Wirringa Baiya provides free legal advice to Aboriginal and Torres Strait Islander women, children and youth who are or who have been victims of violence.

8 March 2013

The Honourable Pru Goward
Minister for Family and Community Services
Minister for Women
GPO Box 5341
SYDNEY NSW 2001
CPreforms@facs.nsw.gov.au

By email and post

Dear Minister,

DISCUSSION PAPER
CHILD PROTECTION: LEGISLATIVE REFORM AND LEGISLATIVE PROPOSALS STRENGTHENING PARENTAL CAPACITY, ACCOUNTABILITY AND OUTCOMES FOR CHILDREN AND YOUNG PEOPLE IN STATE CARE (THE DISCUSSION PAPER)

SUBMISSION

We refer to the above and welcome the opportunity to make a submission to the Discussion Paper.

Wirringa Baiya Aboriginal Women's Legal Centre

Wirringa Baiya Aboriginal Women's Legal Centre is a New South Wales statewide community legal centre for Aboriginal women, children and youth. The focus of our service is to assist victims of violence, primarily domestic violence, sexual assault and child sexual assault and our casework involves assisting clients apply for victim's compensation.

Over the sixteen (16) years of our operation we have given advice and support to many hundreds of women and children who have been victims of violence. In addition to our day-to-day advice and casework services, we also provide legal advice clinics in several outreach locations including in women's correctional centres and community centres. As part of our advice line we often provide advice to:

- women who have been contacted by Family and Community Services (Community Services) with concerns about their children;
- women whose children have been removed; and
- grandmothers whose grandchildren have been removed.

PO Box 785 Marrickville NSW 1475 Corner Livingstone and Marrickville Roads, Marrickville
Phone: (02) **9569 3847** Free call: **1800 686 587** Fax: (02) 9569 4210 **www.wirringabaiya.org.au**
Wirringa Baiya is a non-profit organisation managed by Aboriginal women.
ABN: 60 382 206 441

We have also provided casework to women in their victims compensation matters for domestic violence whose history has included the involvement of Community Services. However, we do not have a care and protection practice as such and do not appear for parents or children in the Children's Court.

We have provided numerous community legal education workshops to community members in New South Wales, in both regional and metropolitan locations and some of these workshops are to raise awareness around violence and the associated child protection issues.

As such, our experiences are informed by the women we work with and the clients we support and where relevant, we have used case studies in this submission to illustrate our points.

We prefer to use the noun Aboriginal rather than Indigenous. However, we note that a number of reports use the term Indigenous and where we refer to those reports in our submissions we will use the term Indigenous if that is the term used in the relevant report. Unfortunately when it comes to statistics no distinction is made between Aboriginal people and Torres Strait Islander people. Although our service is available to both Aboriginal and Torres Strait Islander women, children and young people close to 99% of our clients are Aboriginal. For this reason throughout this submission we will refer to the issues and needs of Aboriginal people and their communities.

The current system is failing Aboriginal children

It is a well -known fact that Aboriginal children are grossly over-represented in the care system and in particular in Out-of-Home Care (OOHC). In NSW statistics show that Indigenous children are 11.5 more times likely to be in OOHC compared to non-Indigenous children.[1] NSW has the highest rate of Indigenous children in OOHC compared to other states with 80.6 per 1000[2]. NSW Family and Community Services Annual Statistical Report for 2010/11 dated January 2012 states that: *"At 30 June 2011, 33.9 per cent of the children and young people in OOHC were Aboriginal and/or Torres Strait Islander".*[3]

Given this disturbing fact it is our view that the child protection system in NSW needs to be completely re-evaluated for Aboriginal children and families. The system is failing the Aboriginal community and has been for some time.

Aboriginal solutions

The need for Aboriginal solutions to improve the well-being of Aboriginal communities, including in the arena of child protection, is well documented. The *Special Commission of Inquiry into Child Protection in NSW* (the *Wood Special Inquiry*) considered Aboriginal children in the child protection system. It

---

[1] http://www.aifs.gov.au/cfca/pubs/factsheets/a142117/index.html

[2] ibid

[3] NSW Family and Community Services Annual Statistical Report for 2010/11, January 2012.

reviewed a number of previous reports and held consultations with some Aboriginal communities. The Inquiry found that:

> "The conclusion that can be drawn from this information is that the best evidence for what works in addressing the issues in Aboriginal communities is likely to be drawn from the Aboriginal people themselves, through consultations, drawing on their ideas, experiences and opinions, respecting their knowledge drawn from their own individual and community experiences, and drawing on case reports of individual Aboriginal people and specific programs."[4]

The need for Aboriginal solutions has also been recognised by professional bodies such as the Australian and New Zealand College of Psychiatrists in its' report, *Report from the Faculty of Child and Adolescent Psychiatry. Prevention and early intervention of mental illness in infants, children and adolescents: Planning strategies for Australia and New Zealand.* The report discussed the mental health and well-being needs of the Aboriginal populations of Australia and the Maori of New Zealand and noted:

> "Any interventions aimed at these population groups must contain; culturally relevant strategies; include Indigenous input; appropriately adapt to Indigenous conceptions of what mental health is; and give detailed attention to the structural obstacles which may hamper deliver. Despite the high levels of risk experienced, Indigenous children and adolescents can also maintain considerable resilience due to strong links to family (wha-nau) and local communities and robust cultural values. In relation to Indigenous populations, prevention and early intervention approaches need to work within a holistic understanding of social and emotional wellbeing, and incorporate all aspects of wellbeing – physical, cultural, social, emotional and spiritual.
>
> For Aboriginal and Torres Strait Islander people, the development of resilience is particularly important given the ongoing impact of serious disadvantage and poorer health outcomes. Mixtures of universal and targeted approaches are therefore appropriate, including both adapted mainstream and Indigenous- specific programs, all of which require rigorous evaluation. Access to adapted mainstream programs should be introduced cautiously and only where there is evidence." [5]

Programs and Services must be trauma informed

Furthermore, any legislative reform, service initiatives or programs that aim to improve the wellbeing of Aboriginal individuals, families and communities has to

---

[4] *Report of The Special Commission of Inquiry into Child Protection in NSW*, November 2008, Volume 2, page 781.

[5] The Royal Australian and New Zealand College of Psychiatrists, *Report from the Faculty of Child and Adolescent Psychiatry. Prevention and early intervention of mental illness in infants, children and adolescents: Planning strategies for Australia and New Zealand*, 2010, page 15.

be trauma informed. The impact of trauma is well documented, as acknowledged in the *Wood Special Inquiry*. The ongoing effect of trauma and loss as a result of colonisation, dispossession, forced removals and systemic racism (both historical and current) cannot be underestimated.

> "Addressing the underlying causes of Indigenous children's overrepresentation in child protection systems needs to go considerably deeper than an Indigenous child placement principle. If child protection legislation and practice is to be reformed in an effective way, then understandings of colonial policies and their impact on Indigenous children cannot be kept at arms length from reform. They need to be integrated in practical ways. Acknowledgment of the past needs to inform current legislation and policy rather than serving as a separate symbolic or policy statement".[6]

This means, for example, that a program for drug and alcohol abuse in Aboriginal communities must look behind the complex reasons why there is such abuse and see it as a symptom of individual and collective trauma.

We have assisted many clients in relation to applications for victims compensation for violence such as child sexual assault, sexual assault and domestic violence. A number of these clients had a drug or alcohol problem, which they have linked to their experience of trauma. When our clients are assessed by a clinical psychologist to identify the injuries caused by the violence they are frequently diagnosed with severe post-traumatic stress disorder, depression and anxiety. Sadly, they have lived with the burden of this poor mental health for many years, and did the best that they could raising their children.

We also see the effects of trauma on our clients who are in prison. Our own work with Aboriginal women in prison shows high rates of victimisation of our clients, many of whom are parents.

