# Changes to child protection laws in NSW – Issues Paper

On 21 November 2013, Minister Goward introduced the Child Protection Legislation Amendment Bill 2013 into NSW Parliament. This Bill will disproportionately affect vulnerable and disadvantaged families and we fear may not promote the best interests of the child. Of particular concern is the likely impact on Aboriginal and Torres Strait Islander families; culturally and linguistically diverse families; victims of domestic and family violence; parents with disabilities; parents living in regional, rural and remote areas; and parents in prison.

It is important the following protections are included in legislation.

1. Enforceable right to appropriate services
2. Free legal advice at all stages
3. Framework around alternative dispute resolution
4. Decisions on a case-by-case basis – not legislated time frames
5. Holding perpetrators of domestic violence to account
6. Appropriate identification of Aboriginal and Torres Strait Islander children
7. Resolving the potential conflict of interest – simultaneous assessment as carer and prospective adopted parent; simultaneous provider of restoration services and services for adoptive parents
8. Parents to be involved in case plan reviews and the need for judicial oversight of contact orders

## 1. Enforceable right to appropriate services

A greater focus on early intervention is welcome and consistent with recommendations made by the United Nations Committee on the Rights of the Child. Intervention services should be offered as a general rule and in a timely manner, before removal is considered an option. To ensure this happens services must be adequately resourced.

Parents must have a say in what is realistic and achievable when entering any agreement, such as a parental responsibility agreement or parental responsibility contract or when a parental capacity order is made by the Children's Court. They must be able to choose which service they engage with, for example, a service they know to be culturally safe and trauma informed.

The service must be available, accessible and at no or very low cost. An accessible service means, for example, that transport will be arranged for the parent or primary caregiver to attend the program; and childcare is available while the parent or primary caregiver attends the program. An available service means there is space in a program to start immediately. It is not enough to be referred to a service and put on a waiting list.

To ensure vulnerable families are protected **parents must have an enforceable right to services in legislation that are meaningful, available, accessible and at very low or no cost.**

## 2. Free legal advice at all stages

Without free, independent legal advice prior to signing any agreement, parents may not understand:

- that they can negotiate what is in the agreement and have a say about what is realistic and achievable;
- what is required of them;
- what is required of Family and Community Services or the NGO service they are working with;
- the consequences of not following the agreement.

While not all agreements are legally binding, a failure to follow an agreement can be used as evidence of a failure to engage, which may lead to removal of children.

Early, robust legal advice is likely to increase parental participation and improve positive outcomes for children by ensuring that parents understand what is needed.

Legal Aid is also required for representation.

**Parents must have access to free legal advice before signing any agreement.**

## 3. Framework around alternative dispute resolution (ADR) that supports parents to fully participate and addresses power imbalances

Potential benefits of ADR include informing parents of concerns earlier than at the time children are removed and providing parents with an opportunity to respond to concerns. An ADR process can offer flexibility and provide culturally responsive procedures and outcomes.

However, there needs to be a **comprehensive framework for ADR in the legislation**. The framework must include:

- involving legal advisors where appropriate as well as other support persons in the ADR process to properly address power imbalances between parents and child protection authorities (particularly important where family violence is present);
- comprehensive screening and risk assessment frameworks and tools to assess risk and suitability of matters for ADR;
- impartiality of the mediator; and
- a court process or similar review mechanism where an outcome at ADR has the potential to affect the rights of the parties.

## 4. Decisions on a case-by-case basis – not legislated time frames

Rather than imposing rigid time frames for making a decision about realistic prospects of restoring a child to his/her parent(s), decisions must be made on a case-by-case basis.

The proposed time frames of 6 months for children under 2 years and 12 months if the child is over 2 years fail to recognise that every family is unique.

Rigid time frames will disproportionately affect vulnerable parents, particularly mothers who have experienced trauma, such as intergenerational trauma and post-natal depression, or are in custody (noting that women are often imprisoned as a result of the trauma they have experienced). There is no acknowledgment that it takes time and support to recover from trauma, particularly intergenerational trauma, despite a substantial body of research that has increased understanding of trauma.

In many situations it will be in a child's best interests to be restored to the care of a parent who has experienced trauma than be permanently removed from their biological family.

