption should not be an option in respect of Aboriginal and Torres Strait Islander children in the care and protection jurisdiction, and continues to hold that view.

Earlier family preservation and restoration

Question 1 - What does the concept of "restoration" mean?

In the Law Society's view, restoration generally means restoration to the person or people exercising parental responsibility before intervention in the family took place. However, we note family members or parents can make applications under section 90 of the *Children and Young Persons (Care and Protection) Act 1998* ("Care Act") for restoration notwithstanding that they may not have held parental responsibility at the time the subject child was removed.

Noting that sections 10A(3)(a) and 83 of the Care Act refer to 'restoration' in the nature of a child or young person being 'restored to the care of his or her parent or parents so as to preserve the family relationship', we generally consider that it is appropriate to keep the primary focus of restoration to parents. However, where this is not possible, other suitable

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[2] NSW Government, *Their Futures Matter: a New approach,* https://www.facs.nsw.gov.au/__data/assets/file/0005/387293/FACS_OOHC_Review_161116.pdf

[3] Department of Family and Community Services, *Pathways of Care Longitudinal Study,* http://www.community.nsw.gov.au/about-us/research-centre/pathways-of-care-longitudinal-study

[4] Department of Family and Community Services, *Report on the outcomes of public consultation on the child protection legislative reforms discussion paper 2012,* November 2013. See responses to proposals 11, 15 and 16.

carers should capture the variety of prevailing care arrangements that exist in Australian society including same sex couples, ex-partners, grandparents and extended families. A definition that applies to Aboriginal children should be considered and consulted on separately.

We also note that 'restoration' is referred to in relation to care plans section 136(3) of the Care Act. Any proposed definition should take into account the term's application in that provision.

We do not in principle oppose a legislative definition of restoration for the purposes of setting out clearly what is expected to take place for restoration to occur, and how the Court determines whether restoration is viable.

Question 2 - How could the Care Act be amended to better reflect the breadth of family systems and structures within our community?

In our view, there is no need for a definition of family. The Law Society notes the breadth of the definition of both relative and kin at section 3 of the Care Act. A definition of family may unintentionally limit consideration of who comprises family. A provision could be inserted that states that "family" includes extended family and that the child's social, cultural and religious background should be considered in determining who is the child's family (see also above comments regarding other suitable carers). This would be in accordance with the principles of the Department's "Safe Home for Life" reforms.

Question 3 - If the Care Act was amended to better reflect the breadth of family systems and structures within our community what additional safeguards should be required to ensure children and young people are protected?

We do not consider that additional safeguards are required.

The Law Society's view is that section 10A of the Care Act provides adequate guidance on the principles of permanency and restoration, in accordance with the hierarchy stipulated in that provision. We note that while the birth parents and adoptive parents are the primary level of consideration, section 10A provides that the secondary line of consideration for permanent placement is with a relative, kin or other suitable person.

In addition to the objects of the Act, the Law Society continues to strongly support the current existing placement principles for Aboriginal and Torres Strait Islander Children and Young Persons set out in section 13 of the Care Act. The Law Society notes that section 13 was implemented in order to recognise the rights of Aboriginal children to be placed in a culturally appropriate way, and in accordance with cultural responsibility and obligations.[5] In considering whether the Care Act needs amendments, the Law Society emphasises that it is very important that these principles remain.

The Law Society notes that FACS' Permanency Support Program was introduced on 1 October 2017 and involves 52 permanency coordinators across NSW and a new case management policy and guidelines.[6] While this is a positive initiative by FACS, we note that it is important that case workers are properly trained to ensure that they are familiar with the permanency principles in the Care Act, particularly so that case workers understand that adoption is not a culturally appropriate option for Aboriginal and Torres Strait Islander

[5] The Law Society has previously supported this position: see The Law Society of NSW, Submission to the Minister for Family and Community Services, *Child Protection: Legislative Reform Proposals Discussion Paper*, 22 March 2012.

[6] Department of Family and Community Services, *Permanency Support Program* (accessed on 22 November 2017) http://www.community.nsw.gov.au/permanency-support-program

children. Sections 10A and 13 arguably provide a legislative mechanism that obliges FACS to carry out appropriate casework to identify appropriate kin and family placements. However, it is not clear what consequences there are for FACS failing to comply with these provisions. Consideration could be given to amending the legislation to clarify that the permanent placement principles set out in sections 10A and 13 are a requirement, rather than merely a guide.

We also note our comments below regarding mandated report or response timeframes, which help to ensure that children and young people are protected.

Mandated timeframes

Question 4 - Should there be mandated timeframes for responses to ROSH reports by FACS or other agencies? If so, why? If not, why not?

The Discussion Paper notes that some jurisdictions have legislated timeframes to respond to child protection reports.

The Law Society considers that the implementation of a mandated response timeframe may be detrimental if not adequately resourced. We are also concerned that the implementation of such timeframes could result in a backlog of reports (similar to the out of home care backlog of investigations into carer misconduct). This could have significant implications on outcomes for children and young people at risk of harm.

We also note that the most appropriate timeframe in any particular case may depend on the particular circumstances of the case. The imposition of a mandated timeframes may make it difficult to take those factors into account.

The Law Society suggests that it would be more useful to direct resources to improve the effective triaging of ROSH reports than to mandate face to face assessments. It may also be useful for FACS to develop indicative timeframes for investigation that are made publicly available.

Question 5 - What would you consider to be an appropriate timeframe for assessments to be conducted, a case plan to be developed and appropriate support services to be put in place to keep the family together?

As noted above, the imposition of a mandated timeframe may make it difficult to take the individual circumstances of a particular case into account. Any timeframe should be able to respond to the seriousness of the allegation and account for the best interests of the child as the paramount consideration. Similarly, indicative timeframes would assist all parties involved.

Question 6 - What benefits and risks for families may arise from mandating response timeframes?

The Law Society is concerned about possible unintended consequences that may flow from mandating response timeframes. In particular, we are concerned that full and proper investigations may be curtailed, resulting in perfunctory and insufficient initial responses without close or comprehensive interrogation of the relevant risks and appropriateness of the response. We also consider that mandating response timeframes may increase the risk that there will be backlog of matters if the timeframes are not supported or implemented effectively, which has occurred in other areas with mandatory response timeframes. A further risk is that the threat of individual sanctions to caseworkers (for example, due to failure to meet timeframes) could lead to reduced numbers of caseworkers,

If timeframes are to be mandated, we suggest that resources should be directed to monitoring the sufficiency of responses. Even if timeframes are not mandated, resources may be more appropriately directed to independent monitoring and oversight of the quality of the ROSH reports and investigations undertaken to identify risk of significant harm.