Research indicates that a disproportionately high number of Aboriginal women serving sentences have been victims of violence. One survey of Aboriginal women in custody revealed that 70 percent had been sexually assaulted as children, 14 percent were incest survivors, and around 61 percent were victims of physical violence[7].

The survey also revealed the high incidence of violence experienced as adults: 78% of Indigenous women in custody. Nearly one half of Aboriginal women in prison were victims of a sexual assault as an adult (44 percent) and 5 percent said a family member had sexually assaulted them. The survey also revealed that

---

[6] T. Liebesman, "Indigenising Indigenous Child Welfare", *Indigenous Law Bulletin*, Vol 6, issue 24, 2007 at http://www.austlii.edu.au/au/journals/IndigLawB/2007/4.html

[7] R. Lawrie, "Speak out Speak Strong: Rising Imprisonment rates of Aboriginal women", http://www.worldlii.org/au/journals/ILB/2003/24.html

nearly all of the women who were victims of child sexual assault and have a drug problem were also victims of violent abuse as adults.[8]

Thus it is our strong submission that programs for Aboriginal parents that aim to improve their parenting must always be trauma informed and work to healing and recovery. Aboriginal individuals and/or families should only be referred to Aboriginal services that can work holistically; that can see and understand all the complex historical and cultural issues that come into play.

Closing the Gap

It is our submission that it is meaningless to talk about improving the outcomes for Aboriginal children and their families without addressing the significant social and economic disadvantage that Aboriginal people continue to endure.

While a poor parent certainly does not in itself mean there is neglect, nonetheless, significant social and economic disadvantage can make life very difficult for a parent and this needs to be recognised:

> "[Bonnie] Robertson (2000) highlights the impact of socio-economic disadvantage on female heads of households, who often care for large numbers of children (which may in itself be due to family violence) and forced to live in derelict houses that cannot be adequately locked to prevent external intruders entering the house and assaulting residents (children or adults). To what extent should a caregiver be held accountable for abuse or neglect under such circumstances? There needs to be some recognition (and attempts to resolve) the environmental conditions affecting a caregiver's ability to adequately care for her children." [9]

Conclusion

While we note that Community Services is currently conducting a longitudinal study of children in out of home care, there is currently very little quality research in relation to the out of home care issues and outcomes for Aboriginal children. Thus it has been said that:

> "Given the significant over-representation of Aboriginal and Torres Strait Islander children in care in Australia, the lack of quality research in this area represents a major failure." [10]

---

[8] ibid

[9] J. Stanley, A M. Tomison and J. Pocock, "Child abuse and neglect in Indigenous Australian communities" *Child Abuse Prevention Issues no.19 Spring 2003*, http://www.aifs.gov.au/nch/pubs/issues/issues19/issues19.html

[10] L. Bromfield and A. Osborn "Getting the big picture: A synopsis and critique of Australian out-of-home care research." *Child Abuse Prevention Issues Paper, No 26*, 2007, published by Australian Institute of Family Studies, at page 24

The same authors noted that the measurements for well-being of Aboriginal children should include cultural considerations:

> "The use of concepts such as attachment and bonding (or at least the Western understanding of these psychological terms) to assess the wellbeing of Aboriginal and Torres Strait Islander children are inconsistent with Aboriginal and Torres Strait Islander values of relatedness and childrearing practices (Yeo, 2003). Wellbeing indicators for Aboriginal and Torres Strait Islander children should include cultural and spiritual dimensions as well as physical, emotional and social status (McMahon & Reck, 2003)". [11]

It is a concern to us that policy and recommendations are formed without such research, and would appear to fly in the face of NSW Family and Community Services *"commitment to evidence based, sustainable solutions"* referred to in the Discussion Paper.[12]

Thus it is our submission that it is poor policy to make changes that will significantly affect Aboriginal children in out of home care if there is no evidence that the well-being of Aboriginal children will be improved.

It is our view that the NSW Government needs to create a child protection system that responds to the needs of the Aboriginal community. Many of the proposals being put forward by the Discussion Paper will only force Aboriginal families to heed to a punitive western legal process that in itself, whether intentionally or not, will create another stolen generation. In light of the Federal Government's apology to the Stolen Generation and the State Government's apology for forced Adoption Practices extreme caution should be taken before introducing any type of legislative change that will result in more permanent removals and adoption of children.

While there are some situations when it is never appropriate and safe for a child to remain or be returned to the care of their parents, the primary focus of a child protection system should always be on giving the parents the capacity and skills to care for their own children. This is an investment worth making into terms of the emotional and social well-being of the Aboriginal community, as well as good economics.

It is our view that the child protection system for the Aboriginal community needs to be completely re-thought from the beginning to the end, from early intervention, to court process, through to the placement of Aboriginal children in out-of-home care. This would need to be done with the full consultation and cooperation of Aboriginal communities across the state.

---

[11] opcit, at page 24

[12] at page 2

We are not suggesting that this will be an easy task, as noted by the prominent Aboriginal lawyer and academic, Terri Liebesman:

> "It is very difficult for child welfare departments to relinquish power and resources. It is also very difficult for Indigenous communities to assume responsibility where this has been denied over a long period. Further, many communities not only need to develop appropriate decision-making structures and expertise but suffer endemic problems because of the widespread trauma and loss of capacity over a number of generations. It will therefore take considerable resources and commitment to build community capacity in many areas. It is not in Indigenous children's best interests to retain legislative and departmental structures, which are not serving them effectively. Neither is it in their interests to transfer responsibility for their wellbeing to Indigenous agencies, which lack sufficient capacity. However, a process of de-colonising attitudes, establishing new Indigenous child protection structures and empowering Indigenous agencies through training and provision of resources over a period of time will improve relations between mainstream and Indigenous agencies and communities and will facilitate, over the longer term, improvements for Indigenous children."[13]

We note that there does exist Aboriginal models to consider such as the *Lakidjeka* ACSASS program in Victoria.[14] We also note that some practices currently being deployed, such as Family Group Conferencing (discussed further below) and Care Circles are promising for the Aboriginal community.

It is our view that what is required is a major re-think of the child protection system for Aboriginal children and their families. Having said that, in the likelihood that this does not occur we have responded to a number of the specific recommendations raised by the Discussion Paper, as discussed below.

SECTION 1

Parental Capacity Orders

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

Question 1 (a):
Do you think parenting capacity orders would be an effective mechanism to address escalating risk in both an early intervention and child protection context? Are there other mechanisms that might be equally or more effective?
Question 1 (b):

---

[13] T. Liebesman, "Indigenising Indigenous Child Welfare", *Indigenous Law Bulletin,* Vol 6, issue 24, 2007 at http://www.austlii.edu.au/au/journals/IndigLawB/2007/4.html

[14] For a summary of this program see Higgins,J.R .and Butler,N. (2007) *Indigenous responses to child protection issues.* "Promising practices in out-of-home care for Aboriginal and Torres Strait Islander Carers, Children and Young people' (booklet 4). Melbourne:Australian Institute of Family studies.

What factors do you think the Court should consider before making a parenting capacity order?
Question 1 (c):
What should be the consequences for failing to comply with a parenting capacity order?

We have significant concerns about this proposal.

The Discussion Paper refers to a need re-engage parents who are disengaged from voluntary prevention and early intervention.[15] But what the Discussion Paper does not explore and address is why there is disengagement. This needs to be answered before any punitive measures are contemplated. We suggest that there are many reasons why parents may be disengaged, especially Aboriginal parents. These reasons may include:

- Programs are not culturally inappropriate for Aboriginal communities
- Caseworkers may be openly racist, or oblivious to their own cultural bias or ignorance
- Caseworkers lack experience
- Programs not being trauma-informed and thus unable to adequately address the concerning behavior
- Anxiety and fear by parents that engagement with a service will only lead to a removal of their children
- Deep shame and embarrassment for Aboriginal parents who have had children removed. Family is extremely important to Aboriginal people and the removal of children is a cause of deep shame.

