WOMEN'S LEGAL SERVICE NSW

30 November 2017

Ms Simone Czech
Shaping a Better Child Protection System Commissioning Division
Department of Family and Community Services
4-6 Cavill Ave
Ashfield NSW 2131

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

Dear Ms Czech,

Shaping a Better Child Protection System

1. Women's Legal Service NSW (WLS NSW) thanks the Department of Family and Community Services (FACS) for the opportunity to comment on *Shaping a Better Child Protection System 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 support, care and protection, human rights and access to justice.

3. WLS NSW has an Indigenous Women's Legal Program (IWLP). This program delivers a culturally sensitive legal service to Aboriginal women in NSW. We provide an Aboriginal legal advice line, participate in law reform and policy work, and provide community legal education programs and conferences that are topical and relevant for Aboriginal and Torres Strait Islander women.

4. An Aboriginal Women's Consultation Network guides the IWLP. It meets quarterly to ensure we deliver a culturally appropriate service. The members include regional community representatives and the IWLP staff. There is a representative from the Aboriginal Women's Consultation Network on the WLS NSW Board.

5. Members of our Aboriginal Women's Consultation Network have extensive experience engaging with community on the issues of care and protection as well as working within the child protection sector.

6. The Network members express a sense of frustration and deep disappointment that there have been so many child protection inquiries and reports over the years with a lack of effective response and real change. These include *Bringing them Home*, the 2008 *Special Commission of Inquiry into Child Protection Services in NSW ('Wood Inquiry')*, FACS Child Protection Legislative Reform Discussion Paper (2013), The NSW Parliament General Purpose Standing Committee No 2 Child Protection Inquiry (2016), the Tune Review. They call for real

accountability for compliance with existing laws and requirements such as the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles and Cultural Care Plans, rather than see any improvements coming from yet further changes in the law.

7. The focus of this submission will be on the need to properly implement existing laws; the importance of accountability of the Department of Family and Community Services (FACS) and NGOs providing child protection services; and the importance of procedural fairness particularly in the context of adoption.

8. In summary, we recommend:

8.1 Parents and primary caregivers need an enforceable right to services in legislation that are meaningful, available, accessible and at very low or no cost to them.

8.2 "Prior alternative action" must include parents/primary caregivers being provided formal written notification of the issues of concern that need to be addressed, referral for early legal advice and a plan developed with the parents/primary caregivers about how the issues will be addressed, including parents/primary caregivers being provided assistance to engage with relevant services.

8.3 FACS be required to present detailed evidence to the Children's Court of the searches made for Aboriginal family as an attachment to the Care Plan. This should include dates and times of calls made; copies of letters sent; copies of Chapter 16A requests to relevant agencies such as Centrelink for details of relatives/community members identified; details of the community members they consulted with and full genograms. Children's Court Magistrates must hold FACS accountable for compliance with this requirement and FACS senior management must hold caseworkers accountable for failing to satisfy the Court that the searches for Aboriginal family have been undertaken properly.

8.4 Additional funding for Link Up and local Aboriginal community controlled organisations to ensure this work happens in a timely fashion.

8.5 More effective and meaningful consultation with community and better documentation of such consultation. This needs to be developed at a local level with appropriate funding.

8.6 Accountability for failure to comply with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles.

8.7 Short term care orders only be used in the context of family preservation and restoration.

8.8 FACS be able to supervise ordered contact in the context of a guardianship order.

8.9 The Children's Court have the power to list a matter following a section 82 report.

8.10 There be no further limitations on the making of section 90 applications.

8.11 There be no targets set for adoption.

8.12 The Children's Court not be given jurisdiction to decide adoption matters.

8.13 There be no additional grounds to dispense with parental consent in adoption matters.

Terminology

9. The term "early support" is used instead of "early intervention". "Early support" is intended to mean being offered strengths based, client-centred, trauma informed, culturally safe support at the earliest opportunity when an issue of child safety is identified. Concerns have been raised by community members about the connotations associated with the term "intervention" for Aboriginal and Torres Strait Islander people. The term "support" is preferred as it suggests a more collaborative strengths-based approach.

