SUBMISSION: Amendments to Children , Young Persons and Their Families Act, 1997 (Feb 2008)

5. PERMANENT CARE OPTIONS WHERE REUNIFICATION IS NOT AN OPTION

The CfC counsels great care in approaching legislative amendment of any part of ss.42-50. This is because the CfC support "permanency planning" for children of any age at an early stage in their relationship with CAFS where CAFS assesses a risk that family capacity to change and reunification may not be feasible in the medium to long term.

The caution I suggest is to ensure that amendment relating to the older cohort will be able to mesh with the concept of "permanency planning" for younger children if Government adopts that as policy or as a statutory approach to all cases, as in some jurisdictions.

5.1 LONG TERM GUARDIANSHIP TO SECRETARY ORDER FOR CHILDREN AGED 12 AND OVER

The CfC accepts in principle proposals to provide a "long term guardianship to Secretary" order for children over 12 who consent and are thus seeking stability. The CfC recommends certain drafting principles be applied.

Criteria listed in s.290 of the Victorian *Children Youth and Families* Act 2005 includes several findings of fact necessary for such an Order. These include a finding that there is a person available for the child to live with for the duration of the order, that the child and the Secretary consent and most importantly that the parents are "unable or unwilling to resume custody and guardianship of the child:".

The Victorian Act requires that the Secretary review the operation of the order every 12 months and that the parents be notified of the outcome of the review. The parents may not apply for variation of the order (s.299).

In the Victorian model the parent or the child may apply for revocation of an order within 12 months of the order being made, but after 12 months may only apply to revoke with leave of the Court. This provision is to protect the child from repeated applications to revoke by a distressed parent. It is to be remembered that the parent will have had the right to appear and argue against an order at the time of its making.

The CfC strongly recommends that parents have the right to apply to a Court for a revocation of a long-term guardianship order, but as in Victoria that right be subject to leave of the Court in a proper case in "exceptional circumstances".
The CfC accepts that Permanent Care Orders in most systems are able to be varied and revoked on the application of parents, and that provisions such as preliminary leave applications and limiting repeated applications for alteration and revocation in all but exceptional circumstances will protect the child from unsettling eternal litigation. S.118 of the *Family Law Act* 1975 (Cth) is an example of drafting such provisions, or the principle in Rice and Asplund (1979) FLC 90-725 can be codified.

Any door slammed shut carries its own risks of harming the happy development of a late teenager and the writer can think of at least one case where that has happened against CAFS quite reasonable expectations. The lives of children and of their parents are in a constant state of flux.

5.2 PERMANENT CARE ORDERS AND PERMANENCY PLANNING UNDER 12 YEARS

Whilst it may seem attractive to insert such a provision relating to over-12s it would be unfortunate if doing this now missed the opportunity to revisit the system of long term (ie until age 18) and other

shorter-term orders that met the needs of those under 12 and in particular those under 3 years old.

Contemplating and planning for the possibility of permanent out of home care [however described] is not inconsistent with the primary object of keeping children safe in their own families where possible.

Indeed it is now widely accepted that permanency planning should begin sooner rather than later to prevent children "falling between the cracks" when parental care is found to be persistently unsafe and yet insufficient attention has been given to preparing the alternative.

In NSW for instance s.83 of the *Children & Young Persons (Care & Protection) Act* 1998 provides for the Director-General to take one of two paths in seeking orders, one where he assess that there is and the other where he assess that there is not "a realistic possibility of the child being restored to his parents". If there is, he is to prepare a permanency plan involving restoration and if not a permanency plan for "another suitable long-term placement".

Permanency planning is a fundamental part of stability in placement a thus a fundamental right of children taken into State care. It represents an example of the State as "model parent" making prudent long-term plans of which the birth parent is manifestly incapable.

It should be available for children of all ages upon first coming into State care. Criteria employed elsewhere include a Court finding that the child has been in out of home care for a set number of months related to their developmental age, and that by a process of structured assessment the birth family is unlikely to be able to provide a safe and stable environment for the child.

The CfC submits that in this present set of amendments the Government should give urgent consideration to specific provision for permanency planning and permanent care orders, and not leave those considerations to later. The evidence base for improved outcomes with stable placement and the seriously adverse outcomes of unstable and multiple placements are trite in the child protection industry in Tasmanian, Australia and internationally.

Discussion of the "long term guardianship" proposal in "Additional information Appendix 6.7.4" to the Cabinet Minute at pp.17-18 raises the question, whether and how provision ought to be made for children of all ages, or whether the mere expression of jurisdiction in s.42(4)(d) is enough.

It is noted that the author of the Appendix somewhat curiously refers at page 18.4 to s.48(2) which relates to the cessation of orders on Family Law Act orders being made.

More relevant are the obscure and indirect sub-sections 49(4) and 49(5) which fall short of providing limitations making long term orders, and of giving sufficient guidance to the Court in making them.

The CfC recommends that certain minimum provisions be provided for every protection order, as follows:

5.2.1 Early mandated development of Care Plan

The Court making an order has to be satisfied that what is proposed is a better option for the child than what preceded it. It is essential that the Court be provided with a care plan. Such provisions are now standard practice in many Australian jurisdictions.

In the case of long-term orders such plans will include a disposition plan and a stability plan (cf s.322 Victorian Act) before the Court even has jurisdiction to make any final order.

5.2.2 Minimalising personal disruption

The amendments can insert "ladder" provisions that reinforce the "least intrusive" objects in s.8(2)(b) by requiring that no order be made unless an order further down the ladder is not adequate to provide for the safety, wellbeing and development of the child.

For instance s.276(2) of the Victorian Act prohibits the Court from making any order resulting in out of home care without first considering and rejecting an order leaving the child in their parents' home and finding that all reasonable steps have been taken to support the child within the home.

This principle may be a theoretical part of child protection practice but legislation would bring it to the forefront of practice and increase the lower than national average levels of kinship care in Tasmania.

5.2.3 Explicit kinship preference

Another "rung" of the "ladder" that should be considered is the explicit exclusion of alternate kinship care and placement in the child's habitual geographical region as viable protection options before placing the child in the care of foster carers or Departmental carers.
The Aboriginal Placement Principle [immediate family – extended family – local aboriginal community – wider aboriginal community] is less expressly set out in the Tasmanian Act than it is in other jurisdictions, but the harm of family and geographical dislocation caused to Aboriginal children and families has a history of having been replicated in non-Aboriginal community. Examples are to be found in s.13 *Children and Young Persons (Care and Protection) Act* 1998 NSW, and s.13 *Children Youth and Families Act* 2005 VIC, and s.83(4) *Child Protection Act* 1999 QLD.

IT IS SUBMITTED that it is timely that the principles of s.9 should – and could with little statutory difficulty – be applied to the non-Aboriginal children mutatis mutandis, eg without reference to "recognised Aboriginal organisation" et al.

Submisison to Review of the Family Violence Act 2004 (2008)

RECOMMENDATIONS

Accordingly the CfC makes the following recommendations:

1. While the criminal character and public importance of family violence has historically been overlooked and that oversight has been directly addressed by the FV Act, the familial and psycho-dynamic dimensions continue to be overlooked.

For this reason it is important to build into any statutory scheme to address family violence formal processes for resolving relationship breakdown and for protecting and advancing the best interests of children. The models for these processes have been developed in the specialist environment of the Family Law Act 1975 (Cth).

To the greatest extent possible, and consistent with the safety of adults and children, the Family Law Act models for family dispute resolution and the maintenance of meaningful but safe relationships between children and their parents and significant adults should be adopted.

This includes using terminology from the Family Law Act in appropriate places, such as "the best interest of the child", "meaningful relationship,", "living with", spending time with" and "communicating with".

ACCORDINGLY IT IS RECOMMENDED that section 3 the objectives section of the FV Act be amended to include a statement that recognises the potential for conflict between the "interests' of a parent victim of family violence and the interests of the children of the parties who are members of the parties' household.

This might be achieved by adopting in a sub-section (2) all or part of the principles set out in s.60B of the Family Law Act 1975 (Cth). The CfC SUBMITS that the following paragraphs at least be included and that such a subparagraph might read:

3(2) In respect of affected children that the safety wellbeing and interest of children are met by:

(a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and

(b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

(c) ensuring that children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and

(d) parents should agree about the future parenting of their children; and

(e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture) and for the purposes of this paragraph but without limiting its effect an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right to maintain a connection with that culture; to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and to develop a positive appreciation of that culture.

2. IT IS RECOMMENDED that s.7 be amended to include in the definition of “family violence” violence between parents and children and between the domestic partners of parents (step-parents) and children in the home.

This can be achieved by the insertion of a third paragraph

7(c) any of the types of conduct committed by a person, directly or indirectly, against a child of that person or that person's spouse or partner being conduct referred to in paragraph (a) or in sub-paragraphs (b)(ii) or (iii) of this section.

3. IT IS RECOMMENDED that the amendment to s.7 exempt from the definition violence against children the use of force of a kind referred to in s.59 (1) of the Crimes Act 1961 NZ.