In relation to families that experience domestic violence we are dismayed that often the focus of intervention is on the non-offending parent, overwhelmingly the mother, rather than on the offending parent. This was acknowledged by the *Wood Special Inquiry*:

> "..... the mother is more likely to be a victim of domestic and family violence rather than a perpetrator, however, it is usually to her protective conduct or lack thereof that the child protection scrutiny is directed. Caseworkers need to have sufficient training and access to resources to navigate an appropriate response in these circumstances." [16]

The *Wood Special Inquiry* referred to research that shows that victims of domestic violence can continue to be effective parents.[17] The Report supported best practice guidelines that supports non-offending parents maintaining the care of their children:

> "Best practice guidelines typically support maintaining the children in the care of their 'non-offending parent' if possible. For instance, practice

---

[15] at page 11
[16] opcit 2008, at para 17.12
[17] ibid at para 17.48

> guidelines for "Effective intervention in domestic violence and child maltreatment cases" developed on behalf of the US National Council of Juvenile and Family Court Judges have endorsed three core principles:
> a. To ensure stability and permanency, children should remain in the care of their non-offending parent (or parents), whenever possible.
> b. A community service system should have many points of entry, should minimise the need for victims to respond to multiple and changing service providers, have adequate resources to allow service providers to meet family needs and avoid out-of-home placements.
> c. Responses should differ according to the experience and needs of particular families: "Families with less serious cases of child maltreatment and domestic violence should be able to gain access to help without the initiation of a child protection investigation or the substantiation of a finding of maltreatment."
>
> It is difficult to argue with the appropriateness of any of these principles."[18]

Indeed the fear of intervention and removal of children is a reason why many Aboriginal women are reluctant to report domestic violence. Too often perpetrators will threaten to report their female partners to Community Services as a means of control. While in other cases, where women do escape a violent relationship, the perpetrator and/or his supporters make vexatious reports to Community Services about ex-partners as revenge.

We suggest this same fear of children being removed may be a reason why women generally, and Aboriginal women in particular, may disengage with parent capacity programs.

Interestingly the Discussion Paper does state that:

> "Parenting capacity programs that will address the needs of parents already within the child protection system and be suitable for inclusion in a PRC need to offer a level of intensive support and targeted learning that is not provided by current mainstream universal programs and be part of a holistic case plan that address child safety issues."[19]

We welcome that there is some concession by Community Services that there needs to be an improvement in parenting capacity programs. Yet there is no accountability for how, and what programs are provided. This is strikingly unfair and unjust given that so much turns on the parent's engagement with such programs.

If parenting capacity orders are introduced, and there is found to be a breach, a parent must have a right to respond with the opportunity to challenge the appropriateness and adequacy of the programs they did not engage with. A

[18] ibid paras 17.49 and 17.50

[19] at page 10

parent must be informed about their right to make a complaint.

It is our strong view that it is more appropriate for the government to focus on improving parenting programs and resourcing Aboriginal communities to develop culturally appropriate programs, rather than insisting on the role of the court to create orders, which if breached, lead to punitive consequences.

How will capacity be assessed?

It is suggested by the Discussion Paper that the requirement to establish the need for care and protection prior to making any order would be removed and the sole relevant factor to be established would be "the need to improve parenting".[20] We have considerable concerns about how capacity or lack thereof will be assessed.

CASE STUDY 1

Client 1 is an Aboriginal woman. As a teenager the client was living on the streets and was using heroin. While a teenager she was also sexually assaulted. When she was about 17 years of age she fell pregnant and sought assistance from Community Services but none was offered. The father of her child was very violent. Client 1 was eventually able to escape this relationship and her ex-partner was convicted for offences against her. Despite this early history of trauma she had recovered from her heroin use and was parenting her children well. Sadly, having recovered and in a stable and safe relationship with a new partner she was sexually assaulted by a stranger which triggered major trauma. Nonetheless, she maintained her home and her relationship with her new partner. While in hospital delivering her third child the social worker referred Client 1 to a NGO support service for some ongoing support. This NGO support service reported Client 1 to Community Services stating that she was using heroin and in a violent relationship. The client completely denies this and agreed to urine testing, which consistently showed that she was heroin free. There is no evidence of domestic violence in her current relationship. During a conversation with her Community Services caseworker she told him that it is possible for people to recover from drug use and lead a normal life, to which he replied: "You'd be in the first in history if that was the case." Her caseworker has told her that for the moment they will keep her case open and plans another visit to her home, which is causing our client considerable distress and anxiety.

This case illustrates a number of factors:

1. Reports can be based on poor information, or false information;
2. Caseworkers have their own subjective views about what a risk is;
3. Past histories are used against a client despite there being recovery and improvement for some time; and
4. Caseworkers have their own prejudices about what is achievable for an individual parent.

Child Protection caseworkers need to be mindful of their own values and what

[20] at page 12.

they deem to be appropriate standards for parenting may not be universal. Amongst our own staff, both Aboriginal and non-Aboriginal, we have varying views about what would be considered to be a clean house, or when a child of a certain age should be in bed or able to walk to school unaccompanied. Yet these relatively minor issues may be raised by a caseworker and his/her view inappropriately imposed on parents, as the following case study illustrates.

CASE STUDY 2

Client 2 is a young Aboriginal woman who felt that her caseworker from a non-government agency was particularly prescriptive about her parenting, admonishing her for letting her child under two years of age be around when she was watching an American sitcom. The client felt that the detrimental effects to her child, that the caseworker was arguing, was overstated, however, she felt that if she complained then she would be seen as uncooperative.

At the outset we submit any assessment of a parent's capacity would need to be comprehensive, holistic and culturally appropriate.

Obviously there are some fundamental issues that are universal such as a child not being physically abused or deprived of food and shelter. But for many other issues child protection caseworkers need to constantly test their perceptions/views of what is appropriate and what parenting issues needs to be improved, and when working with Aboriginal families they must seek guidance from Aboriginal services as to what would be appropriate.

Therefore we submit that if parenting capacity orders were introduced, any establishment of "the need to improve parenting" must include the right of parents to respond and oppose any assertion that a capacity order is required.

It is not clear what time frames will be placed on improving capacity and how improvement will be measured or assessed. We submit that any regime that imposes a need for improvement must have realistic and flexible time frames for that improvement.

There is also some confusion in the Discussion Paper about when a Parenting Capacity Order will be used. The Paper seems to suggest that a Parenting Capacity Order could be a condition of a Parental Responsibility Contract.[21] However, the Discussion Paper later suggests that if a Parental Responsibility Contract is breached the Court may then issue a Parenting Capacity Order.

Parental Responsibility Contracts (PRCs)

PROPOSAL 2: Strengthen the PRC Scheme by:
(a) introducing a new modified PRC for use in early intervention programs to support disengaged parents
(b) extending the duration of a PRC from six to twelve months to enable a parents

[21] At page 12.

to attend intensive parenting courses or therapeutic treatments and demonstrate abstinence from substance misuse so children can stay at home with them safely
(c) introducing PRCs for parents with an unborn child at risk to help improve their parenting capacity in preparation for the birth of their child
(d) requiring FACS (CS) to attempt to use PRCs with parents prior to commencing care proceedings in appropriate matters
Question 2 (a):
Do you think there is a place for PRCs in early intervention programs?
Question 2 (b):
If so, what should the consequences of a breach of a PRC in an early intervention context be?
Question 2 (c):
Do you agree that PRCs will be improved by extending timeframes, broadening their scope to include unborn children and mandating their use prior to commencing care proceedings in appropriate matters?
Question 2 (d):
Are there any other ways that PRCs may be improved to help parents keep their children out of OOHC?

We welcome the acknowledgement by the Discussion Paper that a cultural shift needs to occur that: "shifts the mindset of child protection caseworkers towards preservation and restoration".[22] Certainly a PRC would be preferable to the removal of a child providing the conditions of a PRC are reasonable, appropriate and realistic. However, we are concerned about parents being signed up to PRCs that from the very outset will fail. We reiterate our significant concerns about the adequacy and appropriateness of current programs that parents may have to commit themselves to under a PRC.