We are concerned that the proposal to mandate timeframes is not focused on improving outcomes for children and families, but appears to be unduly focused on compliance with a policy.

Alternative Dispute Resolution

Question 7 - What are your views about strengthening the obligation for FACS to always consider the use of ADR where there are child protection concerns?

The Law Society sees great value in ADR processes and supports the proposal to strengthen the obligations for FACS to always consider the use of ADR where there are child protection concerns. In most cases, use of ADR at an appropriate time will enable a more individualised response to the child protection concern. ADR methods currently used in the NSW child protection system include Family Group Conferencing (FGC), Dispute Resolution Conferences (DRCs) and mediation conducted by Legal Aid in relation to contact disputes.

Using FGC early in the child protection process, prior to an application to the Children's Court, generally assists caseworkers to more clearly identify what the case plan goals are concerning permanency. FGCs are run by independent facilitators who are trained mediators or FGC accredited facilitators with diverse experience in working with families, including children, young people and Aboriginal families and communities. In relation to Aboriginal families, the facilitation of ADR is appropriate in circumstances where self-determination is promoted, and consultation is meaningful; consistent with section 11 of the Care Act.

We agree that participation in FGC should be voluntary, in circumstances in which FGC is being used in the early stages of intervention with a family, their relatives and supports.

However, we raise the possibility of participation in ADR being mandatory when there are serious child protection concerns and removal is being considered. We note that there is provision for dispute resolution to take place when a parent capacity order has been filed (section 91D). If this was considered, we would recommend a model of ADR that is lawyer assisted and in which parents and children are legally represented. We recommend that there should be at least one mandatory DRC prior to a hearing being set.

In the experience of our members, FGC works best when it is promoted as an inclusive, strength based process. Some of our members are concerned about the "creep" of FGC in care and protection matters, such as in the negotiation of guardianship orders (which have far reaching legal implications) and contact orders, particularly in light of the fact that it is non-lawyer driven and children are not represented.

We are aware that too often parents and others are alienated and disempowered by the decision-making process. In the experience of our members, there is a significant disparity in power between FACS and parents and the Law Society considers legal assistance a critical part of the success of ADR. The opportunity for parties to obtain legal advice should not be viewed as obstructive, and often results in better outcomes for the child and families.

Given the overrepresentation of Aboriginal children in the care system, it may be necessary to provide Aboriginal families with the opportunity to be legally represented from the outset, so they are fully informed about what is happening. In these circumstances, legal representation should involve extended kin and should allow for financial assistance to allow

families to travel from regional areas to attend ADR sessions. Consideration should also be given to whether children should be represented, especially in respect of children who are self-placing back to families.

The Law Society also considers it important that FACS staff are trained on appropriate behaviour in mediation conferences and interests-based negotiation models to assist them in attending section 86 meditation conferences in instances where there are no lawyers present. Consideration could be given to empowering those staff members with greater discretion to enter into agreements. In the experience of our members, it appears that FACS staff attending the mediation conferences are not able to fully participate. We also suggest that in such circumstances FACS staff should have access to a legal officer that they can contact during the conference to provide them with legal support.

Question 8 - Does the Care Act provide enough clarity in relation to the use of ADR at various stages of the child protection process? If not, how could it be improved?

In the Law Society's view, the current section 37 is sufficiently clear with one exception. There should be a legislative requirement to advise parties who are Indigenous of the options pursuant to the *Family Law Act 1975* (Cth) We note that the Law Society has previously highlighted that it can be very difficult to secure arrangements for meaningful contact arrangements and cultural connection through Children's Court processes for Indigenous children and families.[7] While we acknowledge that there have been improvements, such as in respect of cultural planning in the Children's Court, in our experience, better outcomes can be secured for Indigenous children and families through the family law jurisdiction. In the experience of our members, most problems arise from lack of resources and skills devoted to its implementation. For example, if particular caseworkers are not sufficiently trauma-informed, it may be inappropriate for them to be involved in an ADR process involving Aboriginal children and families.

We note that contact mediations may take place under section 86 of the Care Act. In our view, these mediations are a good opportunity for parties to develop contact that continues to be appropriate and commensurate with risk. In the experience of our members, better outcomes result if parties are represented, and we submit that it should be a requirement that parties have the opportunity to obtain legal representation.

We also suggest that consideration be given to amending section 63 of the Care Act to provide additional clarity as to the stages in which ADR should be considered in the lead up to a care application. We suggest that section 63(1)(b) be strengthened by requiring FACS' to provide specific evidence of the use, or consideration of, ADR. The section should also provide for consequences, such as costs consequences, for FACS in failing to comply with its ADR responsibilities. We also suggest that consideration be given to amending the Care Act to provide further guidance as to when and in what circumstances ADR would be appropriate and could assist the parties to the proceedings.

Question 9 - What measures could be implemented to improve support for participants in the FGC process?

In the experience of members, there does not appear to be utility in strengthening the obligation to consider the use of ADR when there is no positive obligation to follow through with the agreements reached at the ADR, particularly where FACS has obligations (for example, referrals). Feedback from regional areas is that where FGC is to occur but service

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[7] Law Society of NSW, *Family Law Council Reference – Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems,* https://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/1044586.pdf

providers are not available within a timeframe, FGC does not proceed and often a court application is filed.

We are also aware of instances where FGC is not always extended to kinship groups, despite them being more culturally appropriate in theory. We suggest that kinship groups require greater consultation as to who should attend, particularly with Aboriginal and Torres Strait Islander families.

We further consider that there should be a renewed focus on the use of Aboriginal Care Circles in the ADR process.[8] In the experience of members, the use of care circles appears not to have developed as a result of lack of resources and recruitment of community members. We suggest that, where possible, FGC be held 'on country' and at a place and location identified by family.

We also suggest that FACS consider how domestic violence negatively impacts the ADR process and consider ways to ensure the safety of participants.

Given the disparity in power between FACS and parties in a FGC process, parties should have the opportunity to be legally represented.

It may be helpful for more data and evidence around the benefits of using ADR as an alternative to court intervention to be gathered and provided to participants in FGC to encourage participation.

Question 10 - In what circumstances do you consider the use of ADR is appropriate or inappropriate?

In most cases ADR will be appropriate if done at the right time. It is preferable for ADR to happen prior to any removal of a child. The need to consider alternative action before making a decision to remove a child from their family is necessary to ensure compliance with the principle of least intrusive intervention set out in section 9(2)(c) of the Care Act and in accordance with the best interests of the child.

