THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IndgIssues:JD:VK:690243

22 March 2012

The Hon. Pru Goward MP
Minister for Family and Community Services
c/- Statutory Child Protection Branch
Department of Family and Community Services (Community Services)
Locked Bag 4028
ASHFIELD NSW 2131

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

Dear Minister

Child Protection: Legislative Reform Proposals Discussion Paper

I am writing on behalf of the Family Issues Committee (FIC) and the Indigenous Issues Committee (IIC) (together referred to as the "Committees") of the Law Society of New South Wales. The Committees represent the Law Society on family law and Indigenous issues respectively, as they relate to the legal needs of people in NSW and include experts drawn from the ranks of the Law Society's membership.

The Committees thank you for the opportunity to comment on the Discussion Paper, and welcome reforms of the child protection system in NSW. Given their far reaching effect on children and families in NSW, the Committees submit that any proposed legislative changes should be the subject of further consultation by way of a Green Paper.

The IIC notes particularly that statistically, Aboriginal people are estimated to make up 5% of the total New South Wales population and yet are identified to be the highest population in foster care. Conservatively, the New South Wales Government's statistics estimate the representation of Aboriginal children in foster care is five children to every one non-Aboriginal child. The national figure is reportedly even higher.

Having regard to the statistics, the IIC makes a general comment that it supports reform to the current care and protection legislation to the extent that the proposed reform promotes better outcomes for Aboriginal children. The principle of better outcomes for Aboriginal children must include safeguards that protect an Aboriginal child's right to be parented within a safe and nurturing Aboriginal family. It should always be considered that the best interest of any Aboriginal child is met by remaining within their own family network and/or kinship structure. Any placement of an Aboriginal child outside their family network and/or kinship structure should only be considered as a last resort.

If your office has any questions, please contact Vicky Kuek, policy lawyer for the HRC on (02) 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely,

John Dobson
President

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Responses to the proposals set out in the Discussion Paper

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

The FIC is supportive of efforts to identify parenting capacity issues and the strategies which can be put into place to address them.

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?

The FIC's view is that parenting capacity orders may be another tool to be used in the early intervention phase working with children and young people. However the orders cannot be seen as a panacea for addressing the identified deficits. Resources must be available in order for these orders to be effective. That means perhaps there needs to be a mechanism of priority developed for those services funded by the State and Commonwealth in order to secure placements for families where there is a parenting capacity order akin to what happens currently in child care centres where there is a capacity for those child care centres to enroll a child from an at risk family.

The FIC submits that there may also be the need to dialogue with Commonwealth agencies, such as in relation to the Medicare rebate being extended to include recognised treatment programmes for those persons with mental health issues and who require specialised treatment currently not available on the Pharmaceutical Benefits Scheme.

In relation to whether other mechanisms might be more effective, the IIC suggests that care plans made under section 38 ("section 38 care plans") of the *Children and Young Persons (Care and Protection) Act 1998* ("Care Act") be utilised earlier in the process to secure better outcomes for families. In the IIC's experience, more often than not the Department of Family and Community Services (FACS) will file an application before the Children's Court as a measure of last resort. Ironically despite acknowledging this, it is often the first contact FACS has had with the family despite a history of overwhelming reports.

Section 38 of the Care Act provides for FACS to prepare a care plan for a child without needing to remove a child and/or a formal finding to be made against a parent. If not complied with, section 38 of the Care Act provides for intervention by the Court by way of breach proceedings.

The IIC notes that section 38 is hardly ever used and if it is, is normally used at the end of proceedings where all parties are supporting restoration. The IIC suggests that where FACS is engaged with Aboriginal families and is considering intervention (that is, a Safety Plan), such intervention should first occur by way of a section 38 care plan.

In the IIC's view, the benefits include the following:

- Parents will be aware, prior to any action to remove, of the seriousness of FACS' concerns;

- There will be legal assistance available to advise parents and family members of their rights;
- Parents will be entitled to representation (more often than not Aboriginal people engage with FACS at an adverse power imbalance and believe they are not being heard);
- All parties will have a greater sense of accountability;
- FACS and the parents will be obliged to work collaboratively with each other to ensure the best outcome for Aboriginal children prior to removal considerations.

The IIC respectfully submits that utilising section 38 care plans will not flood the Children's Court unnecessarily. An application for a section 38 care plan can be filed with the Children's Court and facilitated by the mediation process. Therefore the only time the judiciary is likely to be burdened by the section 38 process will be in circumstances where there is non-compliance with the care plan (that is, where there are breach proceedings and/or an application to remove is filed).

Matters to be addressed in a care plan should include engagement with services to assist Aboriginal families to provide better outcomes to Aboriginal children. Alternatively an application for a supervision order can ensure a similar outcome.

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

The IIC notes that the Children's Court carries the responsibility of ensuring the safety, welfare and wellbeing of children. Therefore the making of any parenting capacity order, stand alone or otherwise, must consider the child's circumstances as a whole.

In the IIC's view, the following matters should be included:

- The history of the child/ren;
- The purpose of the parenting order;
- The intended outcome of the parenting order;
- The views of the parent/s;
- The views of the child/ren;
- Identified services and dates for commencement with services;
- Identified parental supports i.e. medical, social, educational, legal.

The FIC further recommends that appropriate evidence should be filed by the requesting agency as to the need for a parenting capacity order, and responses should be invited by the parent/child. That is, parents and children should have a right to be heard in this regard, prior to the making of any such orders (which should not be made on an undefended basis).

The FIC notes that prior to compelling any family to enter into a parenting capacity order, the Court should be aware whether a placement into a nominated service has been secured. The FIC submits that the Court should be reluctant to make such orders in circumstances where there is not a reasonable prospect of that family being able to access the required service within the prescribed time frame.

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

The FIC submits a breach application should not be available for failing to comply with a parenting capacity order. The ultimate consequence should be that care proceedings may be instituted, and the evidence of non-compliance may be used as evidence as to parenting capacity and the need for care and protection and may also satisfy the requirements of section 63 of the the Care Act.

The IIC notes that is difficult to provide a clear or definite response in circumstances where numerous matters will be relevant to determining whether there should be consequences for non-compliance. These matters for consideration will include:

- The myriad reasons for non-compliance;
- The detriment to the child/ren, if any, of the non-compliance;
- The seriousness of the failure resulting in non-compliance.

The IIC notes generally that currently, section 38 care plans attach consequences for breach or noncompliance with the care plan. This can be problematic if the client has not engaged independent legal advice prior to consenting to the care plan. The IIC notes that allowing a care plan to be developed as part of the Court-appointed mediation process will eliminate this concern because all parties will be represented.

The IIC cautions that any application seeking an order from the Court must allow the parent/caregiver the right of response. It should not just be assumed an order obliging a parent to do something should be automatically accepted by the Court.

PROPOSAL 2:
Strengthen the 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 FACS (CS) to attempt to use PRCs with parents prior to commencing care proceedings in appropriate matters

The FIC's view is that Parental Responsibility Contracts (PRCs) appear sound in theory but are yet to be significantly tested in practice. Regardless of their effectiveness as an early intervention tool they should not be used as a replacement for more intrusive intervention where it is required in higher risk cases.

In relation to this question, the IIC notes again its view that section 38 care plans can be utilised earlier in the process to secure better outcomes for families.

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

The FIC agrees in principle that there is a place for PRCs. However, there needs to be an overhaul of the name "Parental Responsibility Contract". A contract has legal

obligations and responsibilities and is not an appropriate name for an instrument which is in essence a case plan outlining minimum bench marks that must be achieved in order for a child to be safe in a family setting.

The FIC submits that there should be a capacity for parents (and children for that matter) to obtain independent legal advice in relation to the consequences that may flow from:

- entering into the agreement and non-compliance; and
- not entering the agreement (particularly if section 38E(4) of the Care Act is not amended as discussed below).