In addition we are frequently told by clients and support workers about conditions of PRCs that are impossible to satisfy. Practical and logistical issues such as access to public transport to programs, or money for transport, is sometimes ignored and leads to failure.

Often whether a breach has occurred, or not, appears to be a very subjective process. One caseworker might view an incident as a minor infraction that does not constitute a breach, whereas another caseworker may be much more hardline and technical rather than looking at the substantive issue of whether there is a risk of harm to a child from the relevant infraction.

Case Study 3

Our Centre assisted a young Aboriginal woman who had a very young child restored to her care subject to a number of year's supervision and undertakings. Towards the middle of this period there was a perceived infraction of one of the undertakings by the client that resulted in Community Services going back to court and seeking final care orders for the child until they were 18 years of age. A number of support workers that had worked with the client were upset this was occurring as they felt the actions of Community Services were unwarranted, particularly as the client had made so much progress and the incident involved no risk of harm to the child. A replacement support

[22] At page 14.

worker for the client's regular support worker who had been on leave at the time had made the report to Community Services. The regular support worker admitted that the report about the client would not have been made, had she been around.

We reiterate our concerns about the subjective and inconsistent views of caseworkers about what parents must do to satisfy them that the safety of the child has been improved.

Even if an appropriate service or program is available a PRC must equally oblige the appropriate and relevant services to provide and deliver the support required. A PRC must be made in the spirit of how services can help parents and/or family care for children, not as a threat of removal if you fail.

It is our view that a PRC should have no legal validity unless a parent has received adequate and appropriate legal advice before signing it, not merely given the opportunity to seek legal advice.

If, as suggested, a PRC is going to be used in an early intervention context we suggest that even 12 months for some families is inadequate as a timeframe for change, depending on the complexity of the issues identified.

The Discussion Paper also suggests that PRCs apply to parents with unborn children said to be at risk. Once again, a PRC is preferable to the baby being assumed into care at birth. However, we know anecdotally that a number of Aboriginal women avoid antenatal care for fear of reports being made to Community Services; this is especially the case for women who have had children removed in the past.

Family Group Conferencing

PROPOSAL 3:
Consider the suitability of FGC for care matters to better engage families to resolve child protection concerns.
Question 3 (a):
Should there be an obligation upon Community Services to refer care matters to a FGC prior to commencing care proceedings and, if so, what should be the nature of this obligation?
Question 3 (b):
Should the Court be able to refer parties to FGC in addition to or in place of a dispute resolution conference?
Question 3 (c):
What kinds of matters do you think would be appropriate for FGC in the context of care proceedings?

We welcome the Discussion Paper's suggestion that "[a] clear legislative imperative should exist to require Community Services to involve the family in decision-making about the care and protection of the child or young person".[23] It

[23] At page 17

is our view that Family Group Conferencing (FGC) in principle is a more appropriate model to be used when making decisions for Aboriginal children. We firmly support families being empowered to make decisions about how best to keep children safe and support parents address the issues that need to be, with the appropriate support of relevant services and professionals.

While we think that FGC is a promising model it needs to be adapted to suit the needs of the Aboriginal community.

Aboriginal staff at our Centre, and Aboriginal colleagues at other Aboriginal services attended training provided to be a FGC Facilitator. Many of these Aboriginal workers did not complete the training as they felt that there were a number of elements that were not suitable for the Aboriginal community and there was no recognition of a need to adapt the model for the Aboriginal community, rather than the other way around.

Assuming that the FGC model is improved and adapted appropriately for the Aboriginal community we are of the view that it would be beneficial that the Children's Court would be able to refer parties to FGC after a care application had been made. We think potentially it is more preferable to Alternate Dispute Resolution (ADR) as it allows for separate family time to develop family centred-strategies to the child protection issues. As the recent review of FGC identified:

> "Family Time has been referred to as the foundation of FGC as it is the key mechanism through which families experience feelings of empowerment and control (Harris 2007; Lowry 1997; Olson 2009)". [24]

We think most matters could be referred to FGC, depending on the issue that needs to be resolved. It may be that in very serious matters involving sexual abuse or domestic violence family members may meet in a FGC to make decisions as to how support the non-offending parent, or decide where children should live, if it is not possible for them to live with a parent. It is our view that many families have members that have the strength and capacity to look after children and keep them safe, and families should be given the first opportunity to do this. Each case and family should be assessed for suitability rather than stating certain matters should be automatically excluded.

Prohibition Orders

PROPOSAL 4
Incorporate sanctions for breaches of prohibition orders that include:
- **fines**
- **community services orders**
- **compulsory attendance at parenting capacity programs, counselling or drug and alcohol**

---

[24] H. Boxall, A. Morgan and K.Terer, "Evaluation of Family Group Conferencing pilot program", Australian Institute of Criminology, Canberra, 2012, page 91.

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

We have concerns about this proposal.

The Discussion Paper states that the Children's Court does not have the power to enforce a prohibition order, but no evidence is provided as to the size of the problem.

One of the examples of prohibition orders provided by the Discussion Paper are issues around parents having no contact with a child outside formal arrangements. Yet for most of the people we speak to contact is rarely ordered, or if it isordered it is minimal (see further discussion about contact orders below). The Discussion Paper refers to the powers of the Family Court of Australia to take remedial action in the event of a breach of a parenting order. However, this is a Court that frequently orders contact between parents and children with legislation that states when making decisions a primary consideration is a child having meaningful a relationship with his/her parents (section 60CC(2)(a) of the *Family Law Act 1975*). In the family law jurisdiction contact is frequently ordered and thus it is more appropriate to have remedies for breaches.

Alternate Sentencing Options for child abuse and neglect offences

PROPOSAL 5:
Introduce alternative sentencing options (other than fines) to child abuse and neglect offences such as community service orders and educative and therapeutic services or rehabilitation.
Question 5:
Do you agree that there should be alternatives to fines for the child abuse and neglect offences under the Care Act and, if so, what type of orders would be appropriate?

The main motive for the proposal seems to be the lack of prosecutions of offences under the Care legislation, which is suggested is possibly due to the limited sentencing options. It is not clear to us how significant a problem this is given that many forms of child abuse can be prosecuted in criminal courts under criminal law. We think that there should be a difference between abuse in the form of violence and abuse in the form of neglect. Furthermore, as was discussed by the Australian Law Reform Commission and NSW Law Reform Commission in their report *Family Violence - A National Legal Response,* in the context of domestic violence the focus of accountability should always be on the person responsible for the violence:

> "The onus should be on holding the person who commits acts of violence accountable for the abuse and neglect of children in cases where there was evidence of domestic and family violence, rather than blaming the

non-abusive parent –usually the mother- for failing to protect the child. This was a persistent criticism of the response of the child protection system."[25]

Hierarchy of placements

Proposal 6:
Achieve greater permanency for children and young people in OOHC by:

- **incorporating permanency into the objects of the Care Act including the preferred hierarchy of permanency being:**

  1. **Family preservation/restoration**
  2. **Long-term guardianship to relative or kin**
  3. **Adoption**
  4. **Parental responsibility to the Minister**

(b) requiring that the Court can only make an order for parental responsibility to the Minister if adoption or long-term guardianship is not possible

(c) requiring permanency plans not involving restoration to include the pursuit of guardianship/adoptions or reasons why they should not be pursued.

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

We do not support this proposal.

We submit that the answer in reducing the possibility of instability and uncertainty arising from a succession of different placements or care arrangements, as identified as a concern by the Discussion Paper, is for early appropriate and effective early intervention to assist the birth family. Policy decisions when it comes to the well-being and safety of children should be based on sound evidence, not budget constraints.

Having said that, we welcome that the Discussion Paper states that the first option for a placement of a child is to be restored to the care of their birth family. We also welcome that the second option is placement with a family member or member of their kinship group.