Earlier family preservation and early support

Evidence of prior alternative action, service provision and strengthening "best endeavours"

10. Section 63 of the *Children and Young Persons (Care and Protection) Act 1998* ('the Care Act) outlines the requirement for evidence of prior alternative action:

    (1) When making a care application, the Secretary must furnish details to the Children's Court of:
    (a) the support and assistance provided for the safety, welfare and well-being of the child or young person, and
    (b) the alternatives to a care order that were considered before the application was made and the reasons why those alternatives were rejected.
    (2) The Children's Court must not:
    (a) dismiss a care application in relation to a child or young person, or
    (b) discharge a child or young person who is in the care responsibility of the Secretary from that care responsibility,

    by reason only that the Children's Court is of the opinion that an appropriate alternative action that could have been taken in relation to the child or young person was not considered or taken.
    (3) Subsection (2) does not prevent the Children's Court from adjourning proceedings.

11. It has been the experience of several of our clients that FACS did not contact them to offer early support and the opportunity to address issues of concern prior to the sudden removal of their child. It is particularly traumatic when babies are removed from their mother's care in hospital immediately after birth. See, for example, the case study below.

Case Study

Jacquie (not her real name) 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 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 indicated that they had no concerns about her capacity as a mother, but they did have safety concerns about her family.

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

12. While we recognise that there are times when child safety necessitates, the emergency removal of children from their primary caregivers, the fact that there are so few consequences for failure to undertake "prior alternative assistance" before taking this step means there is a lack of accountability of FACS and NGO child protection services.

13. We note the Discussion Paper proposes mandating response times to Risk of Significant Harm (ROSH) reports as a means of strengthening obligations on FACS to take prior alternative action (Questions 4-6). The focus appears to be on ensuring *"families receive a face-to-face assessment earlier than is currently the case"* with insufficient detail on the kinds of support that would be provided in consultation with the parents/primary caregivers. Rather than mandating response times to ROSH reports we believe it would be better for children and their families if there could be a greater focus and accountability for provision of early support for families – including early referrals for legal advice and social support.

14. "Prior alternative action" must include parents/primary caregivers being provided formal written notification of the issues of concern that need to be addressed, referral for early legal advice and a plan developed with the parents/primary caregivers about how the issues will be addressed, including parents/primary caregivers being provided assistance to engage with relevant services.

15. Section 8(c) of the *Care Act* states that one of the key objects of the *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".*

16. One of the principles of the *Care Act* outlined at Section 9(c) is that the least intrusive action must be taken in any decision about protecting a child or young person from harm and promoting that child or young person's development.

17. Yet while parents and primary caregivers can ask for support[1] there is currently no obligation to provide support.[2] FACS and NGO child protection services are only required to use *"best endeavours"* to comply with the request.[3]

18. Parents and primary caregivers need an enforceable right to services in legislation that are meaningful, available, accessible and at very low or no cost to them.

19. The value of investing in early support is well documented in the research commissioned by the Department of Family and Community Services as part of the Targeted Earlier Intervention Reforms.[4]

---

[1] 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".*

[2] 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".*

[3] Section 18(1)

[4] Australian Research Alliance for Children and Youth (2015), *Better Systems, Better Chances: A review of research and practice for prevention and early intervention* http://www.community.nsw.gov.au/__data/assets/pdf_file/0008/335168/better_systems_better_chances_review.pdf See also, Neha Prasad & Marie Connolly, *Factors that affect the restoration of children and young people to their birth families,* published by ABSEC, ACWA and the NSW Government 2013: http://www.community.nsw.gov.au/__data/assets/pdf_file/0014/320036/literature_review_on_restoration.pdf

20. Following the Tune Review into Out-of-home-care (OOHC) in NSW, the NSW Government recognised investment is *"crisis driven"* rather than focused on early support or family preservation and restoration services.[5] It also recognised that to improve outcomes for children at risk of being removed, there is need for sustained treatment for parental mental health issues, addressing family violence, treatment and support to prevent and treat drug and alcohol abuse and ensuring access, engagement and educational attainment for children and young people.[6]

