WOMEN'S LEGAL SERVICES NSW

Incorporating
Domestic Violence Legal Service
Indigenous Women's Legal Program

18 March 2013

Department of Family and
Community Services, NSW

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

Dear Madam/Sir,

Child Protection Legislative Reform

1. Women's Legal Services NSW (WLS NSW) thanks the Department for the opportunity to comment on the *Child Protection Legislative Reform Discussion Paper ('Discussion Paper').*

2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.

3. We are a member of Community Legal Centres NSW and co-convene the CLCNSW Domestic Violence/Victims Compensation Subcommittee, co-convene the CLC NSW Prisoner's Rights Working Group and actively participate in the Aboriginal and Torres Strait Islander Rights Working Group and the CLC NSW Care and Protection Network.

4. This submission will primarily focus on issues for Aboriginal and Torres Strait Islander women, victims of domestic violence, women in prison and women in regional, rural and remote areas.

Introduction

Overview

5. The issue of child protection is a complex and serious issue. However, we do not support the majority of measures proposed in the *Discussion Paper*. The measures, in large part, take child protection public policy in a direction that is contrary to international best practice which demonstrates the benefits of serious commitment to early intervention, particularly where mothers have experienced domestic violence; or where trauma, social

exclusion and poverty are the causes of child protection concerns. To increase the focus on adoption as a child protection strategy suggests we have not learnt from the past and are set to repeat mistakes that will necessitate another apology in the future.

6. In summary, we support greater emphasis on:

   a. Accessible early intervention and parental support for all who wish to access it;

   b. FACS (CS) and non-government organisations being held accountable for the timely provision of support services for parents and children;

   c. Flexible and culturally appropriate solutions that involve parents and children in the decision-making process and focus on the best interests of the child;

   d. Prioritising family preservation as the first and primary permanency response as generally it is in the best interests of children to remain with their family;

   e. Contact with family where children have to be removed;

   f. The need for improved recruitment, training and supervision so that experienced and compassionate staff are available to solidly work with parents and carers. A sound understanding of the dynamics of domestic and family violence[1] and a focus on a "strengths based" approach to parenting are needed;

   g. Positive engagement with Indigenous women, particularly those who have experienced domestic violence and intergenerational trauma, to support their capacity to be protective parents;

   h. Further research and studies in the Australian context[2] and the exploring of alternative solutions, including holistic community based models that include social worker/support services, parent advocates and early intervention legal services to support parents and children.

Human Rights Framework

7. Child Protection must be considered within a human rights framework.

8. It is imperative that the child protection regime is consistent with the principles set out in the *Convention of the Rights of the Child ('CROC').* This includes:

   - that the best interests of the child[3] and protecting a child from harm[4] are of paramount importance;

   - that children have the right to participate in decisions that affect them;[5]

[1] For the importance of understanding of the dynamics of family violence, see Lundy Bancroft, Jay Silverman and Daniel Ritchie, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*, 2nd edition, SAGE, Los Angeles, 2012

[2] While noting the 2008 Special Commission of Inquiry into Child Protection Services in NSW ('Wood Inquiry'), we believe a more extensive inquiry on this issue is required, as is occurring currently in Queensland.

[3] *Convention on the Rights of the Child*, ratified by Australia on 17 December 1990, Article 3(1)

[4] *CROC,* Articles 3(2), 3(3), 19,

[5] *CROC* Articles 9(2), 12

- that children have the right to maintain relations and have contact with their family except if it is contrary to the child's best interests;.[6]

- that children have the right to cultural identity, to maintain cultural identity and to participate fully in cultural life;[7] and

- that children have the right to periodic review of their placement in out-of-home-care.[8]

9. *CROC* defines a child as a person below the age of eighteen years. Where a parent is younger than eighteen years of age, the principles of CROC will apply not only to that parent but also to their child/ren. In these circumstances, it is important to ensure that the rights of both the parent and child are upheld in accordance with CROC.

10. *CROC* also requires State Parties to "render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities"[9] and the right of the child to benefit from social security.[10]

11. It is also accepted that it is generally in the best interests of the child to be placed with family. In the case of domestic and family violence, a form of gender violence,[11] the state has a responsibility to protect victims, namely children and their mothers, and bring perpetrators to account.[12]

12. Australia's human rights obligations to eliminate violence against women are outlined in the *Convention on the Elimination of All Forms of Discrimination Against Women 1979* (CEDAW) ratified by Australia on 28 July 1983 and *CEDAW Committee General Recommendation No 12 (General Recommendation No 12) and CEDAW Committee General Recommendation No 19 (General Recommendation No 19).*

13. General Recommendation No 19 makes it clear that gender-based violence is a form of discrimination within Article 1 of CEDAW[13] and Article 2 of CEDAW obliges state parties to legislate to prohibit all discrimination against women.

14. The government has a responsibility to help and support victims of domestic and family violence to be protective parents. We welcome the Government's acceptance in principle of Recommendation 37 in the *Domestic Violence Trends and Issues in NSW Report*. This recommendation requires Women NSW and Community Services to develop a joint plan

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[6] *CROC*, Articles 8, 9(3)
[7] *CROC*, Articles 30, 31, 20(3), 29(1)(c); *International Covenant on Civil and Political Rights (ICCPR)*, ratified by Australia on 13 August 1980 Article 27; *International Covenant on Economic, Social and Cultural Rights (ICESCR)* ratified by Australia on 10 December 1975, Articles 1, 3, 15; *Declaration on the Rights of Indigenous Persons (DRIP),* Australian Government formally expressed support for the *DRIP* on 3 April 2009, Articles 3, 5, 8, 11, 12, 14, 15, 31,
[8] *CROC, Article 25*
[9] *CROC,* Article 18(2)
[10] *CROC,* Article 26
[11] Domestic violence is also acknowledged as gender violence in s9(3)(b) of the *Crimes (Domestic and Personal Violence) Act 2007*.
[12] General Recommendation No 19, para 24(b) 24(t); Due diligence obligations outlined in: Human Rights Committee, *General Comment No. 31*, CCPR/C/74/CRP.4/Rev.6, para. 8; Committee on the Rights of the Child, *General Comment No. 5,* CRC/GC/2003/5, 27 November 2003, para. 1; Committee on Economic, Social and Cultural Rights, *General Comment No. 14*, E/C.12/2000/4 (2000), para. 33.
[13] CEDAW Committee, *General Recommendation No. 19: Violence against Women*, UN Doc A/47/38 (1992), para 7.

for addressing the tension between child protection interventions and those for domestic violence, including "promot[ing] practices that harness the strengths of victims and children in order to move on from violence, and seek to build the relationship between them".

15. The NSW government is currently developing a policy direction for family and domestic violence in NSW: the *Domestic and Family Violence Framework ('DFV Framework')*. We believe the *DFV Framework* will need to address the intersection of domestic and family violence with family law as outlined at paragraphs 54-57.

Indigenous children

16. We are greatly concerned by the large numbers of Aboriginal children and young people in out-of-home-care (OOHC). The *Discussion Paper* states "at 30 June 2011 there were 6060 Aboriginal children and young people in OOHC".[14] The *Child Protection Australia 2011-12 Report* notes that for every substantiation of notification for a non-Indigenous child, there are substantiations of notification for 9 Indigenous children.[15]

17. The *Child Death 2010 Annual Report* recommends "working with intergenerational risk factors"[16] but no evidence of this is to be found in the policy outlined in the *Discussion Paper*.

18. Further, there has been a 20% increase in the incarceration of Aboriginal women since June 2011.[17] While it is not clear how many women had children in their care before being incarcerated, based on our experience of working with women in prison, some children would have been removed from their primary caregiver mother for this reason.

19. Child Protection reform should not occur in isolation. It is imperative that it is part of a holistic response which includes: a focus on justice reinvestment; alternatives to custody for women offenders, particularly women who commit non-violent offences;[18] supporting parents suffering from the effects of trans-generational traumas and disenfranchised grief; and the *DFV framework*. Such responses are urgently needed for Indigenous women and children and will benefit all women and children.

20. It has been five years since the National Apology to Australia's Indigenous peoples and just over five months since the NSW Government's Apology for Forced Adoption Practices. These were important acknowledgments of the long-term and ongoing pain and suffering caused particularly to mothers and their children by removing children from their mother's care and the loss of children's cultural identity.

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[14] NSW Government, *Child Protection Legislative Reform Discussion Paper ('Discussion Paper')* November 2012 at 33.
[15] Australian Government, *Child Protection Australia 2011-12,* Child Welfare Series No 55, Australian Institute of Health and Welfare, Canberra, 2012, Table 2.4
[16] *Discussion Paper,* Note 14 at 33
[17] Australian Bureau of Statistics, 4517.0 Prisoners in Australia, 2012, accessed on 6 March 2013 at: http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/1538D125CE98D675CA257ACB001316FD?opendocument
[18] See Corrective Services NSW Women's Advisory Council submission in response to the NSW Law Reform Commission Review Crimes (Sentencing Procedure) Act 1999 Special categories of offenders – Women, October 2012 accessed on 6 March 2013 at: http://www.womenslegalnsw.asn.au/downloads/law-reform/2013_WAC_LRCNSW_Specialcategoryofoffenders_Women.pdf (WLS NSW is a consultant member of the Corrective Services NSW Women's Advisory Council and contributed to this submission).