The FIC and the IIC submit that parents and children must be properly informed of the consequences that may give rise to a breach of agreement, so that families and children are placed on a more equal playing field than currently exists.

The FIC notes that in order for such legal advice to be available for children and families, Legal Aid would need to make a grant of legal aid available for such advice.

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

The FIC notes that currently section 38E(4) provides the remedies that are available to FACS if a breach is filed for a PRC, namely:

> In any care application that is made by the Director-General duly filing a contract breach notice with the Children's Court it is to be presumed (unless the presumption is rebutted by a party to the proceedings other than the Director-General) that the child or young person in respect of whom the application is made is in need of care and protection.

At present, one of the consequences of a breach of a PRC is that it reverses the onus of proof, placing the onus on the respondent and not the applicant. This means that the respondent must establish that they did not commit a breach which is particularly onerous in circumstances where the "breach" may not ultimately be proved or the matter is of such insignificance that is does not impact on the safety, welfare and wellbeing of a child.

The FIC is of the view that the current legislative format for PRCs impedes their effectiveness as an early intervention tool. The FIC recommends that section 38E(4) should be amended to remove the onus from the respondent to prove that there was not a breach. In their current form PRCs are too onerous and one must caution against entering into such an arrangement.

The PRC can ultimately be considered as evidence and pursuant to section 63 of the Care Act, any breach of non-compliance of a PRC can instead constitute prior alternate action if care proceedings are commenced for any section 61 application and section 71 finding as to need of care and protection.

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?

The FIC notes that section 38A(3) currently provides that there can be one PRC in any 12 month period and section 38B provides for the terms of reference for the PRC to be amended. There is no need to provide a greater time frame for PRCs.

In the FIC's view, if there is to be a mandatory requirement for pregnant women to enter into PRCs then there must be appropriate services available for those women to access. This is particularly important for young women who themselves are subject to parental responsibility orders and in state out of home care where there is a lack of service provision. Such service provision would include but not be limited to the following:

- Medium term residential accommodation with Baby Health Clinic/Tresillian nurses;
- Social work and psychologists on staff;
- Parenting capacity and attachment specialist staffing;
- Educational opportunities such as returning to school;
- Child care;
- Aftercare workers when leaving the programme;
- Access to health;
- Streamlined access to residential drug and alcohol services which takes children and women who are using methadone or an equivalent;
- Access to therapeutic services such as Dialectical behavioural therapy or Cognitive Behavioural Therapy through Medicare rebates.

Unless and until resources are allocated in a meaningful way the purpose of the early intervention programme either on a "voluntary" or mandated basis will not be achieved.

The IIC notes further that currently sections 21 and 22 of the Care Act provide for a minimal level of engagement between parents and FACS. However the Court is under no obligation to consider any request made by parents for FACS to engage at a pre-natal stage with parents. The IIC would be in favour of including unborn children in the scope of PRCs if FACS and parents would be equally obliged to engage early (and in a meaningful way), with the joint goal of preventing the removal of new born babies.

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

The FIC is of the view that PRCs should be limited in their scope to exclude the use of temporary care orders. The PRC is a tool in circumstances where the children remain in the care of the family unit and as such an early intervention to preserve the familial relationship and unit. Once temporary care is included in the PRC it is a much more intrusive intervention with children being effectively removed from their parental care.

The FIC does not support PRCs being issued in tandem with temporary care agreements (section 151). This is a much more intrusive option as it means that the child is removed from the family unit (albeit temporarily) as opposed to a mechanism to work with children and families as a unit.

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

If matters are to be referred to Family Group Conferencing during the course of proceedings it is important that all of the participants have access to legal representation and that the children's representative be able to participate in such conferencing. The provision of such legal assistance would be essential given that Court proceedings are already on foot.

The provision of such assistance would be entirely dependent upon adequate resourcing of NSW Legal Aid to provide funding of representation for the children and also funding of representation for any party to the proceedings who qualifies for Legal Aid under the means test.

It would be an exercise in futility if the parties entered into Family Group Conferencing in the currency of Court proceedings and came up with a proposed resolution which was not likely to be endorsed by the Court. Adequate representation would prevent this.

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

Both the FIC and the IIC support greater use of Family Group Conferencing (FGC) in principle in lower risk cases as a preliminary tool to address and hopefully resolve child protection issues. The IIC notes that FCG allows for a greater sense of accountability and responsibility for the family. Accordingly there would need to be some assessment as to the appropriateness of a particular familial situation being referred to an early FGC. The IIC notes that the FGC approach should be preferred at first instance to Court intervention.

The FIC's view is that there is currently a legislative base for FGC and other forms of ADR pursuant to section 37 of the Care Act which has not been implemented or utilised as effectively as it could have been.

The IIC expresses its concern about families, particularly Aboriginal families, being properly informed about the legal implications of entering into agreements with FACS in an FGC setting. If there is no legal representation (or inadequate representation) for families at a FGC, families may fall into the "trap" of agreeing to requests made by FACS in that context that they either do not understand, or cannot comply with, or both. The IIC notes that this may then trigger removal and formal commencement of care and protection proceedings rather than actually facilitate family engagement to resolve child protection concerns.

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

The FIC and the IIC both support this proposal. The IIC suggests that this is particularly useful in cases where the majority of matters are agreed upon between all parties. The FIC recommends that at the commencement of care proceedings all key stakeholders should be involved in a FGC. This would include the parents,

extended family members, services involved, and solicitors. The IIC notes that for Aboriginal children, family should be legally represented (even if it is only for the purposes of legal advice; that is, parties would still participate directly with each other, and the role that legal representatives would play would be to provide legal advice on the proposed agreements).

The FIC notes that there is currently legislative provision for this to be achieved pursuant to section 65A of the Care Act. However there would need to be policy and procedures implemented into the Court process to enable this to take place. For example, the FIC suggests that upon the filing of an application, the Children's Court Registrar will convene a FGC, inviting to the proceedings parties and key stakeholders (including those nominated by the parents), FACS and child/young person within five working days of such application.

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

The FIC submits that there should be the capacity to consider each case on its own set of facts as to whether ADR/FGC should take place. The FIC is of the view that there would be cases, albeit limited, where FGC or ADR would not be appropriate such as involving a child /young person in a ADR/FGC where one of the parents has been charged and is currently incarcerated for a serious offence perpetrated against the child/young person. The FIC is of the view that there needs to be discretion rather than a prescription of cases that would or would not be suitable and that ADR should be available in the following matters:

- Pre-Court proceedings;
- Commencement of Court proceedings;
- Resolution of interlocutory matters; for example, interim matters such as contact, parental responsibility (which would hopefully have been addressed at the ADR at the commencement of the proceedings);
- Placement matters.

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

The FIC's view is that it is a significant defect of the Care Act that breaches of the majority of orders (including all those in Chapter 5) do not carry with them specific enforcement provisions.

The FIC supports the usual sanctions for breaches of Court orders, including prohibition and contact orders, compulsory attendance of parenting capacity programs, counselling or drug and alcohol rehabilitation and community of service orders and fines.

The IIC notes generally that while the Care Act does have a regime for breaches of undertaking, the Care Act is deficient in providing for consequences of breaches of other types of orders. The IIC's view is that the regime applicable to breaches of undertaking can be incorporated into the Care Act for all breaches, such as breaches

of contact, breaches of parental responsibility order and so forth. The IIC submits that the breach procedure and breach remedy adopted should be similar, if not the same, as the procedure and remedy provided for by the *Family Law Act 1975* (the Family Law Act), which provides for far more comprehensive remedies for breaches.

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

The IIC's view is that sanctions (by way of breach proceedings) are appropriate, as long as the sanction is proportionate to the breach. Breach proceedings in themselves are criminal proceedings and therefore any breach proceedings must comply with the strict rules of evidence. The IIC notes that defendants will need access to legal representation to prepare a response/defence given the seriousness of the proceedings.