Again, we note that better outcomes result if parties have had the opportunity to obtain legal advice.

We suggest that ADR should be required for any situation where there is a birth flag, and a clear reassessment of the mother should occur. In these circumstances, family law options should also be explored, especially the option of the child leaving the hospital in the care of their father. If grandparents or other family members are interested in a family law solution within the family, an assessment of their suitability should take place. The child can stay in the hospital until urgent orders are made. We make these comments particularly in respect of Aboriginal children and families, based on successful family law applications in such circumstances.

Question 11 - What is considered to be sufficient prior alternative action before taking action to remove a child from their family?

This will depend on each situation and the degree of risk to the child. We are of the view that this is an important threshold issue for FACS and that there should be a requirement to provide substantial evidence of prior alternative action at every step of the proceedings. At the least, the following should be considered:

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[8] Children's Court, *NSW Care Circles: Procedure guide,* http://www.childrenscourt.justice.nsw.gov.au/Documents/care%20circles%20procedure%20manual%20amended%20june%202012.pdf.

1. Temporary care agreement with FACS if the safety issue is short term.
2. Use of a Parental Responsibility Contract (PRC).
3. Use of a Parent Capacity Order (PCO).
4. Use of a Safety Plan.
5. Exploration of family law options.
6. Referral of the new parent to a residential parent/baby support service like Karitane or Tresillian.
7. Referral of the parent with housing issues to refuge accommodation.
8. Referral of the parent into residential drug rehabilitation with children (if appropriate).
9. Referral of the parent to an intensive family support program similar to Newpin services.

In our view, FACS should provide formal notice of what the risk issues are, what engagement with FACS is required and how individuals may seek therapeutic and legal assistance. FACS should also refer, where appropriate, individuals to family law options. FACS should properly consider effective and appropriate ways to engage with parents, in particular, parents with cognitive disabilities. In this regard, we note the Newpin model of providing parents with intensive wraparound therapeutic and parenting capacity services currently available to parents as restoration support. However, we strongly suggest that this style of intensive wraparound service delivery should be available prior to the removal of children. In the Law Society's view, the best form of permanency is keeping children with parents.

The Law Society's view is that FACS should use PRCs more often, and refer families to early legal assistance. In our view, PRCs can be an effective tool for individuals to identify how to engage.

Greater use of PRCs, together with the opportunity to seek early legal advice, should be considered a key part of any early intervention strategy. We note that in the Inquiry report, the Parliamentary Committee expressed its surprise that PRCs have only had nominal use. The Parliamentary Committee noted that PRCs have the potential to be used in early intervention, before a child is removed, to allow parents the opportunity to participate in programs, counselling or other services.

The Parliamentary Committee acknowledged in the Inquiry report that Legal Aid NSW and the Women's Legal Service NSW have been working with FACS to improve and promote the use of PRCs, and encouraged FACS to identify new ways of increasing the use of these contracts, given the potential benefits that they can deliver.[9]

As noted in our submissions, given that the legislation provides for this mechanism, greater use of PRCs in appropriate cases can and should be used effectively as an early intervention tool to secure better outcomes, particularly for Indigenous families. We submit that FACS should specifically direct its staff to utilise PRCs (especially to assist) Indigenous families, and to provide families with information on where they are able to seek legal assistance, including through the Care Partners program.[10] We acknowledge that there are circumstances where safety plans may be more appropriate (for example, where there is urgency), but note that PRCs could still be put in place once such situations have been dealt with.

We note that simply making a referral to services should not be considered sufficient prior alternative action. Services must be appropriate for the person involved, available, effective and culturally safe (and safe in general). FACS should carry out a reassessment of

[9] Inquiry report p 83 [4.100-4.101].
[10] See here for more information: https://www.legalaid.nsw.gov.au/what-we-do/family-law/care-and-protection-services/care-partners-listing.

engagement at the level of the individual at appropriate times to identify any reasons why there may not be sufficient engagement.

We note that there should be better information sharing between FACS and service providers about the strengths of the family, not just negative information.

Service provision

Question 12 - How can FACS more effectively access the capabilities of other government agencies and funded NGOs to provide services to vulnerable children and families?

The investment approach referred to in "Their Futures Matter: A new approach" should provide a positive incentive to greater cooperation. The focus of services on the child rather than the child being eligible or ineligible for a programme is a much better approach.

It is important to ensure that there is no duplication in function between FACS and NGOs and no perceived or actual conflict of interests in circumstances where an NGO is both delivering a service previously overseen by FACS and providing other early intervention and family preservation services.

We submit that it is important that there are identified Aboriginal community controlled organisations that are adequately funded. In this regard, it is crucial also that adequate funding is accompanied by targeted capacity building. In the experience of members, there is a lack of these services in regional areas. Given the overrepresentation of Aboriginal children in the care system, we also suggest that it is appropriate that identified Aboriginal community controlled services are required to provide services to Aboriginal community members (for example, a requirement that government agencies and NGOs reserve five places for Aboriginal clients in a parenting course). We would also support financial assistance being provided to families to attend such services.

Question 13 - Are the current 'best endeavours' provisions adequate to ensure timely service provision for vulnerable children and families?

There is no good evidence of their effectiveness one way or the other. Anecdotally it would appear that they have no effect. Unless provisions like these are enforceable, they are of little value. In our view, service providers should be required to report back to FACS if they are unable to provide services within a particular timeframe. The onus should be on the service provider to provide effective services, not on the client to be able to obtain them.

The Children's Court should be able to include enforceable requirements in Care Plans for the provision of services. This would lead to include a consideration of the capacity of the agency to provide the service, the importance of the service to the child and some form of cost benefit analysis. The Court should be able to require FaCS to provide sufficient funds for a service.

If such provisions continue to be used, it may be beneficial to have a clear definition of what constitutes 'best endeavours' to ensure consistency across services and provide clarity about the expectations of the NGO sector.

Question 14 - What changes could be made to the 'best endeavours' provisions to align with a whole of government approach to service delivery to vulnerable children and families?

We note that consideration is being given to introducing changes to broaden 'best endeavours' to cover the provision of a wider range of services, such as early intervention

and family preservation services, or strengthening the obligation to use 'best endeavours' to provide services to a child, young person or family.

The most important consideration here is a commitment by relevant Ministers to ensuring that this occurs. This commitment should be reviewable by an independent agency such as the Children's Guardian. The Children's Guardian has been severely constrained by resource limitations in fulfilling the intention with which it was originally established. Any reviewing agency would need to be suitably resourced.