The right to participate

21. Children have the right to participate in decisions that affect them. Significantly, the topic of Standard 2 of FaHCSIA's 2011 *National Standards for out-of-home-care* is "Children and young people participate in decisions that have an impact on their lives".[19]

22. As McDowall argues in the *2013 CREATE Report Card: Experiencing Out-of-Home Care in Australia - The Views of Children and Young People*, *('Report Card')* "children and young people need to participate in the formulation of their care or case plan, in which many of the parameters of their life in care are defined".[20] Yet of the 1000 children and young people interviewed for the study, less that one third knew about the existence of a care plan.[21] Awareness was particularly low in NSW and of those who knew about their care plan, over one third were not meaningfully involved in its development.[22] Real participation of children and young people in the development of care plans is essential and must be addressed.

23. Indigenous persons have the right to self-determination and the right to meaningfully participate in the decision-making processes that affect their lives and rights.[23] It is essential that any reform in child protection incorporate these rights.

24. Our clients regularly state that they feel they have been excluded from decision-making about their children. This experience is supported by research into the parent's experience of child welfare systems which indicates, "parents feel confused by, dissatisfied with, and overlooked by the foster care system on the whole".[24] This too needs to be addressed.

Women in prison

25. We are concerned about the disproportionate impact the proposed reforms will have on mothers in prison and believe this issue requires considerably more attention and resourcing. We note there are research projects currently being undertaken looking at the impact of incarceration on parenting. For example*, Impact of parental incarceration on children's care* led by Dr Catherine Flynn at Monash University and the *Social and Cultural Resilience and Emotional wellbeing of Aboriginal Mothers in prison (SCREAM)*[25] research project led by Professor Juanita Sherwood (University of Technology, Sydney).

26. The ABS reports a 60% increase in the female prison population over the past 10 years from 1999-2009.[26] In NSW, Aboriginal and Torres Strait Islander women represent 30% of women in prison. Aboriginal people are incarcerated at 13 times the rate of non-

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[19] FaHCSIA, *An Outline of National Standards for out of home care*, 2011 accessed on 8 March 2013 at: http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/an-outline-of-national-standards-for-out-of-home-care-2011?HTML#sec_11

[20] Joseph McDowall, *Experiencing Out-of-Home Care in Australia -The Views of Children and Young People,* CREATE Foundation, Sydney, 2013 at 86-87 (112-113).

[21] Ibid at 87(113)

[22] Ibid.

[23] DRIP Article 3; *ICCPR* Article 1; *ICESCR* Article 1.

[24] L Alpert, 'Research review: Parents' service experience – a missing element in research on foster care case outcomes', *Child and Family Social Work*, 2005, 10(4) at 363.

[25] *Social and Cultural Resilience and Emotional wellbeing of Aboriginal Mothers in prison* (SCREAM)[25] (NHMRC Project Grant # 630653)

[26] ABS 2010 cited in Mary Stathopoulos, *Addressing women's victimisation histories in custodial settings*, ACSSA, No 13, 2012 at 3.

Aboriginal people[27] and Aboriginal women are the fastest growing group in NSW prisons. As Stathopoulos notes, Aboriginal women generally serve shorter sentences, often for minor offences such as driving infringements and non-payment of fines and are more likely than non-Aboriginal women to be on remand.[28] This raises concerns about over-policing. It is also of great concern that women are being incarcerated because they are poor. As Stathopoulos further acknowledges "prisoners who are on remand are usually not eligible to participate in programs".[29]

27. A high proportion of women in prison have been victims of violent crime prior to coming into custody. The *2009 NSW Inmate Health Survey* found that: 66% of female inmates had been involved in at least one violent relationship and 29% of female inmates had been subjected to at least one form of sexual violence.[30]

28. Lawrie's 2003 study of Aboriginal women in NSW prisons found that over 75% of Aboriginal women had being sexually assaulted as a child, just under 50% had been sexually assaulted as adults and almost 80% were victims of family violence.[31]

29. Stathopoulos acknowledges that while there is little research regarding the prevalence of child sexual abuse amongst women in prison, where research has been done, prevalence is between 57% and 90%.[32]

30. As Stathopoulos observes, "the most significant co-occurrence of child sexual abuse sequelae is substance addiction and mental health issues … [which] is intertwined with mental health problems and pathways to offending".[33] As Herman explains, drugs are a coping mechanism, providing relief and a form of escape from reality.[34]

31. Helping women to address their trauma is key to reducing recidivism. Reducing recidivism for mothers in prison is important so as to limit disruption to the care of children.

32. When a vulnerable parent is in custody it is an ideal time to offer treatment and support programs and encourage contact between mothers and children in an environment where they are free of fear and offenders. These programs should also be available to those on remand.

33. While acknowledging that not everyone will want to access counselling while they are in prison, we support the need for women in prison to be given the opportunity to address their trauma if they would like to, as trauma is a factor which contributes to recidivism. One way to address trauma is through counselling.

34. We refer to Australia's acceptance of Universal Periodic Review (UPR) recommendation

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[27] Corrective Services NSW, *Statistical Profile of Offenders*, 2009.
[28] Research cited by Mary Stathopoulos, Note 26 at 3.
[29] Ibid.
[30] Devon Idig, Libby Topp, Bronwen Ross, Hassan Mamoon, Belinda Border, Shalin Kumar and Martin McNamara, *2009 NSW Inmate Health Survey*, Justice Health, Sydney 2010 at 131
[31] Lawrie cited in Natalie Taylor & Judy Putt, 'Adult sexual violence in Indigenous and culturally and linguistically diverse communities in Australia,' *Trends and Issues in crime and criminal justice,* Australian Institute of Criminology, September 2007 at 2 accessed on 12 March 2013 at: http://www.aic.gov.au/documents/1/D/F/{1DF7DB51-E301-4666-BEB2-78763EE00B71}tandi345.pdf
[32] Ibid at 4.
[33] Mary Stathopoulos, Note 26 at 6.
[34] Herman cited in Mary Stathopoulos, Note 26 at 6

86.82 that all victims of violence have access to counselling and assistance with recovery. We note that in the past there have been very limited if any counselling services for women victims of violence in prison despite many women in prison being survivors of domestic violence or sexual assault. We warmly welcomed the pilot counselling program for prisoners at Dilwynnia and Wellington Correctional Centres which commenced in 2012.We recommend that this program be made available to people in all prisons in Australia who would like to access it.

35. We also believe that in sentencing and considering possible diversionary options, consideration should be given as to primary caregiving responsibilities for a child/ren, any history of violence experienced and any history of mental health and substance abuse. This is consistent with the United Nations Bangkok Rules.[35] Imprisonment of a primary carer for crimes other than violent offences should be as a last resort.

36. If a mother is imprisoned for a non-violent crime, wherever possible, her children under six years of age should be able to live with her. We note this currently occurs very successfully at Emu Plains Correctional Centre and recommend this be expanded to other prisons.

37. Clients consistently tell us that maintaining a relationship with children while in prison is an important factor that can contribute to reducing recidivism. Similarly, an inability to maintain contact with children contributes to recidivism. Toohey cites several studies which found children's coping skills were also enhanced and "problematic behaviour" was reduced by maintaining contact with their incarcerated parents.[36]

38. Upon release from prison it is also important that women are supported to "transition effectively into the broader community".[37] The WIPAN pilot mentoring program which was in place from May 2010 to November 2011 is an excellent example of the kind of support required for women leaving prison. In recently evaluating this pilot program it was found that "82% of the women who were engaged in the program for one year or more did not re-offend or return to prison". [38] This is significant given that "93% of these women were recidivists and/or serial recidivists".[39]

39. We further note the importance of having safe and secure housing as another factor that helps to reduce recidivism.[40] This is also a relevant factor to children living with their mother once she is released from prison.

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[35] United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, E/2010/30 adopted by the UN General Assembly on 21 December 2010, Rule 41(b)

[36] Julie-Anne Toohey, 'Children and Their Incarcerated Parents: Maintaining Connections – How Kids' Days at Tasmania's Risdon Prison Contribute to Imprisoned Parent-Child Relationships,' *Changing the Way We Think About Change,* The Australian and New Zealand Critical Criminology Conference 2012 at 33 accessed on 11 March 2013 at http://www.utas.edu.au/tiles/publications_and_reports/conference_proceedings/The%206th%20Annual%20Australian%20and%20New%20Zealand%20Critical%20Criminology%20Conference%20Proceedings%202012.pdf

[37] *The Report: The Pilot WIPAN Mentoring Program 2009-2011*, WIPAN, August 2012 at 6 accessed on 12 March 2013 at: http://www.wipan.net.au/publications/WIPAN_The_Report_Pilot_Mentoring_Program_2009-2011-OK.pdf

[38] Ibid.

[39] Ibid.