The FIC is of the view that notification of parties of the obligations created by orders of the Children's Court would be appropriate in similar terms to those set out in sections 65M-65Q of the Family Law Act. The Family Court issues its parenting orders with a standard notice to the parties about the obligations created by the parenting orders.

An escalating level of consequences of failure to comply with orders would be appropriate. Again, Division 13A of the Family Law Act would provide a model for such a scheme.

If there are to be breaches of the Care Act then those breaches would need to apply equally to the parents, or parties who may hold parental responsibility, and also to FACS and to non-Government agencies.

Given the serious consequences and potential criminal sanctions that may result if a breach of Division 13A of the Family Law Act is founded, the FIC recommends that the following principles apply in care and protection proceedings:

- For findings of a breach of order the onus of proof must be beyond reasonable doubt and not at the civil standard;
- That the rules of evidence apply for any application for contravention or breach of orders; and
- That applications for contravention or breach of orders are heard before the President of the Children's Court.

Additionally the FIC recommends that there be a provision for an application for a Recovery Order akin to what is available in the Family Court. There should also be an interstate arrangement whereby that Recovery Order can be administratively transferred to an Interstate Agency and implemented without the need to institute the cumbersome and untimely processes that are currently required if a child is illegally removed from the parental responsibility of a person or Minister either on an interim or final basis.

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?

The FIC certainly agrees that child abuse and neglect are offences to the person and an infringement of the basic human right of any Australian child. It follows that acts of abuse or neglect should carry with them a criminal sanction. However the most appropriate legislative response to this need is best contained within the *Crimes Act 1900*. The FIC submits that to extend the Care Act to provide for a quasi-criminal function would create unnecessary confusion to the penal code.

An additional difficulty with the imposition of criminal sanctions is that currently the NSW Police are reluctant participants in processes arising from the Care Act. Feedback from members suggests they routinely oppose the voluntary provision of recordings and transcripts of interviews with young victims of serious abuse and regularly fail to comply with subpoenas requiring them to do so (see the General Feedback section below).

The IIC agrees that there should be alternatives to fines for the child abuse and neglect offences under the Care Act. The IIC notes that often fines remain unpaid due to the fiscal circumstances of the parent/care giver involved. Fiscal reprimand only serves to further financially disadvantage families that are often already vulnerable and experiencing financial difficulties. The IIC suggests that the implementation of a reprimand that is educative, therapeutic and/or rehabilitative would be more useful as it would address the neglectful and/or abusive behaviour. The IIC's view is that this approach would assist the family to reach better outcomes, rather than to entrench the family into further disadvantage.

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

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

The FIC notes that the concept of permanency planning is well entrenched into the care and protection legislation pursuant to sections 78, 78A and 83. The concept of permanency planning is one that encourages stability and continuity of relationships for children and young people with their own family unit, extended family or in an out of home care placement.

The FIC and IIC both note that there is currently a placement hierarchy in place pursuant to section 13 of the Care Act for Aboriginal and Torres Strait Islander children and young people. The IIC strongly supports the placement hierarchy for Aboriginal children. Section 13 was implemented in order to recognise the right of

Aboriginal children to be placed in a culturally appropriate way, and in accordance with cultural responsibility and obligations; that is, if not with Mum or Dad, then with family; if not with family, then with kinship structure; if not with kinship structure, then within the child's community. It is very important that these principles remain. The IIC's view is that these principles differ in the non-Aboriginal context, and if section 13 were removed and the placement of Aboriginal children mainstreamed with non-Aboriginal placement, this will likely result in Aboriginal children being placed in non-Indigenous families rather than requiring an exploration of culturally appropriate placements.

The FIC suggests that if there is to be a hierarchy of placement for children (including non-Aboriginal children and young people), the regulations should prescribe in a meaningful way what steps need to be taken in order to move from one option to the next phase of the hierarchy.

Family preservation/restoration

As a matter of best practice the FIC supports the notion of permanency planning either through a restoration of the child or young person to their family unit or a kinship placement if a reunification of the child or young person with their family unit is not possible. The IIC also supports this position.

However, the FIC submits that appropriate resources need to be assigned to children and families in order to effect either restoration arrangements by consent, or Court-ordered restorations. This would require to caseworkers to be assigned to parents in order to assist and monitor in a timely and effective manner the minimum outcomes, and also caseworkers assigned to children to ensure that their needs are being met.

As a matter of casework policy and procedure, the FIC suggests that perhaps it is timely to consider whether outcomes can be achieved with families and children for a reunification in circumstances where the caseworker who removed the children from the family unit continues with caseworker responsibility during the course of the proceedings.

Kinship placements during the course of care proceedings

If children cannot be reunified with their own familial unit then the FIC agrees kinship placements should be considered. The IIC supports this position, noting at this point that the distinction between a guardianship order and a parental responsibility order to a relative or kinship carer is unclear.

The FIC suggests that where children are removed from the care of their family unit during the course of care proceedings, kin should be considered in the first instance.

The FIC notes that often children are not placed in kinship placements during the course of the care proceedings because there is lengthy delay in assessing the family. In those situations children are placed into foster care. The FIC concedes that there are families where inter-generational abuse has been perpetrated on children and that investigations are appropriate. However, the FIC's view is that children should be placed with kin as a matter of urgency, and at the earliest opportunity. The FIC submits that the systems must be streamlined in relation to assessments and obtaining "working with children" checks from appropriate agencies. It may expedite the process to include kin in any ADR undertaken.

Accordingly, the FIC submits that if there is to be a hierarchy of placements to be considered in policy or legislative reforms, such a hierarchy should be instituted as it pertains to kin at any time that the child is removed from the family unit by way of:

- temporary care agreements; and/or
- during the course of care proceedings; and/or
- interim placements; and/or
- short and long term placements.

Long term out of home care placements with non-relatives

Although this is not an option canvassed in the proposal, the FIC notes that past casework practices of FACS even when children were placed into long term out of home care had a caseworker assigned to a family. The FIC recommends during the devolution of care to the non-Government agencies that this "old casework" model should be investigated.

Parental responsibility orders to the Minister

The IIC's view is that an order to the Minister should only be made as a last resort in circumstances where there is no other order that can be made to ensure the safety, welfare and well-being of Aboriginal children, noting its view set out below that adoption is not a culturally appropriate option for Aboriginal children.

The FIC's view is that an order to the Minister should be considered prior to adoption for the reasons set out below. The FIC notes that there is no need for "guardianship orders" to be made if amendments to sections 79 and 81 of the Care Act as outlined in this paper are implemented.

Adoption

The FIC agrees that adoption may indeed lead to positive outcomes for children where it results in one continuous placement (an aim for all long term out of home care placements). However, in a care context, placements and children's circumstances need to be stabilised and this takes time. It is concerning that the discussion paper proposes the Court could make adoption orders in circumstances where the placement is in its initial phases. There may be some appropriate cases, for instance where neither parent is available due to incarceration on a long term basis or death or incapacity where adoption can be identified as a case plan. However, this can be achieved expeditiously by way of a parental responsibility order to the Minister and proceedings in the Supreme Court.

The FIC does not support the notion that adoption should be considered before an order of parental responsibility to the Minister if there is to be a hierarchy of preferences in care proceedings. There are families who are able to address their issues in a timely manner and have their children restored to their care. If adoption was considered as the next option in the hierarchy of care after kinship it would mean that immediately after a finding of no realistic possibility of restoration is made, an adoption could be approved, making the purpose of section 90 completely redundant. Section 90 allows parents to revisit the finding of no realistic possibility of restoration if they are able to address any parenting concerns within a reasonable time frame.

The FIC is opposed to adoption orders being made in the Children's Court for the reasons set out under proposal 11.