21. 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".*[7] For decades advocates have been calling for better resourcing of child protection.[8]

22. 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"*.[9]

23. The 2016 NSW Parliamentary Inquiry into Child Protection found that:

> *The Department [FACS] should be working more effectively with these families to identify whether support services can be provided to address child protection concerns after they have been identified. In this regard, there should be a focus on identifying whether restoration of that child is possible, assuming any safety concerns are adequately addressed*.[10]

24. 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.

25. A trauma informed response to "prior alternative action" is therefore required. This requires much more than just providing a list of services to which a parent or primary caregiver is encouraged to access – which in our view does not constitute "prior alternative action".

26. Rather, a trauma informed response to "prior alternative action" means, for example, 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

---

[5] NSW Government, *Their Futures Matter: A new approach – Reform directions from the Independent Review of Out of Home Care in NSW*, 2016.

[6] NSW Government (2016), *Their Futures Matter: A new approach – Reform directions from the Independent Review of Out of Home Care in New South Wales*, p4-5 https://www.facs.nsw.gov.au/__data/assets/file/0005/387293/FACS_OOHC_Review_161116.pdf

[7] The Hon James Wood, *Report of the Special Commission of Inquiry into Child Protection*, November 2008, Executive Summary p i.

[8] Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, ALRC Report 84, November 1997 at 17.6

[9] Wood Inquiry, p i-ii.

[10] NSW Parliament Portfolio Committee No. 2 – Health and Community Services (2016), *Report of the Child Protection Inquiry,* 70 https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2396

services/support" rather than viewing them as perpetrators or bad parents.[11] Research clearly identifies that a significant obstacle for parents to enter into and complete treatment programs is motivation.[12] 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.

27. 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.[13] It is therefore important that caseworkers are well qualified and experienced and receive the necessary on gong training, supervision and support to undertake their work and efforts be made to retain and support competent casework staff.[14]

28. In our experience, women may seek support and/or services from FACS or non-government organisations working in child protection and these are often not available or not provided in a timely manner. The lack of access to services is exacerbated for women in regional, rural and remote areas. Where services are available women often need to travel long distances which may not be accessible by public transport. The cost of getting to appointments can create financial stress.

29. Little effort is made to help mothers engage in support services. Barriers to engaging with support services are often not addressed. In our experience, barriers include: shame; case workers' judgmental attitudes; that where early support plans are used they 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.

30. 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 so-called "protective manner".

31. 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.

32. 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.

33. 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

[11] Northern California Training Academy, *The importance of family engagement in child welfare services*, June 2009 p6-7 accessed at http://academy.extensiondlc.net/file.php/1/resources/LR-FamilyEngagement.pdf

[12] Northern California Training Academy, Note 11 p 8.

[13] Festinger cited in C Potter and S Klein-Rothschild, 'Getting home on time: Predicting timely permanence for young children, *Child Welfare,* 2002, 81(2) p127; K Dawson and M Berry, 'Engaging families in child welfare services: An evidence-based approach to best practice, *Child Welfare*, 2002, 81(2) p 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) p 46-56.

[14] C Potter and S Klein-Rothschild, Note 13 p146.

context.[15] 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. This view also fails to acknowledge that some women remain with a violent partner in order to protect their children as they fear what will happen if their children are left unsupervised with the alleged perpetrator.

34. "Prior alternative action" should include FACS and NGO child protection workers making effective referrals of parents and/or primary caregivers to early legal advice and other support. This has been a key discussion focus of the Safe Home for Life Care and Protection Legal Update meetings attended by FACS and legal assistance service providers over the last few years. Concerns have been raised by legal assistance service providers about the low use of early support tools (a form of prior alternative action) such as parent responsibility contracts and parent capacity orders. We understand information about referrals for early legal advice has been included in FACS internal casework practice manual and flyers have been developed and provided to every FACS district. However, WLS NSW receives very few referrals from FACS.