This can be achieved by the insertion of a fourth paragraph

7(d) Paragraph (c) of this section does not apply to the use of physical force by a parent or person in loco parentis being force not applied for the purposes of punishment but force reasonable in the circumstances:

(i) to prevent harm to the child or another person,

(ii) to prevent the child committing a criminal offence,

(iii) to prevent the child engaging in offensive or disruptive behaviour; or

(iv) being inconsequential force used in normal daily tasks incidental to good care and parenting.

4. IT IS RECOMMENDED that s.16 be amended by the addition of a provision that if an order excludes any time spent with or communication with an affected child by a person to whom a FVO is issued or a person against whom a FVO is made, then such an order should only be made upon evidence that there is an unacceptable risk the person is more likely than not to commit a family violence offence on or in the presence or hearing of the child which has the capacity to adversely affect the welfare of the child.

5. IT IS RECOMMENDED that in any case where an order may restrict time with or communication with an affected child, s.16 expressly direct Police and Magistrates to

consider what conditions can be imposed on an FVO that will best achieve the objects the CfC has submitted in Recommendation 1 above.

6. IT IS RECOMMENDED that if an order is made at interim hearing limiting time or communication between a Respondent and an affected child, then the views of the child should be sought as to the conditions of any restraint placed on their relationship with the respondent.

7. IT IS RECOMMENDED that s.18 be amended to provide that the Court, in imposing any condition having the effect of restricting a person's time with or communication with an affected child, shall have regard to the best interests of the child as the paramount consideration and consider the benefit to the child of having a meaningful relationship with both of the child's parents; and the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Alternatively the Court could be directed to consider the matters set out in s.60CC of the Family Law Act 1975 before imposing orders that would have the effect of restricting a person's time with or communication with an affected child.

8. IT IS RECOMMENDED THAT there be no final FVO made until the parties have attended accredited mediation, the Family Relationship Centre or an accredited Family Dispute Resolution Practitioner under the Family Law Act, and that organisation has certified what if any progress has been made and whether the parties have themselves agreed on the conditions that should attach to any FVO.

It is trite that an agreement crafted by the parties themselves is far more likely to be sustained than one imposed on them unwillingly by a disinterested Court.

9. IT IS RECOMMENDED that s.14 mandatory reporting by Police to Child and Families either be limited to situations where the officer reasonably believes that the child is at risk of abuse or neglect with a rider

"for the avoidance of doubt including the risk of emotional abuse or neglect arising from family violence in the home",

or be omitted altogether.

10. IT IS RECOMMENDED that ss. 37 and 38 not be proclaimed.

Parens Patriae – Who Will Take Responsibility? Inquiry into the circumstances of certain children living in disability respite facilities (February 2009)

Recommendations

WHEREAS the Commissioner is mindful of the special needs of children expressed in the UN Convention of the Rights of the Child, of the evolving capacities of children with disabilities and the right to full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children as expressed in the UN Convention on the Rights of Persons with Disabilities; and

WHEREAS the Government is bound to pursue the Objectives set out in Schedule 1 to the Disability Services Act 1992 (Tas), and is bound to observe the Principles set out in

Schedule 2 of that Act, and is bound to implement standards of service in accordance with Schedule 3 of that Act in delivering services to children eligible for assistance; and

WHEREAS the Minister is bound to further the Object of the Children Young Persons and Their Families Act 1997 (Tas) ("CYPATF Act") set out in sub-section 7(1) of that Act by means of the activities set out in subsection 7(2) and FURTHER is bound by the Principles set out in subsection 8(1) and the considerations in subsection 8(2) of that Act; and

WHEREAS referral of requests for services to the Directorate of Disability Children Youth and Family Services ("DCYFS") is from about 2010 likely to be via an Area Gateway community based access and assessment service and the supply of family support services for vulnerable families and children are likely to be coordinated by an Intensive Family Support Service; and

WHEREAS the Government has committed itself to putting the welfare of children at the forefront of all that Tasmania does in its community; and

THEREFORE the Commissioner advises the Minister to make special provision for the needs of children with disabilities, as distinct from adults with disabilities.

This Report makes the following Recommendations:

Government Disability Respite Services booking system

1. That the Secretary immediately establish a project within the Directorate of Policy and Programs DCYFS to replace the centre-based respite booking system for children from the current first-day-of-the-month-before scramble with a State-wide system for bookings planned annually or six-monthly based on the expressed and assessed needs of existing and incoming client families, prioritised according to an assessed level of family stress, and then resource or purchase infill services to meet any short fall.

Unmet demand for respite services for children with disabilities and their families

2. That the Government immediately institute an Inquiry into or conduct an audit of the true level of unmet demand of families with a child eligible for Disability Services Act 1992 (Tas) assistance ("an eligible child" or "eligible children") for periodic out of home respite and longer term accommodation needs.

Early intervention strategies and disability service provision models

3. That the Government currently within DCYFS and from 2010 within the proposed Integrated Family Support Service [IFSS] structure commit to maintain its role as a bed-provider of last resort of safe respite and long-term out-of-home residential care for eligible children against the possibility that non-Government service providers are unable or unwilling to supply the assessed out-of-home residential needs of an individual child.

4. That the Government within the proposed Gateway and IFSS structures:

4.1 ensure that the provision of disability services to eligible children is fully integrated within the Gateway and IFSS structure as a family support service on par with all other funded family support services in order to effect the "de-siloing" of the disability services professional culture in Tasmania;

4.2 prioritise every request by parents of an eligible child for funded periodic out-of-home respite as a potential forerunner of long-term routine periodic respite need and long-term out-of-home residential care need;

4.3 require the creation of a Whole-of-Life Case Plan in collaboration with a care team comprising the parents, other carers and professional advisers of the child, assessing the child's short-term and other periodic respite and accommodation needs, as well as their

equipment, therapeutic and other support needs, educational needs and expectations and long-term vocational planning;

4.4 require the Whole-of-life Case Plan to be updated in collaboration with the care team every 12 months until the child attains 18 years;

4.5 require the delivery of Government and non-Government services to be case-managed to meet that child's needs, so as to identify and anticipate crisis points in the child's life before they arise; and

4.6 require such case management to include referring the child to a service, monitoring and measuring the suitability and adequacy of the service and locating additional services as required to meet current and emerging needs in accordance with the Whole-of-Life Case Plan.

5. In cases where the parents of an eligible child seek out-of-home respite and are reporting high levels of family stress, or harm or risk of harm by a child to siblings or family members that DCYFS:

5.1 within a defined time allocate or require the responsible funded service provider to allocate a case manager with post-secondary qualifications in childhood development, in social work and in disabilities to co-ordinate, secure and monitor the ongoing supply of an agreed level of periodic out-of-home residential care and other services for the child; and

5.2 if that time limit is exceeded, that the case be referred to the State-wide Director of DCYFS for the purpose of identifying and either locating or creating and funding resources needed to implement the Whole-of-Life Case Plan previously developed for the child, and if necessary referring a proposal to the Board for Exceptional Needs from the Director's office.

6. Funding models should be attached to the child and should be for each element of the Whole-of-Life Case Plan, so that the child and family can move between services in a manner flexible enough to address emerging needs and crises during the child's development.

7. The Government advance recommendations numbered 9 (low-income concessions), 11 (communication of service options), 12 (extension of hosted respite), 17 (incontinence aids from four to 18 years), 20 (children's therapy service), and 22, 23 and 33 (transport for concession holders) in the publication Hinton T., "Forgotten Families – Raising children with disabilities in Tasmania", Anglicare Tasmania, 2007.

8. That the Government develop forward plans to implement and adequately fund best educational practice for children with developmental, behavioural or autistic spectrum disorders following the model proposed by Rose, Dunlap and Kincaid[1].

Statutory intervention and legislative issues

9. That the Secretary amend the CAAG guidelines to provide that orders be sought under Part 5 of the CYPATF Act only where the birth family formally declines to participate in negotiation or where at the time of the application the child is at risk of harm or threat to their own safety and are not already in the care of the Secretary.

10. That the Secretary immediately examine the use as Applicant or joint Applicant of not only consent but also contested parenting orders under Part 6 of the Family Law Act

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[1] Rose I., Dunlap G. & Kincaid D. (2003). *Effective educational practices for students with autism spectrum disorders*. Focus on Autism and other Developmental Disorders, *18*, 150-168.

1975 (Cth)("FLA") as a less adversarial and preferred means of achieving best interest outcomes for children with disability where there are agreements between parents and Government, or partial agreements requiring discrete independent adjudication of discrete issues.

11. That the Government

11.1 discontinue relying on Part 5 of the CYPATF Act where the parents of a child with a disability seek assistance with sharing aspects of residential parental responsibility with Government [or Government-funded service providers] or refuse after due notice to collect them from out-of-home care respite or host family settings but wish to retain some legal status in the lives of the child; and

11.2 that the Secretary instead make application to the Magistrates Court of Tasmania, or the Federal Magistrates Court of Australia or the Family Court of Australia for parenting orders by consent or for determination of disputes about discrete aspects of parental responsibility under Part 6 of the FLA.