The IIC's view is that adoption is not a culturally appropriate option for Aboriginal children and strongly opposes the inclusion of adoption as an option in the Children's

Court. The IIC's view is that adoption is a specialised area of the law which requires the Court to take into consideration matters above and beyond those it would normally consider at the placement stage of proceedings. The IIC echoes the FIC's point that if the Children's Court has the power to make an adoption order prior to an order of parental responsibility to the Minister, this will effectively extinguish a parent's and/or care giver's right to seek a variation (by way of a section 90 application) of an order made to the Minister.

The IIC's concern about including adoption as an option in the Children's Court is compounded in light of the Minister's proposal to introduce legislative time frames for restoration. The IIC queries if, under this proposal, an adoption order may be made in circumstance where it is not considered viable for a newborn baby to be restored to either of the parents within six months? The IIC strongly opposes this outcome as such an order will prevent the parent from being able to remedy the removal. If an adoption order follows a no restoration order then it is a "once and for all" order because once an adoption has taken place there is no way a natural parent can seek the return of the child. Whilst an order to the Minister finalises proceedings, a parent, FACS and/or an interested party is still able to file a section 90 application to vary or discharge the final order.

The IIC acknowledges that while adoption is not generally considered culturally appropriate for Aboriginal children, there may be exceptions. The IIC's view is that this should be resolved according to principles of self-determination on a case by case basis; and therefore the child in question should be of an age where he or she is able to understand what he or she is providing consent for.

The FIC also notes that early identification of adoption as a case plan for permanency, under section 83(4) of the Care Act, is appropriate in certain cases. The FIC suggests that consideration be given to establishing best practice guidelines for these cases to produce better outcomes for children and families.

Achieve greater permanency by (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

The IIC notes again that it does not consider adoption a culturally appropriate option for Aboriginal children.

Achieve greater permanency by (c) requiring permanency plans not involving restoration to include the pursuit of guardianship/adoption or reasons why they should not be pursued

The IIC notes that the current framework requires this information to be provided within the care plan and for FACS to set out the measures undertaken to secure a relative and/or kinship placement in the event of no restoration. The need for a guardianship order is still not clear to the IIC. The IIC queries whether a guardianship order that is different to an order for parental responsibility to a relative and/or kin exists and, if so, seeks clarification of the differences between these types of orders.

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?

Neither the FIC nor the IIC support a legislative timeframe being placed on restoration. Whilst the concept of a timely resolution of restoration is supported, the Court must retain discretion to extend the timeframe in appropriate cases. If these timeframes are prescribed in legislation, the Court will not be able to take into account the facts of each case, expert evidence and other related matters that may be important. The IIC submits that legislating restoration timeframes will generalise the circumstances, experiences and needs of individual families. The IIC considers this an extremely risky approach which is likely to cause greater numbers of Aboriginal children in foster care. The IIC suggests that FACS adopt timeframes as a matter of policy instead, which will allow for a consistent approach by all FACS officers and caseworkers.

The FIC notes that parents need to demonstrate a period of sustained change before caseworkers will consider restoration and that a 6 month time frame would be insufficient in a significant number of cases to do so. For example, a first time mother with a learning difficulty who, although she has the capacity to parent, may not learn or adapt at the same speed as a parent without learning difficulties.

The IIC considers it preferable to allow the Children's Court, which is equipped with specialist Magistrates, to determine whether or not restoration is a viable option based on the whole of the evidence before the Court, rather than curtail the Court's discretion to fit into a prescribed time frame.

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?

The FIC and IIC note that the rationale behind this proposal is unclear. Beyond reducing the burden on FACS and NGOs, the benefit of this proposal is not immediately obvious, and appears to be driven by financial factors rather than the best interests of children. Accordingly the FIC does not agree with a proposal of self-regulation.

The FIC notes that family carers who currently have long term parental responsibility of children are already independent of government intervention and therefore already autonomous. In cases where the Court has identified and sanctioned a need for continuing state intervention, some or all aspects of parental responsibility are retained by the Minister. In many of those cases, shifting the burden of accountability to the family would defeat the objective of the Minister's continued involvement. The FIC considers that there should be a greater registration of orders under Division 13B of the Family Law Act in circumstances where there are stable long term placements. Decision making and processes within FACS should be streamlined to enable this registration to take place.

The IIC's generally supports self-regulation of relative and kinship placements. However, in the event self-regulation pertains to the fiscal support of a placement, it is not supported. In the context of Aboriginal people, relative and or kinship placements are often placements with grandparents, great uncles and/or aunts. Aboriginal people are recognised as the most economically disadvantaged group of people within Australian society. Often Aboriginal people who care for relatives or kin are illiterate, rely on Centrelink payments, and are residing in either Aboriginal or public housing. The IIC's view is that it is unrealistic to suggest that the fiscal circumstances of Aboriginal carers are likely to change after a period of two years. In more cases than not, the ability to care and to be successful in caring for a child will be largely dependent on fiscal assistance above and beyond that offered by a Centrelink payment. If self-regulation also means "fiscal self-regulation" the IIC's view is that there is likely to be a decline in culturally appropriate placement options for Aboriginal children, thus increasing the already alarming statistics on Aboriginal children currently in care.

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

The IIC's view is that the key elements of a self-regulation model for supported out of home care would be the ability to:

- provide a safe and nurturing home environment; and
- manage and facilitate family relations within the context of kinship network.

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?

As noted previously in this submission, it is not clear to either the FIC or the IIC what the benefit of a guardianship order is, as opposed to a parental responsibility order (unless there is a view that a guardianship order would not transfer parental responsibility).

The FIC notes that during the review of the *Children (Care & Protection) Act 1987*, terms of orders were amended to reflect the changes of terminology such as "guardianship" in the Family Law Act. Sections 79 and 81 of the current Care Act were amended to reflect the changes in terminology in the Family Law Act in relation to parental responsibility. Annexure A of this submission contains further detail in relation to amendments to sections 79 and 81. The FIC's view is that reverting to the term "guardianship" is contrary to current language and legal definitions in the Family Law Act and therefore the FIC does not support this proposal.

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

Please see response to Question 9 (a).

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

The IIC cautions strongly against FACS adopting an approach where foster care is seen as a stepping stone to adoption. It is unclear to the IIC what the difference is between "authorised carers" and "prospective adoptive parents", and until such information is available, the IIC would be unable to offer an informed response.

Likewise, the FIC does not support the automatic approval of long term carers as a pool of adoptive carers, noting that there are different expectations in the two types of care. Caring for a child in a statutory framework with the Code of Conduct and case planning requirements requires a different assessment than one for an adoptive parent, and clearly what would be expected of the two categories of carers would be different. Those expectations may significantly impact on the case plan for the child, particularly in circumstances where the needs and expectations of one class of carers are not being met by the child's case plan.

The FIC notes that there is already a mechanism in place for "streamlining current carers" through the *Adoption Act 2000* whereby accredited agencies provide dual authorisation of long term/permanent placements. The FIC is of the view that there is no need for another system to be developed.

In relation to whether there are options that could be implemented to avoid multiple placements, the FIC refers FACS to the work of Dr Alexandra Osborn and Dr Leah Bromfield[1] which highlights the negative outcomes for children and young people in care.

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?

The FIC and the IIC oppose this proposal, and do not agree with the proposed dilution of the Adoption Act or the proposed expansion of the Care Act.

The FIC opposes the proposal to include adoption orders to be made in the Children's Court for the following reasons:

- 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;

[1] Osborn, A, & Bromfield, L, 'Outcomes for children and young people in care' (2007).

