



# briefing paper



## NSW Parliamentary Research Service

### **Permanency planning and adoption of children in out-of-home care**

**Briefing Paper No 03/2013**

by Lenny Roth

## RELATED PUBLICATIONS

- *Permanency Planning and Adoption*, Briefing Paper No. 2/2001 by Abigail Rath
- *Adoption and Care and Protection of Children: The Proposed Legislative Changes*, Briefing Paper No. 10/2000 by Marie Swain

**ISSN 1325-5142**  
**ISBN 978-0 7313-1899-5**

April 2013

© 2013

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this document may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior consent from the Manager, NSW Parliamentary Research Service, other than by Members of the New South Wales Parliament in the course of their official duties.

# Permanency planning and adoption of children in out-of-home care

by

Lenny Roth

## **NSW PARLIAMENTARY RESEARCH SERVICE**

Gareth Griffith (BSc (Econ) (Hons), LLB (Hons), PhD),  
Manager, Politics & Government/Law ..... (02) 9230 2356

Lenny Roth (BCom, LLB),  
Senior Research Officer, Law..... (02) 9230 2768

Lynsey Blayden (BA, LLB (Hons)),  
Research Officer, Law ..... (02) 9230 3085

Talina Drabsch (BA, LLB (Hons)),  
Research Officer, Social Issues/Law ..... (02) 9230 2484

Daniel Montoya (BEnvSc (Hons), PhD),  
Research Officer, Environment/Planning ..... (02) 9230 2003

John Wilkinson (MA, PhD),  
Research Officer, Economics ..... (02) 9230 2006

**Should Members or their staff require further information about this publication please contact the author.**

Information about Research Publications can be found on the Internet at:

<http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/V3L1stRPSubject>

Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion.

## CONTENTS

<b>Summary</b> .....	<b>i</b>
<b>1. Introduction</b> .....	<b>1</b>
<b>2. Out of home care</b> .....	<b>1</b>
2.1 The care and protection system.....	1
2.2 Pathways into care .....	2
2.3 Responsibilities in care .....	2
2.4 Children and young people in care .....	3
<b>3. Permanency planning for children in care</b> .....	<b>5</b>
3.1 What is permanency planning?.....	5
3.2 Importance of permanency planning.....	5
<b>4. Legislation on permanency planning</b> .....	<b>7</b>
4.1 Brief history of reforms.....	7
4.2 Current provisions.....	9
<b>5. Permanency planning in practice</b> .....	<b>13</b>
5.1 Permanency Planning Project.....	13
5.2 Adoption as part of permanency planning .....	14
5.3 Financial support for carers who adopt.....	15
5.4 Number of adoptions of children in care .....	16
5.5 Use of sole parental responsibility orders .....	17
<b>6. Legislation on adoption</b> .....	<b>17</b>
6.1 Brief legislative history .....	17
6.2 Current provisions.....	18
<b>7. Legislative reform proposals</b> .....	<b>20</b>
7.1 Proposals relating to child protection legislation .....	20
7.2 Proposals relating to adoption legislation .....	22
<b>8. Selected stakeholder responses</b> .....	<b>24</b>
8.1 NSW Children’s Guardian.....	24
8.2 NSW Commission for Children and Young People.....	25
8.3 Association of Child Welfare Agencies .....	27
8.4 Legal Aid NSW .....	28
8.5 Community Legal Centres NSW .....	30
8.6 Royal Australian & New Zealand College of Psychiatrists .....	31

<b>9. Permanency planning in two other states .....</b>	<b>32</b>
9.1 Victoria.....	32
9.2 Queensland .....	35
<b>10. Permanency planning in two other countries .....</b>	<b>38</b>
10.1 United States .....	38
10.2 England .....	41
<b>11. Comparing foster care and adoption outcomes .....</b>	<b>45</b>
11.1 The evidence base for comparing outcomes is limited .....	45
11.2 Comparative analysis of research on foster care and adoption ....	46
11.3 Longitudinal studies comparing foster care and adoption.....	46
<b>12. Conclusion .....</b>	<b>48</b>

## **SUMMARY**

In November 2012, the Minister for Family and Community Services, Pru Goward MP, released a discussion paper containing child protection legislative reform proposals. The reform proposals are in three parts: (1) promoting good parenting; (2) providing a safe and stable home for children and young people in care; and (3) creating a child-centred system. This briefing paper provides background and commentary on the second part of the proposals, which aim to improve permanency planning for children and young people in care.

### **Out of home care**

As at 30 June 2012, there were 18,169 children and young people in out-of-home care in NSW (compared to 14,667 five years earlier). Around two-thirds were in statutory care (where the Minister or a non-related person has parental responsibility for residency because of an order of the Children's Court), and one third were in supported care (care arranged, provided or supported by the Director-General of the Department). About 27 percent of children and young people in care were under the age of six. Over one third of the out-of-home care population were Aboriginal and/or Torres Strait Islander. More than half of the same population were in relative or Aboriginal kinship care, while almost 40 percent were in foster care. More than one third of all children and young people in care had three or more placements in their current care period. [2.4]

### **Permanency planning for children in care**

The concept of permanency planning emerged in the 1970s, first in the US and later in the UK. The permanency movement developed in response to concern about children drifting in a number of unstable fostering arrangements for long periods of time. While there does not appear to be an accepted definition of permanency planning, Tilbury and Osmond describe it as "a case planning process aimed at securing stability and continuity for children in out-of-home care". They also note that permanency planning has relational, physical and legal dimensions. According to a 2007 paper by Osborn, Delfabbro and Barber, the evidence suggests that placement instability in out-of-home care is likely to have significant effects on the current and long-term wellbeing of children. A 2007 study of young people leaving care in NSW found that stability and, more importantly, a sense of emotional security were highly significant predictors of young people's outcomes four to five years after leaving care. [3]

### **Legislation on permanency planning**

Permanency planning provisions were introduced in NSW in 2001. The bill that led to these provisions was much amended after considerable controversy about proposals to encourage consideration of adoption at an early stage. Under the current provisions in the *Children and Young Persons (Care and Protection Act 1998* (which are basically the same as in 2001), the Director-General of the Department is required to prepare a permanency plan when applying to the Children's Court for a care order. This is a plan that aims to provide a child or young person with a stable placement that offers long-term security. The permanent placement options include: restoration to the parents, placement with members of a kinship group, long-term placement with a foster carer, placement under an order for sole parental responsibility, and adoption.

In the case of an Aboriginal or Torres Strait Islander child or young person, a permanency plan must address how the plan has complied with the Aboriginal and Torres Strait Islander placement principles. [4]

### **Permanency planning in practice**

In May 2006, the Department of Community Services began the first stage of its three-year Permanency Planning Project which aimed to integrate the principles of permanency planning into casework practice. The project involved training caseworkers in the implementation of a new Permanency Planning Policy, which contained specific timeframes for decision-making about long-term care of children and young people in care (for children under two years of age, decisions about whether restoration was a realistic possibility were to be made within six months of removal). In 2008, the Department set up an out-of-home care adoption team to promote permanency through adoption if was in the best interests of the child, particularly those in long-term placements. While the number of adoptions of children and young people in care has risen over the past five years, the numbers are still low (65 in 2011/12). There is no published information on the use of sole parental responsibility orders, although the Department has stated that these orders have been underutilised. [5]

### **Legislation on adoption**

In NSW, adoption is governed by the *Adoption Act 2000*, which was enacted following a NSW Law Reform Commission review of adoption laws. That review recommended that the laws be rewritten so that adoption was characterised by openness and was no longer shrouded in secrecy. An adoption application can be made to the Supreme Court by the Director-General of the Department or by the principal officer of an accredited adoption service provider. Generally the court must not make an adoption order unless consent has been given by each parent of the child; consent is not required if a child aged 12 or older gives sole consent to the adoption, or if the Court dispenses with the requirement for consent. The Court must not make an adoption order unless satisfied of a number of matters including that it is in the child's best interests of the child, that due consideration has been given to the child's wishes and feelings, and if relevant, that the Aboriginal and Torres Strait Islander placement principles have been properly applied. [6]

### **Legislative reform proposals**

The discussion paper released by the Minister contains a number of permanency planning reform proposals. These proposals, which would impact on both child protection and adoption laws, include:

- Establishing a new preferred hierarchy of permanent placement types (with adoption placed above long-term foster care);
- Introducing specific timeframes for making decisions about restoration of the child to their family;
- Creating a new long-term guardianship order that would support long-term relative and kinship placements;



- Streamlining adoptions, including by removing administrative burdens for existing carers to be approved as applicants for adoption. [7]

### **Selected stakeholder responses**

The Department of Family and Community Services received 230 submissions in response to the discussion paper. These submissions have not yet been made available on the Department's website (as at 2 April). Presented in this briefing paper are a summary of responses from six important stakeholders. These stakeholders had mixed views on the proposals. For example, while some stakeholders (e.g. NSW Children's Guardian) support the promotion of adoption as a permanent placement option (with some qualifications), other stakeholders (e.g. Legal Aid) argue that adoption should only be considered once a child is established in long-term foster care, with a carer with whom they have developed a strong bond. Similarly, while some stakeholders (e.g. the Association of Child Welfare Agencies) support legislative restoration timeframes (subject to various provisos), others (e.g. Community Legal Centres NSW) argue that all decisions need to be made on a case by case basis. [8]

### **Permanency planning in two other States**

In Victoria, child protection laws require the Secretary of the Department to ensure that a stability plan is prepared for each child who is in out of home care as a result of a protection order. Stability plans must be completed within certain statutory timeframes. The long-term placement options are similar to those in NSW. One option is a permanent care order, which is more widely used than sole parental responsibility orders in NSW. Adoption is another long-term placement option but is has been rarely used. In January 2012, a child protection inquiry panel delivered its report, which recommended that the Government should identify and remove barriers to achieving permanent placements for children in care, including by reviewing every child in care who is approaching the statutory stability timeframes to determine whether an application should be made for a permanent care order. [9.1]

In Queensland, legislation requires the Department to develop a case plan for each child who is in need of care and protection. The Department must regularly review this plan and prepare a review report and a revised case plan. This report must address how the revised case plan gives priority to the child's need for long-term stable care. Permanency planning guidelines also contain timeframes for reunification to occur after which a long-term placement should be pursued. In February 2013, the Queensland Child Protection Commission of Inquiry released a discussion paper which identified two options to improve placement stability for children in care. One is the increased use of long-term guardianship orders; and the other is a new form of order between long-term guardianship and adoption. The paper noted that "significantly increasing the use of adoption in the care system...would be widely opposed". [9.2]

### **Permanency planning in two other countries**

In the US, the child protection system is primarily governed by State law but federal Congress has enacted legislation which States must meet in order to receive federal funding. In 1996, President Clinton outlined the goal to at least double the number of children adopted or permanently placed each year. In

1997, Congress enacted the *Adoption and Safe Families Act 1997*, which aimed to help States move children out of foster care into safe, permanent homes more quickly. Measures included reducing the timeframe for holding a permanency hearing from 18 to 12 months and a program to reward States for increasing the number of adoptions from care. The *Fostering Connections to Success and Increasing Adoptions Act 2008* extended the adoption incentive program and introduced other measures. During 2011, almost 50,000 children were adopted from foster care (up from 27,000 in 1996). [10.1]

The UK Government has also introduced a number of measures to promote permanency for children in care, including adoption. In 2002, legislative reforms were enacted to support adoption and to create a new placement option: special guardianship orders. Since taking office, the Cameron Government has made increasing adoptions of children in care a priority. In March 2012, the Government released an action plan to tackle delays in adoptions of children in care; in December 2012, it announced a new package of support for people who want to adopt; and in January 2013 the Government announced proposals to address the shortage of adoptive parents. In February 2013, the Government introduced into the House of Commons a bill which seeks to implement a number of measures announced over the past year. [10.2]

### **Comparing foster care and adoption outcomes**

According to Thoburn, on the basis of the available evidence, there is no robust way of comparing outcomes for children adopted from care with similar children who join permanent foster families or leave care through guardianship orders. The results of a longitudinal study in the UK (published in 2009) found that disruption rates for children in foster care compared unfavourably with those for children who had been adopted. However it was difficult to compare the two types of placement because children in foster care generally enter these placements at an older age than children enter adoptive placements. For children in foster care whose placements were stable, the study found no significant difference in emotional difficulty and educational progress compared to those who were adopted. A longitudinal study in the US (published in 2011) reported different findings. It compared developmental outcomes after five years for young children (under 13 months of age) in foster care who had returned home, remained in care, or been adopted. It found that children in foster care had the poorest developmental outcomes on all measures. [11]

## 1. INTRODUCTION

In November 2012, the Minister for Family and Community Services, Pru Goward MP, released a discussion paper containing child protection legislative reform proposals.<sup>1</sup> The reform proposals are in three parts: (1) promoting good parenting; (2) providing a safe and stable home for children and young people in care; and (3) creating a child-centred system. This paper provides background and commentary on the second part of the proposed reforms, which aim to improve permanency planning for children and young people in out of home care. The permanency planning reform proposals include:

- Establishing a new preferred hierarchy of permanent placement types (with adoption placed above long-term foster care);
- Introducing specific timeframes for making decisions about restoration of the child to their family;
- Creating a new long-term guardianship order that would support long-term relative and kinship placements;
- Streamlining adoptions, including by removing administrative burdens for existing carers to be approved as applicants for adoption.

This paper begins with an overview of the out-of-home care system in NSW. It then explores the concept of permanency planning and its importance. Next, the paper provides an outline of the relevant statutory provisions in NSW and of permanency planning in practice. It then presents a brief summary of adoption laws in NSW. The following sections set out the current legislative reform proposals in relation to permanency planning and adoption and consider various stakeholder responses. The paper then examines permanency planning policies in some other Australian and overseas jurisdictions. Finally, the paper refers to research comparing long-term foster care with adoption.