12. That alternatively to proceeding as Applicant or joint Applicant under the FLA that the Government amend the CYPATF Act to include a new Part providing for situations where:

12.1 the parents of a child who is eligible for Disability Services Act 1992 (Tas) assistance seek assistance with sharing aspects of parental responsibility with Government [or Government-funded service providers] or refuse after due notice to collect them from out-of-home care respite or host family settings but have expressed a wish to retain some legal status in the life of the child; and

12.2 the parents are able to maintain a meaningful ongoing relationship with the child and to take responsibility for decisions about their long-term welfare; and

12.3 the parents are unwilling to relinquish all of the responsibilities of legal guardianship and custody to other care providers (through Court orders), that relinquishment is inappropriate in the particular circumstances and a suitable long-term placement is available; and

12.4 there is no unacceptable risk of immediate harm to the child in the care of the parents that cannot be dealt with by the provision of other services or any such risk arises from the circumstance that the child is at the time of the application living in Government or NGO out of home care.

13. That in the situations described in Recommendation 12 the CYPATF Act be amended to provide for:

13.1 medium-term extensions of s.11 voluntary care agreements up to 12 months aggregated total duration;

13.2 long-term voluntary care agreements of indefinite duration where the Secretary is satisfied there is a suitable person available and the agreement meets the needs and the rights of the child and the birth family (modelled on Part 3.5 Children Youth and Families Act 2005 (Vic));and for

13.3 Court-ordered allocation of aspects of parental responsibility for children eligible for Disability Services Act 1992 (Tas) assistance, whose parents have been unable to reach agreement with the Secretary sharing aspects of parental responsibility (e.g. long-term accommodation) with Government [or Government-funded service providers] or have failed to collect them from out-of-home care settings after a defined period of due notice.

14. That in any event the CYPATF Act be amended:

14.1 to update the legal terminology relating to aspects of parental responsibility to match that pertaining under Part 6 of the FLA;

14.2 to provide that all Part 5 CYPATF Act applications proceed by a less adversarial procedure, that is by provision for formal cross-application, affidavit or statement, by relaxing the rules of evidence and procedure and by empowering the Court to make any order allocating aspects of parental responsibility between the family and the State that the Court considers proper having regard to the best interests of the child; and

14.3 to provide as a condition precedent to the making of a CAPO by the Court that the Secretary file and serve a Care Plan setting out the manner in which the Secretary asserts that the Plan will address the risk of abuse or neglect alleged by the application.

15. That the Secretary forthwith discontinue the practice of applying to the Court under Part 5 of the CYPATF Act seeking orders for "joint guardianship" and instead where appropriate seek instead specific issues orders under s.42(4)(g) of the CYPATF Act for the allocation of discrete aspects of parental responsibility.

16. That the Secretary take all reasonable steps to ensure that in all cases where Part 5 of the CYPATF Act or Part 6 of the FLA are invoked, but especially those where one or more of the factors in Re K[2] is present, that the interests of the child are independently represented by a Separate Representative or an independent children's lawyer as the case may be.

17. That the Secretary take all reasonable steps to ensure that in all cases where Part 5 of the CYPATF Act or Part 6 of the FLA are invoked and where the "risk" to the child identified has arisen from behaviours secondary to the child's own disability that the parents have reasonable opportunity to obtain independent legal advice about representation and their part in the proceedings before the Secretary makes submissions for a final order.

External monitoring of residential services to children

18. That the Government create and fund the position of Independent Children's Visitor with investigative powers and reportable to Parliament under the auspices of the Ombudsman or the Commissioner for Children with jurisdiction to monitor and audit the provision of residential services to all eligible children in all forms of Government funded out of home care; OR ALTERNATIVELY the Government provide the Ombudsman or the Commissioner for Children with the statutory function and powers of monitoring and auditing the provision of such services for such children in such care.

19. That the Secretary issue a directive to DCYFS and include in all service agreements that Government and non-Government out-of-home respite service providers must notify the Commissioner for Children as well as the Director of DCYFS immediately if a child remains in respite at the expiry of two working days from the end of an agreed respite period and the family has made no arrangement to collect the child at a fixed time within the two working days following that expiry date.

Disability services and child protection services interface

20. That the Secretary adopt the KPMG Draft "Integrated Implementation Plan – Child and Family Service reforms" (June 2008) as formal policy and implement full integration of all Government functions relating to child protection, disability services and family support services.

21. That with respect to the Policy and Guidelines "Service Provisions to Children and Young People who have Disabilities and Child Protection Concerns" the Secretary consult

[2] (1994) FLC 92-461

with the Commissioner for Children, with families of children with disabilities who are high-end users of Government and NGO respite and funded out of home accommodation services and with those respite service providers before the June 2009 Review date, with a view to eliminating the possibility of "decision drift".

22. That the Secretary establish a system to invite the Commissioner for Children to participate in the steering and development of any policy, practice or guideline that affects the delivery of disability services and out of home respite for children.

Disabilities, child protection and education workforce

23. That for all Government and non-Government personnel providing personal care for children eligible for disability services funding in out-of-home care settings DCYFS mandate minimum post-secondary educational qualifications in childhood development, in the nature and extent of disabilities, in behaviour management and administration of medication.

24. That DCYFS engage the University of Tasmania or other University to design a common curriculum in those areas of discipline for internal professional development of all DCYFS staff in modular form to minimise the cost of disrupting continuing service provision.

25. That DHHS provide paid leave or paid time in lieu for all such personnel in Government employment to enrol in and complete such qualifications within a set time from enrolment and include this measure in every future NGO service agreement providing for residential care of children.

26. That DCYFS require and assist as necessary all foster carers providing care to any eligible child to complete Certificate 3 in Community Services and Health (Disability Work) or an equivalent qualification from a recognised academic/training organisation or progress towards attaining this qualification.

27. That DCYFS implement a Working With Children Check that, subject to procedural fairness and review processes, screens residential care workers providing personal care for children not only for criminal convictions, but also for charges for specified offences that have not proceeded to conviction, for family violence or restraint orders and for previous employment discipline or discipline–related terminations relevant to their capacity to provide emotional support and behavioural management programs to children with disabilities.

28. That DCYFS review management practices and staffing levels at Government and non-Government respite facilities to ensure more consistent one-to-one supervision of children in the care of the facility

29. That for all teachers aides providing educational assistance for any eligible child the Government mandate minimum post-secondary educational qualifications in childhood development, in the nature and extent of disabilities, in behaviour management and in administration of medication.

REFORM OF CHILDREN, YOUNG PERSONS AND THEIR FAMILIES ACT 1997
"Commissioner for Children's List of Possible Areas of Reform"(September 2009)

LIST OF POSSIBLE AREAS FOR REFORM OF THE CHILDREN, YOUNG PERSONS AND THEIR FAMILIES ACT (1997)

1. Act terminology

The terms "custody" and "guardianship" are used throughout the Act; for example, s5 and s6 of the Act describe the responsibilities and powers of guardians and of a person who has custody of a child (respectively) and s42(4) describes the sorts of care and protection orders that may be made by a Court using that terminology. The terminology is troubling for two reasons. The first is that the scope of "guardianship" is a fluid one and one that even the High Court has been unable to agree about (see Vitzdamm-Jones v Vitzdamm-Jones cf Barwick CJ and Stephen J).

The second objection to terminology of "custody", "access" and "guardianship" is that these words connote ownership of children as chattels or at least as objects rather than active human subjects. Where adults disagree about the allocation of parental responsibility for children, the terminology heightened the sense of "winning" and "losing" and focussed adult attention on their own success or failure in the conflict rather than needs and interests of the child.

This of course reflected children's historical status which has continued to change through the second half of the 20th Century, in particular the adoption by Australia of the UN Convention on the Rights of the Child. This concern was a major reason for the 1987 amendments to the Family Law Act 1975 which introduced concepts and terminology based on the experience of the child rather than the experience of the adult.

Action

Introduce the terminology of "parental responsibility" to replace "guardianship" and allocation of explicit aspects of parental responsibility of natural or adoptive parents only as required to meet the needs of children.

Thus under such a scheme "a person who has the benefit of a residence order" has the day to day care and responsibility as in s.6; and "an order providing for access to the child" in s.42((4)(e) becomes "an order providing for the child to have contact" with a person.

If "guardianship" becomes "parental responsibility" then aspects of that can be allocated to the Secretary or persons having longer term residence orders, related to specific parenting issues (religious instruction, cultural connection, medical and surgical consent, choice of school, surname, for example) as "specific issues"

2. s.7 Objects & s.8 Principles

Sections 7 and 8 set out the Object of the Act, how it is to be furthered and Principles to be observed in its administration respectively.

Action

Review/update the Object and Principles to assess whether they reflect best practice and child centred principles; what is the purpose of the Act? Is the "partnership" between State and family adequately prioritised?

Do the Principles in s.8 adequately effect the Objects set out in s.7? For instance does the Principle of "primary responsibility" result in an emphasis on reunification that may not serve the best interest of the child?

Does the "preference" in sub-section (1) adequately protect children in the home? Should there be a principle that all administrative and court proceedings be the least disruptive to the child?

Does one size fit all? Should there be a requirement for early permanency planning in cases identified by best practice research (eg child in out of home care more than xx months in an aggregate period of yy months?)

Are the Objects and Principles cast in terms of the child's Human Right to protection from abuse, exposure to family violence and neglect, to ongoing contact with significant others if removed from the family, rights to have their views and wishes taken into account in administrative and court proceedings. In other words several of the Principles in s.8(2)(b) could be converted to "serious consideration to the desirability of" to a direct recognition of the right of the child to have proper consideration given to those factors.