**Decision making must be flexible, respond to the individual circumstances, be culturally appropriate and in the best interests of the child. There should be no legislative time frames.**

## 5. Holding perpetrators of domestic violence to account

In the context of domestic and family violence, it is often the case that rather than holding the perpetrator to account, the victim is punished for not acting in a so called "protective manner". If a mother (noting the statistics show domestic violence is highly gendered) is unable to leave a violent relationship within a nominated and probably arbitrary timeframe, she will often be viewed as failing to act "protectively". In the child protection context it is therefore the mother who is unfairly seen as responsible for the consequences of the father's violence.

This view fails to recognise that when a woman leaves a relationship, it is one of the most dangerous times of the relationship, as recently highlighted in *R v Gittany* [2013] NSWSC 1737, and requires planning and support.

If women are to be empowered to leave a violent relationship there also needs to be adequate resourcing of and access to refuges and safe and appropriate housing.

A parental responsibility contract (PRC) for expectant parents may see the victim of domestic violence being held responsible for the perpetrator's violence. There is also a risk that perpetrators of violence may use the threat of reporting a breach of a PRC as a continuation of the violence.

The way to protect children who experience domestic violence is not to deprive them of the beneficial relationship with the non-violent parent, but rather to support that parent. Victims of domestic and family violence must not lose their children because the State fails to protect and support them.

Caseworkers also need to be supported with adequate training, including about trauma–informed practice.

**It is essential to support rather than blame mothers escaping domestic and family violence as well as to recognise the onus on the perpetrator to take responsibility for their actions. We need a system that ensures victims of domestic violence are not prevented from being with their children because of domestic violence.**

## 6. Appropriate identification of Aboriginal and Torres Strait Islander children

In line with the Government commitment to place Aboriginal and Torres Strait Islander children for adoption only as a last resort, it is important to ensure that Aboriginal and Torres Strait Islander children are identified. This is particularly important when one or both parents are not recorded by the Government as being Aboriginal and/or Torres Strait Islander.

## 7. Resolving the potential conflict of interest – simultaneous assessment as carer and prospective adopted parent; simultaneous provider of restorations services and services for adoptive parents

The fast-tracking of adoption by conducting assessments for suitability as a foster carer at the same time as assessment as a prospective adoptive parent is problematic. The role of a foster carer is fundamentally different to that of an adoptive parent. A key question seems to be: how does simultaneous assessment encourage carers to have a genuine commitment to working towards restoration of the children to their

biological parents? **These should be separate assessments, with the assessment to be an adoptive parent occurring only when there is no realistic possibility of restoration to the biological parent(s).**

There are challenges for non-government organisations to work with both the biological parents seeking restoration of their children and with the prospective adoptive parents. These are competing interests and may not result in outcomes that are in the best interests of the child.

## 8. Parents involvement in case plan reviews and the need for judicial oversight of contact orders

The proposal that final contact orders will only be made for a period of 12 months is highly concerning. While flexibility may be important, a child has a right to maintain relationships and have contact with their family unless it is contrary to their best interests. This includes situations of adoption or situations of tension with a foster carer.

We note Community Services' commitment to review contact between children and biological parents and significant others through annual placement reviews. It is imperative that parents are informed of and able to participate in these meetings.

But judicial oversight where agreement cannot be reached is also required.

The proposed laws state that if contact cannot be resolved through alternative dispute resolution, the Court may hear the matter if there has been 'a significant change in any relevant circumstances since a final order was made in proceedings.'

The threshold test of 'a significant change in any relevant circumstances' is the current threshold to bring a section 90 application to rescind or vary court orders. This threshold is designed to be a bar to litigation. It is too high a bar for parents seeking contact orders after 12 months.

For instance, there may be very appropriate circumstances where court orders are needed but the threshold test might not be met. For instance, in a case where contact has been proceeding well, how will the child's right to continue contact be protected?

Additionally, if there is tension about contact between the biological parents and foster carers / adoptive parents or Community Services / NGO providing services and this tension continues beyond the first 12-month order, can a 'a significant change in any relevant circumstances' be established to warrant the making of another order?

It would be a significant denial of access to justice to impose such a high threshold on access to court regarding an issue of such a basic human right as the ability to maintain a relationship with one's parents.

**There should be discretion at the time of making final contact orders to extend contact orders beyond 12 months. It is also important that there is judicial oversight of contact arrangements where agreement cannot be met.**

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