As noted above, a clear definition of 'best endeavours' and what that constitutes within the legislation would help to ensure consistent performance across all agencies especially if services are provided by a number of agencies in the sector.

Consideration should be given to increased use of an integrated therapeutic legal process. Therapeutic services (provided by the range of relevant government and non-government agencies) could integrate with courts to support vulnerable families in a therapeutic jurisprudence framework, particularly around the use of PCOs and PRCs. We suggest consideration of the approach taken by the Neighbourhood Justice Centre in Collingwood, Victoria. The following information has been extracted from their website:

> The Neighbourhood Justice Centre (NJC) was established in 2007 and is Australia's only community justice centre. It is located in Collingwood, Melbourne, and serves the City of Yarra.
>
> The Centre is committed to resolving disputes by addressing the underlying causes of harmful behaviour and tackling social disadvantage.
>
> Through bringing together a multi-jurisdictional court with a wide array of support services and community initiatives, the NJC has been effective in reducing crime, increasing community safety and creating savings through fewer cases in the system.[11]

The Law Society would support a pilot of this approach, particularly in respect of Aboriginal children and families. Noting the Federal Circuit Court's pilot Indigenous list, we suggest consideration of setting up an opt-in Indigenous list in the Children's Court, that would take the approach suggested above and include the appropriate specialised magistrates and other service providers.

Children's services

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

We query whether there is any utility in broadening the application of the term 'children's services' for the purposes of mandatory reporting when the services that are not currently captured by the term can still report to the Helpline.

However, we note that a return to a broader definition of 'children's services', as previously provided for in the NSW legislation before the adoption of the Children (Education and Care Services) National Law, may have the benefit of further enabling reporting and investigation under the Care Act. In order to form an accurate picture of the circumstances of the families in question, we suggest that mandatory reporters should also be encouraged to provide reports on the strengths of the family.

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[11] Neighbourhood Justice Centre, *About Us*, http://www.neighbourhoodjustice.vic.gov.au/home/about+us/

Question 16 - What additional 'children's services' should be captured for the purposes of mandatory reporting?

If additional services are to be captured for the purposes of mandatory reporting, we suggest that 'children's services' should include services captured under the former definition, including:

a) centre based children's services;
b) family day care children's services;
c) home based children's services; and
d) mobile children's services.

While legislative clarity is desirable, any change in definition should be supported by comprehensive training and explanatory material. Proper account should also be taken of the resourcing implications of expanding the definition of 'children's services' for the purpose of mandatory reporting.

Mandatory reporting

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

The Discussion Paper outlines that consideration is being given to allowing an exception to the existing mandatory reporting requirements for mandatory reporters who are working intensively with families following a referral from FACS.

We submit that re-reporting would suggest that the current approach is not working. In addition, there may be unintended consequences where the discretion is left with service providers (such as NGOs) to re-report. For example, service providers may be less inclined to take an objective view of their own casework, which may not have been as effective as intended. We submit that fresh risks and reports of repeated risks are necessary for an independent monitoring agency exercising oversight to obtain a complete picture. We hold concerns that 'watering down' the obligations for mandatory reporters may minimise opportunities for necessary changes to casework and service delivery.

If FACS decides to create another pathway for mandatory reporters to submit a streamlined electronic report to the Helpline, then implementation of such an approach would require additional guidance and training to be provided to mandatory reporters about when it would be appropriate to submit a streamlined electronic report and when it is necessary to make a report to the Helpline in the usual way. It would be necessary to ensure consistency between agencies in the approach to reporting.

We are of the view that when service providers are aware that there has already been a report (and especially when they have received the referral from FACS) they should send in a mandatory report update that is strengths based if the risk has abated, and a copy should be given to the parents.

Streamlining court processes

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

No. The court should always have an obligation to fulfil its responsibilities and should not be bound by agreements between parties to the proceedings.

The current process for making guardianship orders includes a number of safeguards, including those set out in section 79A. While the Discussion Paper states that the legislative requirements will not change, it is not clear how this will work in the absence of an application before the court which leads to a finding that there is no realistic prospect of restoration. The court process provides an opportunity for all parties to participate and be heard, and if appropriate to object to the orders being proposed. We are also concerned that removal of the consent requirement would not allow for the application of the legal principles specific to the Aboriginal child placement principles (see sections 11 to 13 of the Care Act).

Given the permanent nature of guardianship orders for the child, it is appropriate that they are only made in situations where the parties have been given an opportunity to fully participate and be heard. The Children's Court is not the Family Court. These are matters where there has been state intervention in the lives of children and their families, and children are not living with their birth parents. There needs to be proper consultation with family members about care arrangements and future contact. A process whereby orders can be made by consent without a formal application being made may mean that family members are not properly consulted.

Guardianship orders can currently be made by consent once an application has been filed with the court. Where the parties consent outside of the court process, orders may also be made in the family law jurisdiction.

The Law Society considers that it is preferable to retain the current position where guardianship orders are made following an application to the court.

If these amendments are made to the Care Act, we submit that parties should have access to independent legal advice, and that a "cooling off" period should be instituted.

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

Yes. The section requirements are cumbersome and far more appropriate for changes to final orders. Any application would need to be by leave of the court in order to prevent vexatious and repeated applications. We suggest that parties should be able to make oral applications to vary orders.

Shorter Term Court Orders

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

Question 21 - Will permanency outcomes be improved through greater use of STCOs? If not, why not?

Question 22 - Should the Care Act contain an explicit provision enabling the Children's Court to make STCOs as a final order i.e. orders allocating parental responsibility to the Minister for FACS for shorter periods?

Question 23 - If yes, should they be defined differently based on permanency case plan goal (restoration, guardianship, open adoption)?

Question 24 - What might be an appropriate upper time limit for a STCO?

Question 25 - What would be appropriate matters for the Children's Court to take into account when making a STCO on the basis that there is a future possibility of restoration e.g. parents demonstrate commitment to undergo counselling / therapy to address concerns that led to the removal of their children?

Question 26 - Does the test of 'realistic possibility of restoration' need to be amended? If so, how? If not, why not?

This answer relates to questions 20 to 26.

We note that the legislation already allows for short term court orders, and that there are many orders made by the Children's Court for a limited time frame which envisage restoration (for example, a final order could allocate parental responsibility to the Minister for 6 months, followed by a parental responsibility order to one of the parents). The Court is required by section 83 only to make long-term orders when it has determined that there is not a realistic possibility of restoration. However, we understand that 96% of applications for parental responsibility to the Minister until the child is 18 are successful.[12] We understand that, in these circumstances many parents "give up" seeking restoration, and that for caseworkers, the matter is "resolved."