- Adoption is a complicated and extremely invasive process which must carry with it the highest level of judicial oversight;

- The Supreme Court is better resourced then the Children's Court, able to hear matters expeditiously and over a continuous period of time, unlike the Children's Court where there are delays, matters are held over non sequential days and often weeks if not months between sitting dates;

- The severance of a child's legal nexus with his or her biological parents should be dealt with in a Court of superior record;

- This would result in two classes of adoption in the State of 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 and cannot be in the interests of children and families in NSW;

- The care and protection jurisdiction is exercised by a number of non-specialist Local Court Magistrates, particularly in country and regional areas, where the workload is heavily weighted towards criminal proceedings and apprehended violence orders. Local Court Magistrates could not be expected to attain a sufficient understanding and knowledge of the adoption issues to make appropriate determination in these complex matters;

- The work load of the Children's Court is already significant and it is not realistic to expect Children's Court Magistrates to travel throughout the state to approve adoptions in the current resource climate;

- If adoption is to proceed then there must be a significant period of time from the determination of no realistic possibility of restoration to the adoption. The effect on families would be devastating if the Court proceeded immediately upon a finding of no realistic possibility of restoration to consider adoption. The trauma of an adverse finding about restoration is significant in any event, but added to that an immediate adoption would create untold trauma to families which would inevitably lead to significant long term social harm.

The IIC notes that the objectives and principles set out at sections 8 and 9 of the Care Act are that the best interests of a child should be promoted, and in the IIC's view, this principle is met by children remaining within their own family network wherever possible. The Care Act promotes variation by way of section 90 applications to orders of the Court where there has been long term orders made placing children under the Parental Responsibility of the Minister. To incorporate adoption, extinguishing once and for all parental responsibility to a natural parent, undermines the Care Act.

The IIC submits that it remains unclear at this point in time how the Minister proposes to include an adoption jurisdiction into the Care Act. It is submitted that if an adoption jurisdiction is included in the Care Act, Children's Court Magistrates may face applications to disqualify themselves from hearing the adoption proceedings in circumstances where they have determined that the same child could not be restored.

In the IIC's view, a further difficulty arises in relation to the need for the judiciary to remain independent of the executive. The proposed amendments will create a situation whereby the Court is asked by FACS to find that restoration is not possible, and then to go on to find in favour of adoption. The IIC's view is that it would be difficult to explain to the general public how the decision to adopt can be made independently of the judiciary's decision not to restore. The IIC submits that it is imperative that the Children's Court maintains independence in relation to any decision to grant adoption.

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

The IIC notes that adoption is the most serious intervention available, so far as severing a natural parent's involvement in a child's life. Therefore a full assessment of the proposed carer, whether authorised as a foster carer or not, should be undertaken. The IIC notes that compliance with current adoption laws should not be undermined by a "fast-tracking" of the requirements regardless of the role of the carer seeking adoption.

The FIC does not support any dilution of the Adoption Act or its processes, including the availability of expert reports to the Supreme Court to address capacity issues of the carer within the adoption framework. The FIC notes that the Adoption Act prescribes the procedure for the selection and approval of adoptive parents, and also enables participation of non-consenting birth parents in the process. If there is to be a casework shift towards a policy of pursuing adoption, then the FIC recommends that significant attention and consideration should be directed to the recommendations outlined in the 2012 research study *Past Adoption Experiences*[2] and appropriate services and resources implemented. The FIC submits also that all carers, regardless of whether or not they are kin, should be subject to satisfactory assessment within the adoption context.

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?

[2] Kenny, P., Higgins, D., Soloff, C., & Sweid, R. (2012). *Past adoption experiences: National Research Study on the Service Response to Past Adoption Practices* (Research Report No. 21). Melbourne: Australian Institute of Family Studies

The IIC is not aware of the difference between the two standards. The IIC's view remains that adoption for Aboriginal children cannot be supported as part of permanency planning for Aboriginal children.

The FIC notes that comment on this proposal is difficult without further detail.

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?

Given that one of the fundamental principles of the Australian legal system is to promote procedural fairness, the IIC's view is that any application for adoption should automatically include the birth parent as a party to the proceedings which will allow the parent the right to file a response and engage actively in proceedings.

The FIC notes that the objective of this proposal is not clear without further detail. The FIC agrees in theory that the concept of involving the birth parents in the adoption process appears positive. However, the FIC considers it is unlikely that birth parents would be enthusiastic participants in the preparation of a plan for adoption.

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

The IIC's view is that dispute resolution may be used as a tool to ensure birth parents are heard in an informal, less adversarial environment in cases where the adoption is not opposed.

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?

Both the FIC and the IIC oppose the creation of additional grounds for dispensing with parental consent or service. The FIC notes that there is substantial case law before the Supreme Court in relation to the service of documents on parents. 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.

The FIC notes that adoption is the most intrusive act that the state can impose on a child parent relationship. The FIC's view is that 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 many 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 affected. 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.

The FIC further notes 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.

The FIC also notes that article 9(1) of the United Nations *Convention on the Rights of the Child* 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"...*

The FIC submits 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 IIC's view is that the current *Adoption Act 2000* provides satisfactory provisions for the purpose of dispensing with consent.

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 parent 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?

The FIC and the IIC both oppose this proposal.

The FIC notes that the Children's Court can and does remove parental responsibility from a parent in circumstances where the parent is not at fault, for example, the inability to raise an effective contrary argument because they cannot afford legal representation or by reason of intellectual incapacity. The FIC does not wish to see this form of disenfranchisement extrapolated to adoption proceedings.

The FIC further notes that the discussion paper does not provide sound reasons, based on best practice, to support this proposal nor research to support the proposition that care adoptions proceed on an ex parte and undefended basis. The FIC considers that the 2012 research study *Past Adoption Experiences*[3] should guide decision making. The lack of transparency in care proceedings and disempowerment of families (usually in the care jurisdiction from the most economically and socially disadvantaged groups), as well as International Conventions in which Australia is a signatory[4] and case law[5] all caution against an adoption process proceeding in such a way.

The IIC notes that a finding of no realistic possibility of restoration attaches to the point in time that a finding is made. Parents' circumstances change over time, including a parent's ability to address concerns and consider an application under section 90 of the Care Act. To minimise a parent's role in adoption proceedings because of a finding of no realistic possibility of restoration assumes the parent has no intention of resuming care. Minimising their role in adoption proceedings has the potential to silence a parent who may otherwise be in a position to re-commence parenting.

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

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

The FIC acknowledges that there are difficulties arising from Court ordered contact in non-restoration cases but considers that removing the possibility of Court ordered contact would be too draconian a measure because:

- It is routinely the case that FACS recommends minimal token parental contact as a matter of policy where children are placed in out of home care without having regards for the specific contact needs of the child. Even with better intentions, once a child is in out of home care, maintaining family contact is not considered a priority by FACS and should not therefore be left to that agency to facilitate;

- Similarly the Court's sovereignty over sibling contact, also regularly overlooked as a priority by FACS, is something which must be maintained;

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[3] Ibid.
[4] *United Convention on the Rights of the Child.*
[5] *Re Tracey* [2011] NSWCA 43

- The sibling contact issue is a difficult one when children are in separate placements managed by different Community Service Centres. The provision of a contact order about sibling contact focuses the mind of the out of home care caseworkers to respect that order which in turn means continuation of the sibling relationship;

- The Children's Court has, in accordance with the Wood Report, developed guidelines as to contact which are helpful and instructive. They make the point that contact for a child must be looked at on a case by case basis. Too often Community Services approaches the contact issue with a "one size fits all" approach;

- The negative outcomes for children in out of home care who have had no or limited contact with birth families has been well documented in substantial social research in the past[6];

- Research is clear[7] that maintenance of a connection with birth parents is critical from both the developmental and identity perspectives for a child, and the impact of contact decisions goes well beyond the parent and child to siblings and other family members. The scope and importance of the issues is such that judicial determination is the most appropriate approach.

The IIC supports the views of the FIC on this issue.

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?

The FIC submits that a framework cannot be a replacement for a statutory scheme, nor should the development of a framework dilute the discretionary role of the Children's Court in making decisions on a regime of contact in a particular matter.

The FIC notes that there are some cases where children are not able to live with their parents and need to be in out of home care but their relationship with their parent is significant, their contact with that parent is positive and the children are not at risk exercising such contact with their parent as the parents capacity is not impeded for such a period of time. A framework, if strictly adhered to, would not countenance such factual matters.