## 2. OUT OF HOME CARE

### 2.1 The care and protection system

The Department of Family and Community Services (previously known as DoCS) is responsible for providing assistance to children and young persons who are suspected of being abused or neglected, or whose parents are unable to provide adequate care or protection. The Department's responsibilities and powers are set out in the *Children and Young Persons (Care and Protection) Act 1998* (NSW). If the Department considers that a child or young person is in need of care and protection, it can respond in various ways, including referring the family to support services, providing intensive case management, and applying for a court order to remove the child or young person from the family home. In exercising its functions under the Act, the Department must apply the

---

<sup>1</sup> Department of Family and Community Services, [Child Protection: Legislative Reform Proposals](#), Discussion Paper, 22 November 2012

principles in section 9 of the Act, including taking “the least intrusive intervention in the life of the child or young person and his or her family that is consistent with the paramount concern to protect the child or young person from harm and promote the child or young person’s development”.

## **2.2 Pathways into care**

The most common pathway into out-of-home care is where the Department obtains a care order from the Children’s Court, which confers on the Minister or another person parental responsibility for residency (known as statutory out-of-home care: see s 135A). These care orders can only be made if the Court is satisfied that the child or young person is in need of care and protection for one of the reasons listed in the Act (see ss 71, 79, 81). There are a number of provisions in the Act to promote planning for permanent placements in relation to care orders (discussed in Section 4 below). Another pathway into out-of-home care is where the Department forms the view that the child or young person is in need of care and protection and the Department provides, arranges or supports a temporary placement which is agreed to by the parents of the child or young person (supported out-of-home care: see s 135B). A third pathway is placements arranged by the parents without the Department’s intervention (voluntary out-of-home care: see s 135C).

## **2.3 Responsibilities in care**

Arrangements for the provision of statutory or supported out-of-home care may only be made by a designated agency (a government or non-government organisation accredited by the Children’s Guardian), or by the Children’s Guardian (s 138). Designated agencies can only place children and young people in the care of an authorised carer (s 136) (i.e. a person who has been authorised as a carer by a designated agency: s 137). All relative/kinship carers and foster carers must therefore be authorised under the Act.

A designated agency that places a child or young person in the care of an authorised carer has a responsibility to supervise the placement (s 140). In doing so, the agency will exercise certain functions delegated by the Minister (s 140). Authorised carers have authority to exercise a range of functions listed in the Act: e.g. to make decisions concerning the day-to-day care and control of the child or young person (s 157). However, the exercise of these functions is subject to any written direction given by the designated agency.

The Department of Community Services currently provides out-of-home care services to around 83 percent of all children and young persons in out-of-home care.<sup>2</sup> The remaining 15 percent is delivered by non-government agencies. This is changing as a result of a recommendation by the Wood Special Commission of Inquiry into Child Protection to transfer all out-of-home care services to the non-government sector. The transition process began in 2011/12 and is expected to take between five and ten years.<sup>3</sup>

---

<sup>2</sup> Department of Family and Community Services, [Annual Statistical Report 2010/11](#), January 2012, p10

<sup>3</sup> Department of Family and Community Services, [Out of Home-Care Transition – About the](#)

## 2.4 Children and young people in care

As at 30 June 2012, there were 18,169 children and young people in out-of-home care in NSW (compared to 14,667 five years earlier).<sup>4</sup> Around two thirds (12,172) were in statutory care (where the Minister or a non-related person has parental responsibility for residency because of an order of the Children's Court), with one third in supported care (care arranged, provided or otherwise supported by the Director-General). Almost 80 percent of children and young persons in care were on a final care order.

Age: The ages of children and young people in out-of-home care are shown in the Table below. Combining the first two age-brackets reveals that 27percent of the children and young people in care were under the age of 6.

Age	Number	Percent
0 to 2 years	1,917	10.6
3 years to 5 years	3,120	17.2
6 years to 10 years	5,795	31.9
11 years to 15 years	5,543	30.6
16 years and older	1,793	9.9
<b>Total</b>	<b>18,169</b>	<b>100.0</b>

Aboriginality: Over one third of children and young people in care (34.6 percent) were Aboriginal and/or Torres Strait Islander. The rate of Aboriginal and Torres Strait Islander children and young people in care (84 per 1,000) is much higher than for non-Aboriginal children and young people (8 per 1,000).

Placement type: The placement types for all children and young people in care are shown below. More than half (52 percent) were in relative or Aboriginal kinship care, and almost 40 percent were in foster care.

Placement type	Number	Percent
Relative & Aboriginal kinship care	9,742	52.1
Foster care	7,013	38.6
Non related person	148	0.8
Parents	702	3.9
Residential care	506	2.8
Independent living	220	1.2
Supported accommodation	53	0.3
Other	55	0.3
<b>Total</b>	<b>18,169</b>	<b>100.0</b>

<sup>4</sup> [Transition](#), [online], accessed 19 March 2013

<sup>4</sup> Department of Family and Community Services, [Annual Statistical Report 2011/12](#), January 2013, Part E

Length of time in care: As shown below, around 73 percent of children and young people in out-of-home care had been in care for more than two years, with 38 percent having been in out-of-home care for five years or more.

Placement type	Number	Percent
Less than 6 months	1,428	7.9
6 months to < 1 year	1,209	6.7
1 year to < 2 years	2,198	12.1
2 years to < 5 years	6,386	35.2
5 years or more	6,931	38.2
<b>Total</b>	<b>18,152</b>	<b>100.0</b>

Number of placements: The Table below shows the number of placements for children and young people by length of time in care in the current care period. For the total population, 39 percent had only one placement, 25 percent had two placements, and 36 percent had three or more placements. Of those in care for more than five years, almost 44 percent had three or more placements.

Time in care / Placements	Number	Percent
Less than 1 year		
1 placement	1,571	59.6
2 placements	740	28.1
3+ placements	326	12.4
1 year to < 2 years		
1 placement	895	40.7
2 placements	643	29.3
3+ placements	660	30.0
2 years to < 5 years		
1 placement	2,348	36.8
2 placements	1,619	25.4
3+ placements	2,419	37.9
5 years or more		
1 placement	2,331	33.6
2 placements	1,593	23.0
3+ placements	3,007	43.4
<b>Total</b>		
<b>1 placement</b>	<b>7,145</b>	<b>39.4</b>
<b>2 placements</b>	<b>4,595</b>	<b>25.3</b>
<b>3+ placements</b>	<b>6,412</b>	<b>35.5</b>

### 3. PERMANENCY PLANNING FOR CHILDREN IN CARE

#### 3.1 What is permanency planning?

A 2001 briefing paper noted that the concept of permanency planning emerged in the 1970s, first in the US and later in the UK. It explained:

During the 1960s and 1970s, a number of studies highlighted that there were many children who remained in institutions or unstable fostering arrangements for long periods of time with no effort being made to return them to their families or find them more permanent arrangements.<sup>5</sup>

The permanency movement developed in response to concern about the detrimental effects of this “drift in foster care”. However, the concept has changed over time and between jurisdictions. The briefing paper stated:

Kelly argues that in the US, rehabilitation to the child’s family was considered the major permanence option, where in the UK “permanence” became synonymous with adoption. Maluccio et al. describe how the concept of permanency planning evolved in the UK from its origins as a movement to deal with “drift in care” to encompassing the prevention of removal of children from their homes. More recently, developments in the US and the UK are focused on adoption as an important and under-utilised aspect of permanency planning.<sup>6</sup>

While there does not appear to be an accepted definition of permanency planning, in a recent Australian article Tilbury and Osmond described the concept in the following terms:

Permanency planning is a case planning process aimed at securing stability and continuity for children in out-of-home care. Permanent options cover the spectrum of placement prevention, reunification, supporting children and carers in kin, foster and residential placements, and adoption. Permanency planning is conceptualised as having relational, physical and legal dimensions: relational permanence pertains to children having the opportunity to experience positive, caring and stable relationships with others; physical permanence denotes stable living arrangements; and the legal dimension pertains to the legal arrangements of a child’s custody and guardianship.<sup>7</sup>

#### 3.2 Importance of permanency planning

In a 2007 paper, Osborn, Delfabbro and Barber summarised the importance of placement stability for children as follows:

Evidence suggests that such placement instability is likely to have significant effects on the current and long-term wellbeing of children. An absence of stability is thought to deprive children of the capacity to form attachments with

---

<sup>5</sup> A Rath, [Permanency Planning and Adoption](#), Briefing Paper No. 2/2001, Parliamentary Research Service, February 2001, p7

<sup>6</sup> A Rath, note 5, 2001, p8

<sup>7</sup> J Osmond and C Tilbury, ‘Permanency Planning Concepts’, (2012) 37(3) *Children Australia* 100. See also C Tilbury and J Osmond, *Permanency Planning in Foster Care: A Research Review and Guidelines for Practitioners* (2006) 59(3) *Australian Social Work* 265

adults, stable peer relationships, [and] has been implicated in poorer school performance, as well as greater emotional and behavioural maladjustment. Barber and Delfabbro (2004) found that children who started with more serious behavioural problems were more likely to have poorer psychological outcomes over time and to experience greater placement instability. However, outcomes in this group were generally even poorer if placement instability was sustained for 12 months or longer. Similar conclusions were reached by Rubin, O'Reilly, Luan and Localio (2007) in a sophisticated longitudinal analysis of children entering care in North America. Although baseline behavioural problems were strongly predictive of placement instability over time, placement instability itself was found to have a separate or independent (and negative) effect on behavioural adjustment 18 months later, even amongst children who had entered care with few behavioural problems.<sup>8</sup>

One of the studies they cited was a longitudinal study of young people leaving out of home care in NSW.<sup>9</sup> This study is being carried out by the Social Policy Research Centre at the University of NSW. In 2007, the study reported on findings in relation to young people four to five years after leaving care. The study examined a range of outcome domains for these young people including employment, living arrangements, education, substance abuse, mental health, criminal behaviour, and relationships. One of the findings was that:

Stability and, more importantly, a sense of [emotional] security in care were highly significant predictors of young people's outcomes four to five years after they left care. As Jackson and Thomas (1999) pointed out, "stability on its own is not the end of the story" and is not necessarily desirable in itself if the child is unhappy or the placement does not meet the child's needs....Stability is important because it allows children to 'put down roots' and develop a network of relationships and because, as Jackson and Thomas (1999) outlined, it is likely to be a pre-condition for continuity in schooling, friendships, health care, and familiarity with the neighbourhood and local community

While both stability and sense of security were interrelated, young people's sense of security was a more significant predictor of their outcomes after leaving care than stability *per se*. This is consistent with Jackson and Thomas's distinction between stability and continuity, and Schofield's emphasis on the importance of 'felt security'. It is also consistent with the role of a lasting relationship with at least one significant adult in children's lives in promoting resilience (Andersson, 2005; Gilligan, 2001; Lahti, 1982; Rutter, Giller & Hagell, 1998; Sinclair et al., 2005).<sup>10</sup>

The report then considered how to "translate stability into security so that young people leaving care have a safety net of supports around them that they can trust and are willing and able to access". The report stated:

The most likely means is through the continuity of relationships, acceptance, and the normality of their daily lives - and continuity which does not end on their

<sup>8</sup> A Osborn, P Delfabbro and J Barber, 'The psychosocial functioning and family background of children experiencing significant placement instability in Australian out-of-home care' (2008) 30 *Children and Youth Services Review* 847 at 848 (references omitted)

<sup>9</sup> J Cashmore and M Paxman, [Longitudinal Study of Wards Leaving Care Four to Five Years On](#), Social Policy Research Centre, University of New South Wales, 2007

<sup>10</sup> J Cashmore and M Paxman, note 9, p124



18th birthday. Placing children with their siblings and facilitating contact with family members, in line with the child's wishes and best interests, allows children to have some continuity in the relationships that matter a great deal to them. Keeping children at the same school - as far as possible - allows them to maintain their friendships, familiarity and connection with the local community. Ideally, what they need is a family where they are cared about, listened to, and treated as one of the family – a place where they can feel at home and that this is 'their home'. Because children in care have almost always experienced the pain and loss of separation or rejection, this may take some time and it will also require a great deal of sensitivity, acceptance, emotional availability, patience and skill on the part of carers and workers...<sup>11</sup>

## 4. LEGISLATION ON PERMANENCY PLANNING

### 4.1 Brief history of reforms

In June 2000, before the new *Children and Young Persons (Care and Protection) Act 1998* (NSW) had commenced, the Minister for Community Services, Faye Lo Po', released a draft exposure bill which sought to amend the Act to place a greater emphasis on the need for permanency planning for children in out-of-home care, and to encourage consideration of adoption as a permanent placement option.<sup>12</sup> The Minister explained that:

There is broad agreement amongst child protection professionals that greater emphasis needs to be placed on permanency planning for children in out-of-home care. Good casework practice requires that a safe, stable and loving family environment should be sought and maintained for these children. This bill aims to provide a clearer focus for courts and child protection workers on this important issue, and to put some legislative checks and balances in place. It seeks to ensure that permanency planning is firmly on the agenda when decisions are made about a child's future.<sup>13</sup>

Although permanency planning was widely supported, the bill was very controversial, in particular, the provisions to encourage consideration of adoption at an early stage.<sup>14</sup> These provisions were particularly contentious given statements by the Minister which suggested that adoption should be preferred to foster care as a permanent placement option. The Minister said:

The adoption of children in long-term foster care has always been technically possible, although not well utilised, under our existing system. These proposals aim to more actively encourage consideration of adoption as an option for children who may otherwise spend their entire childhood in long-term foster care. I am aware that there are some who will say that there is nothing wrong with long-term foster care, and that there is no need to encourage consideration of adoption...Despite the dedication of the foster carers, foster care itself has

---

<sup>11</sup> J Cashmore and M Paxman, note 9, p126

<sup>12</sup> *Children and Young Persons (Care and Protection) Amendment (Permanency Planning) Bill 2000*

<sup>13</sup> Faye Lo Po', *NSW Parliamentary Debates (LA)*, 21 June 2000, [p7327](#)

<sup>14</sup> See A Rath, note 5, p2-7; and see also M Swain, *Adoption and Care and Protection of Children: The Proposed Legislative Changes*, Briefing Paper No 10/2000, Parliamentary Research Service, August 2000, p22-30

one fundamental disadvantage — it can never guarantee the children permanency, as it cannot protect the children from future legal appeals. This uncertainty is always there, in every foster placement, no matter how committed the foster carers and how settled the child. The only option which offers real permanency and real security is adoption. This uncertainty associated with foster care is all too real for those concerned.<sup>15</sup>

There was significant debate about whether adoption should be the preferred placement choice for children in out of home care. The arguments were outlined in the 2001 briefing paper and are summarised briefly below.<sup>16</sup>

Arguments for	Arguments against
Research shows the success of adoption	Research does not unequivocally support a preferential approach towards adoption
Adoption is the only legally secure option	Alternatives to adoption can be secure. In any event, a sense of security is more important to children than legal status.
Children generally prefer adoption	Some children do not want adoption
Adoption normalises the parent-child relationship	Adoption is more likely to result in a loss of contact with relatives
Problems with adoption have been overcome – adoptions are now open and can provide for ongoing contact between a child and his or her birth family	Adoption has risks including the risk of breakdown and the risk of bitter and protracted court proceedings if the adoption is contested by parents
	Placement should not be determined according to a rigid formula

In June 2001, the Minister introduced into Parliament a much amended draft exposure bill<sup>17</sup>, saying that:

This new bill will be treated as a further draft exposure bill to enable more consultation to take place on these proposed amendments. Consultation to date has confirmed that there is broad agreement in the community with the principle that permanency planning for abused and neglected children in out-of-home care needs greater focus.