3. Voluntary Care Agreements

Sections 11 and 12 of the Act govern Voluntary Care Agreements (VCA) between the Secretary and the guardians of a child. VCAs result in the Secretary having the care and custody of the child for a period not exceeding 3 months.

If the policy objective of VCAs is assist families with structural parenting problems like Family Violence or compounding risk factors like addiction, family violence, mental illness and disability, should VCA's be permitted that enable parents to assign aspects of parental responsibility (residence, education, medical care) for longer periods while the problems are addressed? Is 12 months long enough?

Action

Permit VCAs to operate for longer periods. Consider how long this should be for.

4. Emergency removal of child

Sections 18-21 provide for "assessment" of a child by the Secretary in various circumstances without the necessity to obtain a Court order.

When the power is used, it is more often not for "assessment", but for protection from an immediate threat of harm. The "assessment" that triggers the removal has already taken place, at least in a rudimentary form.

Section 21 empowers the Secretary to retain custody of a child removed for assessment (pursuant to a requirement or warrant) for a maximum of 120 hours unless the Secretary applies for and obtains custody pursuant to an Assessment Order.

Action

Remedy apparent anomaly in that s21 assumes Secretary has custody under s20 despite the absence of a specific provision to this effect.

Change the wording of the emergency provisions to reflect the fact that it is primarily for protection not any form of formal assessment.

Amend to permit emergency removal of a child if there is a reasonable likelihood that the child is at risk but provide that the Secretary must seek a Court order for interim care and protection assessment as soon as practicable but in any case within 72 hours after the child was taken into custody..

5. Assessment Orders – Adjournments, applications and orders

Sections 22-28 govern the process and nature of applications by the Secretary for an Assessment Order.

There are limits on the period of time for which an order may be in place (maximum 4 weeks) and may be extended only once (maximum of 8 weeks if the Secretary is proceeding to a Family Group Conference or a maximum of 4 weeks in any other case). Adjournments are limited - applications may only be adjourned once and the Court must

not adjourn the hearing of the application for a period exceeding 14 days unless there are exceptional circumstances.

There is concern that assessment order applications, interim assessment orders, extensions of interim assessment orders, assessment orders themselves and extensions of them within the Act have become a “back door” means of obtaining a care and protection order (CAPO).

It is also a concern that the processes that follow the CAAG approval of Court action do not reflect the “partnership approach” Principle in s.8(2)(a) and that far from Court proceedings being the time to abandon that partnership approach, Court proceedings can be a means by which to foster and develop partnered responsibility for the welfare of the child between family, State and State-funded Family Support Services.

On the other hand, whilst the statutory time limits are clearly intended to underscore the exceptional nature of State interference in the private lives of families, those notions pre-date the emergence of children’s rights. The paramount nature of the child’s best interests clearly over-rides the “right” of parents to have possession and control of their child.

It is submitted that the Court’s obligation to serve the best interests of the child is inconsistent with a statutory time limit.

Assessment Orders should be justified as to their existence and their duration by evidence of the need for compulsion to secure the assessment and evidence of what assessment is needed and what steps have been and are being taken to secure it from a named professional.

Action

1. Rules of Court should be developed OR the Act amended to provide for:

affidavit material to specify the nature of the assessment proposed i.e. exactly what is to be assessed

service and tender of all relevant medical and other health and allied health professional reports on which the Secretary intends to rely relating to the child, the parents, other significant persons in the child’s life and any other person living with the child (the class of persons referred to in s.18 as amended).

affidavit material to detail which professionals are to be consulted, whether appointments have been made and when and if not, what steps have been taken to secure appointments, who is to be assessed etc.

if it is proposed that the Secretary have custody of the child for the period of the assessment order, evidence of the living and other arrangements to be put in place for the child to promote the child’s best interests and of the protective concerns upon which such an order is being sought

such other matters that will ensure that the Respondents and independent child representative are fully apprised of all relevant issues and ensure that proceedings are not adjourned without good cause

minimum service requirements.

2. If the matter is to proceed to hearing, there is a need for pre-trial case management by the Court (filing of affidavits, further ADR, expert reports, identification of issues etc) and this is to be incorporated in the Rules or dealt with by way of a directions hearing.

3. Where circumstances require urgent filing and first return date, the Secretary must seek leave from the Court to dispense with requirements of the Rules or with relevant provisions of the Act.

In view of the above, the Court may adjourn for as long as is consistent with the best interests of the child.

6. Care and Protection Orders: Applications, orders and adjournments

It is felt that the distinction between public children's law and private children's law is an appropriate one to maintain, so that the Act does not simply empower the Court to make any order it considers in the best interest of the child once an application is filed. In other words it was felt that the factual pre-condition to the exercise of jurisdiction be maintained, that is "risk…of abuse or neglect".

However it is felt that the Principle of "partnership" between State and family in s.8(2)(b)(i) is defeated by the 19th Century prosecutorial model of litigation enshrined in the Act which it is felt is bound to maximise the level of resistance, litigious strategising and adversarial conduct of proceedings. It will take a lot to shift the cultural perception that the "Welfare" has come to "take the kids", to a perception that the parents can accept responsibility for the State taking such an important step without being permanently labelled "unfit" or "bad". It is the experience of Child Protection managers and workers that instead of motivating parents to "step up to the mark" and make big changes in their addictive, violent or self-focussed behaviours, the process which gives them 12 months to resolve all those issues is unrealistic and the same process which then (after two similar 12-month extensions) consigned the child to State wardship for the balance of their majority promotes hopelessness and abandonment.

These are not desirable outcomes for children, as the research shows that children growing up with sub-optimal but safe and supported birth family attachments have better measurable life outcomes than children who grow up in stranger care and lose meaningful contact with their birth family.

Short service and inadequate service (eg reference in affidavits to expert reports that are not annexed) result in adjournments, a sense of ambush inimical to the "partnership" Principle, and are often not justified by urgency, DCYFS having had weeks or months (or years!) involvement with a family before the CAAG decision to commence proceedings.

Compliance with pre- and post-filing procedure can be effected either by legislation which is accessible, open and enforceable by courts, or by Rules of Court. Rules of Court are statutory instruments tabled and amended by tabling in Parliament, but often require an infrastructure to manage them, such as Court Registrars with resources of time and staff additional to their existing load.

Alternative Dispute Resolution (ADR) in private and public (child protection) family law is a discipline of its own, but certain themes seem to be clear for public law cases which primarily involve families with limited insight, self-help, financial and viable immediate family resources:

1. Conciliation or Early Neutral Evaluation (ENE) rather than mediation are more effective modes of ADR, especially as they are likely to have arisen when the State has already formulated a plan to use coercive powers.

2. The actual timing of the ADR event is less predictive of outcomes than the frequency of the ADR events. Even child protection often involves extended family who hold differing views and frequent exposure to these views can focus the minds of families on the primacy of the child's needs;

3. Child involvement (even if through an independent consultant or representative reporting the child's views on their behalf) is more effective at predicting child-focussed and sustainable outcomes than just Child-Focussed ADR.

In Tasmania Separate Representatives and even the Department's counsel hold ADR sessions not necessarily protected by settlement negotiation privilege, and the Legal Aid Commission frequently requires parties to attempt such informal ADR as a condition of legal assistance.

Without a structure of application and response, the model of litigation is similar to that of a prosecution for a crime, which is indeed the 18th century origin of the Child Protection jurisprudence. Families approach the litigation as if they are being branded criminals: the opposition is immediate, fierce and implacable. The fight becomes more significant than the subject matter of the dispute, namely the child's best interests. All hope for the "partnership" Principle is lost.

Action

1 Secretary's Application – pre filing and post filing

Rules of Court or the Act should provide for the Secretary's application and supporting affidavit material to specify certain matters (for example, the action required to be taken by the parents to address matters giving rise to the application, copies of all relevant reports and an indication of reports to be obtained, action taken to date to attempt to address issues by way of ADR/FGC).

Rules or the Act should also provide minimum periods of service before the first and subsequent return dates, save in cases of urgency for which leave should be sought at the first return date based on reasons in evidence.

A Family Group Conference should except in a case of urgency be a pre-requisite to the Secretary filing an application for an Assessment or Care and Protection Order.

Whether an Assessment or Care and Protection Order is sought, there should be routine orders for a further FGC, unless this is not considered to be in the best interests of the child.

Consideration should be given to amending the Act to also enable the Separate Representative appointed for a child to hold a post-filing Conciliation Conference that is subject to similar privilege as s.52.

2. Response/Cross Application

There should be legislated provision for all statutory parties (including the children through their separate representative) to file a Response to the Secretary's application with supporting affidavit or other documentation setting out orders they believe are in the best interests of the child. The Application and these responses must be capable of amendment before any final hearing, but provide an essential framework within which the family and the State can focus in the ADR processes on the needs of the child.

3. Adjournment

If matters are properly case managed by the Court and parties comply with the Rules, time wasting adjournments can be avoided. On this basis the Court's power to adjourn matters and the duration of adjournments should not be constrained by anything other than consideration of what is in the best interests of the child.