35. There is a need for cultural change within FACS and the child protection sector so that workers understand the importance of parents receiving social and legal support at an early stage, to promote the safety of the children, inform parents and primary caregivers of concerns and how to address the risks of the children being removed from their families.

36. If funded, community legal centres are well placed to develop and provide a model of practice which would include a lawyer, a non-legal support worker who could provide case management and intensive support and specialist workers, such as Aboriginal and Torres Strait Islander specialist workers to help respond to the over-representation of Aboriginal and Torres Strait Islander children in OOHC.

Recommendation 1:

Parents and primary caregivers need an enforceable right to services in legislation that are meaningful, available, accessible and at very low or no cost.

Recommendation 2:

"Prior alternative action" must include parents/primary caregivers being provided formal written notification of the issues of concern that need to be addressed, referral for early legal advice and a plan developed with the parents/primary caregivers about how the issues will be addressed, including parents/primary caregivers being provided assistance to engage with relevant services.

Actions taken before court proceedings

37. We refer to the Community Legal Centre NSW (CLCNSW) *Changes to child protection laws in NSW Issues Paper* published in January 2014.

38. This Issues Paper outlined the need for a "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*

[15] L Radford and M Hester, *Mothering through domestic violence*, Jessica Kingsley Publishers, London, 2006 p 143.

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.*

Upholding Aboriginal and Torres Strait Islander Child and Young Person Placement Principles

39. While there are no specific questions in the consultation paper related to this we continue to remain concerned about poor practice in the implementation of the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles which are central to the *Care Act.*

40. We acknowledge the work of the President of the Children's Court in seeking to improve practice. We also acknowledge the introduction of the new care and cultural plan in January 2017. However, further work is required.

41. Members of our Aboriginal Women's Consultation Network have raised concerns about the lack of a meaningful and effective process of searching for Aboriginal family and the need for greater accountability to ensure this happens. We have been told when matters are transferred from FACS to NGOs, it is frequently the case that no information is received about Aboriginal family or when a child has an Aboriginal parent and a non-Aboriginal parent often the genogram focuses exclusively on the non-Aboriginal side of the family. In these circumstances when further inquiries are made by the NGO and Aboriginal family members are identified and their details provided to FACS we have been told they are not pursued. When FACS is asked why family members have not been pursued they respond they phoned the family member but they did not get back to them.

42. Our Aboriginal Women's Consultation Network also calls for more effective and meaningful consultation with community and better documentation of such consultation. This needs to be developed at a local level with appropriate funding.

43. To ensure greater accountability we support the following recommendations by our Aboriginal Women's Consultation Network:

Recommendation 3:

FACS be required to present detailed evidence to the Children's Court of the searches made for Aboriginal family as an attachment to the Care Plan. This should include dates and times of calls made; copies of letters sent; copies of Chapter 16A requests to relevant agencies such as Centrelink for details of relatives/community members identified; details of the community members they consulted with and full genograms. Children's Court Magistrates must hold FACS

accountable for compliance with this requirement and FACS senior management must hold caseworkers accountable for failing to satisfy the Court that the searches for Aboriginal family have been undertaken properly.

Recommendation 4:

Additional funding for Link Up and local Aboriginal community controlled organisations to ensure this work happens in a timely fashion.

Recommendation 5:

More effective and meaningful consultation with community and better documentation of such consultation. This needs to be developed at a local level with appropriate funding.

Recommendation 6:

Accountability for failure to comply with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles.

Streamlining court processes

Short term care order

44. We believe the Children's Court already has the power to make short term care orders. This is consistent with Principle 9(2)(c) in taking the "least intrusive" action in any decision about protecting a child or young person from harm and promoting that child or young person's development.

45. We note The Children's Court of NSW Practice Note 4 relates to Short Term Care Orders (STCO) in the context of family preservation and restoration. We recommend that STCOs only be used in these contexts. Given the focus should be on family preservation and restoration the goal should be that this is the pathway for all families.