[40] See, for example, WIPAN, *Dreaming of a safe home - Consumers and community workers' perspectives on housing and support needs of women leaving prison in NSW*, August 2012 accessed on 12 March 2013 at: http://www.wipan.net.au/publications/WIPAN_Dreaming_of_a_Safe_Home_WEB.pdf

Early intervention (Proposal 2)

Support for parents

40. The 2008 *Special Commission of Inquiry into Child Protection Services in NSW ('Wood Inquiry')* found that the key to reducing risk to children is "sufficiently resourcing flexible prevention and early intervention services so as to reduce the numbers of children and young people who require the state to step in to keep them safe".[41] For decades advocates have been calling for better resourcing of child protection.[42]

41. The *Wood Inquiry* also found "A range of complex and often chronic factors characterise many of the families coming into contact with the child protection system such as low income, unemployment, substance abuse, limited social supports, imprisonment, domestic violence, and mental health issues. Many of these factors are inter-related. The elimination or reduction of each of these factors would significantly lower the number of children and young people reported as being at risk of harm".[43]

42. We acknowledge and welcome programs implemented in response to the *Wood Inquiry* such as Intensive Family Support Services. However, we believe that these initiatives do not incorporate some essential features that are both recommended and present in international models, including legal and parent advocacy.

43. We believe a successful early intervention approach is a holistic community based service for parents and children which includes social worker/support services, early intervention legal services and parent advocates, that is parents who have successfully engaged in early intervention and are willing to offer support.

44. The Cornerstone Advocacy approach discussed below at paragraphs 104 to 108, is a good example of such a service, albeit, a service which is provided post removal of a child. We believe this model would be highly successful where implemented prior to removal of a child with a view to supporting and working with families to remain intact.

45. The Newpin program conducted by Uniting Care Burnside in NSW provides an intensive, therapeutic program for parents and children who have potential or actual child protection issues.[44] Newpin works from a "strengths based" framework and includes a trained parent for support where one is available. Newpin is able to assist 20-25 families at any one time,[45] with the optimal time for a parent being a part of the Newpin service being18-24 months.[46] UnitingCare estimates the cost for a family to attend Newpin is $10,500 per annum and the outcomes are positive.[47] We understand this program is only offered at Bidwell, Doonside and St Mary's for mothers and their children and at Bidwell for fathers and their children.[48] Demand exceeds capacity. Such intensive, therapeutic programs need to be provided universally across the state and to be resourced appropriately. We do not

[41] The Hon James Wood, *Report of the Special Commission of Inquiry into Child Protection*, November 2008, Executive Summary at i.
[42] Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, ALRC Report 84, November 1997 at 17.6
[43] Wood Inquiry, Note 41 at i-ii.
[44] UnitingCare Burnside, Newpin, October 2011 accessed on 11 March 2013 at: http://www.burnside.org.au/content/NEWPIN%20Internet.pdf
[45] Ibid at 3.
[46] Ibid at 6.
[47] Ibid at 6.
[48] Ibid at 4-5.

support funding through social benefit bonds, as is the case with the current Newpin program provided in NSW.

46. Section 8(c) of the *Children and Young Persons (Care and Protection) Act 1998 ('Care Act')* states that one of the key objects of the *Care Act* is to provide parents with "appropriate assistance …in the performance of their child-rearing responsibilities in order to promote a safe and nurturing environment".

47. Section 21(1) of the *Care Act* states "A parent of a child or young person may seek assistance from the Director-General in order to obtain services that will enable the child or young person to remain in, or return to, the care of his or her family".

48. Section 22 outlines the Director General's obligations to respond, though section 22(2) states the Director-General is not required "to take any action other than assessing the request for assistance".

49. Many children are in care as a result of a combination of complex problems, such as substance abuse, domestic violence, mental health and poverty. It can be very difficult to determine a primary reason for removal and there is often not one. This can make it challenging to identify appropriate supports and treatment options for parents. However, this is not a reason to put parents in the "too hard basket".

50. For example, in cases where parental substance abuse has been identified as a contributing factor it is important to recognise that substance dependency may arise from past trauma and violence. Every effort should be made to develop a range of accessible treatment programs to provide parents with a genuine opportunity to address their alcohol and/or drug misuse, including any underlying catalysts. A key component of this is identifying parents as "in need of services/support" rather than viewing them as perpetrators or bad parents.[49] Research clearly identifies that a significant obstacle for parents to enter into and complete treatment programs is motivation.[50] If there was a cultural shift towards support rather than surveillance and punishment, parents are likely to feel more able to engage with treatment services.

51. Where research about mothers' experiences with caseworkers has been undertaken, it highlights that positive interaction and support of parents by experienced caseworkers who show empathy, trust and respect decreases removal and increases the likelihood of restoration of children to a parent.[51] It is therefore important that caseworkers receive the necessary training, supervision and support to undertake their work and efforts be made to retain and support competent casework staff.[52]

52. In our experience, women may seek support and/or services from FACS (CS) or non-government organisations working in child protection and these are often not available or not provided in a timely manner.

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[49] Northern California Training Academy, *The importance of family engagement in child welfare services*, June 2009 at 6-7 accessed on 1 March 2013 at http://academy.extensiondlc.net/file.php/1/resources/LR-FamilyEngagement.pdf

[50] Northern California Training Academy, Note 49 at 8.

[51] Festinger cited in C Potter and S Klein-Rothschild, 'Getting home on time: Predicting timely permanence for young children, *Child Welfare*, 2002, 81(2) at 127; K Dawson and M Berry, 'Engaging families in child welfare services: An evidence-based approach to best practice, *Child Welfare*, 2002, 81(2) at 302-303. J Thomson and Ros Thorpe 'Powerful partnerships in social work: group work with parents of children in care' *Australian Social Work*, 2004, 57(1) at 46-56.

[52] C Potter and S Klein-Rothschild, Note 51 at 146.

53. Little effort is made to help mothers engage in support services. Barriers to engaging with support services are not addressed. In our experience, barriers include: shame; case workers' judgmental attitudes; that early intervention plans are generally developed in a context of power imbalance and are seen as an evidence gathering exercise which will result in punitive consequences such as the removal of child(ren) from their mother rather than as genuine support; and fear that children will be removed.

54. In the context of domestic violence, it is often the case that rather than holding the perpetrator (often the father) to account, the mother is punished for not acting in a protective manner. This can be explained by the different professional approaches used in responding to domestic violence in criminal, child protection and family law contexts which can result in conflicting messages.

55. For example, in the family law courts the focus is on balancing a meaningful relationship with both parents and protecting the child from harm. While amendments to the *Family Law Act* came into effect on 7 June 2012 prioritising safety over a meaningful relationship, the presumption of equal shared parental responsibility remains the starting point. While it is too early to tell the impact of these legislative changes, it will be important to monitor decisions in this area.

56. In contrast, the child protection context focuses on protecting children. It is often the case that if a mother is unable to leave a violent relationship within a suggested and often arbitrary timeframe, she will be viewed as failing to act protectively. It is therefore the mother who is unfairly seen as responsible for dealing with the consequences of violence in a child protection context.[53] This view fails to recognise that when a woman leaves a relationship, it is one of the most dangerous times of the relationship and requires planning and support.

57. In addressing the intersection of domestic and family violence with family law in the *DFV Framework*, the focus should be on the victim (generally the woman) who should be treated with dignity and respect, and supported to be a protective parent. The early intervention strategy should include early intervention services to work with women who have experienced family violence to strengthen their protective parenting capacities; and to also be willing to support her to seek protective orders in the family court rather than be subject to care proceedings.

58. It is essential to support rather than blame mothers escaping domestic violence. Research in the United States has found no evidence to indicate that mothers who had experienced domestic violence were "less affectionate, less proactive, less likely to provide structure for the child, or more punitive".[54] This research also found that mothers who had experienced domestic violence engaged in mother to child aggression at almost twice the rate of mothers from non-violent relationships, but six months after leaving refuge accommodation, showed a significant decrease in parenting stress and child-directed aggressive behaviour.[55]

59. Additionally mothers who had experienced domestic violence reported a decrease in depressive symptoms after escaping the violence, but also a decrease in self-esteem,

[53] L Radford and M Hester, *Mothering through domestic violence*, Jessica Kingsley Publishers, London, 2006 at 143.
[54] G Holden et al, 'Parenting behaviours and beliefs of battered women' in G Holden, R Geffner and E Jouriles (eds), *Children exposed to marital violence*, APA Press, Washington, 1998, 289-334 at 325.
[55] G Holden et al, Note 54 at 304, 321-322.

suggested to be connected to a lack of psychological and social supports and financial security.[56] This clearly demonstrates the necessity of providing appropriate supports including counselling, safe and secure housing, financial independence and treatment programs once a mother removes herself and her children from a violent relationship.

60. The lack of access to services is exacerbated for women in regional, rural and remote areas. See case study 1.

Case study 1

Sarah* lived in a regional area. She had experienced significant violence in her life both as a child and an adult. She had a physical disability and a history of substance abuse. She was a single parent, but seeing a man who, unbeknown to her, had been previously investigated by FACS. After experiencing severe anxiety and depression she self referred for psychological assistance. As a result of the mental health intervention she was admitted into a facility that was some distance from her children who had been placed in out of home care. Sarah was unable to see the children regularly or attend the court proceedings about the children. As a result, she initially had infrequent and disrupted contact with the children which caused significant distress to both Sarah and her children.