However, we do not support the hierarchy placement preference where adoption is placed before parental responsibility to the Minister. It is our strong view that adoption should always be the last option. Thus, we do not support

---

[25] ALRC and NSWLRC, *Family Violence- A National Legal Response*, October 2012, Canberra, para 20.25

Proposal 6 (b) being the expressed requirement that the Court can only make an order for parenting responsibility to the Minister in cases only where adoption is not possible.

The Discussion Paper attempts to acknowledge that for the majority of Aboriginal children and their families, adoption may not be the best permanent arrangement due to cultural inappropriateness in situations where the carer is an Aboriginal relative.[26] And in those instances the Court will have the power to issue Guardianship Orders to kinship carers when restoration is not viable. We refer to the explanation provided by The Secretariat of National Aboriginal and Islander Children in Care (SNAICC) as to why adoption is not appropriate:

> "The cultural and spiritual importance of connection to family means that SNAICC does not support adoption for Aboriginal or Torres Strait Islander children, other than customary Torres Strait Islander adoptions within extended families. Adoption is not part of Aboriginal culture. Aboriginal children need to remain connected to their family and community and the possibility of restoration to family should be kept open. The Stolen Generations and their families are to this day dealing with the trauma of past adoption policies and their suffering has taught that for many, adoption created pain that could not be healed and problems that could not be fixed".[27]

It is our view that if proposal 6 is legislated it must be made very explicit that the hierarchy being proposed does not apply to Aboriginal children. We also wish to state that we support the current legislative timeframe for when adoptions may be considered and assume that no shortening of this time frame is being contemplated (currently after two years in a stable placement).

Statistics show that 17.6% of Aboriginal children in NSW are placed with a caregiver that is not an Aboriginal family member, kin, other Aboriginal family member or non-Aboriginal family member[28]. While NSW is performing much better than other states in this regard it is our view that every effort needs to be made to place an Aboriginal child with a member of their family or kin and that the Aboriginal Placement Principles are strictly adhered to.

The frequent lament we hear is that there are not enough Aboriginal foster carers in the event that a child cannot be placed with family or kinship carers. It is our view that there be a focus on improving the recruitment and retention of Aboriginal carers. We note the NSW Ombudsman Report Supporting the carers

---

[26] at pages 27 and 28.

[27] SNAICC (Secretariat of Aboriginal & Islander Child Care) 2005, *Stable and Culturally Strong Out of Home Care for Aboriginal and Torres Strait Islander Children*, SNAICC, Melbourne, page 21.

[28] Australian Institute of Health and Welfare, Child Protection Australia 2010-2011, (2012) Canberra, ACT, at page 71

of Aboriginal children, should be of assistance to Community Services in this regard.[29]

Streamlining Adoption

PROPOSAL 11:
That the Children's Court be conferred jurisdiction to make adoption orders where there are child protection concerns.

Question 11

Do you agree that there are benefits in conferring adoption jurisdiction to the Children's Court?

We are not convinced that enough reasons have been provided by the Discussion Paper to justify transferring the jurisdiction to the Children's Court. As a general comment we think that it is important that the adoption proceedings are dealt with by a Court that has fresh eyes on the issues, and immune from any perception of bias or partiality, especially from the birth parent's point of view.

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

We have concerns about this proposal. It cannot be assumed that just because a carer was assessed to be appropriate as an OOHC carer that therefore they do not need to be comprehensively assessed again as an adoptive parent. It may very well be there are many concerns about the placement that have not been identified.

PROPOSAL 13
Enhance the permanency planning capacity of non-government services by merging the NSW standards for Statutory OOHC and the NSW Adoption Standards

We are not in a position to offer a firm view about this proposal.

PROPOSAL 14
Amend the *Adoption Act* to improve the involvement of birth parents in planning for the adoption of their child including allowing non-consenting parents to be parties to an adoption plan and greater use of alternative dispute resolution in adoption proceedings so that parents are fully engaged in planning for matters such as contact.

---

[29] NSW Ombudsman, *Supporting the carers of Aboriginal children: A review conducted under section 11(1)(c) of the Community Services (Complaints, Reviews and Monitoring) Act 1993*, June 2008

While in principle it is better to improve the involvement of birth parents in planning for the adoption we re-iterate our concerns about the limitations of ADR, as discussed below.

PROPOSAL 15

Amend the *Adoption Act* to provide for the additional grounds for dispensing with parental consent, including grounds where:

- **(a) the parent is unable to care for an protect the child e.g. The parent is incarcerated for an offence against the child, or the parent repeatedly refused or neglected to comply with parental duties and reasonable efforts have failed to correct these conditions.**
- **(b) A parent cannot be located, despite having given an undertaking to keep FACS (CS) informed of their whereabouts**
- **(c) There is no realistic possibility that the parent will be able to resume full-time care of the child or young person because reasonable efforts have failed to correct the conditions leading to the child or young person's placement and it is in the best interest of the child or young person to make the decision now.**

Question 15
What should be the additional grounds for dispensing with parental consent?

We strongly oppose proposal 15 in its entirety.

We reiterate our concerns about the inadequacy of programs that aim to improve the parenting skills of Aboriginal parents. We are greatly concerned that parents may have been deemed to have "failed to correct the conditions leading to the child or young person's placement" when the programs, or support provided to those parents, were completely inappropriate for the parents.

Case Study 4

Client 4 is the maternal grandmother whose grandchild was removed at birth from her young teenage mother (our client's daughter). The hospital staff made a report to Community Services alleging the mother 'was not bonding with her newborn and showed no interest in tending to her baby'.

Our client's daughter went into shock and severe depression after her baby was removed without any prior warning. Our client arranged for her daughter to attend counselling for her depression and ensured that the daughter attended and completed all the necessary parenting courses in accordance to her undertakings with FACS. However, the birth mother had breached one undertaking – the requirement that she secure suitable accommodation (other than with her mother). Our client and her

daughter attended several private rental inspections without success, and social housing wasn't a possibility due to the lengthy waitlist.

The daughter's lawyer advised her in court that if she doesn't secure suitable accommodation before the next court date, then she is not to bother turning up to court. Our client's daughter took the advice literally and did not attend subsequent courts dates, as she hadn't found 'suitable accommodation'.

The baby was placed with a non- Aboriginal carer with Court orders providing that adoption may be considered when the baby turns two years of age. The child has recently turned two and our client's daughter has been notified of the carer's intention to apply for adoption.

The grandmother and the birth mother are devastated and traumatised by the initial removal of the child and now the possible adoption.

The only undertaking that the teenage mother breached was not securing accommodation. An undertaking that had little chance of being met in Sydney's competitive private rental market, or the under resourced social housing scheme.

We oppose any attempt to dispense with a fundamental duty by the State to make a genuine attempt to obtain parental consent. To rely on an undertaking given by a parent to keep Community Services informed of their whereabouts, is harsh and an unfair heavy burden.

There are various reasons why a birth parent may fail to keep Community Services informed. This may include the following:

- financial hardship which may mean the birth parent has no mobile, no credit on mobile, is homeless;
- poor literacy;
- disability (which may be undiagnosed);
- ongoing issues of trauma and loss which has led to mental health issues (such as depression and anxiety);
- incarceration for offences unrelated to the child;
- fear of contacting their Community Services caseworker due to an unworkable relationship that has led to complete disengagement.

In situations where a parent can't be located, we assert that Community Services make every effort to locate a parent. It may be that legislative change is required to enable Community Services to seek a location order, similar to a Commonwealth Information Order under the *Family Law Act 1975.*

Birth parents in prison

We are particularly concerned about the impact this proposal would have on birth parents in prison. None of the clients we have assisted in prison have been in prison for offences against their child, but many of them are parents. In the instances where Community Services are involved with those children our legal assistance frequently involves contacting Community Services to seek

information about our client's children and follow up with any contact orders that are not being followed. Too often our clients in prison are ignored by Community Services, and we are very concerned that it would be easy to say that we cannot locate them, or they have "refused or neglected to comply with parental duties and reasonable efforts have failed to correct these conditions".