4. Case Management and Evidence

Family law both private and public involves assessment of non-expert perceptions of love, tenderness and other emotions, of events that occur in very private moments, in the heat of domestic battle or under the influence of a variety of drugs, legal and otherwise. The High Court has ruled that the determination of whether an event occurred as a matter of objective reality is less important a fact than the paramount consideration that is to make an order that meets the needs of the child: M and M, (1988).

There is now cogent evidence that the less-adversarial trial (LAT) procedure developed initially through the Family Court's Magellan process has produced quicker and more durable outcomes, as well as a greater sense of party ownership of the outcome.

However such a directive procedure departs markedly from the common law "tabula rasa" model of judicial remove, and legislation is required to create it, while ensuring procedural fairness, transparency of judicial thinking and accountability by appeal.

Action

Section 63 should be effectively "reversed" as it has been for many decades in other states. Paradoxically relaxing the rules of evidence leads to shorter not longer trials.

There should be a mechanism for pre-trial and case management by the Court designed to identify the issues between the parties, issue directions as to the filing of affidavits, expert reports and other matters necessary for the matter to proceed to trial, limit evidence and cross-examination and apply the Rule of Evidence as the gravity of the factual maters in dispute require.

A clear model for this is found in Division 12A of Part VI of the Family Law Act 1975 (Cth), enacted in June 2006.

5. Care plan

The Court should be prohibited from making a care and protection order unless the Secretary has filed and served or tendered a care plan for the duration of the order being sought which the other parties are able to test in the ADR process or in evidence.

The Act should specify matters to be included in such care plans (eg contact arrangements, education, health, living arrangements).

6. Duration of orders

Existing limits on the duration of care and protection orders should be removed, so that if it is in the best interests of the child and supported by evidence, the Court should be at liberty to make a final care and protection order for an appropriate period. (up to 18 years of age).

7. Obligations of the Secretary

Where a care and protection order includes orders that impose obligations on the Secretary and the Secretary fails to comply with those obligations, there is no enforcement process, aside from a s.48 application to vary or remove, which does not of itself ensure compliance with any substituted order..

There should be should be an enforcement process.

Parties aggrieved should be able to bring non-compliance to the attention of an Administrative Tribunal who should have power to make corrective orders and alter "specific issues" and "contact" orders, though not "residence" or "parental responsibility" orders. Parties will have the existing s.48 to bring back to Court grievances about residence and parental responsibility.

8. Supervision orders

The Act should be amended to provide for supervision orders to be made, under which a child would remain with his/her parent(s).

In keeping with the s.8 Principles of maintaining a child's safety in the family home, partnership between State and family, and the States obligation under s.7 to provide services to maintain a child's stability in the home, s.42 should be amended to prevent the Court making an order allocating parental responsibility (or a care and protection order resulting in a child living out of home unless it determines that a supervision order is not

capable of providing sufficiently for the child's safety and protection from the risk of abuse and neglect).

9. Permanency Planning

The Act should be amended to provide that the Secretary commences the process of permanency planning in relation to a child subject to a care and protection order where that child satisfies legislated criteria relating to age, duration of the final care and protection order and or /length of time in a particular placement.

Models can now be found in the legislation of Queensland, New South Wales and the ACT.

10. Court ordered Review of arrangements for a child subject to a care and protection order

Final orders should include a "usual order" that mandates Court ordered regular review of arrangements for a child subject to an order.

7. Restraint Orders

Section 23 empowers the Court to make a restraint order on receipt of an application by the Secretary for an assessment order, instead of or in addition to the assessment order; s27 deals with the making of such an order on adjournment of an application for an assessment order. Similar provisions exist in s43 and s47 of the Act in relation to an application for a care and protection order.

Action

The Restraint Order provisions in s23 and s43 should be amended to permit the Court to hear an application without the need for an assessment order or care and protection order being made.

8. Alternative Dispute Resolution /Family Group Conferences

Sections 30-41 govern the circumstances and processes applicable to the convening of a Family Group Conference (FGC). Section 62 (Court may refer matter to a FGC), s44 (precondition for extension of care and protection order) and s53 (review of arrangements for a child under a care and protection order) are also relevant. An FGC may also be convened by the Secretary to make recommendations about arrangements for a child considered to be at risk and in need of care and protection (s30(1)) whether or not Court proceedings are on foot.

There is a requirement that, before convening an FGC under s30(1), the Secretary consider an advisory panel report relating to the child however Advisory Panels do not exist.

The Act specifies who must to be invited to a FGC (s32(6)) and who may be invited (s32(10)); in neither case is the child's separate legal representative (if appointed) mentioned.

Action

Remove the advisory panel requirement for convening an FGC under s30(1) to permit greater use of this form of ADR prior to and during proceedings (where no Court order)

The separate legal representative of a child must be invited to an FGC.

9. Parties to proceedings (Assessment Orders and Care and Protection Orders)/Joinder

Section 64 of the Act details who is a party to proceedings under the Act.

In proceedings for an assessment order or for a care and protection order, the Secretary, the child and each guardian of the child are parties; in proceedings to vary, extend or revoke an order, all persons bound by the order are also parties to the application.

Section 67 of the Act empowers the Court to join a person as a party to proceedings for an assessment order or care and protection order if the Court is of the opinion that it should make an order binding upon a person who is not a party. The person is to be allowed to make representations to the Court as to why the order should not be made.

Section 51 provides that in proceedings under Division 2 of Part 5 (Care and Protection orders) the Court may hear submissions and take evidence from various other types of persons (e.g. a person who has at any time had care of a child) on the application of that person even if that person is not a party to the proceedings.

Action

Consideration should be given to amending the Act to repeal s67 and provide instead for a person to seek leave to intervene and become a party.

Retain s51.

10. Separate Representative

Section 59 of the Act deals with legal representation of a child the subject of proceedings and empowers the Court to order that a child be separately represented.

Action

Amend the Act to provide that the separate legal representative of the child is to be treated like a party – refer Rule 8.02 of the Family Law Rules 2004.

Amend the Act to provide that the child's separate legal representative should be able to sight (but not copy) as of right all relevant Departmental files relating to the child.

Clarify the role and functions of the separate legal representative, including as to when that function ceases.

11. Service

Section 65 of the Act provides for service of "an application" for an assessment order, care and protection order or variation thereof, a care and protection order or an interim care and protection order and of notice of the time and place of the hearing on parties, including personal service on "the child the subject of the application or order if the child is 10 years old or more".

The Act does not specify any minimum period for service of an application.

Action

The Act should provide for a minimum service period of for example 3 days prior to the first return date, except in cases requiring urgent action.

Does the term "application" in s65 incorporate a reference to supporting affidavit material? If so, it is my strong view that it is inappropriate to serve affidavit material on a child, regardless of age, unless the Court orders it having regard to the child's maturity and wishes.

If a child is to be served, consider whether the 10 year age threshold is appropriate and in any case, the age threshold should be increased to 15 years.

An alternative option is for the Court to determine in individual cases whether the child is to be served with the application, regardless of the age of the child.

12. Rules of evidence

Section 63 of the Act provides that in any proceedings under it, the Court is bound by the rules of evidence except where the Court determines otherwise; the Court may determine it is not bound by the rules of evidence if it is satisfied that it would not be in the best interests of the child to be so bound.

Where the Court determines it is not bound by the rules of evidence, it may inform itself in any way it considers appropriate.

The onus of proof is “on the balance of probabilities”.

Action

Amend to provide that the Court must conduct proceedings in an informal manner, proceed without regard to legal forms and may inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary.

Retain “balance of probabilities”.

Question whether it is appropriate for a child the subject of proceedings to be able to give evidence in those proceedings or if so, whether existing protections need to be improved (refer Evidence(Children and Special Witnesses) Act 2001).

13. Children in care of Secretary

The Secretary’s obligations towards children in his/her custody or for whom he /she has guardianship are set out in various provisions such as:

Section 53- convene FGC to review arrangements for a child under care and protection order;

Section 69- powers and duties of Secretary in relation to children under guardianship or in custody of the Secretary generally; and

Section 71- review of circumstances of child under long term guardianship of the Secretary.

Action

Amend the Act to provide for ongoing obligations for a child subject to a guardianship until 18 years order until that “child” reaches 25 years of age.

Clarify ambiguities in s69.

Amend the Act to oblige the Secretary and/or the Minister to ensure that the Charter of Rights for Children in Out of Home Care is widely promoted, distributed and complied with.

Clarify the Secretary’s obligations to children in out of home care including, for example, by amending the Act to provide for regular reviews of arrangements for a child under a care and protection order.

14. Prosecutions

Division 1 of Part 10 sets out various offence provisions.

Action

The Act should be amended to make clear who is responsible for deciding to prosecute.