The Law Society accepts the rationale for this proposal, and notes the success of the Family Preservation and Short Term Court Order (STCO) pilot program carried out by FACS. We note that the evaluation of the pilot found that the pilot group (of 175 children and young people) was much more likely to be restored to their family (54 per cent) after 12 months, compared to the comparison group (8 per cent). We note also that two-thirds of children showed a reduction in risk of harm.

In our view, if the conditions of the pilot program can be replicated on a state-wide basis then there may be merit in pursuing this approach. However, we are concerned about whether, in practice, it is possible to do so, and in these circumstances would be concerned that children would be subject to a series of STCOs. We are concerned that a greater emphasis on short term orders would increase anxiety for some children and would likely make recruitment of foster carers more difficult. It would also make it likely that services which would enhance a permanent placement in Out of Home Care would not be provided because of the prospect of restoration. We note also that research indicates that there are a small number of applications under section 90 and that most of those for restoration to a parent are not successful.

If FACS pursues this proposal, we suggest that STCOs must be accompanied by judicial directions for parents to do certain things, and for FACS to facilitate such engagement. For example, in our view, it would be effective if STCOs are accompanied by, for example, a referral to Newpin. We suggest also that the approach taken in Queensland be investigated. We understand that much more flexible orders are made in that jurisdiction, and that contact orders made are more in line with family law contact orders and therefore more significant.

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[12] Figure provided by FACS at the legal stakeholders consultation, 8 November 2017, Sydney NSW.

STCOs used in a therapeutic jurisprudential process as contemplated in our response to question 14 are likely to yield better outcomes. As discussed in question 14, an opt-in Indigenous list in the Children's Court could be created, and appropriate matters referred in from the mainstream list. The therapeutic work could be overseen by an authorised court clinician. The Magistrate and the court clinician could case-manage the matter.

We note that the current approach is to stabilise placements. However, more attention and resources should be provided to improve parenting capacity and therefore to improving prospective restoration. We understand that FACS is moving towards funding arrangements such that NGOs are incentivised to restore children, noting the model adopted in respect of funding for Newpin,[13] and the good outcomes achieved via that service.

We also suggest that an alternative proposal to avoid children languishing in care may be to have longer adjournments to provide parents with an opportunity to engage with services and/or for caseworkers to make enquiries about alternate placements.

Report on Suitability of Care Arrangements

Question 27 - What should the role of the Children's Court be if it is not satisfied that proper arrangements have been made for the care and protection of a child or young person?

Question 28 - Should the Children's Court be given the ability to relist matters following receipt of a section 82 report where it forms the view that proper arrangements have not been made for the care and protection of the child or young person? In what circumstances should the Children's Court be given this power? If not, why not?

Question 29 - If a matter has been relisted by the Court, what subsequent powers should the Court be given?

Question 30 - Should the Court be able to request further evidence from a party about its efforts to implement the care plan and its progress towards achieving a permanent placement, including reasons for delay in achieving these goals?

This answer relates to questions 27 to 30.

In our view, the Children's Guardian should have oversight of the implementation of care plans. Despite what was said by the Wood Commission of Inquiry, the Children's Guardian currently is not sufficiently resourced to have the capacity, or the statutory framework to intervene in individual matters where adequate care has not been provided. It is our understanding that it was this failure that caused the Children's Court to intervene. Usually the intervention was because of failure by FACS to ensure that services contemplated in the care plan were provided. In our experience, the Ombudsman only intervenes in extreme matters.

The Children's Court should be able to refer matters raised in a section 82 report to the Children's Guardian if no party makes a section 90 application within 28 days. The Children's Guardian should be required to report to the court within a further 28 days. The Children's Court should then be able to reopen proceedings on its own motion, as it previously could, if it is still not satisfied about the adequacy of care. We suggest that there be a requirement that section 82 reports include information on cultural plan implementation.

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[13] See Social Ventures Australia, http://www.socialventures.com.au/work/newpin-social-benefit-bond/

An anecdotal instance is illustrative. The Court made an order regarding four Aboriginal children who had been victims of ongoing sexual abuse while in the care of their mother. It was clear that restoration to either parent was not realistic. Parental Responsibility was allocated to the Minister. The Care Plan included the need for ongoing sexual assault counselling and/or therapy. They were in the care of an aunt who was excellent. Despite repeated inquiries and pleas by the aunt no counselling was provided for over a year from the time of removal. A section 90 application by the aunt or by the child's representative would not have had any effect as it rested with the Minister to provide the necessary therapy. This only happened when a Children's Magistrate reopened the matter and threatened to write to the Minister personally.

However, if the Children's Guardian is not adequately resourced to report on these matters, we support powers being provided to the Children's Court to require a party to provide evidence about its efforts to implement the care plan. We suggest that the Children's Court should provide guidance on what evidence is to be included. For example, an explanation as to how or why circumstances have changed since the making of the order, whether the plan for the child has changed, the reasons for any delay in carrying out the plan and the outcome of any enquiries that have been made in relation to alternate family and kinship placements.

Contact orders, guardianship and applications to vary or rescind care orders and NGOs consent to bring guardianship applications

Question 31 - What alternatives are available to overcome issues of contact supervision where an allocation of parental responsibility by guardianship order is being sought?

Parental contact is beneficial for the child except in the most risky circumstances. If there is not an arrangement in place that supports contact, it is likely that a parent will cease attending with negative consequences for the child. If a guardian does not ensure that there are adequate safeguards for a child in any interaction with their parent there will also be negative consequences for the child.

The only realistic option is to provide for FACS or another agency to nurture and supervise contact.

Consideration could be given to permitting guardians, pursuant to section 69ZK of the *Family Law Act*, to use family law processes to assist them to manage contact. These would be the most difficult contact matters of all, and guardians are not given any of the support of court orders that ordinary parents/carers get.

Question 32 - How could the current contact order provisions be enhanced to better support guardianship?

The Law Society notes that the Family Court can make contact orders where a guardianship order is in place. Some members of the Law Society consider that generally where there is a functional care giver, issues about contact should be dealt with in the private jurisdiction, particularly where Indigenous children are involved. The experience of members of the Indigenous Issues Committee is that the family law jurisdiction has often resulted in better outcomes for Indigenous children and families. Some members of the Law Society suggest that the requirement that FACS give its consent (s 69ZK(1)(b) of the *Family Law Act 1975*) should be dispensed with where there is a guardianship order in place. Guardians would then have the support of Commonwealth funded contact centres.