The FIC recommends that any framework should be used as a guide only and not a set formula for contact. The framework must be guided by research and should be a policy document that is subject to review rather than enshrined in legislation.

The IIC's view is that it should not be the role of an agency to determine contact but rather to ensure that proper compliance, assistance and support is structured and

[6] Cashmore, J, & Paxman, M, 'Wards Leaving Care' (2006) 31(3) *Children Australia* 18-25.
[7] Ibid.

utilised to ensure best outcomes for consent Contact Agreements and/or Court orders concerning contact.

PROPOSAL 19:
Improve the resolution of contact disputes by:
(a) requiring ADR be used to settle contact disputes
(b) where ADR is unsuccessful, contact disputes will be resolved in the Children's Court or the 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?

The FIC prefers Model 1 which provides that once ADR has been attempted and has not been able to resolve a contact dispute, the Children's Court would retain the power to make final orders regarding contact.

The FIC strongly supports the use of ADR to try to resolve contact before proceedings. The FIC notes that a similar provision exists in the Family Law Courts whereby a certificate from a Family Dispute Resolution practitioner must be filed with the Court pursuant to section 60I of the Family Law Act before proceedings are commenced. Both the FIC and IIC are of the view that a similar provision would be appropriate in care proceedings.

The IIC also supports the use of ADR to resolve contact issues before proceedings. In circumstances where there has already been a contact order or other such provisions for contact made, and those orders or provisions are in conflict, then the IIC would support efforts to resolve the matter through ADR. It follows that if the matter is not resolved through ADR then there should be an application to the court for the matter to be determined judicially.

However, the IIC notes its concern that a contact application would be heard separately to an application filed by FACS. The IIC's view is that it should still be possible for contact applications to be heard as part of a first instance case. In the IIC's experience, parents will often argue relevant contact as an alternative to restoration. In the Model 1 situation, the IIC would be very concerned if contact disputes were mandatorily required to be heard at ADR prior to the Court having jurisdiction to determine appropriate contact.

The IIC considers it important that legal representation is available to the parties participating in the ADR process and notes that the Court would need to endorse any agreement reached between the parties by way of consent orders.

The IIC also notes that contact disputes can be resolved through provisions that are already available to the Children's Court; i.e. by way of an application filed before the Court seeking contact orders. Currently applications made under section 90 of the Care Act are used to vary orders which may include an application to vary an order to either change or include contact under section 86 of the Care Act.

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?

The IIC notes that this is currently within the discretion of the Court and submits that it should remain so as careful consideration of the facts and evidence of each individual case is required.

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?

The FIC strongly opposes the proposal that any contact disputes be determined in the Administrative Decisions Tribunal (ADT). Children's issues regarding contact involve consideration of complex issues of attachment which the specialist Children's Court has significant experience in. It is a repetition of resources for contact issues to be determined by the ADT rather than in the Children's Court which determines issues about children's placement and contact on a daily basis.

Referral of such matters to the Family Court or the Federal Magistrates Court is also opposed by the FIC. The waiting time in those jurisdictions is extremely lengthy - a two year wait for a final hearing is not unusual in most registries. The Children's Court is able to deliver outcomes in a much more timely manner.

The IIC notes that the ADT is able to review internal decisions, which includes decisions pertaining to contact, and that section 69ZK of the Family Law Act allows the Director General to consent to proceedings being heard in the Family Court. The IIC can see no reason why third parties cannot obtain the consent of the Director General for the purpose of contact.

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?

The FIC and IIC both agree that there should be mechanisms for enforcing contact agreements or orders and that breaches would need to apply equally to the parents and other parties who hold parental responsibility as well as FACS and non-Government agencies.

As mentioned at question 4 above, the FIC's view is that it is a significant defect of the Care Act that breaches of the majority of orders (including all those in Chapter 5) do not carry with them specific enforcement provisions. The IIC agrees the Care Act is deficient in relation to the enforcement of contact orders, and that all parties, including FACS, should be held to account.

The FIC supports the usual sanctions for breaches of Court orders, including prohibition and contact orders, compulsory attendance of parenting capacity

programs, counselling or drug and alcohol rehabilitation and community of service orders and fines. The FIC's view is that an escalating level of consequences of failure to comply with orders would be appropriate, for example, as provided for in Division 13A of the Family Law Act.

Given the serious consequences and potential criminal sanctions that may result if a breach of Division 13A of the Family Law Act is founded, the FIC recommends that the following principles apply in care and protection proceedings:

- For findings of a breach of order the onus of proof must be beyond reasonable doubt and not at the civil standard; and
- That the rules of evidence apply for any application for contravention or breach of orders; and
- That applications for contravention or breach of orders are heard before the President of the Children's Court.

The FIC recommends that provision be made for an application for a Recovery Order akin to what is available in the Family Court. There should also be an interstate arrangement whereby that recovery order can be administratively transferred to an Interstate Agency and implemented without the need to institute the cumbersome and untimely processes that are currently required if a child is illegally removed from the parental responsibility of a person or Minister either on an interim or final basis.

In the event of successful enforcement proceedings, the IIC's view is that the affected party should have a right to bring a cost order against the non-complying party and/or request make up contact time. In more serious cases of breach of contact orders, remedies for breach within Division 13A of the Family Law Act should be available.

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?

The IIC supports this proposal and suggests that the current framework used in the Family Court jurisdiction should be adopted in the Children's Court jurisdiction.

The FIC acknowledges the obvious advantage of having ADR provisions located in the one place and again makes the point that the key to ADR being effective is for there to be adequate resourcing of Legal Aid NSW for the funding of representation of children and adults in care cases. The success of the Bidura Pilot Program and the enhanced DRCs in the Children's Court has only been possible because of the provision of funding from Legal Aid for representation of the parties. Parties attempting to mediate without proper knowledge of their rights and responsibilities do not produce good outcomes for children.

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?

The FIC notes that there is a wealth of precedents available in relation to the administration and provision of special medical treatment for all children in NSW, not only in relation to children and young persons who are subject to a care arrangement and order. Precedents to be relied on in relation to decision making for special medical treatment include:

- *The Secretary, Department of Health and Community Services v JWB and SMB* (1992) CLR 218;106 ALR 385; FamLR 92-293;
- *Re Alex* [2004] Fam CA 297 (2004) FLC 93- 175; and
- *Re Jamie* [2012] FamCAFC (2012) 93-497.

Neither the FIC nor the IIC support the use of guidelines. The safeguards are well founded at law and the Courts, in their exercise of parens patriae jurisdiction, provide the necessary "safeguards" for children in NSW (including those in care arrangements). These mechanisms and sound judicial reasoning should not be diluted by 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?

It is the joint view of the Committees that consent to administer psychotropic medication should come from those who exercise parental responsibility and only when there is a specialist medical opinion as to the need for such intense medication.

Both the FIC and IIC agree that a treatment plan or behaviour management plan is necessary as this allows for a comprehensive understanding of the child's medical needs. The FIC's view is that there would also need to be regular meetings with treating medical specialists, behavioural specialists, youth workers, teachers, carers and CS to ensure that the medication being administered remains effective and in the best interests of the child. The IIC's view is that implementation of a case plan provides clarity about the child's medical condition and treatment for all people involved in the child's life (carer, case worker, school teacher, medical practitioner etc).

The FIC's view is that these are policy and procedural matters that should not be enshrined in legislation but clearly articulated in policy and procedure and/or regulations.

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

This is agreed in principle by the FIC. The FIC notes that the Court is currently very lax in its tolerance of parties who adopt a casual attitude towards the confidential nature of Court documents. If such an offence is to be introduced it must come with a determination by the Children's Court to enforce breaches of confidentiality relating to children, young persons and their families as outlined in question 4 above. There also needs to be greater dialogue with federal agencies as to improper use of social media including the internet in child protection cases.