After discharge, in addition to contact visits and legal appointments, Sarah was required to attend a range of treatment programs addressing substance abuse, mental health and protective behaviours, all located in different parts of her region and mostly not directly accessible by public transport, thus requiring multiple forms of transport. The cost of getting to appointments created financial stress and the process of travel aggravated her physical impairment. Despite the obstacles, Sarah worked hard to meet these requirements, but it still took more than a year for her children to be returned to her full time care.

*not her real name

Parent Responsibility Contracts

61. We refer to Proposal 2 regarding the use of parent responsibility contracts (PRCs). We believe a "strengths based" approach to helping parents improve their parenting is required rather than a punitive response. We are concerned that PRCs may become a punitive response with unreasonable, unrealistic and unnecessary demands for the safety of the child.

62. If PRCs are to be introduced, we recommend they must be realistic, achievable and specific to the individual. Parents must be guaranteed a place in a program that is clearly linked to an issue of concern that is affecting their capacity to parent. Services must also be accessible or conveniently located for parents who rely on public transport. Child caring facilities should also be available while parents engage in these programs and services.

63. A contract implies an equal relationship. Accountability measures on service providers to ensure they provide the relevant services in a timely manner are therefore required. PRCs should be voidable if FACS (CS) cannot guarantee timely entry to a service.

[56] G Holden et al, Note 54 at 323.

64. It is also unclear how the PRCs will work in practice. For example, what constitutes a breach of the PRC? Who decides if it is an alleged breach? What opportunities would a parent have to respond to an alleged breach before a matter is taken to court? It is imperative that parents receive legal advice prior to entering a PRC. This will ensure that parents are aware of the conditions they are agreeing to, have a chance to negotiate any terms which may be unrealistic or unreasonable and receive advice as to the implications of breaching the PRC. We would further expect that parents be given an opportunity to respond to any alleged breaches before the matter goes to court.

65. It is also unclear if the intention is that a PRC is a prerequisite to accessing early intervention services or if, as a result of seeking early support or treatment, a mother may then be identified as requiring a PRC. We strongly caution against such approaches because of the very real and strong risk that mothers will be reluctant to access treatment, for example, for drug/alcohol dependency, for fear of having their children removed.[57]

66. We agree that parents should be given "more time to address identified risk issues and demonstrate a change in their parenting" and that a six month timeframe is insufficient.[58] Flexibility is required and we therefore reject the legislating of restoration timeframes as outlined in Proposal 7.

67. We do not support PRCs for the mother of an unborn child. A foetus only becomes a person after it has been born and when at least one of the indicia of independent life is detected.[59] Whilst we welcome the provision of accessible support programs for vulnerable pregnant women, we do not support legislative amendments that elevate the impact of any action on a foetus over the rights of a pregnant woman.

Alternative Dispute Resolution (Proposals 3, 21)

Family Group Conferencing

68. We refer to Proposal 3 regarding the suitability of Family Group Conferencing (FGC) for care matters to better engage families to resolve child protection concerns. In principle, we support an obligation upon FACS (CS) to refer care matters to a FGC prior to commencing care proceedings as this would allow parents an opportunity to provide their views.

69. We are, however, concerned about unfair and unjust outcomes which result from power imbalances in alternative dispute resolution process such as FGC where FACS (CS) are present and parents do not have legal representation.

70. There is a risk in FGC that parents may feel they have no choice but to agree with proposals and comply with what caseworkers say, even in circumstances where services may not be available or accessible.

71. We are also concerned by Recommendation 8 in the AIC *Evaluation of the Family Group Conferencing Pilot Program* that recommends the caseworker has direct access to the independent facilitator. We question whether this will be prejudicial for parents and

[57] Dawe, S, Paul Harnett and Sally Frye, 'Improving outcomes for children living in families with parental substance misuse: What do we know and what should we do', *Child Abuse Prevention Issues*, 2008, 29 accessed on 12 March 2012 at http://www.aifs.gov.au/nch/pubs/issues/issues29/issues29.html
[58] *Discussion Paper,* Note 14 at 15.
[59] *R v Iby* (2005) 63 NSWLR 278.

submit the impartiality of the mediator is of crucial importance.

Improving the use of ADR

72. In principle, we support the establishment of a comprehensive legislative framework for the use of ADR. We recognise that the potential benefits of ADR include: informing parents of concerns at an earlier stage than at the time of removal of children and providing parents with an opportunity to respond to concerns. In addition, we accept that the ADR process can offer flexibility and provide culturally responsive procedures and outcomes.

73. However, we hold a number of concerns about the use of ADR in child protection cases and consider it vital that the NSW government properly address these concerns. In summary, we consider that the framework should properly account for:

    a. The involvement of legal advisors as well as other support persons in the ADR process to properly address power imbalances between parents and child protection authorities. This is particularly important in cases where family violence is present;[60]

    b. Comprehensive screening and risk assessment frameworks and tools designed to assess risk and determine suitability of matters for ADR;[61]

    c. The impartiality of the mediator whose role is to provide a neutral environment in which to resolve issues between the parties; and

    d. A Court process or similar review mechanism where an outcome at ADR has the potential to affect the rights of parties.

74. More detail is required to explain how the ADR process will fit with the Parental Responsibility Contracts. For example, we would expect a breach of a PRC condition to result in ADR at first instance rather than a court application (unless the child becomes at immediate risk of harm).

Permanency planning for children and young people in OOHC: Flexible and culturally appropriate solutions (Proposals 6, 7, 8, 9, 10, *11, 12, 13, 14, 15, 16)*

75. We agree that it can be detrimental for children and young people to experience multiple placements and we welcome discussion about the best way to achieve more stability. However, as each child and family is unique, the best outcome will depend on individual circumstances and there cannot be prescriptive timeframes or rigid adherence to a hierarchy of preferred placement alternatives. Solutions must be flexible, appropriate to the individual circumstances and culturally appropriate. Further, family preservation or restoration must also be actively pursued.

Family preservation

76. The current objects and principles of the *Care Act* provide for intervention to be the least-intrusive (outlined in s 9(2)(c) of the Act).

[60] This concern is noted by the Australian Law Reform Commission in Report 114 *Family Violence – A National Legal Response, 2010* at paragraph 23.109.
[61] This concern is noted by the Australian Law Reform Commission in Report 114 *Family Violence – A National Legal Response*, 2010, at recommendation 23- 9.

77. We also note a child's right to participate in the decisions that affect them as outlined in s 9(2)(a) and s10 of the *Care Act*. This is consistent with Article 12 of the *Convention on the Rights of the Child* (*CRoC*) and was also recognised in the *Wood Inquiry*.[62]

78. Studies indicate that approximately 85% of children in out-of-home-care self-place back with their parents at some time.[63] We suggest that this highlights the need to work collaboratively with families; to better support parents to improve parenting; and the importance of listening to children. It is argued that because "return is the norm", working in partnership with parents leads to better outcomes for children, because parents are important to children "even if their family experience is not entirely positive".[64]

79. We refer to s 21(1) of the *Care Act* which states a parent can seek assistance from the Director General in order to "obtain services that will enable the child or young person to *remain in, or return to*, the care of his or her family"(emphasis added).

80. We are greatly concerned that while family preservation is listed as the first priority in the *Discussion Paper* more emphasis appears to be on guardianship and adoption orders as preferred permanency plans.

81. We do not support the prioritising of guardianship orders and adoption before parental responsibility to the Minister as outlined in Proposal 6 and reject the inclusion of this in the objects of the *Care Act.*

82. We believe the emphasis on guardianship and adoption is contrary to the least intrusive principle referred to above.

83. We further note our concerns that having a number of caseworkers allocated to a family or frequently changing caseworkers can inhibit prospects of restoration. Research from the United States "found that the number of caseworkers was associated with timely permanence and may even be more important than the number and type of services provided to a child and family".[65]

84. The 2013 report, *Experiencing Out-of-Home Care in Australia - The Views of Children and Young People* emphasises the importance of children having only one or two caseworkers during their time in care so they can build a relationship of trust with this worker. Research cited in the report states this has the capacity "for improving mental health and permanency outcomes".[66]

85. This report also refers to a 2010 comparative study of the child protection system in Norway and Queensland. The focus in Norway is on "promot[ing] social equality among all citizens", by requiring "the municipality to intervene early to take action to ensure the child and family have access to resources needed to 'avoid lasting problems' for the child".[67] This is consistent with the right of the child to benefit from social security.[68]

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[62] The Hon James Wood, *Report of the Special Commission of Inquiry into Child Protection*, November 2008, Vol. 2 at para 16.465
[63] Bullock et al cited in C Tilbury and J Osmond, 'Permanency planning in foster care: A research review and guidelines for practitioners', *Australian Social Work*, 2006, 59(3) at 273
[64] C Tilbury and J Osmond, Note 63 at 273-274.
[65] C Potter and S Klein-Rothschild, Note 51 at 135.
[66] (Dorsey, Kerns, Trupin, Conover, & Berliner, 2012 cited in Joseph McDowall, *Experiencing Out-of-Home Care in Australia -The Views of Children and Young People,* CREATE Foundation, Sydney, 2013 at 86 (112).
[67] Cited in McDowall, Ibid.
[68] *CROC,* Article 26

Significantly, this is reported to "lead to lower caseworker turnover".[69]

86. Additionally, research shows that family restoration is facilitated by more frequent contact with the caseworker, particularly where that parent feels that "their involvement in case planning and services is valued and respectful of their potential to keep their children safe, provides them with the information they need to successfully advocate for themselves and their children, and enables them to access the services and resources they need to achieve reunification".[70]

87. We refer to Proposal 7 that proposes to "legislate strict restoration time frames as within six months for children less than two years and within twelve months for children older than two years". Not only do we disagree with the restoration timeframes proposed in terms of their length but we also more generally disagree with the proposal to legislate rigid restoration timeframes at all.