However, I am aware that there is still a considerable amount of debate about whether adoption should be actively promoted for children who cannot safely return to their birth parents. Consequently, this bill emphasises that adoption is one of a range of possible long-term options for children in out-of-home care. It should be noted that it does not make consideration of adoption compulsory in

<sup>15</sup> Faye Lo Po', *NSW Parliamentary Debates (LA)*, 21 June 2000, [p7327](#)

<sup>16</sup> See A Rath, note 5, p28-32

<sup>17</sup> *Children and Young Persons (Care and Protection) Amendment (Permanency Planning) Bill 2001 (No 2)*

every case, nor does it extend the Children's Court's jurisdiction to allow it to make adoption orders...<sup>18</sup>

After further consultation and amendments, the bill was passed by the Parliament on 30 November 2001. The permanency planning provisions that were introduced have remained largely unchanged since then.

## 4.2 Current provisions

General Principles: The *Children and Young Persons (Care and Protection) Act 1998* contains the overarching principle that, in any action or decision concerning a child or young person, the safety, welfare and well-being of the child or young person is paramount: section 9(1). Subject to this primary principle, there are a number of other principles that apply in the administration of the Act. One of these is outlined in section 9(2)(e):

If a child or young person is placed in out-of-home care, arrangements should be made, in a timely manner, to ensure the provision of a safe, nurturing, stable and secure environment, recognising the child's or young person's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made in relation to a permanent placement.

Care plans: Section 78 requires the Director-General to prepare a care plan when applying to the Children's Court for an order for the removal of a child or young person from the care of his or her parents; and section 80 provides that the Children's Court must not make a final order for the removal of a child from the care of his or her parents, or for the allocation of parental responsibility in respect of the child, unless the Court has considered a care plan presented by the Director-General. A care plan must make provision for the following:

- (a) the allocation of parental responsibility between the Minister and the parents of the child or young person for the duration of any period for which the child or young person is removed from the care of his or her parents,
- (b) the kind of placement proposed to be sought for the child or young person, including:
  - (i) how it relates in general terms to permanency planning for the child or young person, and
  - (ii) any interim arrangements that are proposed for the child or young person pending permanent placement and the timetable proposed for achieving a permanent placement,
- (c) the arrangements for contact between the child or young person and his or her parents, relatives, friends and other persons connected with the child or young person,
- (d) the agency designated to supervise the placement in out-of-home care,
- (e) the services that need to be provided to the child or young person.

<sup>18</sup> Faye Lo Po', *NSW Parliamentary Debates (LA)*, 27 June 2001, [p15585](#)

Permanency plans: Section 83 requires the Director-General to prepare a permanency plan when applying to the Children's Court for a care order; and it requires the court, before making a final care order, to be satisfied that permanency planning has been adequately addressed. The section states:

- (1) If the Director-General applies to the Children's Court for a care order (not being an emergency care and protection order) for the removal of a child or young person, the Director-General must assess whether there is a realistic possibility of the child or young person being restored to his or her parents, having regard to:
  - (a) the circumstances of the child or young person, and
  - (b) the evidence, if any, that the child or young person's parents are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care.
- (2) If the Director-General assesses that there is a realistic possibility of restoration, the Director-General is to prepare a permanency plan involving restoration and submit it to the Children's Court for its consideration.
- (3) If the Director-General assesses that there is not a realistic possibility of restoration, the Director-General is to prepare a permanency plan for another suitable long-term placement for the child or young person and submit it to the Children's Court for its consideration.
- (4) In preparing a plan under subsection (3), the Director-General may consider whether adoption is the preferred option for the child or young person.
- (5) The Children's Court is to decide whether to accept the assessment of the Director-General.
- (6) If the Children's Court does not accept the Director-General's assessment, it may direct the Director-General to prepare a different permanency plan.
- (7) The Children's Court must not make a final care order unless it expressly finds:
  - (a) that permanency planning for the child or young person has been appropriately and adequately addressed, and
  - (b) that prior to approving a permanency plan involving restoration there is a realistic possibility of restoration having regard to:
    - (i) the circumstances of the child or young person, and
    - (ii) the evidence, if any, that the child or young person's parents are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care.

Section 78A(1) defines a permanency plan as a plan that aims to provide a child or young person with a stable placement that offers long-term security and that:

- (a) has regard, in particular, to the principle set out in section 9 (2) (e), and
- (b) meets the needs of the child or young person, and

- (c) avoids the instability and uncertainty arising through a succession of different placements or temporary care arrangements.

Permanency planning recognises that long-term security will be assisted by a permanent placement: section 78(2). A permanent placement is defined (in section 3) to mean a long term placement which provides a safe, nurturing and secure environment for the child or young person, which may be achieved by:

- (a) restoration to the care of a parent or parents, or
- (b) placement with a member or members of the same kinship group as the child or young person, or
- (c) long-term placement with an authorised carer, or
- (d) placement under an order for sole parental responsibility under section 149, or
- (e) placement under a parenting order under the *Family Law Act 1975* of the Commonwealth, or
- (f) adoption.

In the case of an Aboriginal or Torres Strait Islander child or young person, a permanency plan must address how the plan has complied with the Aboriginal and Torres Strait Islander placement principles: section 78A(3). These principles are set out in section 13 and include this general order of placement:

Subject to the objects in section 8 and the principles in section 9, an Aboriginal or Torres Strait Islander child or young person who needs to be placed in statutory out-of-home care is to be placed with:

- (a) a member of the child's or young person's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, or
- (b) if it is not practicable for the child or young person to be placed in accordance with paragraph (a) or it would not be in the best interests of the child or young person to be so placed—a member of the Aboriginal or Torres Strait Islander community to which the child or young person belongs, or
- (c) if it is not practicable for the child or young person to be placed in accordance with paragraph (a) or (b) or it would not be in the best interests of the child or young person to be so placed—a member of some other Aboriginal or Torres Strait Islander family residing in the vicinity of the child's or young person's usual place of residence, or
- (d) if it is not practicable for the child or young person to be placed in accordance with paragraph (a), (b) or (c) or it would be detrimental to the safety, welfare and well-being of the child or young person to be so placed—a suitable person approved by the Director-General after consultation with:
  - (i) members of the child's or young person's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, and
  - (ii) such Aboriginal or Torres Strait Islander organisations as are appropriate to the child or young person.

Review of plan for restoration: A permanency plan involving restoration must be reviewed by the designated agency responsible for the placement of the child or young person. This should occur at the end of the length of time included in the permanency plan as the period during which restoration should be actively pursued, or if it has not been reviewed within 12 months after the last occasion on which it was considered by the Children's Court: section 85A. A review is to determine whether the plan should be changed, particularly with respect to the length of time during which restoration should be pursued.

Sole parental responsibility orders: As noted above, one permanent placement option is an order under section 149 for sole parental responsibility. This section was introduced with the 1998 Act but did not come into force until 2004. In the meantime, the permanency planning reforms in 2001 changed the section to make it easier to apply for these orders. The length of continuous care that was required before an application for such an order could be made was reduced from five to two years. Section 149 now provides as follows:

- (1) An authorised carer who, for a continuous period of not less than 2 years, has had the care of a child or young person, for whom the Minister (either alone or with another person or persons) has parental responsibility, may apply to the Children's Court for an order awarding sole parental responsibility for the child or young person to the authorised carer, subject to this section.
- (2) The application may be made by the authorised carer and the authorised carer's partner, if the partner so consents, and an order may be made accordingly.
- (3) An application cannot be made by a person who has the responsibility of an authorised carer solely in his or her capacity as the principal officer of a designated agency.
- (4) An application cannot be made without the consent of the person or persons who had parental responsibility for the child or young person immediately before parental responsibility was allocated to the Minister. The Children's Court must be satisfied that the consent has been properly given on an informed basis.
- (5) The Children's Court may order a person who makes an application under this section to notify those persons whom the Children's Court specifies of the making of the application.
- (6) An application that relates to a child who is not less than 12 years of age, or a young person, and who is capable of giving consent cannot be made without the consent of the child or young person. A consent is to be given in such form and manner as may be prescribed by the regulations.
- (7) If an application relates to a child who is less than 12 years of age, the principal officer of the relevant designated agency is to give the child notice of the application.
- (8) In making an order under this section for sole parental responsibility, the Children's Court may make or vary a contact order under section 86.

The authorised carer applying for an order under section 149 must present to the Children's Court (i) a care plan prepared in accordance with the section; and (ii) a copy of any report on the health, educational or social well-being of the child or young person that is relevant to the care plan: section 149AA.

Sole parental responsibility orders are intended to be permanent and they can only be varied or rescinded in certain circumstances. An application for variation or rescission can only be brought with the leave of the Children's Court, and with the consent of the principal officer of the designated agency that had last supervised the placement of the child or young person: section 149A.

## 5. PERMANENCY PLANNING IN PRACTICE

### 5.1 Permanency Planning Project

In May 2006, the Department of Community Services began the first stage of its Permanency Planning Project. This three-year project aimed "to integrate the principles of permanency planning for children in care into DoCS casework practice".<sup>19</sup> The project involved training caseworkers in the implementation of a new *Permanency Planning Policy*, which contained specific timeframes for decision-making about long-term care for children and young-people.<sup>20</sup> For children under two years of age, decisions about whether restoration was a realistic possibility were to be made within six months of removal (for older children, decisions were to be made within 12 months). The roll-out of the project in Community Service Centres (CSCs) across the State was completed in December 2008. The Department's 2008/09 annual report stated:

In December 2008, the Department completed the roll-out of its permanency planning strategy. It now operates across NSW through all community services centres for non- Aboriginal children aged 0–2 years.

About 1,600 child protection and out-of-home care caseworkers and other CSC staff were given training that focused on the policy approach to permanency planning. Temporary permanency planning caseworkers supported staff in selected CSCs to ensure case planning reflected permanency planning principles.

The number of children aged 0–2 years in permanency planning has grown significantly – increasing from 450 in June 2008 to about 1,200 by 30 June 2009. This represents a 166 per cent increase in the number of children in permanency planning. Of these children, 59 per cent had final orders placing them permanently with a relative or foster carer or restoring them to their parent/s.

All CSC staff now apply permanency planning to case planning for children aged 0–2 years entering the care system through a Children's Court order and their older siblings entering at the same time. The aim is to avoid the detrimental impact on children of multiple placements.

<sup>19</sup> Department of Community Services, '[Securing their future – permanency planning](#)', *Inside Out*, March/April 2008.

<sup>20</sup> See Department of Community Services, [Permanency Planning Policy](#), July 2007. See also the Department's [Permanency Planning Guidelines](#), October 2008.

A 2008 evaluation report found that indicative outcomes for children in the project, measured by percentage of children in permanent placements, were better than those at comparison sites.

Aboriginal children are not included in the permanency planning project target group at this time. However, DoCS is working to tailor permanency planning for Aboriginal children and ensure that cultural needs are met in the wider context of decision-making. This has involved significant consultation with Aboriginal stakeholders and builds on other initiatives supporting Aboriginal children in care.<sup>21</sup>

In April 2011, a trial of permanency planning for Aboriginal children aged two years and under commenced.<sup>22</sup> The trial took place over 12 months at four sites: Shellharbour, Central Sydney, Blacktown and Armidale.

## 5.2 Adoption as part of permanency planning

The Department's *Permanency Planning Policy*, discussed above, refers to adoption as a permanent placement option without discussing it in much detail. The Department's *Permanency Planning Guidelines*, which is a practice resource for caseworkers, states that adoption:

...is a well-recognised way of providing a child who cannot be restored to birth parents or live with a relative/kinship carer, with a permanent family in which to grow and establish stability for life. Adoption of a child can be requested by a birth parent, their permanent carer, DoCS or, where a child is in the parental responsibility of the Minister, a non-government agency on behalf of the Director-General.<sup>23</sup>

The guidelines note that "adoption by a relative/ kinship carer is not considered appropriate because it distorts genealogical relationships and causes identity confusion". The guidelines state that other permanent legal options, such as Family Court parenting orders or sole parental responsibility orders should instead be explored for relative/ kinship carers.

The guidelines outline three main pathways to adoption: (1) when a birth parent requests adoption as a plan for their child; (2) when a child is in need of a permanent placement; and (3) when a child is in a permanent placement. In relation to the second pathway, the guidelines explain:

The Children's Court care plan may include a statement that adoption will be pursued for the child. This would occur in situations where:

- adoption has been discussed with the family during case planning and it has been agreed that adoption is appropriate for the child, or
- adoption is deemed to be in the child's long term interests, with or without parental agreement; or
- the Magistrate may decide that adoption should be considered.