'Partnering Parens Patriae Parenting – Formal Disability Care for Children Living with Disabilities" (Feb 2010)

The Recommended Model - Advice to Minister January 2010

It is beyond the scope of this Advice to provide draft legislation of any new legislative scheme for relevant children with a disability. However, in the interests of assisting the families of children with high needs disabilities I make the following recommendations[3]:

Option 1 – Family Law Act 1975 (Cth)

1.1 IT IS RECOMMENDED THAT in those cases where the child is not at risk of imminent harm and where the Secretary and the parents of a child with a disability have negotiated partial or complete agreement about the formal allocation of some aspect of parental responsibility for any period of time, AND where the Secretary:

1. wishes formally either to accept himself or to allocate some aspect of parental responsibility to a funded service provider either short term or long term; and

2. wishes the parents or family to maintain a cooperative working relationship with the State and its employees and a funded service provider; and

3. wishes the parents or family to maintain a meaningful relationship with the child; and

4. wishes to maximise the child's prospects of returning to the full or regular part-time care of parents or family; and

5. wishes to avoid the stigmatisation of parents as having placed the child "at risk" by abuse or neglect, so as to need State protection

the Secretary develop a policy of seeking as Applicant, Respondent or joint Applicant not only contested but also negotiated consent parenting orders under Part VII of the Family Law Act 1975 (Cth) as a less adversarial and preferred means of achieving best interest outcomes for children with disability.

1.2.1 IT IS RECOMMENDED THAT in light of differences of legal opinion as to the Secretary's standing to apply for parenting orders under the FLA, the Secretary test the issue by commencing proceedings in the Family Court of Australia in an appropriate case;

1.2.2 AND THAT in the event of such application being dismissed for want of standing, in the alternative the Crown in right of the State in the person of the Minister with portfolio responsibility for the CYPATF Act make such application under the prerogative power of the Crown parens patriae.

Option 2 – State Legislation

2.1 THAT in default of Option 1, IT IS RECOMMENDED THAT the Government make provision in State law for "Disability Care Agreements" (DCAs) and "Disability Care Orders" (DCOs).

2.2 Appropriate State statute

2.2.1 THAT the least inappropriate location for legislating for DCAs and DCOs is the CYPATF Act (in this Chapter "the Act").

2.2.2 THAT the new provisions be located in a discrete Part of the Act, so as to promote the distinction between the new provisions and those where the child is exposed to risk within the meaning of s.4 of the Act.

[3] In these Recommendations "parent" includes any person who has and who is exercising long term parental responsibility (to be defined) for the child.

2.2.3 THAT the Object of the new Part be for the purpose of enabling families either to resume full-time parental responsibility for the child at a later date or to maintain a meaningful relationship with the child by retaining as much of their parental responsibility as is practicable in the circumstances.

2.3 Definitions and Interpretation

2.3.1 THAT the Act be amended to include a definition of "parental responsibility" approximating that of s.15 of the Children and Young People Act 2008 (ACT) ("the ACT Act").

2.3.2 THAT the Act distinguish between

1 "parental responsibility for major long term issues" or "long term parental responsibility" and

2 "parental responsibility for daily care" or "daily caring responsibility" and

3 "any other aspect of the care, welfare and development of the child"

and include definitions of those expressions approximating ss.19 and 20 of the ACT Act.

2.3.3 THAT the Act be amended to replace the words "guardianship" "guardian" and "custody" accordingly.

2.4 Jurisdictional criteria for "child in need of formal disability care"

THAT children to whom the new Part should apply should include:

1 The child has been assessed as eligible for assistance under any relevant Commonwealth/State disability agreement or the Disability Services Act 1992.

2 The parents have previously sought assistance with the child's "secondary disability-specific needs" [to be defined] from the Secretary or a Community Based Intake Service or interstate equivalent.

3 The parents have previously received assistance with the child's secondary disability-specific needs from a Government-funded service provider and have at some previous time demonstrated capacity to provide adequately for the child's parenting needs with that support.

4 The parents have informed the Secretary that they are desirous but no longer capable of discharging all of their parental responsibilities in relation to the child by reason of the chronic nature of the disability-specific needs of the child or by reason of imminent risk of a breakdown of the family unit or of imminent risk to the safety or wellbeing of another child or other children in the family unit.

5 At least one parent is desirous and capable of maintaining a meaningful relationship with the child and of exercising parental responsibility for some aspect of the child's long-term needs or some degree of the child's daily care needs.

6 The Secretary and the parents have attempted to resolve all issues in a Family Group Conference, and have reached agreement about the terms of an Order or there remains disagreement between them as to the nature and extent of the services required to provide adequately for the disability-related needs of the child or as to the degree of the parent's involvement in daily and major long-term parental responsibility for the child that is in the child's best interests.

7. The child may or may not be "at risk" within the meaning of s.4 but is not at risk of imminent harm.

2.5 0bjects and Principles

2.5.1 Objects

2.5.1.1 THAT the Object of the Act in s.7(1) be amended to insert before “the care and protection of children” the matter:

“the discharge of parental responsibility for children in their best interests and…”

2.5.1.2 THAT the obligations of the Minister in s.7(2) of the Act be examined to ensure that in the sub-section the phrase “child abuse and neglect” be expanded to encompass in addition “or the allocation of parental responsibility for children with disabilities in appropriate cases”

AND THAT the “partnership approach” referred to in par (a) be expanded to include “and the problem of providing adequate long and short term out of home and other supports for children with disabilities”.

2.5.2 Principles

2.5.2.1 THAT s.8(1) of the Act be amended to include principles providing that:

1 where a family is not able to meet all of its parental responsibilities to a child for whatever reason that the Secretary may accept or facilitate the sharing of some or all of those responsibilities as are necessary to meet the needs of the child.

2 it is in the best interests of a child that where possible arrangements be made for the allocation of parental responsibility for the child by agreement rather than in contested court proceedings.

2.5.2.2 THAT express provision be made in s.8(2) that in the exercise of powers under the Act:

1 the exercise of those powers must be designed to ensure that as far as practicable the child with a disability has effective access to care conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development;

2 it is in the best interest of the child to develop and preserve a collaborative partnership between the child’s family and the Secretary and service providers funded by the Secretary for meeting the daily and long term needs of the child where that is consistent with the safety of the child;

3 the conducting of court proceedings with as little formality as possible in the circumstances is an integral element of providing assistance to the child and their family.

2.6 Primary Dispute Resolution and Family Group Conference

2.6.1 THAT Division 1 of Part 5 of the Act be relocated into its own Part so as to apply to all proceedings under the Act, not only those under Part 5.

2.6.2 THAT no long term DCA or any DSO be made and no short term DCA be extended (q.v. below) without a Family Group Conference having first been convened, such conference to include the following parties:

1 the parents of the child or any person with parental responsibility for the child;

2 the Secretary represented by senior practice staff;

3 any person providing day to day care for the child at the time of the Conference;

4 any member of the child’s extended family as that term is defined in s.3 of the Act who has expressed to the Secretary in writing an interest in the welfare of the child;

5 any service provider it is proposed will exercise some aspect of parental responsibility for the child, whether as employee or agent of the Secretary or directly for the parents;

6 the child or a Separate Representative of the child's best interests appointed for the purpose of the FGC;

AND

7 either a medical practitioner or allied health care professional with personal knowledge of the child's disability and disability needs; or

a teacher or early childhood education and care professional with personal knowledge of the child.

2.6.3 THAT all parties to the FGC shall be required to provide each other, or in the case of the child, the child's Separate Representative, with all current written assessments of the child's health, personal, social, cognitive, physical needs and strengths.

2.6.4 THAT a DCA made at an FGC may be registered with the Magistrate's Court by a member of the child's family, a persons with daily caring responsibility for the child at the date of registration or the Secretary and that upon registration shall take effect as if it were a DCO of the Court, subject to the Court being satisfied that the provisions in it are in the best interests of the child.

2.7 Separate Representative for the Child

2.7.1 THAT when a FGC is convened the Act provide for appointment of a Separate Representative for the child instructed by the Legal Aid Commission of Tasmanian at the request of the Secretary.

2.7.2 THAT the Act require the Court at the earliest convenient date to appoint a Separate Representative for the child on any application for a DCO, unless the Court determine and give reasons why such appointment would be contrary to the best interests of the child.

2.7.3 THAT the Court be given power to extend the appointment of the Separate Representative for specific purposes and functions for a period following the making of a DCO.

2.8 Consent Provisions – Disability Care Agreements [DCA]

2.8.1 Short Term DCAs

2.8.1.1 THAT the Act be amended to provide for DCAs up to 12 months in aggregate within any 24 months period to be made between the parents and an approved service provider without the approval of the Secretary.

2.8.1.2 THAT there be provision for extension of such short term DCAs between the parent and an approved service provider up to a maximum of 2 years in aggregate within any 3 year period with the approval of all members of a Family Group Conference recalled for considering the extension.

2.8.1.1 THAT the parents of children subject of short-tem DCAs retain all aspects of parental responsibility for the child except daily care responsibility.

2.8.2 Long-Term DCAs

2.8.2.1 THAT the Act be amended to provide for long-term DCAs up to age 18 between the parent(s) and an approved service provider and the Secretary, such agreements to include:

1 the objectives of the agreement

2 the roles of the service provider including their participation in any review of the agreement, their assistance in resolving disputes about the care of the child under the agreement, and the provision of any particular service for the child specified in the agreement; and

3 set out the respective roles of the parent of the child, the service provider and any person providing daily care to the child.

2.8.2.2 THAT such approved service providers approved by the Secretary be those organisations and persons, including other members of the child's family, assessed as having relevant experience caring for a child or children with a disability similar to that of the subject child.

