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Ms Maree Walk
Chief Executive
Community Services
Department of Family and Community Services
Locked Bag 4028
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Dear Ms Walk

Ombudsman submission on the child protection legislative reform discussion paper (the discussion paper)

We welcome the opportunity to comment on the proposals for legislative change canvassed in the discussion paper.

We do not propose to make a detailed submission on all aspects of the planned reforms. Instead, we have sought to direct our comments to the proposals that aim to:

- increase parental accountability and expand the range of options for working with families to address child protection concerns;
- facilitate early and realistic decision-making about the prospects of restoration or alternative permanent care arrangements;
- increase the options available to support permanency;
- increase the use of alternative dispute resolution (ADR) across the child protection system;
- improve the regime in relation to contact; and
- alter the jurisdiction and powers of the Children's Court.

Parenting capacity orders and responsibility contracts

Expanding the scope of parent responsibility contracts

Parent responsibility contracts were introduced into the *Children and Young Persons (Care and Protection) Act 1998* (the Care Act) in 2006 after this office raised concerns about Community Services' reliance on, and failure to effectively monitor compliance with, informal undertakings by parents.

Provided that child safety remains the paramount consideration, we consider that a policy shift towards a much greater focus on family preservation has merit. As part of this shift, we agree that there is a need to strengthen the legislative mechanisms to support this work, including parent responsibility contracts. In particular, we support the proposals in the discussion paper to:

- extend the maximum duration of contracts from six to twelve months;
- make provision for contracts to be entered into with parents prenatally; and
- require Community Services to use a parent responsibility contract (or demonstrate why use is not appropriate) prior to commencing care proceedings.

Use of parenting capacity orders and responsibility contracts in the context of early intervention service provision

Early intervention initiatives can provide early assistance to vulnerable families, with the aim of improving family functioning and preventing children entering, or becoming entrenched in, the child protection system.

Under the reform proposals, it is envisaged that parent responsibility contracts and parenting capacity orders will secure formal commitments from parents to participate in treatment and/or parenting development programs. We support in principle the introduction of a hierarchy of progressively stronger options which are intended to gain the commitment of parents to deal with risks to their children. In fact, our investigation, monitoring and review work has identified many cases where very vulnerable families either declined to participate or withdrew from an early intervention service to which they had been referred, but there was a failure to recognise that the parents' lack of any commitment to accept much needed support meant that the child protection risks had escalated.

On a related note, it is our hope that the proposals focused on ensuring improved recognition and responses to risk, help to deal with our concerns about families being excluded from early intervention services because their child protection risks are deemed 'too high' on the one hand, and yet not 'high enough' on the other, to receive a casework child protection response.[1]

However, despite our support for the general thrust of these proposals, there are a number of service system and cultural challenges which warrant consideration. These are discussed below.

Building capacity

Service availability

The discussion paper notes that the purpose of parenting capacity orders is to mandate attendance at treatment services such as drug rehabilitation, counselling or parenting development courses.

Given the acknowledged capacity constraints in the service system, we believe that there may be merit in requiring an applicant for a parenting capacity order to satisfy the Court that an appropriate program or service is available.

NGO skills/culture

Parent responsibility contracts involve parents formally agreeing to work on improving their parenting skills and, by setting goals and related actions, encourage parents to take greater responsibility for the care of their child.

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[1] NSW Ombudsman, *Report of Reviewable Deaths in 2007,* April 2009

Our work in connection with parental undertakings has largely focused on the use of undertakings by Community Services. Under the proposed changes, non-government service providers are intended to play a significant role in monitoring compliance with court ordered undertakings. Our substantial body of review and investigative work has underscored the importance of child protection risks being rigorously assessed (including the need for expertise in relation to determinations about the capacity and willingness of parents to make required changes). Therefore, it is important to recognise a broad range of agencies in the non-government sector will need to develop consistent and highly skilled practice in relation to monitoring the circumstances of at risk families.