The IIC agrees with this proposal in so far as confidentiality of Children's Court proceedings is promoted. However, there may be exceptions. For example, will a client who is not literate have breached the proposed provisions if someone other than the solicitor reads to them the Court documents? The IIC notes that it is simply not practicable for a solicitor with a Legal Aid grant to sit and read to a client hours' worth of documents, when the grant allows only for one and a half hours in total of preparation time. The IIC suggests that provisions should be made to allow a party to apply for a third party to view confidential documents, similar to providing access for making photocopies and/or professional viewing of documents. The IIC notes that the matter of *KF v Parramatta Children's Court* [2008] NSWSC 1131 has settled this issue as far as professionals are concemed.

The IIC notes that caseworkers will always be subject to disgruntled parents given their involvement with removing children from their care. The IIC suggests that it would be counterproductive to flood the Court with these matters, when the Court's focus should be on determining outcomes to protect the well-being and safety of children. The IIC's view is that harassing or threatening behaviour towards caseworkers is a criminal matter which can and should be reported to the police and remain in the criminal jurisdiction.

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?

The FIC has previously endorsed a position on this issue which is annexed to this response as Annexure **A**. The IIC agrees with the views set out by the FIC.

The IIC notes that including the words "at the expiration of order ....." allows for the expiration of one order and the commencement of another. This is simply a matter of drafting and does not need to be included in legislation.

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?

The FIC does not support this proposal because:

- It is unnecessary, or would be if FACS complied with directions to file reports pursuant to section 76(4). Problems have arisen historically where FACS has either failed to do so at all or on time;

- This proposal carries with it the risk that a child would be subject to the supervision of the Director-General in circumstances where it is no longer necessary, offending the least intrusion principle in section 9(1)(c) of the Care Act;

- In circumstances where a section 76(4) report has been delayed, there may be some merit in allowing the Independent Legal Representative to make an application, with the leave of the Court, to extend the supervision order. However, it would be far preferable for FACS to file the report on time and in accordance with the original Court order;

- The actual casework that takes place and allocation of caseworker time to supervision orders by FACS is often variable. An extension of a supervision order from 12 months to 24 months will not address these ongoing problems.

The IIC does not support this proposal either and notes that non-compliance with a Court order cannot simply be remedied by an automatic extension of that order in circumstances where FACS has not complied with a Court order, particularly where a parent may be subjected to further supervision without a right to be heard.

The IIC notes that the Court has previously had the discretion to make supervision orders for a period of 24 months but amendments to the Care Act shortened the time frame to 12 months. The IIC submits that the difficulty lies with FACS' inability to comply with Court orders (for example, to report to the Court prior to the expiration of a supervision order) and there is nothing to suggest an extension of time will ensure compliance.

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?

Neither the FIC nor the IIC oppose this proposal. However, there would need to be careful and considered safeguards in place for the distribution of highly confidential information.

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

Neither the FIC nor the IIC oppose this proposal. However, there would need to be careful and considered safeguards in place for the distribution of highly confidential information.

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.

Neither the FIC nor the IIC oppose this proposal and suggest that consideration be given to the following:

- Consolidating the list of prescribed bodies currently spread across section 248(6) of the Care Act and clause 8 of the *Children and Young Persons Regulation 2012* in one place, most logically in section 248(6); and

- Making FACS a prescribed body so that it is subject to the same mandatory requirement that binds NSW prescribed bodies. Compliance with an incoming (to FACS) request for information is currently provided for in section 248(1)(a) which states: "the Director-General *may*...furnish a prescribed body with information". Conversely, section 248(1)(b) provides that other prescribed bodies can be *directed* by the Director-General to provide information requested by the Director-General and under section 245D(3) "...the prescribed body is required to comply with the request". By adding FACS to the list of prescribed bodies then it too would be bound by section 245D(3) thus better achieving the objects and observing the principles set out in section 245A.

Further comments are made below under the heading "General Feedback" about FACS' self-imposed embargo on the use of documents obtained under sections 245 and 248 of the Care Act in Court proceedings.

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?

This proposal is strongly supported by the FIC and IIC.

The IIC's view is that this should be required both in circumstances where the child is known to the department and living with their parent/s when they have passed and in circumstances they are in the care of the Minister or someone other than their natural parent when they pass. This allows for accountability, responsibility and transparency for children known to FACS and promotes an avenue for community redress if considered necessary.

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?

The FIC supports this proposal in principle.

General Feedback

- Funding: For any of the proposed measures to be effective, the relevant agencies need to be properly funded.
    - FACS needs to be able to employ enough caseworkers and provide them with comprehensive training. Similarly it needs to provide competitive salaries which would attract applicants of the highest standard;
    - It needs to remain viable for practitioners to take on legally aided care matters. This is becoming increasingly difficult as hourly rates differ considerably from market rates and caps mean that practitioners are not paid for all of the work they undertake.
- Adjudication of care proceedings: The achievement of excellence currently shown in the UK and other jurisdictions can and should apply in New South Wales either by:
    - Ensuring that all Magistrates (whether in dedicated Children's Courts or not) state wide are subject to separate accreditation enabling and entitling them to adjudicate care proceedings, achieving:
        - Higher standards, and
        - Uniformity of decision making and procedures throughout the states.

      Currently Magistrates with little or no experience in private practice or as judicial officers of child protection or care proceedings are given the responsibility of trying serious and complex care cases. The objective should be that the excellent standard of judicial oversight shown by specialist Children's Magistrates sitting in the dedicated Children's Courts should be available state wide.

- Adopting the UK model (or that in the criminal jurisdiction) where the more complex and serious cases are transferred after the first appearance to the District or Supreme Court.

- FACS self-imposed embargo on the use of documents obtained pursuant to statutory requests for information should be abandoned so that documents obtained under those processes can be used without limitation in Court proceedings and in multi-agency consultation.

- The information sharing ethos which led to the creation of Chapter 16A of the Care Act should be extended to the establishment of a protocol for the release of interviews of young victims of serious abuse conducted by the Joint Investigation and Response Team. Currently the police release this information reluctantly, if at all, having little regard for the fundamental requirement of the availability of these interviews in care proceedings. It is common for serious sexual and other physical abuse care proceedings to be decided with only an observer's handwritten notes of such interviews available to the Court. This is contrary to the principle of "best evidence" and natural justice.

- FACS caseworkers should be relieved of the responsibility for legal tasks, currently part of their job descriptions for which they are not trained. In other words, as with other parties to care proceedings and indeed other jurisdictions, the responsibility of the drafting and service of pleadings should fall upon lawyers. This would achieve:

    - A better standard of litigation and the more frequent attainment of the standards required of the Model Litigant, and

    - Freeing caseworkers up to do the casework for which they are trained.

- The process of the transfer, both judicial and administrative, of proceedings and orders between states needs to be overhauled. Given that each state and territory has its own legislative framework, this can only be achieved if the states and territories agree to a list of "transferrable orders" so that in cases where the Court approves the placement of children interstate, only orders from that list can be made. It is acknowledged that this is a complicated area but NSW should commence a dialogue between the states and spearhead this much needed change.

Annexure A

Response to Proposal 24

PROPOSED REFORM OF SECTIONS 79 AND 81 CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) ACT
POSITION PAPER
LAW SOCIETY FAMILY ISSUES COMMITTEE

The Committee thanks Derek Smith, Assistant Director, Legal Services, Community Services for inviting response from the Law Society Family Issues Committee on this issue through discussion and consultation within the Children's Court Working Party relating to this issue. The Committee responds as follows:

GENERAL PREMISE

The Committee respectfully adopts the "Purpose" and "Background" sections of Community Services' position paper. The expressed view that section 79, as it stands, does not adequately provide for circumstances where parental responsibility needs to be shared between the Minister and a non-parent, has merit.