However, other members of the Law Society suggest that an alternative proposal may be for consideration to be given to amendments to the Care Act to allow the Children's Court to make family law style consent orders. If this option is pursued, it should be noted that the Law Society is strongly of the view that there should not be any attempt to constrain the jurisdiction of the Family Court to make contact orders where a guardianship order is in place, particularly in respect of Indigenous children and families.

Question 33 - Should the Children's Court be empowered to make contact orders for the life of a guardianship order?

The Children's Court should be empowered to make contact orders in these circumstances and we support a more flexible approach to contact orders in guardianship. As noted in the discussion paper, there is already provision to make orders for more than 12 months in adoption matters. It would be preferable that initial orders are only for a period of one to two years. It would be hoped that in most circumstances after this period of time a pattern of contact would be established. Guardians or parents should be able to make a section 90 application if contact remains unsatisfactory and there is a need for ongoing agency involvement.

Question 34 - In what circumstances do you think that section 90 applications should be limited?

The current leave requirements are significant, as is the Legal Aid merits test. The only research available indicates that section 90 applications by parents are uncommon and not usually successful.[14] In the Law Society's view, the current legislation is adequate (and in some cases, already presents too high a bar).

The Law Society does not consider that it is in the best interests of children to prevent their parents from making an application under section 90 if the parents' circumstances have changed. As stated in the Discussion Paper, section 90 requires a "significant change" in circumstances. One of the criteria the court must consider in relation to leave is whether the applicant has an "arguable case" (section 90(2A)(e)). Therefore the legislation already provides the Court with the option to refuse leave for an application to be made if the application lacks merit.

Question 35 - Are there any circumstances where an exception might need to apply?

See above.

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

The main concern with the deletion of the notice requirement is that it places greater responsibility on the non-government agency. Those organisations are not as well-resourced as FACS is with regard to the information which may be relevant about the suitability of the proposed guardians, the viability of contact and other relevant matters. Unfortunately there are a number of instances where non-government agencies, particularly those operating on a for profit basis, have seriously failed in their responsibilities. Further removal of oversight is undesirable. Further, the requirement for the Secretary to provide consent places a responsibility on the Secretary to be satisfied with the arrangements. Guidelines should be provided on when the Secretary could refuse consent.

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[14] Patricia Hansen, Rescission or Variation of Children's Court Orders: A Study of Section 90 Applications in New South Wales. Children Australia Volume 37 Number 2 pp. 69–75.

The Children's Guardian has the power to withdraw or limit an NGO's entitlement to care for children. There may be circumstances where the NGO can continue to operate with increased monitoring but external scrutiny is still necessary for an application such as this.

We also note that NGOs bringing an application for a guardianship order without the written consent of FACS may give rise to a conflict of interest.

If FACS is to proceed with this proposal, in our view, FACS should continue to be notified, with the option to intervene in appropriate cases. The refusal of FACS to provide consent to the NGO, or the prospective guardian, could be made a reviewable decision pursuant to section 245 of the Care Act. This change must be accompanied by appropriate capacity building of NGOs.

Streamlining adoption orders

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

The Law Society strongly opposes moving adoption matters out of the Supreme Court for the following reasons:[15]

- The Supreme Court currently has the jurisdiction to deal with complex children's matters exercising the *parens patriae* jurisdiction and also matters brought under the Adoption Act.
- Adoption is a complicated and extremely invasive process which must carry with it the highest level of judicial oversight.
- The severance of a child's legal nexus with his or her biological parents should be dealt with in a Court of superior record.
- The Children's Court is unable to make ancillary orders that the Supreme Court often makes in adoption matters. For example, the Children's Court is unable to make a declaration of parentage.[16]
- The Supreme Court is better resourced then the Children's Court, able to hear matters expeditiously and over a continuous period of time.
- Although we acknowledge that, under this proposal, adoption orders would only be made by specialist Children's Magistrates, the current workload of the Children's Court is significant. It is unrealistic to expect specialist Children's Magistrates to travel throughout the state to approve adoptions in the current resource climate.
- This proposal would result in two classes of adoption in NSW. That is, adoption via care proceedings in the Children's Court and private and overseas adoptions in the Supreme Court. It would only be children who have been subject to care proceedings whose adoption could be approved by the Children's Court pursuant to a different Act and with a different assessment of adoptive carer model. The concept of different "classes" of children having their adoptions considered by two different jurisdictions is opposed.
- The suggestion that this proposal would create a seamless legal pathway for children, young people and careers is misconceived. This is because children rarely attend care and protection proceedings, and in most cases their proposed adoptive parents are not involved. Accordingly, there would be no requirement for them to attend two separate courts. It is only the birth parents and FACS that would have to attend both the Children's Court and the Supreme Court. However, given that an application for an adoption order significantly differs from care and protection matters, and is a separate

[15] The Law Society has previously expressed its opposition to this proposal: see The Law Society of NSW, Submission to the Minister for Family and Community Services, *Child Protection: Legislative Reform Proposals Discussion Paper*, 22 March 2012 <https://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/700291.pdf>.

[16] See *Status of Children Act 1996* (NSW) s 21.

application which is usually made some time after the finalisation of care and protection matters, there does not seem to be any issue.

- This proposal appears to be premised on the assumption that there is some delay in proceedings as a result of adoption matters being determined by the Supreme Court. We are unconvinced that this delay exists. In particular, we are concerned that the stated average time of 4.2 years to complete an order may not accurately reflect the time the Court takes to deal with an application. We note that the Supreme Court prioritises adoptions matters and proceeds expeditiously once the matter is filed. Accordingly, we are unsure how this figure was calculated.
- Even if adoption proceedings take longer to finalise in the Supreme Court, the impact that this would have on children and their proposed adoptive parents is minimal. These children have already been settled into their 'forever home' and any delay will have no impact on this placement.

We further note that a similar proposal was put forth by the NSW Government in 2012 but not pursued due to significant stakeholder opposition. We query why this proposal is being revisited. Accordingly, we reiterate our opposition to this proposal.

If FACS is to pursue this option, we submit that the following safeguards should be implemented at a minimum and amongst other things:

- Only the President of the Children's Court or a Specialist Children's Magistrate authorised by the President should be able to make orders. This will ensure that only suitable and experienced magistrates do this work.
- Adoption proceedings should still be a separate application that can only be made after the conclusion of care proceedings.