Consequences for breach

Currently, breaching a parent responsibility contract registered with the Children's Court gives rise to a rebuttable presumption that the involved child is in need of care and protection.

We note that the discussion paper poses the question as to what consequences should apply if parents fail to comply with parenting capacity orders, or parent responsibility contracts, entered into in the context of early intervention.

We consider that the rebuttable presumption that applies to Court registered contracts should not apply; instead, the consequences should be proportionate to the gravity of the circumstances giving rise to the early intervention; the nature of the breach; and the level of associated risks to the involved child(ren). However, it will be important to ensure that non-compliance or slow progress by parents in meeting relevant conditions acts as a trigger for reassessing the child protection risks.

Proposed permanency hierarchy

In general, we endorse the principles which have informed the proposed hierarchy of permanent placement options. We note that these options emphasise a strong focus on supporting families to achieve timely restoration, while recognising that, when restoration is not a safe option, permanent care arrangements should be established early.

In this regard, we support the proposed use of guardianship and adoption as options aimed at securing permanency for children who cannot live with their birth families. We also note that this approach is consistent with arguments we have previously put forward, including in our *Keep Them Safe?* report.

In that report, we emphasised that given the increased number of children in statutory care, there is a need to review whether existing models of care remain relevant and appropriate. We cited research by the Annie E. Casey Foundation in the United States which indicated that the best outcomes for children are achieved when there is a strong policy focus on the early provision of intensive support to enable permanent and stable family environments through reunification with parents, guardianship with extended family, or adoption.[2]

However, in terms of effective implementation of the proposed hierarchy, there are a number of challenges which will need to be addressed. These are discussed below.

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[2] Usher, Lynn, Crampton et al, (2009), "Cuyahoga County (Cleveland) Ohio Site Profile, Annie E. Casey Foundation, cited in *Keep Them Safe? A Special Report to Parliament,* NSW Ombudsman, August 2011.

Restoration

It is pleasing to note the strong focus in the discussion paper on the need to strengthen practice in relation to the restoration of children to their birth families. Our work in reviewing restoration practice has shown that decisions relating to whether to restore a child need to be based on solid evidence.[3]

From a policy and practice perspective, the challenge will be to ensure that decisions about restoration include:

- comprehensive assessments of parental capacity and the likelihood of timely change;
- thorough planning to identify what changes need to occur and the nature of the support required to facilitate these changes;
- active and well targeted monitoring of progress by parents in meeting specified goals and in ensuring that the developmental needs of their child(ren) are being met; and
- the capacity and preparedness to intervene in those cases where restoration does not provide children with adequate safety and support.

As the discussion paper acknowledges, this work is generally intensive and requires specialist skills. In this regard, recent initiatives by Community Services, including Practice First and the Family Preservation and Restoration Pilot, show promise.

Guardianship and adoption

As with decisions on restoration, applications to the Court relating to permanent placements must be supported by cogent evidence about the proposed or existing placement.

The discussion paper proposes to introduce guardianship orders and measures designed to streamline adoption, including concurrent planning. In general, we support this direction; however, we note that in certain cases, short term orders allocating parental responsibility to the Minister will remain the most appropriate orders to make because there will be a need to first obtain adequate evidence about the appropriateness of adoption or guardianship orders.

In addition, for each case the overriding focus should be on allowing the evidence to determine what options will best promote the safety, welfare and wellbeing of the involved child(ren). In this regard, the discussion paper's strong focus on safety, stability and permanency is apposite.

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[3] For example, our review of 63 children the subject of care orders who had a restoration case plan found that while all of these care plans outlined what was required of parents before restoration could occur, the level of detail about what they needed to achieve varied significantly. We found that some care plans did not address important issues such as how implementation of the care plan would resolve safety issues for the child, how the child's needs would be addressed or what services and supports would be required to support restoration. Furthermore, the care plans rarely detailed how any improvements to parenting capacity or to the safety of the child as a result of the parent(s) completing the requirements for restoration would be assessed or who would make the assessment. Finally, few care plans outlined what supports would be in place after the child had gone home.