88. Each case deserves to be treated on an individual basis. No two families are the same. We do not agree with rigid timeframes for decision-making, especially when decisions such as adoption are irreversible and will affect people for the rest of their lives.

89. For children under two years of age, bonding with primary carers is important and can affect the child's personal development. Studies have shown if a mother is able and supported to maintain significant time with her child during the initial time of removal and care planning, this increases the chance of successful restoration. See paragraphs 106-108.

90. Flexibility should be especially applied when dealing with Aboriginal children. Care needs to be given around judging an established culture by a different culture's standard. Through our advice and casework, we have seen many examples of FACS (CS) staff with poor cultural competence and very little understanding of how a child is raised in an Aboriginal community. Placing western standards on Aboriginal community and family is not appropriate or helpful. There are many things to consider in determining what is best for the child including issues such as identity, belonging, community and country connection.

91. Parents who are suffering from the effects of trans-generational traumas and disenfranchised grief should be provided support and genuine help including parenting skills with a view to creating safe families. Timeframes for working with families must be realistic and flexible.

92. We refer to the Aboriginal and Torres Strait Islander principles, including placement principles, as outlined in s13 of the *Care Act*. We regularly advise Aboriginal clients who report to us that FACS (CS) workers have failed to apply the kinship principles when considering placements for removed children. This is in spite of the *Wood Inquiry* which recommended the development of guidelines to ensure compliance with these principles.[71]

93. We are concerned that if rigid timeframes pressure decisions for long-term care, many Aboriginal children will miss out on culturally appropriate care.

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[69] McDowall, Note 66 at 86 (112).
[70] Child Welfare Information Gateway, *Family reunification: What the evidence shows*, Issue Brief June 2011 at 6-7 accessed on 11 February 2013 at www.childwelfare.gov/pubs/iisue_briefs/family_reunification/family_reunification.pdf
[71] The Hon James Wood, *Report of the Special Commission of Inquiry into Child Protection*, November 2008, Vol 1 Recommendation 11.5

94. There is a need for FACS (CS) workers and NGO child protection staff to be more transparent and accountable for the decisions they make from removal to long-term care arrangements.

95. We refer to the statement at part 2.2.2 of the *Discussion Paper* that "similar timeframes have been recommended or implemented in other jurisdictions in Australia" which is referenced to a Victorian Draft Policy from 2001 entitled *Concurrent and Permanency Planning for Children in Out-of-Home-Care.* Footnote 84 of the *Discussion Paper* citing this Draft Policy states that "a decision about the likelihood of restoration of the child to the birth family should be made within six months of the child entering OOHC" and that "the child must be permanently placed with either their birth family or a permanent care family by within twelve months of entering OOHC". Upon closer inspection of Victoria's statutory framework and its guiding policies with respect to restoration time frames, it becomes apparent that no such strict time frames apply with respect to restoration in Victoria. In fact, the *Child Protection Practice Manual*[72] which was developed for the purpose of "providing Child Protection practitioners and managers with an overview of the planning process and components of a case plan for children who are in out-of-home-care" explicitly states that "it is vital to child-centred practice that timelines do *not* drive decision making and the child's best interests are always paramount". This policy is also reflected in section 171 of the *Children, Youth and Families Act* 2005 VIC.

96. The *Child Protection Practice Manual* also lists a number of reasons or considerations that might support a decision by the Secretary not to prepare a stability (permanency) plan for a child. These include but are not limited to the following reasons:

    a. Family reunification is continuing to be actively pursued as the best option to achieve the child's stable long term care;

    b. There is new evidence or a significant change in the child or family's circumstances that enable the child to be reunified with their family.

Guardianship orders

97. If restoration to parents is not possible for Aboriginal children, guardianship is an option most preferred by kinship carers. This allows the child to remain within the family while transferring the responsibilities for the child to the adult that is considered to be the best carer. This provides continuity of identity and culture for the child.

98. Kinship carers are predominantly the grandparents of the subject child/ren and financial and other non-financial support for these kinship carers is vital. An ongoing, non-invasive and sensitive relationship needs to be developed between kinship carers and FACS (CS) workers which considers not only the needs of the children in their care but also the age, physical and/or mental health of their carers. This is consistent with the research referred to below on supported care at paragraphs 126-130.

99. Caring for children places a great burden on grandparents, particularly where the parents have not given consent to the placement. Whilst this may cause great friction and stress for all involved, it should not be used as a reason for deciding against appointing grandparents as the most appropriate kinship carers.

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[72] *Case Planning For Children in Out of Home Care* (Advice No: 1284 of the Child Protection Practice Manual) Assistant Director, Child Protection Policy, Practice and Planning, Department of Human Services, Victoria, 5 November 2012

100. Where guardianship may create ongoing family problems that will impact on the child, consideration needs to be given to a child remaining with informal kinship carers.

Concurrent planning

101. We do not support a universal dual authorisation of long term carers as prospective adoptive parents as suggested in Proposal 10. We are unclear as to the NSW "authorisation" processes for foster carers and adoptive parents, so cannot comment on the appropriateness of streamlining these assessments.

102. It is still early days in the international use and evaluation of concurrent planning. We note that the work of the agency Coram in the United Kingdom, referred to in the *Discussion Paper*, relates to a study of 59 children who were aged under two years at the time the project commenced and that Coram appears to be the only specialist centre for concurrent planning in the United Kingdom.[73] We understand that concurrent planning is being considered in various jurisdictions. However, in our reading of the source (footnote 102) used in the *Discussion Paper* to assert "the UK Government recently announced its intention to introduce widespread use of concurrent planning in the United Kingdom",[74] we could only find reference to a recommendation to consider it as a best practice model.[75]

103. We are concerned that the *Discussion Paper* does not appear to adopt or promote a usage of concurrent planning that is in line with the more common understanding of the phrase. For example, even in the research cited in the *Discussion Paper,* concurrent planning refers to "an approach in which family reunification and adoption planning are pursued simultaneously" as opposed to simply placing children with foster carers who are also approved adoptive parents.[76] This is a very important distinction.

104. We assert that it is premature to call for opinion on the best way to integrate the dual roles of foster carer and prospective adoptive parent. A model for concurrent planning for NSW first needs to be clearly defined and then stakeholders given the opportunity to provide further comment. Serious consideration must also be given to identifying strategies to avoid the risk that concurrent planning may undermine attempts at reunification, particularly if services "are not adequately resourced to provide comprehensive or intensive services to families".[77]

105. We would also encourage meaningful examination and trials of alternatives to concurrent planning. We believe that multiple placements can be avoided or reduced by making greater efforts to restore children and young people to their birth family, particularly in the critical first days following removal. We are aware of international initiatives that recognise the importance of focusing on the days post removal. For example, the Cornerstone Advocacy approach developed by the Center for Family Representation (CFR) in New York City involves intensive advocacy in the first 60 days following removal. Once a child is removed each parent is provided with a lawyer, a social worker

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[73] Referred to in *Discussion Paper,* Note 14 at 35; S Laws, R Wilson and S Rabindrakumar, *Coram Concurrent Planning Study: Interim Report*, July 2012 accessed on 11 February 2013 at http://www.coram.org.uk/assets/downloads/Coram_Concurrent_Planning_Interim_Report_final.pdf

[74] *Discussion Paper,* Note 14 at 35, Footnote 102.

[75] Department of Education, United Kingdom, *An Action Plan for Adoption: Tackling Delay*, March 2012 at 26-27 (*Discussion Paper*, Note 14, footnote 102)

[76] C Potter and S Klein-Rothschild, Note 51 at 128; See also C Tilbury and J Osmond, Note 63 at 270.

[77] C Tilbury and J Osmond, Note 63 at 271.

and a parent advocate.[78] This approach recognises the complexity of matters where children are removed and the importance of an immediate and appropriate response to ensure that state intervention does not create further barriers between parent and child.