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

The Law Society submits that the *Adoption Act 2000* (NSW) ("Adoption Act") should not be amended to provide additional grounds for dispensing with parental consent. We submit that the existing grounds for dispensing with parental consent under section 67(1) of the Adoption Act are appropriate and sufficiently broad to cover the proposed additional grounds. There will be instances where adoption is appropriate, however in all circumstances adoption must be an order of last resort for all children and only when all other options have been exhausted and it is in the best interests of the child. As previously noted, the Law Society continues to hold the view that adoption should not be an option in the care and protection jurisdiction in respect of Aboriginal and Torres Strait Islander children.

Further, we are not aware of any cases in which the Court was unable to dispense with parental consent merely because the circumstances did not fit within one of the existing grounds. On the contrary, the existing grounds have been interpreted broadly.

The current focus of section 67(1)(d) of the Adoption Act is on the child's current circumstances.[17] The proposed grounds would inappropriately shift the focus to the parent's circumstances. By focusing on parental ability rather than the child's best interests, this risks damaging the relationship between birth parents and their children as well as the relationship with their child's adoptive parents. This is contrary to best practice as it is important to enhance the relationship between the birth parents and the adoptive parents so that

[17] *Re Sarah* [2013] NSWCA 379, [68] (Ward JA); *Re Stephen* [2011] NSWSC 1521, [59] (Slattery J).

arrangements can be made for post-adoption contact without the need for external intervention.

Studies show that approximately 85% of children in out-of-home-care self-place back with their parents at some time.[18] It is argued that because "return is the norm", working in partnership with parents leads to better outcomes for children, because parents are important to children "even if their family experience is not entirely positive".[19]

Further, the Discussion Paper's concern about 'undue delay in placing a child in a stable and loving home' is misconceived. As noted above, the child is already placed in a stable home. In any event, sections 67(1)(a) and (c) of the Adoption Act allow the Court to dispense with parental consent in such circumstances. For example, section 67(1)(c) has been used to dispense with parental consent in circumstances where a parent has refused to become involved in the adoption process,[20] where a parent has expressed support for the adoption of their child but refused to give formal consent,[21] and where a parent has given consent, which is rendered ineffective because of a failure to comply with the preconditions to the giving of consent (such as receiving counselling as required by section 61).[22] These cases highlight that the Court will intervene in appropriate circumstances to prevent the adoption process being unnecessarily delayed.

We submit that service of adoption documents on parents is extremely important to afford parents procedural fairness. Where there is non-service of documents on a parent, or matters proceed on the basis that there has been attempted service on a parent who could not be found, there is a profound effect upon decision making for children, namely whether there is a family member who could care and love the child within a familial context.

Further, adoption is the most intrusive act that the state can impose on a child–parent relationship. We submit it would be completely inappropriate to dispense with parental consent in adoption proceedings for the mere fact that a no realistic possibility of restoration finding has been made. There may be reasons for a parent to make a non-realistic possibility concession which should not preclude them from being heard in relation to subsequent adoption proceedings. For example, a parent may have been un-contactable during the care proceedings due to being overseas, interstate, unwell, incarcerated etc or because service was attempted but not effected. A parent may be illiterate or from a non-English speaking background and may have not been able to read the notice about the care proceedings and so did not understand the need to participate. All of those factors can be temporary and the fact that the parent did not participate in the care proceedings, leading to an adverse finding about restoration, should not of itself be used to dispense with the requirement for seeking their consent.

We further note that the finding of no realistic possibility of restoration is made at a particular time during the proceedings. The parent's circumstances may have significantly changed in the period between that finding and consideration of any adoption.

We submit that children have the right to have their parents be heard on this issue and that the legislature should be very cautious when considering amendments which have the effect of denying parents this opportunity. The introduction of the proposed grounds would potentially create a situation where there would be no contradictor in almost all adoption applications.

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[18] Bullock et al cited in C Tilbury and J Osmond, 'Permanency planning in foster care: A research review and guidelines for practitioners', *Australian Social Work*, 2006, 59(3), 273.
[19] Ibid, 273-274.
[20] *Re C* [2004] NSWSC 702.
[21] *Re DAM* [2011] NSWSC 634.
[22] *Re JRC* [2015] NSWSC 1038.

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

The Law Society submits that a parent's right to be advised of an adoption should not be limited.

We submit that the Discussion Paper does not provide sound reasons, based on best practice, to support this proposal nor research to support the propositions that adoptions proceed on an ex parte and undefended basis. We consider that the 2012 research study, *Past Adoption Experiences* should guide decision-making. The lack of transparency in care proceedings and disempowerment of families, as well as international human rights treaties[23] and case law[24] all caution against an adoption process proceeding in such a way. Such an approach is contrary to the concept of an 'open adoption' and do not accord with the parent's right to procedural fairness.

On the contrary, providing notice to parents can have significant benefits for the child. For example, notification can help parents refocus and re-engage in contact with their children. It can also facilitate notification to the child's grandparents and siblings who may also wish to re-establish contact with the child. The focus of these provisions must be the child's right to have their family involved in their life.

In any event, the notice requirements are not onerous as it only requires FACS to demonstrate that reasonable steps have been taken to locate a parent. This might include searching online, issuing requests pursuant to Ch 16A of the *Children and Young Persons (Care and Protection) Act 1998*, searching the electoral role, searching telephone directories and contacting known family members. As the *Adoption Act* requires birth parents to be consulted throughout the adoption process,[25] it follows that these steps would ordinarily be undertaken anyway. Further, any concerns about delays resulting from the inability to locate the parent are mitigated by section 67(1)(a).

Further, a finding of no realistic possibility of restoration attaches to the point in time that the finding is made. A parent's circumstances may change over time. To minimise a parent's role in adoption proceedings because of a previous finding of no realistic possibility of restoration inappropriately assumes the parent has no intention of resuming care. This has the potential to silence a parent who may otherwise be in a position to recommence care and is therefore contrary to the best interests of the child.

The Law Society is particularly concerned with the proposal to limit the need to advise parents where they have not participated in contact for 12 months. The Law Society submits that this could have a serious impact on a child's rights; particularly in cases where being notified of adoption proceedings helps parents refocus and re-engage in contact. If children are not having any contact with their birth parents, the Law Society submits that caseworkers should be obliged by FACS to properly consider the reasons why contact is not occurring and whether it would be in the best interests of the child to try to re-establish some contact before an adoption order is made, and not exclude parents from the process.

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[23] *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[24] *Re Tracey* [2011] NSWCA 43.
[25] See, eg, *Adoption Act 2000* (NSW) pt 4 (preparation of adoption plans), pt 5 (parental consent).