In relation to the level of ongoing support that will be available for children who transition into permanent placements, we strongly endorse the proposal for financial support in relevant cases involving guardianship arrangements.

Many children the subject of guardianship and adoption orders are likely to have high needs resulting from trauma and abuse, and the full extent of these needs may only emerge after a period of time. As a consequence, a significant proportion of children are likely to require ongoing access to therapeutic treatment, including counselling and other forms of professional support to manage behaviours or to address health, education and broader welfare needs. In addition, particular life events and changing family circumstances may mean that the intensity and level of support required is likely to change over time.

On this issue, the Annie E. Casey Foundation research found that while stable placements with relatives or kin did not generally require active case management by departmental caseworkers, most carers opted to receive support – both financial and non-financial – on an as needed basis.[4]

Therefore, in order to deliver on the government's primary goal of increased stability and security for children who are unable to live with their birth families, it will be critical to explore how to best support those who take on the responsibility to care for these children in circumstances when support will be necessary.

The discussion paper also proposes a two year 'cap' on supported care arrangements. Once this period has elapsed, the paper envisages a move towards guardianship or adoption. In our opinion, the paper fails to outline why such a move would necessarily be in a child's best interests, particularly if there is no evidence of placement instability – or other relevant evidence – indicating that guardianship or adoption is warranted. Furthermore, we believe that, in certain cases, a mandatory move towards an adoption or guardianship order may, in and of itself, lead to placement instability.

In terms of the related but separate issue of determining the circumstances in which the State should provide financial assistance for supported care, we believe that this is an issue that requires further policy debate and refinement.

Safeguards

Self-regulation of supported care placements

As with children who enter statutory care, children who enter supported care do so because the Director General has formed a view that these children would be in need of care and protection were it not for the supported care arrangement.

We believe that there is merit in avoiding unnecessary scrutiny of supported care arrangements where the evidence clearly shows that the placement is both stable and secure. In this regard, we note the proposal for annual self-reports for such placements and question the utility of such an exercise. In our opinion, the nub of

[4] Tracey Field, Director Child Welfare, Presentation to ACWA Board of Directors on 16 May 2011; Usher, Lynn, Crampton et al, (2009), "Cuyahoga County (Cleveland) Ohio Site Profile, Annie E. Casey Foundation, accessed from www.aecf.org/ on 11 March 2012.

the issue around scrutiny and support ought to relate to the available evidence. In some cases, the evidence will point to the need for active monitoring and associated casework. However, in cases where there is solid evidence that supported care families ought to be allowed to continue free from intervention by the State, then we question why the State would seek to impose any procedural requirements on them. On the other hand, given that family dynamics can change, what ought to be regularly communicated to the carers - and children - in these families is the willingness of the Department to provide support if and when it is required.

Supervision orders

We note that the discussion paper proposes to amend the Care Act to allow for an automatic 12 month extension of a supervision order upon expiry of the original order, without Community Services having to file a progress report with the Court.

Our in-care review work has shown that supervision orders can provide an effective tool for assessing whether the circumstances that brought the child to the attention of the Children's Court have changed. However, given that most short term care orders are for a period of two years or less and that the maximum period of a supervision order is 12 months (with the possibility of extension in certain circumstances), in our April 2011 report, *Review of children on statutory orders with a view to restoration,* we recommended that consideration be given to amending section 76 of the Care Act to provide for longer supervision orders.

Therefore, we support the proposal for the Court to be able to make longer orders. However, we consider that the current requirement for Community Services to report to the Court is an important safeguard and for this reason, are of the view that Community Services should provide a report to the Court at the mid-way point, with a view to terminating supervision if the Court determines that this is in the best interests of the child.

Special medical treatment

We support the proposals in the discussion paper to clarify and improve the regulation of special medical treatment, including the administration of psychotropic medication to children in out-of-home care.

In our submission to the 2012 review of the Care Regulation, we expressed support for ensuring that psychotropic medication is administered in the context of a medical diagnosis and treatment regime, as opposed to a behaviour management plan. In this regard, we reiterate our view that the prescription of psychotropic medication, and associated treatment, should be recommended by a medical professional and form part of the child or young person's care plan.