The practical reality which has emerged since the Act was proclaimed is that it has indeed become standard practice to "work around" this deficiency by artfully combining section 79 and 81 to set out the Court's view as to which permutation of allocation of parental responsibility best serves the child's needs.

One particular difficulty which then follows (which is alluded to in Community Services' position paper) is that even in circumstances where it is intended that the Minister (whether solely or shared) be allocated parental responsibility in one discreet aspect then an order under section 79(1)(b) would be the head order. The intended allocation would then be reflected in a subordinate section 81 order.

By way of example based upon a common scenario where:
- The child is placed with a family member (eg aunt and uncle)
- The Minister needs to share PR for contact to assist in its facilitation
- A parent is identified as an important link to the child's culture

The following order would normally be made:

1. Pursuant to section 79(1)(b) parental responsibility for [subject child] be allocated to the Minister for Community Services ("the Minister") until he attain the age of 18, such parental responsibility to be allocated as follows:

   a) Pursuant to section 81(1) (a) the aspects of **education and medical treatment** to be the **sole responsibility** of [child]'s [aunt and uncle]
   b) Pursuant to section 81(1) (c) the aspects of **contact and residence** to be the **joint responsibility** of the Minister and [aunt and uncle]
   c) Pursuant to section 81(1) (c) the aspects of **culture** to be the **joint responsibility** of the Minister, [aunt and uncle] and [child]'s father

This manner of recital is far from ideal because:
1) It is cumbersome,

2) It also has the capacity to cause problems for primary carers who may well have to produce the order as evidence of their role (eg. when registering the child at a new school or medical practice) to persons who may understandably be distracted by the apparent certainty of a head order which clearly states that parental responsibility is to be allocated to the Minister, and

3) It precludes a scheme of uniform precedents for use by the Court and practitioners when making commonplace orders

PROPOSED NEW FRAMEWORK

The Committee has had the benefit of reading and respectfully noting the points of view expressed by His Honour Mark Marien SC, by Community Services and by the Legal Aid Commission.

With due deference and respect to those points of view the Committee shares the general view that a new scheme is required but is of the view that the sections could be simplified still further without compromising their effect thus:

Section 79(1)
Having identified that the principal objective is to remove the current limitations on the allocation of parental responsibility, it is suggested that it is then merely necessary to state which persons can be allocated the parental responsibility without effectively setting out examples of the permutations as has been proposed. Hence, instead of, (as Community Services propose):

> **79 Order allocating parental responsibility**
>
> (1) If the Children's Court finds that a child or young person is in need of care and protection, it may:
> (a) Make an order allocating the parental responsibility for the child or young person, or specific aspects of parental responsibility:
> (i) To one parent to the exclusion of the other parent, or
> (ii) To one or both parents and to the Minister or another person or persons jointly, or
> (iii) To another suitable person or persons, or
> (iv) To the Minister solely, or
> (v) to the Minister and another suitable person or persons jointly or the simpler variation proposed by Legal Aid which still nevertheless lists the permutations:
> **(a) 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**
> **(b) An order to one or both parents and to the Minister or another person or persons jointly**
> **(c) An order to another suitable person or persons**
> **(d) An order to the Minister solely**
> **(e) An order to the Minister and another suitable person or persons jointly.**

This Committee proposes that it is sufficient, but no less effective, simply to say:

> (1) If the Children's Court finds that a child or young person is in need of care and protection, it may:

(a) make an order allocating the parental responsibility for the child or young person, or specific aspects of parental responsibility to one or a combination of the following:
(i) the Minister
(ii) one parent to the exclusion of the other
(ii) any other person
(b) [repealed]

A note confirming the common law position whereby, absent any specific order to the contrary, parental responsibility vests in the child's parents would do no harm but is arguably also unnecessary.

Section 81
Once an adequate scheme for section 79 is in place, Section 81 could be changed by re-arranging the subsections thus:
(1) Repealed
(2) Repealed as it will often be impractical and in a large majority of cases is currently only honoured in its breach thus demonstrating its redundancy
(3) Remains but stands alone

Section 81 could then be given a new title and look like something like this:

81 Shared parental responsibility

If aspects of parental responsibility are to be exercised jointly by the Minister and another person, either the Minister or the other person may exercise those aspects but, if they disagree concerning their exercise, the disagreement is to be resolved by order of the Children's Court.

Time-limited, sequential or concurrent orders
As things currently stand, neither section 79 or 81 specify time periods for which parental responsibility orders can be made. Furthermore of the various care orders available under Chapter 5 it is only Emergency Care and Protection Orders (section 46) and Supervision Orders (section 76) which are expressly limited in their duration[8]. In all other circumstances the Court and its users imply the need to legislate for children for the remainder of their minorities (to age 18 under this legislation). This is a mechanism which appears naturally to have developed and which, it is suggested, is not unlawful.

Similarly there appears to be no limitation upon orders being made:
- sequentially (eg 12 months PR Minister followed by PR to a parent to 18 as is often used in restoration cases) or
- concurrently (eg. 12 months supervision order to run concurrently with the first year of an order allocating PR to a person other than the Minister, again often used in restoration cases)

Accordingly the Committee is of the view that it is not necessary to make changes to these aspects of the legislation.

Aspects of parental responsibility – Section 79(2)
The Committee is of the view that if the division of aspects of parental responsibility has to be legislated for then this too can and should be simplified. The current

[8] In practice of course it is only the latter that would run concurrently with a parental responsibility order (to a person other than the Minister).

scheme which is found in section 79(2) helpfully sets out a list of aspects of parental responsibility which can be specifically allocated. However the merit of that assistance is nullified by the preceding "...but are not limited to..." which naturally begs the question why list the aspects *at all* if that list is not an exhaustive one. The purpose of legislation is to provide a code and a framework for society rather than, as section 79(2) currently does, merely provides suggestion of some of the ways that those laws may be exercised.

By way of reminder, both the *Children and Young Persons (Care and Protection) Act 1998*[9] currently under discussion and the *Family Law Act 1975*[10] have identical definitions for the concept of parental responsibility namely:

> *"...all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children."*

The UK Children Act 1989[11] is very similar:

> *"...all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property"*

None however provides further definition.

Proceeding on the assumption that it will continue to be the case that parental responsibility can and should be subdivided allocating aspects to several of its holders then it is recommended that it be confined to a finite list. This list may include those currently listed in section 79(2) with the words *"...but are not limited to..."* omitted or be a more extensive list such as:

- Where the child lives
- Persons with whom the child should have contact
- Medical and dental treatment
- Education
- Religion and culture
- Name
- Passport
- Marriage of Young Persons under 18
- Administration of property

It is suggested that the often used but clumsy and rather vague "day to day care" is otiose and unnecessary.

CONCLUSION

By way of conclusion the Committee repeats its thanks for the invitation of comment on this issue in which all stakeholders appear basically agreed and that the differences relate to style rather than substance. The fact is that if *any* of the three schemes for section 79 became law, the specimen example set out at the beginning of this paper could look something like this:

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[9] Section 3
[10] Section 61B
[11] At section 3 although in the UK parental responsibility cannot be subdivided into "aspects"

1. Pursuant to section 79(1) parental responsibility for [subject child] be allocated as follows:

    a) the aspects of **education and medical treatment** to be the **sole responsibility** of [child]'s [aunt and uncle]
    b) the aspects of **contact and residence** to be the **joint responsibility** of the Minister and [aunt and uncle]
    c) the aspects of **culture** to be the **joint responsibility** of the Minister, [aunt and uncle] and [child]'s father

Chapter 5 of the Act which comprises the legislative mechanism for the making of care orders is convoluted and, rather like a thoroughbred racehorse, retains the capacity to surprise and unseat even the most experienced handler. That characteristic is far from desirable in a jurisdiction which demands a strong and reliable framework within which fragile young lives can be rebuilt. The reform of the parental responsibility provisions is a worthy and essential part of that process and its rapid advancement and resolution is strongly encouraged by this Committee.

16 June 2010