2.8.2.3 THAT the effect of these agreements be to leave "parental responsibility for major long-tem issues" or "long term parental responsibility" with the parent and to vest parental responsibility for "daily caring responsibility" in the carer subject to specific provision for allocation of any other aspect of parental responsibility.

2.8.3 General DCA provisions

2.8.3.1 THAT the Part of the Act relating to DCAs provide that parents are to retain all parental responsibility for the child not otherwise allocated to another person either expressly or by implication.

2.8.3.1 THAT every DCA is terminable at will by any party to it, and on termination the child must be returned to the care of any person with long term parental responsibility who requests the return, provided that any service provider must notify the Secretary of such termination within 48 hours of the return of the child.

2.9 Contest Provisions

2.9.1 Disability Care Orders (DCOs)

2.9.1.1 THAT the Act be amended to insert a new Part providing for the making of a Disability Care Order.

2.9.1.2 THAT the Court have power to make a DCO allocating to any person or approved service provider any or all aspects of parental responsibility including long term parental responsibility and daily caring responsibility for a child on being satisfied that:

1 the jurisdictional criteria in Recommendation 2.4 above are satisfied; and

2. that the parents and Secretary have attended a Family Group Conference and that a report from that Conference is before the Court; and

3. that all parties have placed before the Court their proposals for the allocation of long term and daily caring responsibility by the Court; and

4. that the order the Court proposes to make is necessary either to enable the parent to resume at a future time full time parental responsibility for the child; or to enable the parent to maintain a meaningful relationship with the child; or both; and

5. that the Court has obtained the views of the child or where those views cannot reasonably be obtained has received submissions from the Separate Representative for the child as to the best interests of the child; and

6. that the orders sought are proper and in the best interests of the child;

2.9.1.3 THAT at any time during proceedings for a DCO the parties may resolve all outstanding matters by discontinuance or by DCA or by consent order in the last case subject to the Court being satisfied of the matters in 2.9.1.2.

2.9.2 Court

THAT the appropriate court for making orders for the allocation of parental responsibility for children to whom the new Part applies be the Magistrates Court (Children's Division).

2.9.3 Who may apply

2.9.3.1 THAT any of the following may apply for a DCO:

1 The Secretary

2 A parent or other person having parental responsibility for major long-term issues for the child

3 Every person or service provider with parental responsibility for daily care or actual daily care of the child at the date of the application

4 The child by a next friend or by a Separate Representative appointed pursuant to the Act.

2.9.3.2 THAT the Applicant be required to file an Application setting out the form of orders they will be seeking if the matter proceeds to hearing together with a prescribed statement of the grounds on which they are seeking those orders and in the case of the Secretary (or service provider if appropriate) a proposed Care Plan.

2.9.4 Respondent/necessary parties

2.9.4.1 THAT all of the following shall be necessary parties entitled to be served, to appear and make submissions except as otherwise ordered by the Court in the best interests of the child

1 The Secretary

2 Every parent or other person having parental responsibility for major long-term issues for the child

3 Every person or service provider with parental responsibility for daily care or actual daily care of the child at the date of the application

4 The child by a guardian ad litem or by a Separate Representative appointed pursuant to the Act.

5. Any other person granted leave to appear as a respondent having in the opinion of the Court a sufficient interest in the welfare of the child

2.9.4.2 THAT each Respondent seeking orders different from those sought in the Application be required to file in Court a Response to the Orders sought by the Applicant setting out the orders they will be seeking if the matter proceeds to hearing and in the case of the Secretary a proposed Care Plan.

2.9.5 Less Adversarial Trial Procedures

THAT the new Part provide that in applications for a DCO Less Adversarial Trial procedures apply including specifically:

2.9.5.1 Principles of Less Adversarial Trial

THAT the Court be bound in hearing cases under the Part by the following principles of less adversarial trial:

1. The court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings.

2. The court is to actively direct, control and manage the conduct of the proceedings.

3. The proceedings are to be conducted in a way that will safeguard the child concerned and all children in the child's family against family violence, child abuse and child neglect; and

4. The proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties.

5. The proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.

2.9.5.2 Powers in Less Adversarial Trial

THAT the Court have the express power to do the following:

1 decide which of the issues in the proceedings require full investigation and hearing and which may be disposed of summarily;

2 decide the order in which the issues are to be decided; and

3 give directions or make orders about the timing of steps that are to be taken in the proceedings; and

4 in deciding whether a particular step is to be taken--consider whether the likely benefits of taking the step justify the costs of taking it; and

5 make appropriate use of technology; and

6 if the court considers it appropriate--order the parties to confer in a further Family Group Conference with a view to further resolving issues in dispute between them; and

7 deal with as many aspects of the matter as it can on a single occasion; and

8 deal with the matter, where appropriate, without requiring the parties' physical attendance at court.

2.9.5.3 Disqualification

THAT a Magistrate who exercises any such power in relation to proceedings is not, merely because of having exercised the power, required to disqualify himself or herself from a further hearing of the proceedings, without otherwise affecting the law as to disqualification of a magistrate.

2.9.6 Evidence in Less Adversarial Trial

2.9.6.1 THAT the rules of evidence relating to matters such as those listed in FLA s.69ZT [q.v.] not apply unless in the particular instance during a case the Court decides to apply them.

2.9.6.2 THAT in particular the evidence of any child relevant to the matter before the Court shall not be excluded only because it offends the rule against hearsay evidence.

2.9.6.3 THAT children shall not be sworn to give evidence nor make an affidavit in proceedings without the leave of the Court having been first obtained.

2.9.6.4 THAT unless the Court in any case gives leave otherwise, only one expert give evidence in relation to any area of expertise and if required for cross-examination by any party that expert shall be called by the Court as its witness.

2.9.6.5 THAT the parties agree on the identity of any such single expert, the issues to be addressed by the expert and responsibility for the costs of such expert, and in default of agreement on any matter the Court decide and make orders accordingly.

2.10 Variation, rescission and enforcement

2.10.1 THAT s.50 be amended to apply also to a breach of a provision in a DCA registered with the Court and in a DSO, and that s.50 be located outside Part 5 of the Act accordingly.

2.10.2 THAT a provision similar to s.48 of the Act apply to a DCA registered with the Court and to a DCO.

2.11 Interrelationship between FCA, formal disability care and child protection, abuse of process and the rule in Rice and Asplund:

THAT the new Part of the Act expressly provide that

2.11.1 the powers and responsibilities of the Secretary and other persons under the Act are unaffected except as expressly provided in the new Part;

2.11.2 the Secretary shall not exercise his powers under Part 4 nor make an application under Part 5 of the Act in respect of a child in need of formal disability care where at the relevant time:

a FGC has been convened, or

a DCA is in force, or

an application for a DCO has been filed or

a DCO is in effect or

a Parenting Order under the Family Law Act 1975 (Cth) to which the Secretary is a party is in force

unless the Secretary is of the opinion that the child is at risk of imminent harm; and that

2.11.3 the Court shall not make an Order under Parts 4 or 5 of the Act in those circumstances unless satisfied that at the time of hearing that application the child remains at risk of imminent harm.

2.11.4 THAT the Court shall not hear any application for a variation or revocation of a DCO unless there has been a material change in the circumstances of the child, the parent or the carer since the making of the DCO.

“She will do anything to make sure she keeps the children” (July 2010)

1 PARENTAL POVERTY AS A CHILD RISK FACTOR

1.1 THAT the Tasmanian Government as a matter of urgency commence negotiations with the Commonwealth Government through FAHCSIA and CENTRELINK for voluntary income management for families referred to Gateway which Gateway assess as likely to benefit and involuntary income management for families with children under a Voluntary Care Agreement, requirement or orders assessed by Child Protection Services as likely to increase the level of child protection.

1.2 THAT the CPIS Notification record and Tasmanian Risk Framework include as risk factors:

family structure, in particular assessments of spouses of single mothers and the presence of itinerant male associates of single mothers

childhood trauma of primary carer

2. SECRETARY TO BECOME THE MODEL PARENT

2.2 THAT case closure ceases to be a measure of successful removal of risk to a child.

2.3. THAT the fact of acceptance of a referral to Gateway and Government-funded Family Support Services (FSS) not be an indication of any change in the level of risk until a) the brokered FSS has engaged and b) the engagement has been evaluated and FSS has reported demonstrated capacity to have reduced risk to an acceptable level.

2.4 THAT s.42(4) of the Children, Young Persons and Their Families Act 1997 (CYPTF Act) be amended to include (a1) an order for a specified period not exceeding 12 months placing the child under the supervision of the Secretary and requiring the child or a guardian of the child to follow all reasonable directions of the Secretary.

2.5. THAT S.42(4) of the CYPTF Act be amended to provide that the Court have power to make an order placing the child under the guardianship of the Secretary for such period exceeding 12 months as the Court considers necessary to provide for the safety and wellbeing of the child.

2.6 THAT Child Protection Workers (CPWs) conduct joint home visits with Department of Education School Social Workers in cases like the present where school non-attendance has become a threat to the developmental safety of the child and/or is a symptom of neglect or risk at home.

2.7 THAT DCYFS conduct joint training of CPWs with Youth Justice Workers to understand cultural perspectives of children and young people.