---

<sup>21</sup> Department of Community Services, [Annual Report 2008/09](#), p68

<sup>22</sup> Department of Community Services, [Annual Report 2010/11](#), p104

<sup>23</sup> Department of Community Services, [Permanency Planning Guidelines](#), October 2008, p21



DoCS Adoption and Permanent Care Services has a pool of carers who are dually authorised as adoptive applicants and permanent carers...<sup>24</sup>

With respect to the third pathway (out-of-home care), the guidelines explain:

Adoption of a child in a permanent placement can be requested by the child, their permanent carer, parent, DoCS or a non-government organisation. Adoption can be raised at any time after placement of the child with their permanent carers.

The decision to support adoption as a case plan goal will be based on an assessment of:

- whether an adoption order is in the best interests of the child
- the attachments formed between the child and proposed adoptive parents
- the views of the child's parents regarding consent to adoption
- ongoing contact with the child's birth family and support for their culture and identity.<sup>25</sup>

The guidelines outline steps for caseworkers to undertake before recommending adoption including:

- Consultation with caseworkers with adoption expertise
- Assessment of the child, family and carers
- Working with the child's family
- Preparation of authorised carers to become adoptive parents
- Life story work
- Preparation of legal documentation and preparation of an adoption plan

In 2008, the Department set up an out-of-home care adoption team to promote permanency through adoption if it is in the best interests of the child, particularly those in long-term placements.<sup>26</sup> The Department explained:

The team's focus is to increase the number of adoptions through the development of procedures and tools that support caseworkers. The team also provides expertise to six new regional adoption caseworkers, who give specific case-based advice and support to staff at CSCs about adoption decisions.

### 5.3 Financial support for carers who adopt

From 1 July 2008, foster carers who adopted a child that had been in their care for at least two years were eligible for a post-adoption allowance which was equivalent to the statutory care allowance paid to foster carers (until their adopted child turned 18 years of age).<sup>27</sup> The statutory care allowance is currently paid at the rate of between \$423 and \$628 per fortnight (depending on the age of the child). In the September 2011 budget, the O'Farrell Government

---

<sup>24</sup> Department of Community Services, note 23, p61-62

<sup>25</sup> Department of Community Services, note 23, p62

<sup>26</sup> Department of Community Services, note 21, p66

<sup>27</sup> Department of Community Services, note 21, p62

announced that it would replace the existing post-adoption allowance with an annual lump sum payment of \$1,500. This change took effect from 1 January 2012.<sup>28</sup> The change did not apply to carers who had made an adoption application before 1 January or who had formally expressed an interest to adopt the child in their care before 6 September 2011.<sup>29</sup>

#### 5.4 Number of adoptions of children in care

The annual reports of the Department of Community Services provide information on the number of out-of-home care adoptions in NSW. The Table below shows the figures for the past ten years.<sup>30</sup> As can be seen, there have been relatively low numbers of adoptions of children in out-of-home care (there were only 65 adoptions in 2011/12) but there has been an upward trend in the past five years (there were 22 adoptions in 2007/08).

	02/03	03/04	04/05	05/06	06/07	07/08	08/09	09/10	10/11	11/12
Adoptions	14	11	25	18	15	22	30	48	45	65

The 2008 Special Commission of Inquiry report on child protection services in NSW discussed the reasons for the low number of adoptions:

According to Cashmore the main reasons why children in long term OOHC are not being adopted more often include the financial disincentives to adoption for carers, and overloaded caseworkers not having the time and skills or the necessary supervision to ensure that they follow through on developing the necessary plan and preparing the paper work. Also many children in care are living with relatives and adoption is generally not considered a useful or appropriate option. The issue of adoption for Aboriginal children is particularly problematic given the history of the 'stolen generation' and because, as HREOC's *Bringing them Home* report states, the concept of adoption is "incompatible with the basic tenets of Aboriginal society."<sup>31</sup>

In February 2012, the Minister for Family and Community Services, Pru Goward MP, suggested a different reason for the low rate of adoptions:

As this Government has identified repeatedly, the reason for this low number is the extraordinarily long, repetitious and difficult process that would-be adoptive families have to go through to adopt in this State. We all believe in safe and loving permanent solutions, but we will not attract more people to adoption while we have a process that can take well over two years and often up to five.<sup>32</sup>

<sup>28</sup> Department of Family and Community Services, [Change to the allowance for carers who adopt a child in statutory care](#), Fact Sheet, October 2011

<sup>29</sup> Department of Family and Community Services, note 28

<sup>30</sup> Department of Community Services, *Annual Report 2002/03*, p67; *Annual Report 2003/04*, p57; *Annual Report 2007/08*, p59; *Annual Report 2008/09*, p66, Department of Family and Community Services, *Annual Report 2010/11*, p103; *Annual Report 2011/12*, p31,

<sup>31</sup> J Wood AO QC, *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, November 2008, [Volume 2](#), p682. See J Cashmore, 'What can we learn from the US experience on permanency planning' (2001) 15(2) *Australian Journal of Family Law* 215

<sup>32</sup> P Goward, *NSW Parliamentary Debates (LA)*, 21 February 2012, [p8559](#)

## 5.5 Use of sole parental responsibility orders

Sole parental responsibility orders under section 149 of the Act were outlined above. A 2004 Department of Community Services fact sheet explained:

Sole parental responsibility gives a carer all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children. The carer can make long-term decisions for the child or young person and reach their own conclusions regarding their best interests. They can do this without having to 'check back' with DoCS or the fostering agency.<sup>33</sup>

The Department notes that, for a child or young person, the advantage of a sole parental responsibility order compared to adoption is that "it reduces the involvement of DoCS and the designated agency, but does not involve the lifelong cutting of legal ties to birth parents and other family members".<sup>34</sup>

There is no published information on how many sole parental responsibility orders have been made. In 2010/11, the Department consulted with non-government stakeholders on strategies to increase the use of these orders.<sup>35</sup> The outcome of this consultation process is not known.

## 6. LEGISLATION ON ADOPTION

### 6.1 Brief legislative history

Adoption is currently governed by the *Adoption Act 2000* (NSW), which was enacted following a NSW Law Reform Commission review of the *Adoption of Children Act 1965*.<sup>36</sup> That review described adoption as:

...a legal process by which a person becomes, legally, a child of the adopting parents and ceases to be a child of the birth parents. All the legal consequences of parenthood are transferred from the birth parents to the adoptive parents. The adopted child obtains a new birth certificate showing the adopters as the parents, and acquires rights of support and rights of inheritance from the adopting parents. The adopting parents acquire rights to guardianship and custody of the child. Normally the child takes the adopters' surname. The birth parents cease to have any legal obligations towards the child and lose their rights to custody and guardianship. Inheritance rights between the child and the birth parents also disappear.<sup>37</sup>

The Review recommended that the 1965 Act be rewritten so that adoption: "is characterised by openness, and is no longer shrouded in secrecy"; "conforms

<sup>33</sup> Department of Community Services, [Out-of-home care: Sole parental responsibility](#), Fact sheet, May 2004

<sup>34</sup> Department of Community Services, note 33

<sup>35</sup> Department of Community Services, [Annual report 2010/11](#), p100

<sup>36</sup> NSW Law Reform Commission, *Review of the Adoption of Children Act 1965*, [Report 81](#), 1997. For a history of adoption law and policy in NSW, see NSW Law Reform Commission, *Review of the Adoption of Children Act 1965*, [Discussion Paper](#), 34, 1994, Ch2; and Legislative Council Standing Committee on Social Issues [Releasing the Past Adoption Practices 1950 - 1998](#), Final Report, 8 December 2000

<sup>37</sup> NSW Law Reform Commission, Discussion Paper, note 36

with Australia's international obligations"; and "is brought into line with other areas of child law, as well as prevailing community expectations and attitudes".

There have been two significant sets of amendments to the Act since 2000. The *Adoption Amendment Act 2006* introduced a new ground upon which a court could dispense with the consent of a child's birth parent, namely that the child was being cared for by the applicants for the order, the child has a stable relationship with the applicants, and the making of the order would promote the child's welfare. The *Adoption Amendment Act 2008* contained a number of changes resulting from a review of the Act, including a reduction in the length of the child-carer relationship (from five years to two years) before a child who is 12 or over can give sole consent to his or her adoption.

## 6.2 Current provisions

The following is a brief summary of the current provisions as they are relevant to the adoption of children who are in out-of-home care.

Principles for decision-making: When making a decision about the adoption of a child, a decision-maker is required to have regard (as far as is practicable or appropriate) to a number of principles (s 8(1)). The principles are:

- (a) the best interests of the child, both in childhood and in later life, must be the paramount consideration,
- (b) adoption is to be regarded as a service for the child,
- (c) no adult has a right to adopt the child,
- (d) if the child is able to form his or her own views on a matter concerning his or her adoption, he or she must be given an opportunity to express those views freely and those views are to be given due weight in accordance with the developmental capacity of the child and the circumstances,
- (e) the child's given name or names, identity, language and cultural and religious ties should, as far as possible, be identified and preserved,
- (e1) undue delay in making a decision in relation to the adoption of a child is likely to prejudice the child's welfare,
- (f) if the child is Aboriginal—the Aboriginal child placement principles are to be applied,
- (g) if the child is a Torres Strait Islander—the Torres Strait Islander child placement principles are to be applied.

The factors to consider in determining the best interests of the child are set out in section 8(2). One of those factors is:

- (k) the alternatives to the making of an adoption order and the likely effect on the child in both the short and longer term of changes in the child's circumstances caused by an adoption, so that adoption is determined among all alternative forms of care to best meet the needs of the child.

Applications for adoption: A person, or a couple, may submit to the Director-General or to a principal officer of an accredited adoption service provider an expression of interest in being approved as suitable to adopt a child, and being

selected to adopt a child (s 42). The Director-General or principal officer may then invite the person or couple to submit an application to adopt a child (s 43). The *Adoption Regulation 2003* sets out criteria that are to be used in assessing applications (cl 12). If the application is successful, an application can then be made to the Supreme Court for an adoption order (ss 23, 87).

Adoption plans: The Act provides that the parties to the adoption may agree on an adoption plan (s 47). This is defined as a plan agreed to by two or more parties to the adoption that includes provisions for the exchange of information between the parties (e.g. about the means and nature of contact between the parties and the child), and any other matter relating to the adoption of the child (e.g. setting out ways in which the child is to be assisted to develop a positive cultural identity) (s 46). If the parties to an adoption agree to an adoption plan, a copy of the plan must accompany the application for an adoption order, unless the adoption plan has been registered by the Court (s 48).

Consent requirements: Generally, the court must not make an adoption order unless consent has been given by each parent of the child, and any person who has parental responsibility for the child (s 52). Consent is not required if the child gives sole consent to his or her adoption, or if the requirement for consent has been dispensed with by the Court (s 54). A child can only give sole consent if he or she is 12 or more years of age and of sufficient maturity to understand the effect of giving consent; and if he or she has been cared for by the proposed adoptive parent(s) for at least two years (s 54(2)). The Court can dispense with the consent of the child's parents in certain circumstances including if:

- the parents cannot be found; or if
- the application has been made by an authorised carer for the child, the child has an established relationship with that carer, and the adoption of the child by the carer will promote the child's welfare (s 67).

The child's parents can give general consent to the adoption of a child by a person(s) selected by the Director-General or the principal officer of an accredited adoption service provider. Alternatively, the parents can give specific consent to the adoption of a child by certain types of persons listed in the Act (e.g. a person who is an authorised carer who has had responsibility for the child for two years or more) (s 53). In giving general consent, the parents may express their wishes as to the preferred background, beliefs or domestic relationship of any prospective adoptive parents of the child (s 45B).

Generally, the court must not make an adoption order in relation to a child who is 12 or older unless the child consents to the adoption (s 55). The Court can dispense with the requirement for consent if it is satisfied that the child is in such a physical or mental condition as not to be capable of properly considering whether he or she should give consent (s 69).

Matters court must be satisfied of: The Court must not make an adoption order unless it is satisfied of a number of matters including (s 90):

- that the best interests of the child will be promoted by the adoption;

- that the arrangements proposed in any adoption plan are in the child's best interests and are proper in the circumstances
- that, as far as practicable and having regard to the age and understanding of the child, the wishes and feelings of the child have been ascertained and due consideration given to them, and
- if the child is an Aboriginal or Torres Strait Islander child – that the Aboriginal or Torres Strait Islander child placement principles have been properly applied
- if the child is not an Aboriginal or Torres Strait Islander child – that the culture, any disability, language and religion of the child and, as far as possible, that the child's given names, identity, language and cultural and religious ties have been taken into account in the making of any adoption plan in relation to the adoption.

Adoption information: Chapter 8 of the Act regulates access to adoption information by adopted children, birth parents and adoptive parents. Adoption information is defined to mean “a birth certificate, adopted person's birth record or prescribed information”. The *Adoption Regulation 2003* sets out a range of prescribed information that persons are entitled to access.

## 7. LEGISLATIVE REFORM PROPOSALS

As noted in the introduction, in November 2012, the Minister for Family and Community Services, Pru Goward MP, released a discussion paper on child protection legislative reform proposals.<sup>38</sup> Section 2 of that discussion paper outlined a number of reform proposals “to better respond to the needs of children in [out-of-home care] and achieve the best permanency outcomes”. A brief summary of the reform proposals, which relate to both child protection and adoption legislation, is presented below. The Government intends to table legislation in Parliament later this year.

### 7.1 Proposals relating to child protection legislation

***Permanency principles:***<sup>39</sup> It is proposed to incorporate in the objects and principles of the Act statements about:

- the promotion of safety permanency and wellbeing (the current objects and principles refer to safety welfare and wellbeing)
- avoiding instability and uncertainty arising from a succession of different placements or care arrangements
- avoiding the harmful effects on a child of delay in making decisions and taking action

<sup>38</sup> Department of Family and Community Services, [Child Protection: Legislative Reform Proposals](#), Discussion Paper, 22 November 2012

<sup>39</sup> Department of Family and Community Services, note 38, p25-30 (Proposal 6)

- the greater need for early decisions to be made to find stable and permanent placements for infants and younger children
- the preferred hierarchy of permanency being:
  1. family preservation/restoration
  2. long-term guardianship to kin or relative
  3. adoption
  4. parental responsibility to the Minister.