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

The Law Society submits that this is a matter for the Court to determine having regard to the facts of the particular case and the searches that had been undertaken.[26]

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

The Law Society submits that the Adoption Act should not be amended to specify the grounds birth parents can rely on when contesting the adoption of their child. This would inappropriately interfere with the Court's discretion in determining adoption applications. Further, as birth parents are not automatically parties to adoption proceedings, limiting their right to contest also unduly limits their ability to access the documents filed in the proceedings as well as their ability to participate in mediation or the formulation of adoption plans. This also raises issues of procedural fairness for parents.

The Discussion Paper's concern that having a 'contested adoption hearing further delays the child's adoption into a safe and loving home' is again misconceived as the child has already been placed with the adoptive parents. In any event, specified grounds would still create delays as it would be necessary for the Court to conduct a hearing to determine whether a parent can rely on those grounds.

Question 42 - Should the six month time limit in section 136(3) be changed to 12 months? If so, why? If not, why not?

The legislation should be amended to allow greater flexibility. It is not always possible to predict how quickly a parent will achieve the necessary standard that will enable restoration. Sometimes support will become available, particularly from family, but may not have been offered prior to the court determination.

Having said this, care plans providing a restoration period of greater than 12 months are extremely rare and ordinarily it would be undesirable to contemplate a time frame of greater than 12 months.

On a related issue, we suggest that the breakdown of placements should act as a trigger for FACS to re-evaluate the prospects of restoration.

Question 43 - What potential risks to the safety of children and young people are associated with this proposal?

There is always the risk of failure if the restoration happens too quickly. The psychological harm to a child in those situations is considerable. Placement failure also traumatises children and adversely affects their capacity to form an attachment with a new carer.

Given that there is the possible risk of harm to the child, there is the need for clear support and supervision to ensure compliance with the care plan and engagement with services in accordance with the terms of the restoration under section 136(3) of the Care Act.

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[26] See generally *Re K* [2005] NSWSC 858, [22] (White J) and *In the matter of N and the Adoption Act 2000* [2012] NSWSC 1263, [5] (Black J) where it was held that what amounts to 'reasonable inquiry' under s 67(1)(a) is to be evaluated from the perspective of both the applicants and the person whose consent would otherwise be required.

This needs to be balanced with the prospect of failure if the restoration does not happen soon enough. If the child's attachment to carers becomes strong this will normally be something that can be accommodated with their restoration to a parent. There will be some circumstances where delay which results in strengthening attachment to a carer could make restoration to appear more difficult.

Question 44 - What would parents have to demonstrate to FACS before having their children restored to them prior to the expiration of an order allocating parental responsibility to the Minister?

The care plan should clearly set out what needs to be achieved in order for restoration to take place. This must be an individualised set of criteria structured around the needs of the child and the resources that are available to support restoration. Ultimately there will be considerable subjective judgment required.

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

We are concerned that a proposal to remove supported care arrangements may create more obstacles for carers requiring financial support. In particular, we are concerned that FACS would no longer provide financial support in situations where young people are placed with relatives and kin, and it is unnecessary or unhelpful to go to court to get an order. Given the need for safety and permanency, we support an approach which alleviates the need to have further interventions by court involvement.

However, in most instances the provision of a care plan pursuant to section 38 is appropriate. These matters are normally dealt with expeditiously by a magistrate in chambers. A further safeguard would be provided if such plans could only be dealt with by Specialist Children's Magistrates.

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

In our view, the current provisions are adequate for the protection of the interests of children and young people. The circumstances of the *Smith* case were most unusual, but nevertheless a good example of the proper balancing of interests.

However, we do not oppose amendments to the Care Act to explicitly prohibit the publication of information identifying a child or young person as being under the parental responsibility of the Minister or in OOHC. We consider that amendments to section 105 as suggested may protect children in OOHC from the stigma and distress which may flow from being identified as a child in care.

However, we recommend that consideration be given to whether the amendment is made subject to applications to publish so that the court retains the ultimate discretion in these matters.

Question 47 - Should care responsibility for a child vest in the Secretary on the death of a guardian/s, or the death of a carer who has been allocated all aspects of parental responsibility? If not, what other legal arrangements might be in the best interests of a child whose guardian or carer has passed away?

We recognise that there are circumstances where the Secretary will need to be involved upon the death of a guardian or carer to assess the most suitable care arrangements for the child.

Some of our members agree with the proposition that care responsibility should vest in the Secretary in the circumstances described, and suggest that this should also encompass any situation where the guardian suffers a permanent lack of legal capacity, for example, because they have suffered a serious brain injury. These members are concerned about leaving children in indefinite limbo where there is no effective care arrangement in place, given that care responsibility reverts to the parents in circumstances where there has been a previous determination that they are not suitable carers.

In the alternative, some of our other members suggest that where guardians have passed away, there should be legislative amendment to permit the Secretary to consider and evaluate the facts of each case and consider whether it is necessary to 'assume' care responsibility. For example, the Care Act could be amended to make it clear that the Secretary has the power to assume responsibility where the carer dies and where there are no appropriate care arrangements in place.

The latter members have some concerns with the care responsibility for a child automatically vesting in the Secretary on the death of a guardian or carer. Firstly, these members are concerned that if care responsibility vests in the Secretary this may create a two tier system for children subject to Children's Court and Family Court orders. For example, if a child is subject to a Family Court order (even where FACS intervened or got Parental Responsibility from that Court) and their carer dies, care responsibility would not vest in the Secretary, but would do so where the child has been subject to a Children's Court order.

Secondly, automatic vesting may mean that a system is created where the state would always intervene in the life of a child, including in circumstances where this may not be warranted (for example, where the child's extended family has made adequate arrangements).

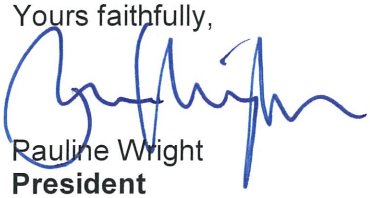
Question 48 - If so, should there be a time limit placed on the Secretary to undertake those assessments?

Should the first option be preferred, the Secretary should be required to lodge a section 90 application within 14 days of being notified of the death of the carer. This does not mean that there will have been sufficient time to properly consider an alternative placement. It will ensure that steps are made to notify parents and other relevant parties and engage them in consideration of alternative care arrangements. The court can determine what the appropriate time frame is.

Should the second option be preferred, the Secretary should consider whether it should lodge a new care application within 14 days of being notified of the death of the carer.

Thank you for the opportunity to provide comments. If you have any questions please contact Vicky Kuek, Principal Policy Lawyer, on victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours faithfully,



Pauline Wright
President