46. As noted above there is a need for cultural change within FACS so there is a greater focus on providing early legal and social support and upon family preservation and restoration.

Recommendation 7:

Short Term Care Orders only be used in the context of family preservation and restoration.

Contact

47. We do not support limiting contact orders to 12 months. While flexibility is important, a child has a right to maintain relationships and have contact with family unless it is contrary to their best interests.

48. We have heard anecdotally that without contact orders, contact has decreased or is not taking place as outlined under the care plan when guardianship orders are in place. For example, we have heard instances when paternal grandparents may agree to supervising contact with the mother but the contact happens infrequently if at all.

49. We have concerns about section 86(2) which prevents an order being made requiring FACS supervision of contact in the context of a guardianship order. A guardian should not be expected to supervise contact. A guardian may not be the most appropriate person to

supervise contact. The need for supervision by FACS should not be an impediment to a guardianship order being made which is otherwise the best outcome in a particular case. FACS should be able to supervise ordered contact in the context of a guardianship order.

50. We have heard anecdotally of cases where FACS are present to watch how well the guardian supervises contact. In such circumstances, some mothers report feeling humiliated by the carer who may have no training in how to engage sensitively with vulnerable parents who are hopeful of having their children restored to their care. Guardians supervising contact also provides a challenging power dynamic for vulnerable parents.

Recommendation 8:

FACS be able to supervise ordered contact in the context of a guardianship order.

Annual reviews

51. Under Article 25 of the *Convention on the Rights of the Child* 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.

52. Section 150(2)(b) of the *Care Act* requires a review of out-of-home care placements within 2 months of a final order being made for a child aged under 2 years and thereafter every 12 months or within 4 months of a final order being made if the child is not less than 2 years old and thereafter every 12 months.

53. Section 150(4) provides *"a review is to be conducted in accordance with guidelines prepared by the Children's Guardian".*

54. The Guidelines prepared by the Children's Guardian require the participation of children in the review and also recommend the participation of parents/step parents, and *"people significant to the child or young parent"*.[16]

55. The NSW Auditor-General found that during 2013-14 annual review of placements for children in out of home care took place in only 54% of cases.[17] In 2014-15 this increased to

[16] The Children's Guardian, *Guidelines for Designated Agencies on the Review of Placements of Children and Young Persons in Out-of- Home Care*, p6

[17] NSW Auditor-General's Report*, Financial Audit Focusing on the agencies in the Family and Community Services cluster*, Volume Nine, 2014 p34 at: http://www.audit.nsw.gov.au/ArticleDocuments/344/01_Volume_Nine_2014_Full_Reportb.pdf.aspx?Embed=Y

76.5% of cases.[18] In 2015-16, 95% of children and young people in OOHC had *"documented caseplans"*.[19]

56. It would be helpful to better understand the review process. For example, does FACS speak with the child? Is there an opportunity to consider restoration to parents? Is there an opportunity to review the effectiveness of the cultural care plan? Consideration should be given to the reviews being conducted independently of FACS.

57. It is also important to have review mechanisms for guardianship orders.

58. 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 and responding to any issues the child wishes to raise. *Kinship Care in NSW – Finding a Way Forward*, also supports this view.[20] 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.

Funding and Specialisation

59. We welcome the focus of Their Futures Matter particularly on family preservation and restoration. It is important to acknowledge that this work is resource and time intensive and the funding for such programs needs to reflect this.

60. We understand that under the new funding model restoration, adoption and guardianship is allocated the same base funding. If family preservation and restoration are to be genuinely prioritised this should be reflected in funding allocations above guardianship and adoption.

61. It is also vital that the restoration packages include funding to work with parents who do not currently have the children in their care.

62. To ensure parents engaged in the child protection system are aware of the new focus on family preservation and restoration there needs to be greater promotion of these permanency pathways. We also recommend the establishment of specialist teams within FACS focused on restoration with a contact line available for parents. If parents are having difficulties engaging with their caseworker, they should be able to contact this line for further information about how they can work towards restoration.