The discussion paper added that “to ensure the hierarchy of permanency placement options is applied in all cases, it is proposed that permanency plans not involving restoration include a proposal for pursuing guardianship or adoption or a reason as to why these will not be pursued”. Furthermore, the Children’s Court would only be able to make an order for parental responsibility to the Minister if adoption or long-term guardianship were not possible.

In proposing adoption as the third option in the permanent placement hierarchy, the paper stated that “international research has found greater advantages to adoption compared to long-term care in terms of placement stability, emotional security, sense of belonging and general well-being”. The paper referred in particular to a 2011 study by Lloyd and Barth and a 2002 study by Triseliotis (both of which are discussed in Section 11 below). In terms of placement stability, the paper noted that 34 percent of children and young people in care had experienced three or more placements in the current care period.

The paper noted that adoption may not be an appropriate placement for an Aboriginal child but it also referred to an alternative view that Aboriginal children and their parents should not be entirely denied this option. The paper then referred to provisions in the *Adoption Act* relating to Aboriginal children.

***Timeframes for achieving restoration:***<sup>40</sup> It is proposed to mandate time frames for reaching decisions about the feasibility of restoration to the child’s family before another permanent option must be pursued. These legislative timeframes would be six months (for children less than two years) and 12 months (for older children). The paper referred to research evidence suggesting that early decision-making about long-term placement results in better outcomes for children and young people, and is particularly important for young children. It also noted that “similar timeframes have been recommended and or implemented in other jurisdictions in Australia, the United Kingdom and the United States”. With respect to Australian jurisdictions, the paper referred to a Victorian draft policy that was published in 2001.

***Enhance supported care placements:***<sup>41</sup> It is proposed to introduce self-regulation of supported care placements by some supported carers to limit the intrusion of the Department in stable relative and kinship placements. In addition, it is proposed to place a two-year cap on the duration of supported care placements to achieve greater permanency and stability through permanent legal orders for these children and young people.

---

<sup>40</sup> Department of Family and Community Services, note 38, p30-31 (Proposal 7)

<sup>41</sup> Department of Family and Community Services, note 38, p31-32 (Proposal 8)

**Long-term guardianship orders:**<sup>42</sup> It is proposed to introduce a long-term guardianship order as a permanent placement option in the Act. Section 149 of the Act, providing for sole parental responsibility orders, would be repealed as it is “underutilised”. A guardianship order will transfer all the duties, powers, responsibilities and authority of a parent to a relative. An application for such an order could be made by a relative with a stable care relationship with the child or young person, or be brought by a designated agency with the carer’s consent. Parental consent would not be required but parents must be informed of the application and have a right to be heard. The circumstances in which a guardianship order would be considered in preference to adoption include:

- the child or young person is in a stable and self-supporting relative or kinship placement and there is no realistic possibility of restoration;
- a guardianship order would better support a child or young person’s cultural identity and cultural connections.

**Concurrent planning:**<sup>43</sup> Concurrent planning involves placing a child or young person with foster carers who are also approved adoptive parents. The paper notes that this offers children and young persons greater stability and the opportunity to form secure relationships with permanent adoptive parents while the possibility of restoration with their parents is being considered. It is proposed to introduce concurrent planning either by streamlining the assessment of authorised carers and prospective adoptive parents, or by creating a new category of “concurrent carer” who is authorised as both a long term carer and prospective adoptive parent. The paper notes that the UK Government recently announced its intention to introduce widespread use of concurrent planning. The paper also cited research in the UK and US that indicated favourable outcomes in cases of concurrent planning.

## 7.2 Proposals relating to adoption legislation

**Children’s Court’s jurisdiction:**<sup>44</sup> It is proposed to confer jurisdiction on the Children’s Court to make adoption orders where there are child protection concerns. The paper notes that there are a number of reasons why the Children’s Court may be the more appropriate forum for adoption applications in these cases. One of the reasons cited is that having one court to deal with all types of care arrangements streamlines court processes and should result in adoption being considered in the range of permanency arrangements at an earlier stage in placement to the benefit of the child. The paper also notes that it would be consistent with the practice in many other states that an inferior court be responsible for granting an adoption order.

**Making carer adoptions easier:**<sup>45</sup> It is proposed to fast-track out-of-home care adoptions by amending the *Adoption Act* to better recognise that authorised

<sup>42</sup> Department of Family and Community Services, note 38, p32-34 (Proposal 9)

<sup>43</sup> Department of Family and Community Services, note 38, p35-36 (Proposal 10)

<sup>44</sup> Department of Family and Community Services, note 38, p37-38 (Proposal 11)

<sup>45</sup> Department of Family and Community Services, note 38, p38 (Proposal 12)



carers (in the out-of-home care system) should not be required to undertake full assessment and authorisation as a prospective adoptive applicant.

**Standards for out-of-home care agencies:**<sup>46</sup> It is proposed to enhance the permanency planning capacity of non-government service providers by merging the *NSW Standards for Statutory OOHC* (which set out the accreditation standards for out-of-home care services) and the *NSW Adoption Standards* (which set out the accreditation standards for adoption services). The paper notes that, with increasing delivery of out-of-home care services by the non-government sector, this sector is a critical partner in ensuring greater permanency for children and young people in care, including adoption.

**Improved family involvement in adoptions:**<sup>47</sup> It is proposed to amend the *Adoption Act* to improve the involvement of parents in planning for the adoption of their child including allowing non-consenting parents to be parties to an adoption plan and greater use of alternative dispute resolution in adoption proceedings so that parents are fully engaged in planning for matters such as contact arrangements. The paper notes that currently non-consenting parents may only be informally included in the adoption planning process.

**Additional grounds for dispensing with consent:**<sup>48</sup> It is proposed to amend the *Adoption Act* to provide additional grounds for dispensing with parental consent including grounds where:

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

The paper notes that fulfilling the current requirements relating to parental consent (locating parents and encouraging their participation to develop an adoption plan) can cause significant delay in the making of an adoption order for a child, ultimately delaying permanency for the child.

**Parental rights to be advised of adoption:**<sup>49</sup> It is proposed to limit the parent's right to be advised of an adoption where the child is over 12 years of age and has given their sole consent; or where the Children's Court has taken away parental responsibility from that parent and found that there is no realistic possibility of restoration. The paper notes that it can take a significant amount

---

<sup>46</sup> Department of Family and Community Services, note 38, p39 (Proposal 13)

<sup>47</sup> Department of Family and Community Services, note 38, p39-40 (Proposal 14)

<sup>48</sup> Department of Family and Community Services, note 38, p41 (Proposal 15)

<sup>49</sup> Department of Family and Community Services, note 38, p42 (Proposal 16)

of time in some out-of-home care adoptions to locate a child's parent to advise of an initial adoption application and then, if the parent cannot be found, for the Supreme Court to direct that further steps be taken to locate the parent. The paper states that this can create lengthy delays for the adoption.

## 8. SELECTED STAKEHOLDER RESPONSES

The Department of Family and Community Services received 230 submissions in response to the discussion paper (the consultation period closed on 22 March). At the time of writing, these submissions were not available on the Department's website. This section provides a summary of submissions by six important stakeholders in response to the permanency planning proposals (these were obtained from the internet and by contacting the stakeholders).

### 8.1 NSW Children's Guardian<sup>50</sup>

Permanency principles:<sup>51</sup> The Children's Guardian "strongly supports an increased focus on permanency, with decisions to be made at the earliest stage". The Children's Guardian generally supports the proposed preferred placement hierarchy but makes several comments. It supports restoration being the preferred option where it is in the child's best interests, and it also supports relative and kin care as the next preferred option subject to:

...there being a comprehensive assessment process to determine that a particular relative is the most appropriate carer, with fit and proper person assessment part of the broader assessment.

The Children's Guardian also supports an increased focus on adoption:

...the care and protection system should facilitate domestic adoptions as a permanency outcome. This means that consideration of adoption...needs to take place at the very earliest stages of planning. This does not generally occur in the current system, with Barnardos being the notable exception.

However, the Children's Guardian notes that developing effective pathways from out-of-home care to adoption:

...will require considerable cultural change within the community services sector. There will need to be a significant investment in education and training to support the proposed changes.

Similarly, there will need to be investment in, and the capacity building of, adoption services. This will take time. There may therefore be a risk of delays in progressing some adoptions after any amending legislation takes effect.

The Children's Guardian suggests that there may be some practical difficulties in placing adoption above, rather than alongside, parental responsibility to the Minister in the placement hierarchy. This is because, at the time when the court

---

<sup>50</sup> NSW Children's Guardian, *Submission to NSW Community Services, Discussion Paper: Child Protection Legislative Reform Proposals*, 22 March 2013.

<sup>51</sup> NSW Children's Guardian, note 50, p10-13

makes care and protection orders, the court may not have enough information to determine that adoption is appropriate (and this might also apply to the use of guardianship orders to support relative and kinship care).

Restoration timeframes:<sup>52</sup> The Children's Guardian submitted (in part):

In order for the 6 and 12 month timeframes to be imposed, the Director-General and the Court must have sufficient information before them to determine restoration. There needs to be sufficient flexibility to enable the Court to extend these timeframes where it is not satisfied that it has sufficient information to make such a determination...and the making of such a determination is not in the best interests of the child or young person.

Guardianship orders:<sup>53</sup> The Children's Guardian submitted that parental consent should be required to make a guardianship order but that the Court should have the power to dispense with consent where this is considered to be in the best interests of the child or young person. In addition, it considers that where a child under the age of 12 has been in out-of-home care before the making of the order, the consent of the designated agency should also be required in the making of a guardianship order. However, it does not support the proposal that the agency that last managed the placement would have a right to bar applications being made for a review of a guardianship order, noting that this would make guardianship similar to adoptions in many respects.

Concurrent planning:<sup>54</sup> The Children's Guardian submitted:

Concurrent planning and the early placement of children with parents who wish to adopt should only be pursued where adoption services are satisfied that the potential adoptive parents are willing to support restoration, while it remains an option, and are fully aware of and able to emotionally cope with the possibility that adoption will not proceed.

Streamlining adoption:<sup>55</sup> The Children's Guardian raised issues with a number of these proposals. It considered that conferring adoption jurisdiction on the Children's Court would provide greater scope for inconsistencies in decision-making. It also queried why additional grounds are needed for dispensing with parental consent to adoptions; and submitted that reasonable inquiries should always be made to locate and advise a parent of an adoption. It commented that additional restrictions on parental consent and on the circumstances in which parents are to be advised of adoptions "would likely invite criticism that the government is introducing new forms of 'forced adoption'".

## **8.2 NSW Commission for Children and Young People<sup>56</sup>**

Permanency principles:<sup>57</sup> The Commission is generally supportive of the

<sup>52</sup> NSW Children's Guardian, note 50, p13

<sup>53</sup> NSW Children's Guardian, note 50, p14-15

<sup>54</sup> NSW Children's Guardian, note 50, p15-16

<sup>55</sup> NSW Children's Guardian, note 50, p16-20

<sup>56</sup> NSW Commission for Children and Young People, *Submission to Department of Family and Community Services Child Protection Legislation Reform Discussion Paper*, 21 March 2013

proposed placement hierarchy. However, in relation to adoption, the Commission considers that “this proposed major systemic shift requires consideration of the range of evidence in different jurisdictions and on outcomes for all age groups”. The Commission referred to the views of Professor Harriet Ward from the UK who “cautioned that adoption may only be suitable for a limited number of children and that adoptive parents may need long term support”. The Commission then stated:

The Commission cautiously supports the pursuit of adoption as a preferable placement alternative to parental responsibility to the Minister, where there has been a thorough examination of the circumstances and a detailed best interests determination which is supported by the caseworker and the Court. Adoption may provide greater stability and promote greater carer commitment and attachment than foster care. However, more research is needed to determine the frequency and consequences of adoption breakdown.

Restoration timeframes:<sup>58</sup> The Commission is “supportive of measures to expedite timely decision-making about restoration” but it notes that “a risk in legislating timeframes is additional pressure on caseworkers resulting in incomplete evidence gathering, rushed assessments and potentially flawed outcomes”. As an alternative, the Commission proposes requiring the Department to “report regularly and publicly on the percentage of cases in which [timeframe] targets are met and reasons for exceptions”. The Commission submitted that, if timeframes are prescribed, consideration should be given to a provision to allow for an extension of time in some circumstances, or for a review of the decision prior to placement finalisation.

Guardianship orders:<sup>59</sup> The Commission supports the proposed long-term guardianship orders but emphasises that “the child or young person should participate to the greatest extent possible in the making of these arrangements and their opinion should be valued”. A key concern of the Commission is the proposal that neither financial assistance nor after/leaving care support or services will be available to the young person post-guardianship.

Concurrent planning:<sup>60</sup> The Commission supports the dual authorisation of adoptive applicants as foster carers for the purpose of concurrent planning. However, the Commission notes that “it will be important to enhance selection, training and support of carers and potential carers to effectively manage the potential uncertainty of these arrangements”.

Streamlining adoption:<sup>61</sup> The Commission supports most of the other proposals to streamline adoptions. However, it disagrees with one of the proposed additional grounds for dispensing with parental consent: namely, if the parent “is unable to care for and protect the child e.g. the parent is incarcerated for an offence against the child...” The Commission is also concerned about the proposal to limit a parent’s right to be advised of an adoption where the child is

---

<sup>57</sup> NSW Commission for Children and Young People, note 56, p8-9

<sup>58</sup> NSW Commission for Children and Young People, note 56, p10

<sup>59</sup> NSW Commission for Children and Young People, note 56, p12-13

<sup>60</sup> NSW Commission for Children and Young People, note 56, p13-14

<sup>61</sup> NSW Commission for Children and Young People, note 56, p14-18

over 12 years of age and has given sole consent. The Commission considers that this “might create considerable pressure and place unfair demands on the young person to show more loyalty to one set of parents”.