106. Research has found that parents who were partnered with an advocate or mentor who has successfully achieved restoration themselves were more than four times likely to be reunified with their children.[79]

107. As emphasised elsewhere in this submission it is vital when children are in care to actively involve birth parents in decision-making, encourage communication and interaction between the birth parent and carers and increase contact between children and their birth parents to assist to increase the likelihood of successful restoration.[80]

108. Similarly the Cornerstone Advocacy approach recognises that it "is not natural for a parent to "visit" with a child". [81] Alternatively, CFR argue for inclusive parental involvement in activities that are normal for children, such as attending sporting events or helping with homework. Crucially, CFR recommend that parents must be supported, prepared and debriefed. The approach outlines models including Visit Coaching, which focuses on training workers and carers as coaches.[82]

109. CFR have achieved some significant results. For example, children under their model spend an average of 2.5 months in care compared with averages of 6.4 months in New York City and 29 months in New York State. Additionally CFR services cost US$6,000 per family compared with US$29,000, which is the average cost of keeping a child in care per year.[83]

Adoption

110. We believe that conferring jurisdiction upon the Children's Court to make adoption orders undermines key principles in the *Care Act*, such as taking the least intrusive intervention in a child's life. Additionally, we are concerned that vulnerable parents will be deterred from engaging in the adoption process if it is conducted in the same court that ordered the removal of their children.

111. We believe existing laws and regulations about adoption in NSW are sufficient, subject to our comments in paragraph 116, and we therefore strongly oppose legislating to provide the Children's Court with jurisdiction to decide adoption matters.

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[78] The Cornerstone Advocacy model is described further on their website: "The CFR lawyer provides quality legal representation in court. The social worker gets to the root of the problem and helps the client access stabilizing services, such as housing, employment training, drug treatment, and domestic violence counseling. Finally, the parent advocate, a trained professional who has experienced the child welfare system and can empathize with the struggles vulnerable families face, provides emotional support and helps the client engage in services, ensuring follow through" accessed on 11 February 2013 at http://www.cfrny.org/our-work/team-model/ .
[79] Child Welfare Information Gateway, Note 70 at 8; See also details of Parent Partner Programs in Child Welfare Information Gateway, *Supporting reunification and preventing reentry into out-of-home care*, Bulletin for Professionals February 2012 at 6 accessed on 11 February 2013 at https://www.childwelfare.gov/pubs/issue_briefs/srpr.pdf
[80] Child Welfare Information Gateway, Note 71 at 4.
[81] CWCIP Best Practice Bulletin, *Cornerstone Advocacy in the first 60 days: Achieving safe and lasting reunification for families*, June 2011 at 4 accessed on 11 February 2013 at www.courts.state.ny.us/ip/cwcip/Publications/CIPBBulletin6_11.pdf
[82] CWCIP, Note 81 at 4.
[83] CFR Our Results accessed on 11 February 2013 at http://www.cfrny.org/about-us/our-results/

112. While we acknowledge that there may be instances where adoption is appropriate, we are also aware of instances where adoption has been very destructive, including because of sexual and physical abuse.

113. If adoption proceeds within the Children's Court jurisdiction, we do not support fast tracking of adoption in any circumstances. Adoption must be an order of last resort for all children and only when all other options have been exhausted and it is in the best interests of the child. A full and independent assessment of the individual child's circumstances must also be required before an order is made.

114. All parents should be automatically joined as parties to adoption proceedings.

115. In relation to the use of ADR, as noted elsewhere in this submission, we are concerned that there will be a significant power imbalance for vulnerable parents. It may be appropriate to use ADR in some circumstances, for example, in adoption matters where the parents do not oppose the adoption, but parents must be provided with legal representation for any ADR process.

116. We do not believe additional grounds to dispense with parental consent are required. However, amendments are required for related issues. For example, we are aware of a matter where the mandatory written information to be provided pursuant to section 59 of the *Adoption Act* was simply mailed to a non-English speaking client in custody. We understand that no attempt was made by FACS (CS) to have this material translated or explained to the client. We submit that the legislation needs to be amended to ensure that parents receive the mandatory written information in a language and format which is accessible to them.

117. We are unsure why the change in Proposal 16 is required. We imagine that in most cases the child will already be residing with the proposed adoptive parent. For example, pursuant to section 54(2) of the Act a child can only give sole consent if they have been living with the proposed adoptive parent for at least two years. Therefore we question the need to speed up the adoption process and by not advising parents, permanently remove any opportunity for them to demonstrate there has been sufficient change in circumstances during the time following a decision of no realistic possibility of restoration, which is a point in time decision.

118. We submit that there is always the possibility that a parent may have satisfactorily addressed concerns about their capacity to parent and be in a position to make a section 90 *Care Act* application at the time an adoption is proposed.[84] This is particularly so if robust early intervention services are provided (as proposed earlier in this submission). It is not in the best interests of children to remove the opportunity for consideration of the nature of their relationship with their parents by failing to inform or attempt to inform the parents about a prospective adoption.

119. More information is also required about what is meant by "cannot be located within a specified period of time".[85]

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[84] This is supported by recent comments made by Commissioner Carmody, Commissioner for the Queensland Child Protection Commission of Inquiry. See: Natasha Bita, 'Child Protection Inquiry chief accuses child protection officers of 'over-reacting' and seeks review of children in care', *The Courier-Mail*, 8 March 2013 accessed on 11 March 2013 at: http://www.couriermail.com.au/news/child-protection-inquiry-chief-accuses-child-protection-officers-of-over-reacting-and-seeks-review-of-children-in-care/story-e6freon6-1226592776309

[85] *Discussion Paper,* Note 14 at 42.

Adoption and Aboriginal and Torres Strait Islander children

120. As discussed above, we do not support the Children's Court having jurisdiction for adoption matters. However, if the Children's Court is granted jurisdiction, adoption of Aboriginal and Torres Strait Islander children must be a last resort after all other options have been exhausted, be in the best interests of the child and assessed and determined in a culturally appropriate manner with particular sensitivity to the implications of loss of ties to family, community and country.

Merging of NSW Standards for Statutory OOHC and NSW Adoption Standards

121. Proposal 13 provides for the merging of the NSW Standards for Statutory OOHC and the NSW Adoption Standards. We note these documents have not been included as part of the *Discussion Paper*. We note the general lack of awareness of processes for appointing carers for children in OOHC. We therefore recommend this proposal requires further consultation.

Financial implications

122. We are concerned that there may be hidden, unexpected or unintended consequences of the changes outlined in Proposal 6.

123. We call on the Government to provide a clear financial breakdown of the direct and indirect payments and expenses, including the cost saving to Government, associated with each of the following and any other care alternatives:

    a. Foster care and other payments (including what these payments are for) for caring for children in out-of-home placements and the timeframe of such payments;

    b. Supported care placements (including what these payments are for) when the child is placed in relative or kinship placements and the timeframe of such payments;

    c. Government-funded assistance if permanent legal orders are made regarding the care of children as referred to in Proposal 8;

    d. Adoption.

124. We have heard anecdotally that there will be substantial financial incentives for organisations working in child protection that successfully use adoption as a permanency plan. If this is true, we believe there is a significant conflict of interest as even if such organisations do make decisions in line with the best interests of the child, the perception may be otherwise.

Self-regulation of supported care placements

125. We refer to Proposal 8 regarding the introduction of self-regulation of supported care placements to limit the intrusion of FACS (CS) in stable relative and kinship placements. While we believe there is a role for self-assessment and self-regulation in supported care placements with a relative/kinship carer, we believe it is also important that such carers are supported by FACS (CS) in their carer role to express any issues or concerns they may have.

126. In the research referred to at footnote 97 of the *Discussion Paper*, *Kinship Care in NSW – Finding a Way Forward*, relative/kinship carers speak of the desire to have "parity with foster carers in terms of the supports available to them" and the importance of resources available "to assist them to assist the children to flourish".[86] They also speak of the challenges when DoCS, as they were then called, and Centrelink are unable to provide accurate responses to questions about entitlements and support services.[87] They also raise the issue of the need for training, but being advised they are not eligible for such training or it was on at times that they were unable to attend.[88]

127. It is also important that the voices of children are regularly heard and listened to in this review process. This is also recommended by kinship carers in *Kinship Care in NSW – Finding a Way Forward*.[89]

128. There is a risk that as children get older or with less contact from FACS (CS), that the relative / kinship carers and the children they are caring for feel they have been forgotten.

129. The *Discussion Paper* raises concerns about "limit[ing] intrusion of Community Services in stable relative and kinship placements".[90] We believe it is more about how the review is undertaken.

130. Good quality reviews can be helpful and play an important role in validating the important role of the relative carer, promoting a collaborative approach by carers and FACS (CS) and responding to any issues the child wishes to raise. We believe the research referred to at footnote 97 of the *Discussion Paper*, *Kinship Care in NSW – Finding a Way Forward*, also supports this view.[91] It is important therefore that reviews are carried out by experienced staff with good training and supervision and knowledge of the issues relevant to the particular placement.

131. Under Article 25 of *CROC,* children have the right to periodic review of their placement. Failure to provide such reviews amount to breaches of Australia's international human rights obligations.