Timeframes for achieving restoration

PROPOSAL 7
Legislate restoration timeframes – within 6 months for children less than two years and within twelve months for children older than two years.
Q 7: Do you agree with the restoration timeframes proposed?

We do not agree with the proposed restoration timeframe. This is even more so when adoption is not being contemplated as the last option in the hierarchy of placements.

Once again we reiterate our significant concerns about the support and programs offered to Aboriginal parents. We once again stress the adequacy and cultural appropriateness of these programs should be the focus of the NSW government, rather than stipulating strict deadlines for restoration. We have spoken to clients where there has not been any early intervention offered to parents, such that the first time they offered some type of support is when their child is removed. This is especially true for clients who have had babies assumed into care after birth at the hospital. Yet if this proposal was to be legislated these parents would need to achieve improvements or changes much faster than the Discussion Paper recognises is appropriate for a PRC (being 12 months). We submit that a great deal more consultation and research would need to take place with a broad range of experts before such strict time frames were legislated.

We also submit that caution should be used when looking at other jurisdictions to justify changing practice or legislation in Australia. Time does not permit us to consider child protection legislation in the United Kingdom, the USA or Canada. However other variables must be considered, including how many resources are devoted to early intervention in other jurisdictions.

It is our view that the Children's Court should have unlimited discretion to set the restoration timeframe based on the guidance and evidence of support workers and professionals working with the parents.

PROPOSAL 9
Provide permanent care to children and young people when adoption is not in their best interest by:

(a) introducing long-term guardianship orders

(b) repealing section 149 of the Care Act that provides for sole parental responsibility orders as this provision is underutilised.

Question 9 (a)

Do you agree with the circumstances to which guardianship orders would apply?

In principle we support Proposal 9(a)

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

It is our view that provisions for financial assistance should be included in any proposed guardianship order.

Proposal 10 Concurrent planning

Time does not permit us to explore or consider the merits or not of this proposal. Suffice to say that we suggest more consultation and research would need to occur before implementing this proposal.

SECTION 3

Contact

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

We discussed above that it has been identified that there is a significant research gap in relation to the needs of Aboriginal children in OOHC, and note the following findings from a literature review specifically around contact issues for children in OOHC state:

> "The research is similarly limited on the specific contact needs of children and young people who are Aboriginal or Torres Strait Islander or from culturally diverse backgrounds". [30]

Wirringa Baiya also submits that it's law reform submissions should be read in the context of the Article 9.3 of *The United National Convention on the Rights of the Child (United Nations, 1991)* which articulates the child's right to parental contact should be respected except where it is contrary to the child's best interests.

---

[30] Nehad Prasad, "Decision making principles around contact visits, A Literature Review", *Uniting Care, Children Young People and Families Research Paper, 3 March 2011,* page 10

The Discussion Paper raises a number of proposals around the issue of contact between children and young people in OOHC, and others with a focus on birth parents, which refer to situations where there is no "prospect of restoration".

We would argue that the concept of "contact" be defined more broadly, so as to include extended kin and siblings in particular, as Aboriginal families structures are extensive. Often more than one Aboriginal child is in care and contact with other siblings and other parental figures should be reflected in policy recommendations dealing with contact. We think that this issue has not been adequately addressed in the Discussion Paper.

It may be that current research presents strong arguments both in support of and against contact visits for children in OOHC. However, we note (as we have previously) that for those that make this their life work there is little research about our client's experiences, even though they will be disproportionally affected by the policy direction and recommendations in this Discussion Paper.

The Discussion Paper states:

> "Contact is not always beneficial and in some instances can have negative effect effects on children. Research shows many children experience behavioural difficulties, loyalty conflicts and anxiety before and after contact and, in cases of unsupervised contact children can be exposed to further abuse."[31]

We argue that whilst it may be the case that contact is not always beneficial in some cases, there is research to show overall that creating an open environment around contact issues has positive outcomes. Including that children are "more likely to be able to explore their identity, background and birth family." [32]

We argue that this is particularly important for Aboriginal children given their extended family structure and the intergenerational trauma caused by the *Stolen Generations.* The Discussion Paper goes on to say:

> "The literature highlights that carers who have open discussions with their foster children about their past, their relationships with their birth family and who are supportive of contact are essential to positive outcomes for contact visits." [33]

The importance of Aboriginal children in OOHC maintaining contact with their family, even if difficult, has been stressed by The Secretariat of National Aboriginal and Islander Children in Care (SNAICC):

> "Contact with family should not be avoided because it is seen as disruptive and unsettling; instead it must be seen as a positive and

---

[31] At page 43

[32] Nehad Prasad, Decision making principles around contact visits, A Literature Review, *Uniting Care, Children Young People and Families Research Paper*, 3 March 2011, page 10

[33] ibid, page 10

> necessary part of the child's experience of out of home care – unless safety issues prevent it. Contact with family should include contact with the child's extended family."[34]

We submit that the issues of behavioural difficulties, loyalty conflicts and anxiety also come into play in other contacts arrangements between parents pursuant to Family Court orders. Parents and children in this jurisdiction are not spared these difficulties. Yet the Family Court does not order no contact for this reason alone.

We would argue that as long as children are safe physically and psychologically, these issues of 'difficult' behaviour, loyalty and anxiety, if they fall within a normal range, are perhaps best dealt with in an open fostering arrangement so they can be worked through and not suppressed and left unresolved.

Concept of "no possible restoration"

We often advise Aboriginal women where there has been deemed no possibility of restoration. These clients are either the birth mother or relative or kin carers of children and young people in OOHC.

While we understand the principle of "establishment" in care proceedings, and even though we do not have access to all the evidence that is provided in care proceedings, we sometimes get calls from clients where we wonder how "establishment" was established. These kinds of matters are often where Community Services has been very quick to breach clients on undertakings or PRCs. We refer to Case Studies 3 and 4, discussed above, to illustrate this point.

The point we seek to make here is that in some cases the finding that "no restoration is possible" can be flawed, even if it found by the Court. Such a declaration can be devastating for any parent and child, but it is particularly so for Aboriginal adults and children who are already socially and economically disadvantaged and often scarred by the intergenerational trauma and legacy of the 'Stolen Generations'.

Problems with contact

In our advice calls we tend to hear more from parents who have lost parental responsibility and are having difficulty with getting contact visits.

Usually the agency that is meant to facilitate contact does not. Our clients feel that they are at the mercy of these agencies. They feel in a bind because if they complain about contact not being facilitated they fear they will put agencies offside and that will result in less contact because they are deemed uncooperative.

Clients also have practical issues about being able to make contact visits, which they often feel are not being taken into account of by facilitating agencies. Our

---

[34] SNAICC opcit 2005, page 21

clients are socially and economically disadvantaged and whilst agencies may have an intellectual appreciation of that, we sense that sometimes caseworkers do not have a practical appreciation of those issues. For example, a client may be technically homeless because they "couch surf" which can increase the distances they have to travel and the financial costs to make contact visits and there a no concessions from agencies to assist with these issues.

Sometimes clients appear to not have an appreciation of the significance of maintaining contact visits, particularly in the broader context of legal repercussions. They often lose hope if they find that the agency that is meant to facilitate contact visits is not helpful. Clients tend to think "What is the point if they make it so hard to see the child?" particularly when they have a lot of other issues often going on, as is often the case. Clients then subsequently find that this is later held against them if they seek restoration, or contact orders at a latter stage when they are more settled.

We are concerned that case planning is often dominated by the view of the relevant agency and where issues of safety for children are at hand this is not an unreasonable position. However, Wirringa Baiya believes that it should be acknowledged that the views of the relevant agencies are not always as impartial to the facts of the circumstances at hand. It is our experience that the culture of particular agencies (state or non-government) and their different offices can vary considerably in dealing with our clients and contact arrangements. Clients will often note that transfer to different office or caseworkers can result in a breakdown of communication and contact visits.