### 8.3 Association of Child Welfare Agencies<sup>62</sup>

Permanency principles:<sup>63</sup> ACWA considers that the proposed placement hierarchy has, in theory, appropriate measures to achieve early permanency and stability systemically. However, ACWA submitted that it “would not support a hierarchy that would mandate adoption over other types of permanency (e.g. guardianship) for Aboriginal children and young people”. In addition, it stated that flexibility was “required within the hierarchy options in order to ensure that there is the ability to choose an option that suits the child’s or young person’s needs and situation”. ACWA also maintained that adoption should be placed in the hierarchy after Parental Responsibility to the Minister. It explained:

Current practice requires that there be an order of Parental Responsibility to the Minister before an adoption can be pursued. Adoption is not a suitable option for all children in OOHC and therefore it would be necessary to have the child/young person in the care of the Minister while their placement options are assessed.

ACWA also submitted that child welfare agencies would need additional resources to work towards family preservation/restoration, as well as to do adoption work. In relation to adoption work, ACWA stated:

Currently agencies are paid a Unit Cost for providing OHCC services for a child/young person. The amount of hours of casework and administration that is required to process adoption orders is significant and currently there is no funding to cover the costs of additional work.

Restoration timeframes:<sup>64</sup> ACWA supports the proposed restoration timeframes subject to a number of provisos including that: resources are invested into agencies to ensure that there are appropriate systems and a skilled workforce in place to undertake restoration work successfully; and that any restoration plans allow birth parents an appropriate time to prepare for restoration and that services to support birth parents are available in the transition period.

Guardianship orders:<sup>65</sup> One concern is that these orders “may be used to artificially reduce the numbers in OHCC, by moving those that were previously in supported care arrangements onto long-term guardianship orders”. ACWA also submitted that there “must be ongoing supports to ensure that issues are addressed as they arise e.g. what happens should relationships sour and contact not go well”. ACWA also called for after care supports and services to be available to young people who leave guardianship at the age of 18.

---

<sup>62</sup> Association of Child Welfare Agencies, [Submission for the Minister’s Discussion Paper on Child Protection Legislative Reform](#), March 2013

<sup>63</sup> ACWA, note 62, p11-13

<sup>64</sup> ACWA, note 62, p13

<sup>65</sup> ACWA, note 62,p16-17

Concurrent planning:<sup>66</sup> ACWA considers that the use of dually authorised carers could be problematic. It explained:

There is the potential for adoptive applicants who are very keen to adopt to hold unrealistic expectations. It would be hard not to view the foster child as their future adoptive child. As adoptive applicants, they may be resistant to restoration, similarly they could develop attitudes to the birth family and decide not to proceed with the adoption.

ACWA argues that the best way to avoid the occurrence of multiple placements is “to ensure that there are adequate resources, skilled and experienced workers, and a service system that supports restoration”. ACWA added:

Our membership have commented on the inadequacy of information, information exchange, and communication at the point when the child or young person enters care. These are critical to ensuring the right placement is made, where the needs of the child are matched according to the skills and attributes of the carers...

Streamlining adoption:<sup>67</sup> ACWA was concerned that conferring adoption jurisdiction on the Children’s Court as well as the Supreme Court “could create two-tiers of adoption in NSW”. However, some of ACWA’s members believed there could be benefits in this proposal. ACWA disagrees with the proposed additional grounds for dispensing with parental consent, and it also disagrees with the proposal to limit a parent’s right to be advised of an adoption in certain circumstances. On the other hand, ACWA supports the development of a mechanism for non-consenting birth parents to be parties to an adoption plan.

#### **8.4 Legal Aid NSW<sup>68</sup>**

Permanency principles:<sup>69</sup> Legal Aid opposes the inclusion of adoption as an option in the placement hierarchy. It suggests that research has found that adoption does not necessarily lead to more secure placements for children; that adoption may not be appropriate for certain children (e.g. older children), that the outcomes for adopted children are not uniformly positive, and that adoption practices are not universally supported internationally (noting that the only two countries to have wholeheartedly embraced adoption for children in care are the UK and USA). Legal Aid also refers to the recent Senate Committee report into forced adoption policies and practices. Legal Aid submits:

Given what we know from history, decisions relating to adoption cannot be made hastily, and require a period of successful placement testing prior to any final order being made. It is our firm view that the time for deciding whether a child should be made the subject of an adoption order is not during primary care and protection proceedings. Adoption should only be considered once a child is

---

<sup>66</sup> ACWA, note 62, p17-18

<sup>67</sup> ACWA, note 62, p19-23

<sup>68</sup> Legal Aid NSW, [Child Protection Legislative Reform Proposals, Submission to Department of Community Services](#), March 2013

<sup>69</sup> Legal Aid, note 68, p19-20

established in long term foster care, with a carer with whom they have developed a strong bond.

Legal Aid is also concerned that including adoption in the hierarchy “would lead to an increase in contested [child protection] matters”. It noted that “many parents consent to a final order, advised that they still have open to them the option of returning to the court by way of a section 90 application”.

As an alternative to the current proposals, Legal Aid suggested that “consideration be given to a legislative regime that mandates the Children’s Court to make recommendations about the suitability of adoption for the children involved”. The determination of whether that adoption should proceed would need to be made in the context of later proceedings.

Restoration timeframes:<sup>70</sup> Legal Aid opposes the introduction of legislative restoration timeframes. It commented:

We acknowledge that early decisions for children enhance the prospects of long term placement stability. However, it is imperative that all decisions are made on a case by case basis, tailored to the needs and best interests of each individual child. It is our view that mandatory timescales and blanket rules have the potential to lead to poor outcomes for children.

If a mandatory time frame were introduced, Legal Aid argues that “it must allow judicial discretion to depart from it in appropriate circumstances”.

Guardianship orders:<sup>71</sup> Legal Aid supports the introduction of these orders as one option available to the Children’s Court when making orders for the permanent care of children. However, it argues that it is important to learn from other jurisdictions which have successfully introduced forms of guardianship. It submitted that the success of special guardianship orders in the UK has been linked to a number of measures including access to ongoing support and advice. Legal Aid also raised a number of issues that would need to be addressed by any legislative amendments: for example, whether there would be a mechanism to rescind a guardianship order.

Concurrent planning:<sup>72</sup> Legal Aid supports the proposal for concurrent planning. However, it recommends that “a targeted education campaign is needed to ensure that concurrent carers understand that the primary objective is restoration to parent”. In addition, Legal Aid is not sure that the proposal would reduce multiple placement changes for children and young people in out-of-home care. It considers that one of the main factors contributing to multiple placements is the fact that non-government organisations refuse to recruit or locate a long term carer until after the Children’s Court has made a final order. This policy “leads to children being moved between crisis and short-term placements whilst the matter is before the children’s court”.

---

<sup>70</sup> Legal Aid, note 68, p20-22

<sup>71</sup> Legal Aid, note 68, p26-27

<sup>72</sup> Legal Aid, note 68, p26-27

Streamlining adoption:<sup>73</sup> Legal Aid does not oppose the proposal to better recognise that authorised carers should not be required to undertake full assessment and authorisation as a prospective adoptive applicant. It also supports the proposal to permit birth parents to be parties to an Adoption Plan even when they have not consented to adoption orders. However, it opposes most of the other proposals to streamline the process for adoptions – including strongly opposing any proposal to limit the right of parents to be informed of the existence of an adoption. Legal Aid states, “it is unclear what rational basis could be advanced to justify a situation where a birth parent, who could be reasonably located, was not informed of the adoption of their child”.

## 8.5 Community Legal Centres NSW<sup>74</sup>

Permanency principles:<sup>75</sup> CLCNSW (and its Aboriginal Advisory Group) are “not convinced that such emphasis on early decisions about restoration and permanency placements is warranted”. CLCNSW maintains that one reason why the placement of Aboriginal children does not work is that the court often uses the general principles in section 9 of the Act to override the Aboriginal Child Placement principles in section 13. CLCNSW stated that it is “strongly opposed to adoption as an outcome for Aboriginal children”, noting that “it is well known that adoption is not culturally appropriate for Aboriginal children”. CLCNSW also noted that the need for long-term guardianship orders is unclear, as it was not apparent how these orders would differ from an order under the existing provisions for parental responsibility to a relative and/or kin.

Restoration timeframes:<sup>76</sup> CLCNSW does not support this proposal. It argues:

Legislating timeframes suggests that either:

- A) A parent can be rehabilitated in a set time period, or
- B) It infers that parents are forever beyond rehabilitation”.

This ignores the individual circumstances of each case / family. Legislating timeframes is likely to increase the number of Aboriginal children in foster care, and function as a driver for another ‘Stolen Generation’.

Long-term guardianship orders:<sup>77</sup> CLCNSW seeks clarification of the benefits of guardianship orders over other forms of parental responsibility. However, it submits that “guardianship orders should, when appropriate, be increased”. CLCNSW believes that guardianship orders “are currently underutilised because in most cases Community Services wants to retain control in relation to contact between the child and the birth parents”. CLCNSW disagrees with the proposal to not allow rescission of a guardianship order without the consent of the agency that last managed the placement.

---

<sup>73</sup> Legal Aid, note 68, p29-39

<sup>74</sup> Community Legal Centres NSW, [Response to Discussion Paper: Child Protection Legislative Reform Proposals](#), 22 March 2013. This submission was made together with the CLCNSW Aboriginal Advisory Group - a group of Aboriginal workers in community legal centres.

<sup>75</sup> CLCNSW, note 74, p7-8

<sup>76</sup> CLCNSW, note 74, p8

<sup>77</sup> CLCNSW, note 74, p9-10



Concurrent planning:<sup>78</sup> CLCNSW is “strongly opposed to FACS developing foster care to become a pathway to adoption” but stated that “it is possible to support concurrent planning for long-term placements that are not adoptions”. Children for whom restoration is unlikely in the near future would ideally be put in placements that could endure for the long-term if necessary. This would relieve them of being moved between foster carers. CLCNSW “recognises that this already happens with the care plan and reviews of the care plan for out of home care, however we want to stress that this is often done poorly”.

Streamlining adoption:<sup>79</sup> CLCNSW makes no comment about the proposal to confer adoption jurisdiction on the Children’s Court and it supports the proposal to improve the involvement of birth parents in planning for adoption. However, CLCNSW disagrees with other proposals to streamline adoption. Generally, it comments that unless it is the will of the child/ren, it “does not support adoption as part of permanency planning for Aboriginal children in most cases”.

## 8.6 Royal Australian & New Zealand College of Psychiatrists<sup>80</sup>

Permanency principles:<sup>81</sup> The RANZCP submitted that “while a hierarchy of preferred placements may be a useful guide, an assessment of the needs of the child in relation to all *available* options at the time is also important”.

Restoration timeframes:<sup>82</sup> The RANZCP proposes that the restoration timeframes should instead be: six months for children less than four years old, and 12 months for children older than four years. However, it warns:

...complications may arise if these time frames are too strictly defined and legislated, given considerable variation between individual situations. If legislated, it would be important for the state to ensure that available and often intensive services and supports are concurrently available.

Long-term guardianship orders:<sup>83</sup> The RANZCP stated that these orders “may be an option for providing greater stability and predictability for children in OOHC where adoption is not in the child’s best interest”.

Concurrent planning:<sup>84</sup> RANZCP outlined the potential advantages and disadvantages of this approach as follows:

Potential advantages of streamlining the assessment of authorized carers and prospective adoptive parent include continuity of care for a child in a settled foster care placement where the wish for adoption would occur.

Potential disadvantages of streamlining: potential exclusion of good foster

---

<sup>78</sup> CLCNSW, note 74, p10

<sup>79</sup> CLCNSW, note 74, p10-12

<sup>80</sup> Royal Australian and New Zealand College of Psychiatrists, [Submission to Child Protection Legislative Reform Discussion Paper](#), 8 March 2013

<sup>81</sup> RANZCP, note 80, p6-7

<sup>82</sup> RANZCP, note 80, p7

<sup>83</sup> RANZCP, note 80, p8

<sup>84</sup> RANZCP, note 80, p8-9

parents from an often depleted pool of foster parents: inappropriate fast tracking of children into the care of foster parents as adoptive parents where neither is ready or the fit is not right; potential uncertainty or unrealistic hope for foster parents who wish to adopt...

It also referred to other options to avoid multiple placements, including improved support and training of foster parents and additional resources to support a child's placement specifically when significant difficulties arise.

Streamlining adoption.<sup>85</sup> RANZCP did not comment on most of the proposals to streamline adoptions. In relation to the proposal to limit a parent's right to be advised of an adoption in certain circumstances, RANZCP commented that "this should be an option of last resort".

## 9. PERMANENCY PLANNING IN TWO OTHER STATES

### 9.1 Victoria

**Out-of-home care:** The Victorian child protection system is governed by the *Children, Youth and Families Act 2005*, which is administered by the Department of Human Services. At the end of June 2011, there were 5,678 children and young people in out of home care: 42 percent were in kinship care, 24 percent were in permanent care, 13 percent were in foster care, and 12 percent were in other home-based care.<sup>86</sup>

**Permanency planning:** There are a number of general principles that are to be applied in administering the Act (s 10). The primary principle is that "the best interests of the child must always be paramount" (s 10(1)). One of the other general principles is the "desirability when a child is removed from the care of his or her parent, to plan the reunification of the child with his or her parent". Other general principles refer to the "desirability of continuity and stability in the child's care" (s 10(2)(f)); and to "the possible harmful effect of delay in making" a decision or taking action (s 10(2)(p)).