132. We also note that while the *Wood Inquiry* recommended reviews could be transferred to NGOs, it did not advocate self-regulation only.[92]

133. We do not support caps on the duration of placements.

Contact (Proposals 17-20)

134. Children have the right to contact with their birth family unless contrary to the best interests of the child.

135. We refer to the article at footnote 124 of the *Discussion Paper* which cites research that concluded that "foster placements tend to be more stable where parental contact is

[86] Ainslie Yardley, Jan Mason, Elizabeth Watson, *Kinship Care in NSW – finding a way forward*, University of Western Sydney, November 2009 at 39.
[87] Ibid at 40.
[88] Ibid at 41.
[89] Ibid at 49.
[90] *Discussion Paper,* Note 14 at 32
[91] Ainslie Yardley et al*,* Note 86 at 36-48, 52.
[92] The Hon James Wood, *Report of the Special Commission of Inquiry into Child Protection*, November 2008, Vol 1 *Recommendation 16.2(ii) and (iii)*

encouraged and there are positive relationships between birth parents and social workers".[93]

136. We are concerned that the inclusion of contact arrangements through case planning without judicial oversight leaves contact to the discretion of FACS (CS) and carers and we therefore do not support Proposal 17.

137. We regularly hear of contact orders being made and not followed by FACS (CS) and/or carers. In our experience, this very frequently occurs when mothers are incarcerated. As discussed at paragraph 37 there are important positive outcomes for children who maintain contact with a parent while they are in prison. We often advocate on behalf of clients to ensure contact continues while the mother is in prison as can be seen in case studies 2 and 3 below. However we are concerned that re-establishing contact in these instances has required the intervention of legal advocates.

Case study 2
Imee* came to see us at a legal advice clinic at a correctional centre. Her child had been removed from her care a few years earlier following concerns relating to drug use and domestic violence. Final orders had been made in the Children's Court providing for Imee to have contact with her child six times a year. At the time of our appointment she had not had any contact with her child for nine months despite advising FACS (CS) of her whereabouts and requesting contact. There had recently been a change in caseworker for her matter. We were able to successfully advocate for resumption of contact.

*not her real name

138. If contact arrangements are by discretion, we fear children will have even less contact with their parents and other family members than is currently the case.

139. In our experience, those who have the child in their care often have significant power and influence in determining contact arrangements, irrespective of whether contact is in the best interests of the child. See case studies 3 & 4.

Case study 3

Sally* was the primary care giver for her children before she was incarcerated. While in prison, the children lived with their father. While Shine for Kids was willing to transport the children to and from contact, the father did not always ensure the children were available as arranged and so contact stopped.

After our intervention, Sally had monthly face-to-face contact with her children and spoke with them on a weekly basis by phone.

*not her real name

[93] R Sen and K Broadhurst 'Contact and children in out-of-home placements' *Child & Family Social Work*, 2011, 16, 298-309 at 301 (*Discussion Paper,* Note 14 at footnote 124)

Case study 4

Mary* cared for her two grandchildren under an arrangement with FACS (CS) for a period of time before the Children's Court made orders that the children live with the father.

There were no safety concerns with the children being in the care of the grandmother.

A notation was made in the court orders to require the father to facilitate contact between Mary and her grandchildren. The care arrangements were to be reviewed after 6 months and a report to be supplied to court.

The father cancelled several of Mary's visits with the children and told the caseworker Mary did not want to see the children.

Mary was upset because she felt the caseworker believed that she did not want to see her grandchildren. Mary wanted the children returned to her care and hoped that might happen when it went back to court. Mary was concerned that when she spoke with the caseworker, she felt the caseworker was quite hostile and antagonistic towards her and appeared to be taking an adverse view (based on the father's word) which could jeopardise her position as potential carer.

* not her real name

140. The *Discussion Paper* states "caseworkers and foster parents also report beliefs that contact can be disruptive, causing behavioural problems to worsen and threatening children's coping and adaptation to their foster homes", citing an article by Mennen and O'Keefe.[94] While this article does refer to research that "children often display problematic behaviour after a visit",[95] Mennen and O'Keefe emphasis the need for case workers to work closely with foster carers and help foster carers to "understand this and develop strategies to deal with the behaviour" rather than reduce contact.[96] They also suggest helping foster carers in dealing with their feelings.

141. There are many reasons that children may be unsettled or distressed by contact with a parent. For example, younger children in particular may simply be tired or hungry; they could be over-excited; they may have been inadequately prepared for the purpose of the contact and had their hopes raised that they would be reunited with the parent only to find they are returning indefinitely to out-of-home-care; they may have heard the carer complaining about having to drive them to contact and feel guilty about causing inconvenience; or they might feel intimidated or scared by a child unfriendly environment, such as a sterile government building or institution.

142. Additionally, while not acknowledged in the *Discussion Paper*, some of the research referenced in the *Discussion Paper* suggests that barriers to effective contact include a

[94] *Discussion Paper,* Note 14 at 44, footnote 117.
[95] Leathers cited in F E Mennen and M O'Keefe, 'Informed decisions in child welfare: The use of attachment theory' *Children and Youth Services Review*, 2005, 27 at 587 (*Discussion Paper,* Note 14 at footnote 117).
[96] Mennen and O'Keefe at 587.

lack of supportive assistance for carers,[97] unsuitability of the venue and the training of caseworkers/supervisors.[98] Additional reasons include: that the child(ren) are not accompanied by the same worker,[99] children not understanding why their visits are supervised and being upset by notetaking during visits.[100]

143. In the absence of paediatric assessment as to the catalyst of the so called "disruptive or problematic behaviour" it is essential to proceed cautiously and not make assumptions as to the cause of a child's distress after spending time with a parent. It is natural to be sad after seeing a parent and then saying goodbye to them. It is vital that carers are trained in supporting children through the contact process with particular emphasis on developing awareness of their own agenda in the carer role, especially if they are hopeful of achieving permanency with the child in their care. We note that there is clearly potential for conflict of interest if the person reporting that contact is distressing to a child is also the person who wishes to retain the child permanently.

144. We refer to Proposal 18 to "develop a common framework about contact arrangements between children and young people and their birth families to guide designated agencies when making contact decisions".[101] We believe all contact arrangements should be made on a case-by-case basis and based on the best interests of the child.

145. We support in principle the use of ADR to resolve contact disputes (Proposal 19). However, as discussed above, it is important for parents to have access to legal advice before ADR and they should be legally represented at ADR. Additionally, ADR must be facilitated by an independent, impartial mediator.

146. Where ADR is not successful we support contact disputes being resolved by the Children's Court. We believe this will be a simpler process than having the matter resolved at the Family Court or the Administrative Decisions Tribunal. However the Court must apply the principles of procedural fairness so that the court's role is not perceived to be rubber stamping a decision made by FACS (CS).

147. We do not support contact orders of limited duration.

148. We support the Children's Court having the power to enforce contact orders and arrangements (Proposal 20).

Other comments (Proposals 1, 4, 5, 22, 23, 24, 25, 26, 27, 28, 29)

Stand-alone Parenting Capacity Orders

149. We do not agree with the statement that "current evidence suggests that mandating parents to attend parenting programs does not impact on their effectiveness".[102] The research referred to in order to support this point (footnote 13) is a study in the UK where only 16% of parents in the study attended courses under parenting orders. This was not due to

[97] Mennen and O'Keefe, Note 96 at 587; This is also discussed in material not referenced in the *Discussion Paper*, for example, Morrison, F Mishna, C Cook and G Aitken, 'Access visits: Perceptions of child protection workers, foster parents and children who are Crown wards' *Children and Youth Services Review*, 2011, 33(9) at 1477.
[98] G Schofield and J Simmonds 'Contact for infants subject to care proceedings', Adoption & Fostering, 2011, 35(4) at 74. See also Morrison et al, Note 98 at 1479 -80
[99] Morrison et al, Note 98 at 1479.
[100] Morrison et al, Note 98 at 1480.
[101] *Discussion Paper,* Note 14 at 47.
[102] *Discussion Paper,* Note 14 at 11.

care proceedings, but because their child/ren were offending or not attending school.[103]

150. While parenting training may be a "routine component of judicial orders in the US",[104] the research in footnote 8 suggests many parents who begin parent training programs do not complete them.[105] Moreover, a retired court judge is said to indicate that "knowing that parents complete parent training had virtually no information value".[106]

151. We reject Proposal 1 to introduce stand-alone parenting capacity orders to require parents to attend a parenting capacity-building or education course. As the *Discussion Paper* acknowledges, this would remove the existing requirement to establish the need for care and protection before making any care order and a breach of such an order would mean the "child meets the threshold of being in need of statutory care and protection".[107] This is the case even though there is no accountability mechanism to ensure that appropriate and accessible services are made available to the parent.

152. Rather than focusing on mandating parenting capacity courses, we believe the focus should be on ensuring the availability and accessibility of early intervention and other services and informing parents when they are being monitored before the removal of their children. By "accessible services" we mean courses that are a short distance from home and can be easily attended by public transport, available in languages other than English, free, provide child care options, run at flexible times, understand the impact of domestic violence, respect diversity and are strengths based and non-judgmental.