2.8 THAT s.59 of the CYPATF Act be amended to provide that the appointment of the Separate Representative shall terminate when the Court so orders, and that during their tenure, the Secretary consult with the Separate Representative in Family Group Conferences, and in CAAG meetings to obtain an independent perspective of the best interests of the child.

2.9 THAT the Legal Aid Commission of Tasmania use every endeavour to engage the same Separate Representative in relation to each child where there are multiple proceedings or applications.

3 COURT APPLICATION ADVISORY GROUP (CAAG) DECISION MAKING PROCESSES

3.1 THAT the CAAG decision making process for considering reunification of children placed in OOHC or placing children in the care of family with whom they were living when the most recent substantiated risk arose is conducted according to a Structured Decision making process.

3.2. THAT in order to correct excessive optimism about family strengths, capacity to change and actual change, the CAAG structure be formally altered to include on every occasion perspectives from outside DCYFS drawn from the following: School Social Worker, Early Intervention Police Officer, Community Youth Justice Worker, relevant Co-located Gateway Child Protection Worker, the Family Support Service Worker who most recently visited the child.

3.3. Alternatively that the CPW Report to CAAG be circulated to the above before the CAAG meeting and they have adequate opportunity to put their views before the CAAG.

3.4. Alternatively that the delegate be required to consult with the above before making a decision on behalf of the Secretary.

3.5. THAT CAAG and the Delegate in every case actively consider the option and the benefits of seeking an extension to statutory intervention and record reasons for excluding it in the particular case.

4. FILE CLOSURE

4.1. THAT DCYFS change its file closure procedure so that when a child is living with family members with whom they were living when the original risk arose the file is closed only when an Area Manager (alternatively a Senior Practice Consultant) from an Area other than the "home" area is satisfied that:

there is documentary evidence from a professional outside DCYFS who has interviewed the child/ren and the adult family that the adults' capacity to protect and provide for the child/ren's health, development, education and wellbeing has changed so as to reduce the risks identified in the most recent substantiated notification

the child has died or moved out of the jurisdiction; or

the child has attained 18 years

5. SCHOOL SOCIAL WORKERS

5.1 THAT the Secretary accept the assessment of a Department of Education Social Worker recorded on a Common Risk Assessment Framework Tool, to be developed for the purpose, as a substantiated notification and allocate it to case management with priority.

5.2. THAT Department of Education School Social Workers undergo professional development in the proper use of the Common Risk Assessment Framework Tool.

5.3. THAT the Common Risk Assessment Framework Tool be amended so that it contains all the information necessary for a CP Intake Assessment, save for previous CPIS history to be included by Child Protection.

6. INVOLVEMENT OF COURT WHEN MAKING ORDERS

THAT in order to address the cultural expectation that the Secretary determines statutory outcome the following amendments to the CYPATF Act be made or Rules of Court provide as appropriate:

6.1 THAT the Secretary when filing an Application for an Assessment Order under s.22 of the CYPTF Act identify on the notice and identify in the application what aspect of the child's circumstances and each parent's circumstances are to be assessed, from what professional discipline the assessor or assessors is to be drawn and the names and dates of the probable appointments made for the assessment; and that the relevant form be altered accordingly.

6.4 THAT s.22(3)(a) be amended to provide "in accordance with the application and such other assessments if any as the Court may order the Secretary to undertake";.

6.5 THAT s.22(5)(b) be repealed or the words "in any other case" be replaced by words to the effect "to enable the completion of an assessment ordered pursuant to s.22(3)".

6.6 THAT Interim and Final Assessment orders identify the party who is to comply with the order of the Court (or express Assessment Orders in the active sense).

6.7 THAT the Secretary be required to tender a Care Plan when seeking a final Care And Protection Order specifying inter alia the risk factors identified by the Secretary that gave rise to the Application and the circumstances the Secretary in his opinion says will be evidence that the identified risks have abated to an acceptable level.

6.8 THAT the Court makes orders that give effect to a Care Plan or require a person or persons to do such things as the Court considers will address the risk factors identified in the Application.

6.9 THAT a Care and Protection Order made pursuant to s.42(4)(a), (b) or (c) only expires upon the Court satisfying itself on evidence adduced that the lapsing of the order is in the best interests of the child (BIOC) in the circumstances that exist at the time of the re-listing and that if such expiry hearing occurs after the expiry of the period of the order, that the order continue in force until such time as the Court discharges it.

6.10 THAT the Court in each case specify the date that the appointment of the Separate Representative shall expire and in an apposite case have power to order that a Separate Representative provide such advocacy services to the child as it sees fit, in particular but not limited to representing the child at a Family Group Conference ordered by the Court or convened by the Secretary and representing the Child at an expiry hearing.

7. CHILDREN AND YOUNG PEOPLE UNDER CARE AND PROTECTION ORDERS (CAPO)

7.1 THAT the Department of Education prepare an Individual Education Plan for each child under the guardianship or custody of the Secretary and provide resources for alternative educational programs recommended by the School Social Worker, the School Principal and the School Psychologist after consultation with the child.

7.2 THAT the Government as a matter of urgency provide community based education settings for children who are at high risk of disengaging from formal education or for whom the classroom setting has been assessed by the relevant School Social Worker and Principal as unsuitable.

7.3. THAT in designing any Statewide alternative education models under the Children and Youth Strategy and the Youth At Risk Strategy, the Government consult closely with children and youths identified as chronic non-attenders, rather than create a model solely based on academic study and models external to Tasmania.

7.4 THAT the Government streamline the capacity for the Department of Education to allocate funding for and provide Distance Education to children under a CAPO on the joint recommendation of the School Social Worker and the CPW, especially when the child declines or fails to attend assessment for general eligibility.

7.5 THAT if the evaluation of the current Children's Visitors Pilot shows that children under the guardianship of the Secretary have obtained benefit from the Pilot that the Minister provide for the appointment of a Children's Visitor for each such child whether in OOHC, in their birth family or in kinship care, such Visitors to be engaged by a body independent of the Government.

7.6 THAT the functions of the Commissioner for Children to include "advocating for children under the guardianship or custody of the Secretary".

8 CHILD PROTECTION AND GATEWAYS PRACTICE

8.1 THAT the Secretary mandate the use of the Form "Complaints in Care Policy Standard – CHILD VISIT" in relation to all children under the guardianship or custody of the Secretary.

8.2 That the Secretary mandate that such visits be conducted with the child in the absence of any other person unless in the special circumstances of the case it is not practicable to arrange such a visit or it is not in the best interests of the child for reasons given.

8.3 THAT Gateways accept referrals from Child Protection Services if accompanied by a Tasmanian Risk Framework report and a briefing from the CPW without conducting a further risk assessment.

9 FUTURE MANAGEMENT OF SUBJECT CHILD

9.1 THAT the Secretary in association with Galileo House refer the Child to a legal practitioner outside Tasmania and specialising in personal injuries to provide her with legal advice as to her prospects of recovering damages or any other redress against any person or body arising relevantly out of her exposure to the risk of harm in the period 22 August 2009 to 20 September 2009.

9.2 THAT the Legal Aid Commission of Tasmania meet the proper costs of such advice including the advice of counsel and the party-party costs of any proceedings instituted as a result of such advice.

10. COMMISSIONER FOR CHILDREN FUNCTIONS AND POWERS

10.1 THAT the Government review the wording of s.80 of the CYPTF Act and enact amendments necessary to clarify the powers of the Commissioner for Children to obtain documents and information either necessary or convenient to the Commissioner to enable him to perform his functions under that or any other Act.

10.2 THAT s.79 of the CYPTF Act be amended to give the Commissioner for Children such additional functions as will enable that Officer to fulfil the promise of “Preventing problems before they arise” including but not limited to:

conducting audits both individually and generally of the circumstances of children and young people in the guardianship or custody of the Secretary

conducting investigations of his own motion into the matters in existing paragraph 79(1)(f)

intervening in Court proceedings at the invitation of a Court and subject to rules of Court.

10.3. THAT the Secretary make the Action Research and Learning Project become a permanent part of Child Protection Practice and develop processes that encourage Child Protection, Foster Care and Family Support Workers to share learning for adverse outcomes.

10.4 THAT the Department of Education institute and adequately resource a uniform and universal school-based personal safety program in the primary school curriculum of all Tasmanian Schools, both Government and Independent.

11. CRIMINAL LAW

11.1 THAT the Government refer and provide adequate resources to the Tasmanian Law Reform Institute for consultation and advice on the following matters:

the question whether the defence of reasonable and honest mistake in relation to sexual offences against persons under 17 should be available and whether it should be altered.

what additional protections can be provided to children giving evidence in cases involving sexual assault.

11.2. THAT the Government review the Sex Industry Offences Act 2005 and in doing so actively consider the option of prohibiting the purchase of sexual services other than for certified medical reasons and actively consider the contribution of any amendment to the safety and sexualisation of children.

11.3 That after an appropriate period the Government advise the Governor to appoint a Commissioner of Inquiry under the Commissions of Inquiry Act 1995 to review the decisions of the Crown in relation to the prosecution or otherwise of persons suspected of

having had intercourse or indecent dealings with the subject child in order to address any public concerns about the probity of such decisions.