The Secretary of the Department must ensure that a case plan is prepared in respect of a child within 6 weeks after the making by the Court of a protection order (s 167). The Secretary must also ensure that a stability plan is prepared for each child who is in out of home care as a result of a protection order (s 170). The stability plan must plan for stable long-term out of home care for the child, and in the case of an Aboriginal child must accord with the Aboriginal Child Placement Principle (ss 169, 170). Stability plans must be completed within certain timeframes, namely (s 170):

- (a) in the case of a child who is under 2 years of age at the date of the order, once that child has been in out of home care for one or more periods totalling 12 months;

<sup>85</sup> RANZCP, note 80, p9-10

<sup>86</sup> P Cummins, [Report of the Protecting Victoria's Vulnerable Children Inquiry](#), Department of Premier and Cabinet, January 2012, Ch10, p242

- (b) in the case of a child who is 2 years of age but under 7 years of age at the date of the order, once that child has been in out of home care for a period or periods totalling 18 months;
- (c) in the case of a child who is 7 years of age or over at the date of the order, once that child has been in out of home care, for a period or periods totalling 2 years within a period of 3 years from the date of the order.

The Secretary must ensure that the case plan (including any stability plan) is reviewed from time to time as appears necessary (s 168).

The long-term placement options in Victoria are similar to those in NSW. One of the options is a permanent care order (s 321), which are similar to sole parental responsibility orders in NSW. These orders grant custody and guardianship of the child to the person or persons named in the order to the exclusion of all other persons (s 321). A court may make such an order only if the child's parent has not had care of the child for a period of at least 6 months, and if: (a) the parent is unable or unwilling to resume custody and guardianship of the child; or (b) it would not be in the best interests of the child for the parent to resume custody and guardianship of the child (s 319).

Adoption is another long-term placement option although (as outlined below) it is rarely used.<sup>87</sup> The *Adoption Act 1984* governs the adoption process in Victoria. The Act allows the Court, in making an adoption order, to dispense with parental consent in a number of circumstances including if the person has persistently neglected or ill-treated the child (s 43).

***Inquiry Panel report (2012):*** In January 2012, the panel conducting an inquiry into *Protecting Victoria's Vulnerable Children* delivered its report to the Minister for Community Services.<sup>88</sup> In a section on permanency planning, the report noted that "there were very few adoptions of children in State care in Victoria, and adoptions that are based on the dispensation of parental consent are extremely rare". The report commented:

The Inquiry considers that children should be afforded the full protection of the law in order to secure their best interests. Consequently, DHS should, as a matter of priority, pursue timely action to secure the release of children for adoption if parental consent is unavailable and if the child's circumstances would make them eligible for parental dispensation of consent to adoption. This should be done in circumstances where suitable adoptive parents are available and where there is no suitable member of the extended family who can provide an alternative permanent placement for the child.

While additional resources may be required to pursue this course of action, and in some instances, to provide post-adoption support that a child with special needs may require, the savings are likely to be very considerable compared with the cost of the child remaining in care until the age of 18. The reason for the Inquiry advocating this course of action, however, is not financial but is

---

<sup>87</sup> See Section 173 of the Act

<sup>88</sup> P Cummins, [Report of the Protecting Victoria's Vulnerable Children Inquiry](#), Department of Premier and Cabinet, January 2012

advocated because the right to adoption should be available to eligible children for whom this is appropriate and who have no other prospect of a secure and stable family to whom they can belong.

There may also be wider benefits to the out-of-home care system by giving greater emphasis to adoption. Suitable individuals and families who would be willing to consider adoption but who are not willing to consider foster care or permanent care, could expand the pool of carers, thus reducing the pressure on foster and permanent care.<sup>89</sup>

The report also discussed the use of permanent care orders. It noted that in 2009-10 there were 203 permanent care orders issued. However, the report was critical of the delay in the making of such orders:

Nearly 90 per cent of these orders were made more than two years after the initial substantiation of harm. The average time taken between a child's first report and their ultimate permanent care order, at just over five years (Inquiry analysis provided by DHS), is too long. For children who have been abused and known to statutory child protection services at a young age, it takes too many years for a permanent care order to be granted when this is necessary to ensure their safety and wellbeing. During this time, many children are subjected to multiple placements, compounding psychological harm.<sup>90</sup>

The report made this recommendation to improve permanency planning:

The Department of Human Services should identify and remove barriers to achieving the most appropriate and timely form of permanent placements for children unable to be reunited with their biological family or to be permanently placed with suitable members of the extended family by:

- Seeking parental consent to adoption, and where given, placing the child in a suitable adoptive family;
- Pursuing legal action to seek the dispensation of parental consent to adoption for children whose circumstances make them eligible under section 43 of the Adoption Act 1984;
- Resolving the inconsistency between practical requirements for child protection practitioners to simultaneously plan for reunification while contemplating permanent care arrangements; and
- Reviewing the situation of every child in care who is approaching the stability timeframes as outlined in the *Children, Youth and Families Act 2005*, to determine whether an application for a permanent care order should be made. Where it is deemed not appropriate to do so (for example, where a child's stable foster placement would be disrupted), the decision not to make application for a permanent care order should be endorsed at a senior level.<sup>91</sup>

---

<sup>89</sup> P Cummins, note 88, Ch 9, p228

<sup>90</sup> P Cummins, note 88, Ch 9, p229

<sup>91</sup> P Cummins, note 88, Ch9, p230 (Rec 23)

In May 2012, the Victorian Government released a Directions Paper, which outlined the first phase of the Government's response to the inquiry.<sup>92</sup> In relation to placement stability, the paper noted:

The government is, as a matter of urgency, establishing a time-limited Permanent Care and Stability Project. This project will use a specially selected team of specialist senior practitioners to examine the case plan of every child under 10 years old who is currently in the statutory system and who has been in care for an extended period. The teams will confirm if reunification is not viable and work to resolve any barriers to establishing a permanent arrangement.

It is expected that these teams will be taking more children's cases before the Children's Court for a timely decision to be made about their permanent placement.

In addition to resolving individual cases the team will be tasked with identifying the underlying causes of these delays with a view to developing permanent systemic improvements. The capacity of the Aboriginal permanent care program will also be increased to address the backlog in the assessments and court reports required prior to the making of the permanent care order for an Aboriginal child.<sup>93</sup>

## 9.2 Queensland

**Out-of-home care:** The Queensland child protection system is governed by the *Child Protection Act 1999*, which is administered by the Department of Communities, Child Safety and Disability Services. As at 30 June 2012, there were 7,999 children in out of home care: 57 percent were in foster care, 35 percent were in kinship care, and 8 percent were in residential care services.<sup>94</sup> Around 38 percent of children in out of home care were Indigenous.

**Permanency planning provisions:** There are several general principles that are to be applied in administering the Act. The main principle is that "the safety, wellbeing and best interests of a child are paramount" (s 5A). One of the other general principles is that "if a child is removed from the child's family, support should be given to the child and the child's family for the purpose of allowing the child to return to the child's family if the return is in the child's best interests" (s 5B(f)). Other principles include "if a child does not have a parent able and willing to give the child ongoing protection in the foreseeable future, the child should have long-term alternative care" (s 5B(g)); "a child should have stable living arrangements" (s 5B(k)); and "a delay in making a decision in relation to a child should be avoided, unless appropriate for the child" (s 5B(n)).

The Act requires the Department to develop a case plan for each child who is in need of protection, and who needs ongoing help. (s51C). A Court can only make a child protection order if there is a case plan that is appropriate for meeting the child's protection and care needs (s 59). There are provisions for

<sup>92</sup> Victorian Government, [Victoria's Vulnerable Children](#), Directions Paper, May 2012

<sup>93</sup> Victorian Government, note 92, p24

<sup>94</sup> Department of Communities, Child Safety and Disability Services, [Our performance - living away from home](#), [online], accessed 20 March 2013

review of the case plan which vary according to whether the child has a long-term guardian (i.e. a person, other than the Chief Executive, who is granted long-term guardianship of the child under a child protection order). If a child does not have a long-term guardian, the Department must regularly review the case plan (s 51V). If a child does have a long-term guardian, the Department must contact the child at least once every 12 months to give the child an opportunity to review the case plan, and at any time, the child or long term guardian may ask the Department to review the case plan (s 51VA).

After conducting a review, the Department must prepare a report and a revised case plan (ss 51V, 51VA). This report must address several matters including how the revised case plan gives priority to the child's need for long-term stable care (s 51X). If a child is placed in out of home care under an order granting custody or short-term guardianship of the child, the report must state (s 51X):

- (d) the risks and benefits of returning the child to the care of a parent; and
- (e) whether there is a real risk that the child's need for long-term stable care will not be able to be met by returning the child to the care of a parent within a timeframe appropriate to the child's age and circumstances; and
- (f) if there is a real risk mentioned in paragraph (b), the progress made in planning for alternative long-term arrangements for the child, for example—
  - (i) arrangements for the child to live with a member of the child's family under a child protection order granting long-term guardianship of the child; or
  - (ii) for a young child—arrangements for the child's adoption under the *Adoption Act 2009*; or
  - (iii) for an older child—arrangements for the child's transition to independent living.

***Permanency planning guidelines:*** The Child Safety Practice Manual states:

Permanency planning begins when a child is removed from their family under a child protection order. Even if the goal of the intervention is reunification, planning needs to occur in the case that reunification cannot occur in a timely and appropriate manner and alternative options must be pursued. The family reunification assessment specifies timeframes within which reunification must occur, before a long term stable out-of-home care placement is pursued.<sup>95</sup>

The timeframes in the reunification assessment are as follows:

- *Child under age of 3* – a long-term placement should be pursued if the child has been in an out-of-home care placement for 18 of the past 24 months; or if, for 12 consecutive months, the risk level has remained high, the contact has been rated fair or lower, or the household has been deemed unsafe.<sup>96</sup>

<sup>95</sup> Department of Communities, Child Safety and Disability Services, Child Safety Practice Manual, [Ch 4](#), p45-46

<sup>96</sup> Department of Communities, Child Safety and Disability Services, note 95, [Ch4](#), p45-46

- *Child aged 3 and over* – a long term placement should be pursued if the child has been in an out-of-home care placement for 24 of the past 30 months; or if, for 12 consecutive months, the risk level has remained high, the contact has been rated fair or lower, or the household has been deemed unsafe.

The practice manual notes that permanency panels operate as part of the case review for children aged under four in certain circumstances.<sup>97</sup> These panels include a senior practitioner, the child's team leader, the child safety officer and a critical friend. Referral to a permanency panel occurs prior to completing a case plan review where the decision is made to either: (a) reunify the child within the next six months, and the reunification assessment outcome supports this decision; or (b) cease reunification efforts and seek a long-term placement through a child protection order granting long-term guardianship or an adoption order, and the assessment outcome supports this decision.

**Commission of Inquiry discussion paper (2013):** The Queensland Child Protection Commission of Inquiry was established in July 2012, and in February 2013 it released a discussion paper.<sup>98</sup> Chapter 5 of the paper discusses placement stability. It notes that "publicly available statistics about departmental placement trends are limited"; and that "there are no reliable figures as to whether the benchmark periods of six, 12, 18 and 24 months for pursuing more long-term out-of home placements are met".<sup>99</sup> The data that was available showed that placement instability "tends to worsen the longer a child is in care".

The paper outlines two options to improve placement stability for children in out of home care. One of these options is an increased use of long-term guardianship orders to a person other than the Chief Executive of the Department. The paper notes:

The Commission for Children and Young People and Child Guardian proposes that the majority of children and young people on long-term guardianship orders to the chief executive be transitioned to a person other than the chief executive as soon as possible. Applying this sort of approach, long-term guardianship orders to the chief executive would be reserved for children or young people with 'extremely challenging behaviours or disability'.<sup>100</sup>

The second option discussed is a new form of permanent placement order between long-term guardianship and adoption. The paper noted concerns expressed to the inquiry that long-term guardianship orders:

...are not having the intended effect of providing a child with sufficient stability. It has been argued that they do not offer the requisite stability because they may be 'contested in court by birth families on an ongoing basis'. This is said to impede a child's bonding with both the foster carer and their family.

<sup>97</sup> Department of Communities, Child Safety and Disability Services, note 89, [Ch4](#), p46

<sup>98</sup> T Carmody SC, [Queensland Child Protection Inquiry: Discussion Paper](#), February 2013

<sup>99</sup> T Carmody SC, note 98, p109

<sup>100</sup> T Carmody SC, note 98, p109

Furthermore, long-term guardianship orders terminate on the child's 18<sup>th</sup> birthday.<sup>101</sup>

Adoption was an alternative option under the Act but the paper commented that:

Adoption is a controversial option which divides the community. Past practices of forced adoption, particularly in the Aboriginal and Torres Strait Islander community but also in the wider population have caused mistrust of adoptions generally.<sup>102</sup>

The paper observed that "in practice adoption is rarely considered by the department".<sup>103</sup> It referred to statistics showing that there were only 5 children adopted in Queensland in 2010-11.

The paper noted that some submissions called for adoption to be given more prominence as a permanent placement option. However, others warned against widespread use of adoption in the system. The paper concluded:

...significantly increasing the use of adoption in the care system in its present form would be widely opposed. However, adoption is a 'changing institution'. While much of the above commentary highlights the need for caution, it nevertheless suggests that a new form of permanent placement order, somewhere on the continuum between a long-term guardianship order and adoption, could be in the best interests of many children in the care system. The Commission suggests that the challenge for Queensland is to develop a new form of permanent placement option which would be attractive to prospective parents while at the same time being in the best interests of the child.<sup>104</sup>

The Commission of Inquiry is due to report to the Premier by 30 June 2013.

## 10. PERMANENCY PLANNING IN TWO OTHER COUNTRIES

This section outlines permanency planning policies in two countries – the United States and England– both of which have introduced reforms in the last decade or so to promote adoption of children in out-of-home care.

### 10.1 United States

**Out-of-home care:** The child protection and foster care system is primarily governed by State law. However, the federal Congress has enacted legislation which sets out requirements that States must meet in order to receive federal funding. As at 30 September 2011, there were an estimated 400,000 children in out-of-home care (which, in the US, is referred to as "foster care").<sup>105</sup> More than a quarter of these children were living with a relative foster carer, while almost half were living with a non-relative foster carer.