On the other side, Wirringa Baiya has had calls from foster carers who have difficulties with contact arrangements, which they find the relevant agency has been unresponsive to.

CASE STUDY 5

Our Centre received a call from an Aboriginal grandmother who was caring for some grandchildren. Although the relevant orders in place stated that the parties are not to put down the each other especially in front of the children, the foster carer grandmother is regularly verbally abused and intimidated at the contact changeover place, which is a police station. The client found both the police and Family and Community Services unresponsive to her complaints.

It is not our view that either party should be penalized, rather that the issue of contact itself be revisited in light of its purpose and safety for children involved. It highlights the issue the foster carer's complaints is not just about the birth parents, more that agencies, including Community Services, lack of support in tackling the issue for the benefit of all parties concerned.

More typically we receive calls from clients having such inadequate contact with children so as to be meaningless, and this in itself gives rise to high levels of

frustration and anxiety which have to be suppressed constantly if a client is to hope to be awarded some meaningful contact.

PROPOSAL 18:
Develop a common framework about contact arrangements between children and young people and their birth families to guide designated agencies when making contact decisions.

Question 18:
What should be the key elements of a common framework for designated agencies in determining contact?

The premise for this proposal is sound. If designated agencies are to develop contact arrangements, a common framework should guide them all.

The Discussion Paper suggests that the Community Services' Guidelines and the Children's Court Contact Guidelines for Magistrates be used a starting base and we have no objection to that.

However, we believe there should be a real consultation about developing a common framework and that should include interested individuals and other key agencies, including but not limited to legal services such as the Aboriginal Legal Service, the NSW Legal Aid Commission and Wirringa Baiya. It goes without saying that Aboriginal stakeholder agencies should also be included given the high overrepresentation of Aboriginal children in care.

It is our view that before key elements of a common framework for designated agencies, is determined:

1. A broad consultation process should occur, particularly with Aboriginal stakeholders because of the overrepresentation of Aboriginal children in OOHC.
2. Those children in care, if they have the capacity and interest, can be invited to be involved in the process of developing a common framework.
3. That a common framework is in as simple and plain language format as much as possible.
4. That it is mandatory that all involved in case planning for contact have a copy of the common framework to refer to.
5. There is a commitment from designated agencies to train caseworkers around Aboriginal cultural issues. This is important to inform those workers about relevant issues to take into account when dealing with Aboriginal families and developing contact arrangements in case plans.
6. That cultural preservation is maintained as a key element in a common framework.
7. There are opportunities to review a common framework yearly with an invitation to previous agencies and individuals involved in the initial consultation as well as involvement of any relevant new interested parties.
8. That where contact exchanges occur in places outside facilitating agencies that guidelines are available to employees at the those sites (for example

police stations) that guide people in dealing with difficulties that they see arise. For example, witnesses to any type of intimidation at exchanges feed back this information to the relevant facilitating agency.

9. That the model includes a commitment by agencies that facilitate contact to be involved in research about their case management of contact issues either by their own agencies or other agencies
10. That any such research forms part of a national collection model of Australian research about out of home care that is held at a appropriate location that is accessible which is a recommendation and aim of the National Child Protection Clearinghouse.[35]
11. That any common framework fits in with any national guidelines that may be developed around these issues at a latter date, which hopefully will be a reflection and consolidation of best practice models in various states so that there is consistency for children and young people nationally on such issues and they are not subject to the political colours of the local state government that is in office at any time.

PROPOSAL 19
Improve the resolution of contact disputes by:
(a) requiring ADR be used to settle contact disputes
(b) where ADR is unsuccessful, contact disputes will be resolved in the Children's Court or the ADT or the Family Court
Question 19 (a):
How should disputes about contact be resolved if they are not able to be resolved through ADR?
Question 19 (b):
If Model 1 is the preferred option and the Children's Court retains the power to make final orders about contact where there is no realistic possibility of restoration, should such orders be of a limited duration? For what time period?
Question 19 (c):
If Model 2 is the preferred option and the Children's Court does not retain the power to make final orders about contact where there is no realistic possibility of restoration do you agree that:
• where the minister or a designated agency has parental responsibility, the ADT be empowered to review the contact decision and make contact orders and
• the Family Court is the best forum for making contact orders if a third party has parental responsibility?

19(a)

Given the critical importance of contact we are of the firm view that the Children Court should be able to make contact orders in relation to all children subject of

---

[35] Leah Bromfield and Alexandra Osburn, "Getting the big picture" A synopsis and critique of Australian out-of-home care research, *Child Abuse Prevention Issues No 26, 2007*,page 40.

care proceedings, whether restoration is possible or not. As the *Wood Special Inquiry* report stated:

> "The Senior Children's Magistrate argued that contact is:
> *too important a matter to be left to the internal process of the Department of Community Services or to private arrangements between the Department and agencies whose own interests in that regard may not entirely coincide with those of the child or young person."*[36]

The *Wood Special Inquiry* also noted the support of the Legal Aid Commission, the Aboriginal Legal Services and a number of other peak bodies for the retention of the Children's Court to make contact orders.[37]

The recent evaluation of the use of Alternative Dispute Resolution (ADR) in the care and protection jurisdiction by the Australian Institute of Criminology showed that the majority of disputes were not resolved by ADR[38]. In the case of contact disputes only 40% were resolved by the Dispute Resolution Conference model (DRC) and 26% resolved by the Legal Aid Pilot.[39] The evaluation noted:

> "Most stakeholders involved in the management and delivery of DRC and the Legal Aid pilot conceded that a large portion of contact disputes could not be resolved through ADR and that the Children's Court was best placed to adjudicate on contact disputes and determine the most appropriate resolution."[40]

Therefore, if ADR is to be attempted before the court adjudicates a contact dispute, it is critical that the right model of ADR is used.

We note that the authors of the ADR evaluation made a number of recommendations as to how improve the effectiveness of both models. We in particular refer to Recommendation 11, which makes a number of points including:

- Aboriginal cultural awareness training for professionals
- using an Aboriginal co-facilitator to assist the Children's Court Registrar
- inviting elders to attend the ADR to advise on cultural issues
- introducing an Aboriginal support worker to provide advice to families on how the ADR program will operate
- conducting conferences away from the Children's Court
- additional resources for the Aboriginal Legal Service to enable it to assist more families.[41]

---

[36] Opcit, para 11.211, at page 439.
[37] Ibid pages 440-442.
[38] ibid
[39] ibid
[40] ibid
[41] ibid, page 136

It needs to be acknowledged that there will be power imbalances between parties in ADR and thus parties seeking contact must always be entitled to legal representation.

In addition, we believe that the number of hours allocated to ADR should be increased. This is because Aboriginal people may need more time to be able to take on board the information being presented (both legal and non-legal) and have more time to express their thoughts.

It needs to be acknowledged that issues of trust and rapport are paramount to success in ADR and particularly so where Aboriginal families are involved because of a traditional distrust of welfare authorities.

With respect to Aboriginal cultural awareness training facilitators of ADR need to understand that working with Aboriginal families means having an understanding of individual and intergenerational trauma, including issues around domestic violence and sexual assault and the impact of the Stolen Generation.

19(b) and 19(c)

We note the benefits of Model 1 with the Children's Court given it is the court that already deals with the care proceedings, however imperfectly. The Children's Court should have a good understanding of the case and the needs of all parties and therefore should be best placed to make contact orders. We also acknowledge it would be confusing for clients if there is a new different court dealing with care issues.

However, in relation to Model 2 we also see significant benefit in the Family Court determining contact disputes given it is considerable experience doing so. We assume that the *Family Law Act* would apply, which has a different approach to contact disputes starting with the premise that when making decisions a primary consideration is a child having a meaningful a relationship with his/her parents (see section 60CC(2)).

On the other hand, our concern with Model 2 is that some matters are referred to the Administrative Decisions Tribunal, which has little experience deciding contact disputes.