153. We are regularly contacted by mothers who have been unaware that they have been monitored by FACS (CS) until after their child/children has/have been removed from their care. See, for example, case study 5 below. It is of concern that FACS (CS) does not contact such parents to offer support and early intervention assistance and the opportunity to address issues of concern prior to the removal of the child. It is particularly traumatic when babies are removed from their mother's care in hospital immediately after birth and while in some cases babies are restored to their families, this would likely have an impact on attachment.

Case study 5

Jacquie* is under eighteen and had just given birth to a healthy baby who she was breastfeeding. When she was younger and living in another state she had to live with a relative for a while because of safety concerns in her family.

The day after she gave birth FACS (CS) came to the hospital and told her they were placing the baby in the care of the Minister and that she could not take her baby with her when she was discharged. FACS (CS) indicated that they had no concerns about her capacity as a mother, but they did have safety concerns about her family.

[103] D Ghate & M Ramella, Positive Parenting: The National Evaluation of the Youth Justice Board's Parenting Programme, Policy Research Bureau for the Youth Justice Board, September 2002 at i, ii. (*Discussion Paper,* Note 14 at footnote 13).
[104] *Discussion Paper,* Note 14 at 10 and footnote 8.
[105] R Barth, J Landsverk, P Chamberlain, J Reid, J Rolls, M Hurlburt et al, 'Parent-training programs in child welfare services: Planning for a more evidence-based approach to serving biological parents', *Research on Social Work Practice*, Vol 15, 2005 at 355.
[106] Ibid at 368.
[107] *Discussion Paper,* Note 14 at 12.

Jacquie had not had any contact with FACS (CS) prior to this time and nor had she been referred to early intervention services throughout her pregnancy. Further, no one had ever told her that they were concerned about where the baby would be living.

Jacquie was not told by FACS (CS) about her right to get legal advice until the day before the first court date.

* Not her real name

Simplify the current scheme of parental responsibility orders

154. We are concerned that the implementation of a simplified scheme setting out the arrangements for allocating parental responsibility, including a formal power of the Court to make a "self-executing" order, whereby parental responsibility is with one person for a period of time and then passes automatically to another at the end of that period lacks the necessary level of judicial oversight and review.

155. We think that judicial oversight is necessary to ensure that there have been no changes in circumstances during the initial period of parental responsibility that may render the automatic shift in responsibility inappropriate. We suggest that some form of court assessment or intervention is included in the scheme to ensure that the shift in parental responsibility is appropriate in all the circumstances. This will necessarily include an assessment of suitability at the time the shift is proposed to be made.

Supervision orders

156. We oppose Proposal 25 to 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.

157. Proposal 25 amounts to a denial of procedural fairness and natural justice. If a report has not been filed for the Court's consideration, there is a lack of evidence for the ongoing need of a supervision order.

158. Before an order is extended, all parties have the right to be heard.

Enforceability of prohibition orders and alternative sentencing options for child abuse and neglect offences (Proposals 4 & 5)

159. We are concerned by Proposal 4 to incorporate sanctions for breaches of prohibition orders and Proposal 5 to introduce alternative sentencing options, other than fines, to child abuse and neglect offences.

160. Both proposals focus on consequences without examining why the current responses have not been working.

161. We agree with the comments raised in the *Discussion Paper* that fines imposed on "an already disadvantaged person [such as those who could be found guilty of abuse of neglect offences] simply opens the door to further interaction with the criminal justice system".[108]

[108] *Discussion Paper*, Note 14 at 21

162. Furthermore, fines are unlikely to address the underlying causes of abuse and neglect and as the *Discussion Paper* notes, may not be in the best interest of the child.[109]

163. We agree with comments in the *Discussion Paper* that there is "no compelling case for reintroducing imprisonment as a penalty for abuse and neglect offences in the *Care Act*".[110]

164. However, community service orders may also be difficult for parents to comply with if it is in addition to engaging with services and programs.

165. The purpose of the punishment is also unclear. In the case of neglect, if the root cause is poverty and social exclusion, a community service order, fine or imprisonment is unlikely to act as a deterrent.

166. This again highlights the importance of adequately funded, available and accessible early intervention services.

Regulation of medical treatment

167. We refer to Proposal 22 which seeks to "clarify and consolidate in the legislation the provisions relating to the regulation of special medical treatment for children and young people".

168. We refer you to the current Senate Standing Committee on Community Affairs inquiry into the involuntary or coerced sterilisation of people with disabilities in Australia and note we are opposed to involuntary or coerced sterilisation of women and girls.

169. As raised in earlier sections, it is important that children actively participate in decisions that affect them and give their own consent when competent to do so in accordance with the principles in *Gillick* as affirmed in *DoCS v Y* [1999] NSWSC 644.

Responding to social media issues

170. We acknowledge that images of children can be misused and open to abuse in social media. However, this is not limited to the child protection context. Moreover we believe there is a need for ongoing awareness-raising and education about the dangers of sharing photos, particularly of children, online. We are not convinced, as outlined in Proposal 23, that strengthening provisions in the *Care Act* to prevent unlawful publication of names and images of children and young people on social media sites will address this issue.

171. Further, we do not support the strengthening of provisions in the *Care Act* to prevent the publication of offensive or derogatory material about FACS (CS) workers which are intended to harass. There are existing means through which such complaints can be heard.

Reporting child deaths

172. We support Proposal 28 that there be a legislative obligation requiring the Director General to prepare an annual report tabled in Parliament on the deaths of children and young people known to FACS (CS) who have died.

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[109] Ibid at 21.
[110] *Discussion Paper,* Note 14 at 23

173. This is important, as the *Discussion Paper* suggests, in the interests of transparency and accountability as well as to focus on areas requiring improvement.

Reporting of children living away from home without parental consent

174. We support Proposal 29 to amend the *Care Act* to:

    a. Clarify that s122 applies to funded residential providers and for-profit businesses only (not private citizens); and

    b. Remove the penalty in s122 of the *Care Act*.

175. Section 122 of the *Care Act* imposes a mandatory obligation on a person providing residential accommodation to a child to report the whereabouts of the child to the Director General if there are reasonable grounds to suspect the child is living away from home without parental permission. We agree however that s122 is not intended to apply to relatives or friends of a child assisting the child with accommodation and that the law should be clarified to indicate that this section only applies to funded residential providers, such as specialist homelessness services and refuges, as well as for-profit businesses.

176. We agree with comments in the *Discussion Paper* that punitive measures, such as a penalty as outline in s122, are "not the most effective way to encourage reporting from interagency partners, non-government service providers or the public".[111] We therefore support the removal of the penalty in s122.

Information sharing

AbSec and CREATE

177. We refer to Proposal 26 that AbSec and CREATE should have access to personal information to permit fulfilment of their objectives. It is unclear why these organisations in particular have been identified.

178. We believe this proposal has been framed in a misleading way. Section 3.3.6 in the *Discussion Paper* discusses a proposal to "amend the Care Regulation to make CREATE and AbSec prescribed bodies for the purposes of s248".[112] Section 248(1)(b) states that the Director-General can direct a prescribed body to provide the Director-General "with information relating to the safety, welfare and well-being of a particular child or young person or class of children or young persons". Section 248(2) requires prescribed bodies to "comply promptly with the requirement of a direction".

179. Proposal 26 only refers to AbSec and CREATE having access to personal information. There is no corresponding reference to the obligation to provide information as outlined above.

180. We are concerned that the sharing of information without informed consent will result in the very people these organisations are designed to help failing to engage with these services for fear of how their personal information will be used.

181. We believe consideration should be given to other ways of obtaining personal information,

[111] *Discussion Paper,* Note 14 at 60.
[112] *Discussion Paper,* Note 14 at 57.
[112] *Discussion Paper,* Note 14 at 57.

other than making CREATE and AbSec prescribed bodies.

Private health professionals

182. We refer to proposal 27 that "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 safety, welfare and wellbeing of a child or young person".

183. The *Discussion Paper* asserts the need for private health professionals to share information above their mandatory reporting requirements of s27 but does not elucidate the reasons for the proposed changes or provide any evidence of failures in the current arrangements.

184. We are concerned that information that relates to "safety, welfare and wellbeing of a child or young person" is very wide and could capture all private medical information.

185. In the event of a private health professional providing counselling, the sharing of such information without consent could impact upon the integrity of the counselling relationship. It could also result in those needing the services of private health professionals not engaging in the services for fear of how their personal information will be used.

186. We are also concerned by the risk of unnecessary sharing of confidential information, particularly in small towns or communities where everyone knows each other.

187. Further, the broader the sharing of information with agencies outside a counselling relationship, the more easily confidential and sensitive communications can be subpoenaed and potentially used, for example, against a victim of violence in a sexual assault hearing.

188. If you would like to discuss any aspect of this submission, please contact Liz Snell, Law Reform and Policy Coordinator or Carolyn Jones, Senior Solicitor on 02 8745 6900. We welcome the opportunity to participate in ongoing discussions of this important issue and to provide further comment during the policy development process.

Yours sincerely,

Women's Legal Services NSW

Janet Loughman
Principal Solicitor