We understand that Community Services has commenced discussions with the Ministry of Health to develop guidelines for carers and medical practitioners in

relation to the administration of psychotropic medication to children in care. This should assist to improve practice in this critical area.

ADR, Contact and the Court

We support the legislative proposals aimed at increasing the use of ADR. In our view, it is important that the full range of options for alternative dispute resolution are able to be considered both before and during care proceedings.

We have previously raised specific issues about the operation of ADR and the participation of Aboriginal people in child protection decision making. In this regard, our work has consistently shown that Aboriginal community leaders often have critical knowledge about children at risk and their family circumstances.

In our report, *Addressing Aboriginal Disadvantage: the need to do things differently,* and more recently in our submission to the review of the Care Regulation, we noted that the participation of Aboriginal community leaders in such processes would be better supported if the legislation were amended so that critical information can be exchanged with them.

In terms of the most appropriate legislative vehicle, we have referred to s.248 of the Care Act. In particular, we believe that, under this section and the related regulation, certain Aboriginal leaders could be designated as 'prescribed bodies' – thus enabling them to both receive and provide certain information relating to safety, welfare and wellbeing of children.

In our submissions, we have also acknowledged the importance of establishing appropriate safeguards to address specific issues, including for example, the need for confidentiality and for rigorous processes to assess the suitability of any Aboriginal leader who is being considered for 'prescribed body' status. Models and governance arrangements for the exchange of information would also need to be developed and trialled, in consultation with Aboriginal communities, to define who should be considered for 'prescribed body' status, what types of information can be exchanged and in what circumstances. Finally, it is important to note that a move in this direction should not be imposed on Aboriginal people. It would be a matter for particular communities, working in partnership with government, to determine whether they wish to adopt the information exchange arrangements that we have outlined.

In relation to the proposals in the discussion paper aimed at increasing the use of ADR to resolve decisions about contact, our work has highlighted that flexibility is crucial to making (and adjusting) arrangements in the best interests of children. For example, in our 2006 discussion paper *Care Proceedings in the Children's Court,* we commented that, in line with the Court's Contact Guidelines, contact arrangements can already be made in care plans, in the absence of Court orders. The benefit of this administrative arrangement is that it allows for contact arrangements to be

varied over time to suit the needs of children and other relevant stakeholders, without the need for ongoing involvement of the Court.

As we expressed in our 2006 discussion paper, we believe that it is reasonable for decisions about contact to be made in the context of case planning (rather than Court orders). In circumstances where there are disputes about contact, we believe that, in the first instance, these should be addressed through alternative dispute resolution. Therefore, we believe that, apart from those circumstances where the case plan goal is still restoration, the Children's Court should only have jurisdiction to make contact orders when there has been a failure of both the case planning and ADR processes to resolve this issue.

In order to promote consistency across the non-government sector and to ensure decisions about contact are made in the best interests of children, we also support the proposal in the discussion paper for the development of a common framework to guide designated agencies in relation to contact arrangements. The framework should also address issues such as the management of costs associated with contact, contact with siblings and extended family, supervision of contact and dispute resolution.

Finally, we note that at the legal stakeholder's forum on 26 February 2013, there was discussion about expanding the breadth of the Children's Court's jurisdiction and increasing its powers to enforce orders and to impose penalties. From a public policy perspective, we believe this warrants consideration and support the specific proposals in the discussion paper relating to both expanding the Court's jurisdiction and strengthening its powers.

We trust that our comments will be of assistance and would be happy to discuss or provide further information as necessary. If you have any questions, please contact Elizabeth West, Director, Systemic Projects, on 9286 0992 or email ewest@ombo.nsw.gov.au.

Yours sincerely

Bruce Barbour
Ombudsman

28 March 2013

Steve Kinmond
Deputy Ombudsman
Community and Disability Services Commissioner

28 March 2013