Finally, we do not see that such contact orders should be limited to a certain time period. If a matter has not been resolved in ADR this would indicate a high conflict position on behalf of all parties and a expiry date on contact orders would in our view appear to undermine that process. However, this is not to exclude the right of a party to go back to Court to change contact orders, either because they are not working or in fact are working so well that contact should be increased.

PROPOSAL 20
That the Children's Court has the power to enforce contact orders and

arrangements.

Question 20:
Should there be mechanisms for enforcement of contact agreements or orders and what should these be?

The premise for this proposal appears to be that the issue of enforcement of contact orders is not clearly being dealt with. This is because a number of different jurisdictions including the Children's Court, the Family Court and Supreme Court have jurisdiction.

We would agree that the Children's Court should have the power to enforce contact orders and arrangements that are being breached by agencies only. However, once again we re-state our view that inadequate contact between parents and children in OOHC seems to be more of an issue.

It is our position that birth parents or significant others who have contact rights pursuant to orders should not be breached for not making contact. There are many factors, not least economic and social disadvantage that are at play. For example, if birth parents are homeless and couch surfing they may have insufficient money to pay for travel to get to contact visits especially if there is a long distance to travel.

The mechanisms for enforcement of contact agreements or orders could include:

- The court advising funding agencies of any agencies not facilitating contact
- Make up contact time being ordered

Prohibition Orders

Wirringa Baiya has concerns about prohibition orders that restrict birth parents from:

- having contact outside formal contact arrangements
- approaching fosters carers about the issue of contact arrangements

Prohibition orders appear quite punitive. It is our view is where this type of behaviour is occurring that it would indicate that the issue of contact has not suitability been resolved. We would suggest that if these issues are occurring further case planning around contact is required preferably over punitive prohibition orders.

We would also argue that if any kind of intimidation occurs from any parties involved in contact that the relevant agencies deal with these issues promptly before matters escalate and parties involved in AVO proceedings, which could further escalate and inflame matters.

Wirringa Baiya submits even if "restoration" is not possible a more incentive based approach to increase contact could work. For example, voluntary enrolment in courses that promote "better parenting " could be used as an

incentive to a birth parent to enable them to gain more contact with their children who are in OOHC.

PROPOSAL 21
Establish a comprehensive legislative framework for the use of ADR in the child protection sector dealing with a range of matters including definitions, role, obligations and protections of convenors, confidentiality of ADR processes, and the limitations on the admissibility of information or documents disclosed during ADR in any subsequent court proceedings.

Q 21: What key provisions do you think should be included in the legislative framework for ADR?

We refer to out discussion above in relation to the issues about ADR and how it can be improved.

PROPOSAL 22
Clarify and consolidate in the legislation the provisions relating to the regulation of special medical treatment for children and young people.

We are not in a position to respond to this proposal.

PROPOSAL 23
Minimise the improper use of social media in a child protection context by strengthening provisions in the Care Act to prevent the unlawful publication of names and images of children and young people on social media sites and to prevent the publication of offensive or derogatory material about FACS (CS) workers, which are intended to harass.

Q23(a) **In what other ways can children and young people be protected from the unlawful publication of information and images on social media sites?**

Q23 (b) **Should it be an offence to publish comments designed to harass child protection workers on social media sites?**

Q23 (c) **Should it be an offence in the Care Act for a convicted sexual offender of children to use social media?**

Question 23 (b)

We do not think that a new offence should be created. Existing NSW state law, namely defamation law and harassment provisions in criminal law can address the above issues.

Question 23(c)

While there is some merit in this proposal we would suggest that an exemption of some sort is appropriate in certain cases where the offender was a child when the offence was committed.

PROPOSAL 24
Simplify the current scheme of parental responsibility (PR) orders.

We are not in a position to respond to this proposal.
Q 24: In what ways do you think that parental responsibility orders can be improved?

We are not in a position to respond to this proposal.

PROPOSAL 25
Allow Supervision Orders to be extended for a further twelve months where the original order has expired and no report has been filed for the court's consideration.

We don't agree with this proposal. The proposal goes against natural justice principles. If the original order has expired then the matter should be heard with fresh evidence and both parties should have the opportunity to present their case.

It is our view that once the order has expired the parent should assume (where there were no reports during the supervision period) that the purpose of the order was achieved and the need for a further supervision order is not warranted

PROPOSAL 26
That Absec and CREATE should have access to personal information to permit fulfilment of their objectives.

We would be concerned about any proposal that allows sharing of information without the consent of the parties involved.

PROPOSAL27
Private Health professionals be able to share with other relevant agencies personal and health information about children, young people and families without client consent where this relates to the safety, welfare and wellbeing of a child or young person.

We would be concerned about any proposal that allows sharing of information without the consent of the parties involved.

PROPOSAL 28:
That there be a legislative obligation to report on the deaths of children and young people in OOHC

Q28: Do you think FACS should be required by legislation to table an annual report to Parliament on their involvement with the families of children known to FACS (CS) who have died?

We agree with this proposal. We agree that transparency and accountability are essential to ensure government intervention to protect children is working to improve their lives.

PROPOSAL 29
Amend the *Care Act* to:
(a) Clarify that section 122 applies to funded residential providers and for profit business only (not private citizens)
(b) remove the penalty in section 122 of the Care Act.

We support the proposal to remove the penalty provision in 29(b). We agree that punitive measures are not the most effective way to encourage reporting.

Q 29: Do you foresee any unintended consequences of clarifying these reporting requirements under the Care Act?

Parents of missing children (who are staying with family or friends) will no longer be notified that their children are safe and well.

Other issues

Legal representation and support

We are frequently contacted by women who struggle to understand the legal process in relation to care proceedings. We believe the following are the main reasons for this:

1. Many lawyers are often time poor and/or unable to explain the process in simple language that is not overly legalistic and full of jargon.
2. Many lawyers lack Aboriginal cultural awareness or worse, are racist.
3. Almost all parents are highly distressed by the removal of their children and thus psychologically unable to take in, and process the information provided.

It is our strong view that all solicitors that work in the care jurisdiction need to have comprehensive Aboriginal cultural awareness training given the strong likelihood they will act for an Aboriginal person in care proceedings.

We also think that there is a role for some type of court support for parents, to provide emotional support through the process as well as clarify what was said or discussed in the court proceedings. Given the high numbers of Aboriginal

families in the care jurisdiction a large majority of these court support workers would need to be Aboriginal.

Lack of accountability once a child is placed

We also wish to express our concern about the failure to regularly check in with children about their placements in out-of-home care. We have spoken to many people over the years that have been abused, including sexually abused, by foster parents or kinship carers. There needs to be a system to regularly and adequately review the adequacy and appropriateness of those placements.

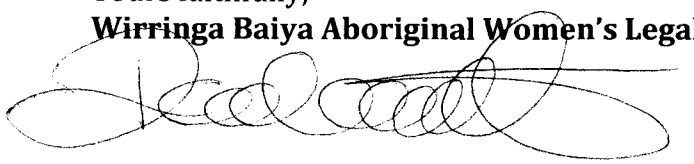
Final Conclusion

It is not clear from the Discussion Paper what will follow once submissions have been received. It is our view that many of the proposals being contemplated need a great deal of consideration, especially the impact on Aboriginal communities.

We have spoken to a number of Aboriginal workers who work with Aboriginal families either in an early intervention context or OOHC context and many were unaware of the Discussion Paper. Furthermore even if they were aware they do not have the resources or capacity to make a written submission to many proposals being put forward. Therefore we suggest that broad consultation needs to take place with the Aboriginal community in an appropriate and meaningful way.

Finally, if you have any questions about our submission please contact either Rachael Martin, Principal Solicitor, or Christine Robinson, Coordinator on 02-9569 3847.

Yours faithfully,
Wirringa Baiya Aboriginal Women's Legal Centre



Per: Rachael Martin
Principal Solicitor