---

[18] New South Wales Auditor-General's Report, *Financial Audit Family and Community Services*, Volume Eight 2015 p 6 at: https://www.audit.nsw.gov.au/ArticleDocuments/589/01_Volume_Eight_2015_Family_and_Community_Services_Full_Report.pdf.aspx?Embed=Y

[19] NSW Auditor-General's Report, *Financial Audit Focusing on the agencies in the Family and Community Services cluster*, Volume Six, 2016 p31 https://www.audit.nsw.gov.au/ArticleDocuments/853/01_Volume_Six_2016_Full_Report.pdf.aspx

[20] Ainslie Yardley, Jan Mason, Elizabeth Watson, *Kinship Care in NSW – finding a way forward*, University of Western Sydney, November 2009 p 36-48, 52.

General comments

63. We support the Children's Court having the power to list a matter following a section 82 report.

64. Section 90 applications are already difficult applications to make and require the leave of the court to proceed. The case has not been made out for change to this provision. We do not support any further limits to section 90.

Recommendation 9:

The Children's Court have the power to list a matter following a section 82 report.

Recommendation 10:

There be no further limitations on the making of section 90 applications.

Adoption

65. In 2015 the NSW Auditor-General recommended targets be set for outcome measures such as the number of children being adopted or safely returned to their birth family.[21]

66. The Secretary of the Department of FACS, Mr Michael Coutts-Trotter, responded by noting FACS does not support targets for adoption as this runs contrary to *"emphasis on reducing entries to care and improving restorations"* and may not be in the best interests of children.[22] WLS NSW agrees.

67. 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 action 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.

68. We believe existing laws and regulations about adoption in NSW are sufficient, subject to our comments in paragraph 75, and we therefore strongly oppose legislating to provide the Children's Court with jurisdiction to decide adoption matters.

69. 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.

70. 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.

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

---

[21] NSW Auditor–General's Report to Parliament, *Transferring out-of-home care to non-government organisations,* 2 Sept 2015, Recommendation 2c at: https://www.audit.nsw.gov.au/ArticleDocuments/520/01_Out_of_Home_Care_Full_Report.pdf.aspx?Embed=Y

[22] NSW Auditor-General's report, Appendix 1 p 25.

72. We do not believe additional grounds to dispense with parental consent are required or desirable. To introduce such grounds would seriously undermine both procedural fairness and open adoption.

73. In November 2014, the then NSW Attorney General, Ms Upton commented:

> *In open adoption the child retains links with their birth family and other significant people in their lives where it is in their best interests. The new laws increase the involvement of birth parents in choosing the type of family they would like for their child and in the development of an adoption plan. Open adoption ensures children know their identity and wherever possible maintain relationships with their birth family.*[23]

74. Excluding biological parents from the adoption process goes against the purpose of open adoption.

75. 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 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.

76. 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.[24] This is particularly so if robust early support 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.

Recommendation 11:

There be no targets set for adoption.

Recommendation 12:

The Children's Court not be given jurisdiction to decide adoption matters.

Recommendation 13:

There be no additional grounds to dispense with parental consent in adoption matters.

[23] NSW Government, *Open adoption now a reality in NSW* (Media release),10 November 2014 at: https://www.facs.nsw.gov.au/about_us/media_releases/media_release_archive/gabrielle-upton/open-adoption-now-a-reality-in-nsw

[24] This is supported by 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 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

Adoption and Aboriginal and Torres Strait Islander children

77. We note that the Permanency Principles clearly state that adoption of Aboriginal and Torres Strait Islander children is a last resort after all other options have been exhausted and it must be in the best interests of the child. However, there continue to be concerns expressed about the potential for adoption of Aboriginal and Torres Strait Islander children.

If you would like to discuss any aspect of this submission, please contact Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,
Women's Legal Service NSW

Dixie Link-Gordon
Senior Community Access Worker

Janet Loughman
Principal Solicitor