<sup>101</sup> T Carmody SC, note 98, p110

<sup>102</sup> T Carmody SC, note 98, p110

<sup>103</sup> T Carmody SC, note 98, p110

<sup>104</sup> T Carmody SC, note 98, p113-114

<sup>105</sup> US Department of Health and Human Services, Administration for Children and Families, Children's Bureau, [AFCARS Report #19](#), 12 July 2012



**Permanency planning:** A recent report by the Children's Bureau in the federal Department of Health and Human Services stated:

...a permanency plan must be established for all children in care, stating at least one explicit goal for a permanent living arrangement upon each child's exit from care. In almost all cases, child welfare staff first must make reasonable efforts to reunify children with their birth families by working with the children and families to resolve the issues that contributed to the children's removal from their homes. If efforts toward reunification are unsuccessful, caseworkers seek other permanent living arrangements, such as living with another relative, guardianship, or adoption. To expedite the permanency planning process, caseworkers often engage in concurrent planning, which involves simultaneously identifying and working toward more than one permanency goal (e.g., reunification and placement with relative). If reunification is determined not to be in the child's best interests, concurrent planning helps to shorten the child's stay in foster care because progress already has been made toward another permanent living arrangement...<sup>106</sup>

**Federal reforms in 1997:** In 1996, President Clinton outlined the goal to at least double by 2002 the number of children adopted or permanently placed each year (from 27,000 in 1996 to 54,000 in 2002); and in February 1997 the President said that he would move forward with legislative and administrative changes to achieve this goal.<sup>107</sup> In November 1997, Congress enacted the *Adoption and Safe Families Act 1997*, which aimed "to help States move children out of foster care into safe, permanent homes more quickly". Some of the measures contained in the Act included:

- Reduced timeframes. The timeframe for holding permanency hearings was reduced from 18 to 12 months.
- Expedited termination of parental rights. States must file a petition with the courts to terminate parental rights in certain circumstances, including when a child has been in out-of-home care for 15 out of the most recent 22 months [note: a termination allows a child to be placed for adoption]. Certain exceptions to these filings are allowed, such as when it is determined that terminating parental rights is not in a child's best interests and when the State has not made reasonable efforts to reunify a child with his or her family.
- "Fast track to permanency." States are not required to pursue reasonable efforts to prevent removal of children from their homes or reunify children with their birth parents if certain circumstances exist, such as when parents have already involuntarily lost parental rights to a child's sibling or subjected a child to aggravated circumstances (as defined in State law, including abandonment and chronic abuse). [The Act] also clarified the meaning of "reasonable efforts" noting that the child's health and safety are of paramount concern.<sup>108</sup>

<sup>106</sup> US Department of Health and Human Services, Administration for Children and Families, Children's Bureau Children's Bureau, [A Report to Congress on Interjurisdictional Adoption of Children in Foster Care](#), 27 June 2012, p2

<sup>107</sup> US Department of Health and Human Services, ['Adoption 2002: Safe and Permanent Homes for All Children'](#), *Media Release*, 14 February 1997

<sup>108</sup> Children's Bureau, note 106, p2

The Act also created the Adoption Incentive Payment Program to reward States for increasing the number of adoptions of children from foster care. The *Adoption Promotion Act of 2003* reauthorised this program and added bonus awards for adoptions of children aged 9 and older.

Two years after the enactment of the 1997 Act, the US Department of Health and Human Services released *Guidelines for Public Policy and State Legislation Governing Permanence for Children*.<sup>109</sup> These Guidelines were designed “to help States review their own laws and develop statutes and policies that reflect the best practices in child welfare today”. The guidelines outlined the following general principles in relation to options for legal permanency (in part):

- b. The most preferred permanent placement for a child is a safe and permanent reunification with the birth parent or extended family of origin.
- c. For children who cannot be reared by their parents or within their extended family of origin, adoption is the preferred permanent placement.
- d. If adoption is not appropriate for a child unable to return home safely, State law should establish other legally sanctioned permanent placements including permanent guardianships.

It was noted that “this hierarchy of preference is not inflexible and requires individualized judgements based on the circumstances of each...child”.

**Impacts of the 1997 reforms:** A 2009 paper by the Urban Institute examined the effects of the *Adoption and Safe Families Act 1997* and, in relation to permanence, concluded as follows:

Evidence from every angle—state enactment and implementation of laws, changes in child welfare agency culture and practice, and findings on outcomes – supports the idea that children’s prospects for adoption and guardianship improved to some degree following ASFA. However, many specifics remain unclear: for example, neither state-by-state differences nor the differential effects for children of color as compared to white children are well understood.<sup>110</sup>

**Federal reforms in 2008:** The next major federal reforms in relation to permanency planning occurred in 2008 with the enactment of the *Fostering Connections to Success and Increasing Adoptions Act*. The Act:

- Revised and extended the Adoption Incentives Program for five years (including doubling the incentive amounts states may earn for an increase in the number of older children adopted from care);
- Authorised states to claim additional federal funds for child welfare purposes (e.g. reimbursement for kinship guardianship assistance); and

<sup>109</sup> Children’s Bureau, [Guidelines for Public Policy and State Legislation Governing Permanence for Children](#), June 1999

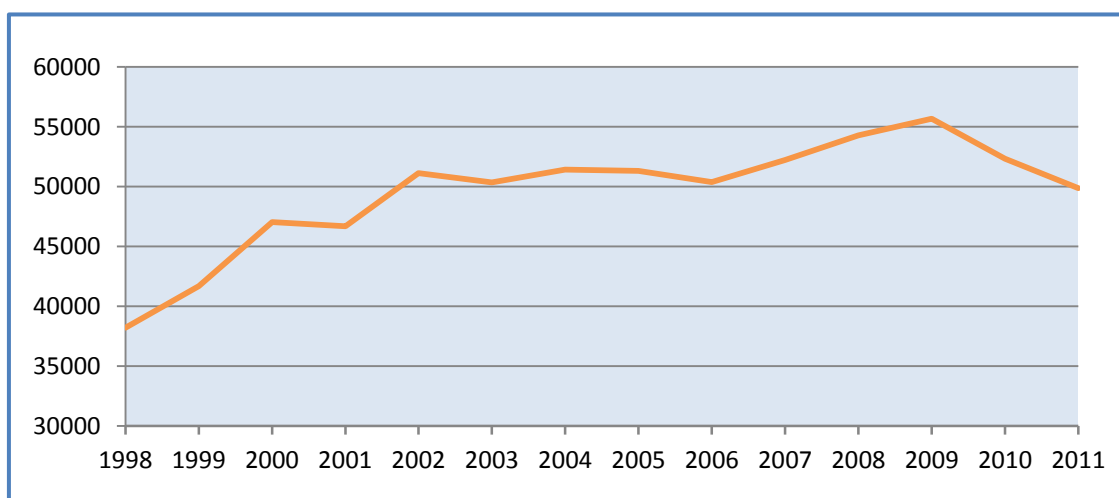
<sup>110</sup> O Golden and J Macomber, ‘Framework Paper: *The Adoption and Safe Families Act 1997*’, p30-31, in Center for Social Policy and Urban Institute, [Intentions and Results: A Look Back at the Adoption and Safe Families Act](#), 2009

- Added new requirements for the receipt of federal child welfare funds (e.g. notifying the adult relatives within 30 days of children entering foster care of their options to participate in the placement of the child).<sup>111</sup>

**Number of adoptions from care:** During the 2011 fiscal year, an estimated 49,866 children were adopted from foster care with public child welfare agency involvement.<sup>112</sup> Almost half of these children were under the age of five. There were 104,236 children waiting to be adopted: these included children with a goal of adoption and/or whose parents' parental rights had been terminated.

Trends in adoption of children from foster care between 1998 and 2011 are shown in the chart below. As can be seen, adoptions from care increased sharply between 1998 and 2002, levelled out between 2002 and 2006, rose again between 2006 and 2009, and then decreased significantly between 2009 and 2011 (falling back to the same level as in 2002).

#### Number of children adopted from care by year<sup>113</sup>



A much smaller percentage of children exit foster care through legal guardianship (which is most frequently used by relative care-givers). In the 2011 fiscal year, 15,707 children were the subject of guardianship orders (which was a much higher number of these orders than in 2003: 5,916).

## 10.2 England

**Out-of-home care:** The statutory child protection framework is set out in the *Children Act 1989*. Local authorities have the primary responsibility for taking action under the Act to safeguard and promote the welfare of children within their area. As at 31 March 2012, there were over 67,000 children in England that local authorities were looking after: either with the agreement of their

<sup>111</sup> E Stolfus, [The Fostering Connections to Success and Increasing Adoptions Act of 2008](#), Congressional Research Service, Report to Congress, 9 October 2008

<sup>112</sup> US Department of Health and Human Services, Administration for Children and Families, Children's Bureau, [AFCARS Report #19](#), 12 July 2012

<sup>113</sup> The figures from 1998 to 2002 are from Children's Bureau, [AFCARS Report #12](#), October 2006; and the figures from 2003 to 2011 are from [AFCARS Reports](#) for those years

parents, or because the local authority had satisfied the family court that it was in the best interests of the child for them to be taken into care.<sup>114</sup> There are a number of different placement types available for children in care but three quarters of children were in foster care placements.

**Permanency planning:** Local authorities are responsible for preparing care plans in relation children who need to be looked after and the family court must consider these plans before making a final care order. One of the functions of the care plan is to ensure that each child has a permanence plan by the time of the child's second review (around four months after the child enters care). As set out in a legislative guidance note, there are several options for permanence:

- For many children, permanence is achieved through a successful return to their birth family, where it has been possible to address the factors in family life which led to the child becoming looked after.
- For other children routes to permanence may include family and friends care, particularly where such care can be supported by a legal order such as a residence order, special guardianship order or, in a few cases, adoption;
- Another important route to permanence is long term foster care where attachments have been formed and it has been agreed through the care planning and review process that this is where the child or young person will remain until adulthood.
- For children who are unable to return to their birth or wider family, adoption offers a lifelong and legally permanent new family. Twin track or parallel planning, including concurrent planning, may provide a means to securing permanence at an early stage for some children.<sup>115</sup>

**Permanency planning reforms in 2000:** In December 2000, the Blair Government released a white paper entitled *Adoption: a new approach*, which aimed to “promote the wider use of adoption for looked after children who cannot return to their birth parents”.<sup>116</sup> The key reforms were:

- invest £66.5m over three years to secure sustained improvements in adoption services
- set a target of increasing by 40% by 2004–05 the number of looked after children adopted, by improving councils' practices on adoption, and aim to exceed this by achieving, if possible, a 50% increase
- legislate to overhaul and modernise the legal framework for adoption:
  - provide new options for permanence
  - support the establishment of an adoption register, with details of all children waiting to be adopted and approved adoptive families
  - set out a new legal framework for adoption allowances

<sup>114</sup> Department for Education, *Statistical First Release: Children looked after in England (including adoption and care leavers) year ending 31 March 2012*, 25 September 2012

<sup>115</sup> UK Government, *The Children Act 1989: Guidance and Regulations – Volume 2: Care Planning, Placement and Case Review*, March 2010, p12

<sup>116</sup> UK Government, *Adoption: a new approach*, White Paper, December 2000

- establish an independent review mechanism for assessment of potential adopters
- give all families adopting children, especially those who have been looked after, the right to an assessment for post-placement support
- provide adopted people with access to information about their history
- require councils to pay court fees when looked after children are adopted
- align the Adoption Act 1976 with the Children Act 1989.<sup>117</sup>

The legislative reforms were enacted in the *Adoption of Children Act 2002*, which had a staged implementation and came fully into force in 2005. One of the new options for permanence contained in the Act was special guardianship orders, which were “a new legal option to meet the needs of children for whom adoption is not appropriate, but who could still benefit from a permanent, legally secure placement”.<sup>118</sup> It was noted that special guardianship might be appropriate for some older children who did not wish to be legally separated from their birth parents, for some children being cared for on a permanent basis by members of their wider family, and for some minority ethnic communities which had religious or cultural difficulties with adoption.<sup>119</sup> A study on the use of special guardianship orders over the first two years found that:

Most take-up in the first two years had been from relatives (86 per cent), with grandparents in the majority. The children concerned were relatively young, with 52 per cent aged five or under. Most (74 per cent) had been living with their carer before application, often for a lengthy period.

.....

Take-up from unrelated foster carers had been low (13 per cent) due largely to concerns about financial uncertainty, the potential loss of social work support for them and/or their child and the potential difficulties of managing birth family relationships...<sup>120</sup>

***New Action Plan for adoption:*** On 14 March 2012, the Coalition Government published *An Action Plan for Adoption: Tackling Delay*.<sup>121</sup> The need for this Action Plan was summarised as follows:

The numbers of children adopted from care has been decreasing in recent years. Just 3,050 children found new homes through adoption last year, the lowest since 2001. Many of the children who are adopted are forced to wait far too long: the average time between a child entering care and moving in with their adoptive family is one year and nine months. If a child enters care when they are already past their infancy, at the age of two and half, the data suggests they will be nearly five by the time they move in with their adoptive family. Research into brain development has shown only too clearly the devastating effects of this delay on children. This is compounded by evidence showing that

<sup>117</sup> UK Government, note 116, p5

<sup>118</sup> UK Government, [Explanatory memorandum to the Special Guardianship Regulations 2005](#), 2005, p11

<sup>119</sup> For more information on special guardianship orders, see Department for Education and Skills, [Special Guardianship Guidance: The Children Act 1989: The Special Guardianship Regulations 2005](#), 26 April 2012

<sup>120</sup> J Wade, J Dixon and A Richards, [Implementing Special Guardianship](#), Social Policy Research Unit, University of York, November 2009.

<sup>121</sup> Department for Education, [An Action Plan for Adoption: Tackling Delay](#), 2012

the longer children in need of adoption have to wait, the less likely they are to be adopted.<sup>122</sup>

The Minister outlined the key proposals in the Action Plan as follows:

- legislate to reduce the number of adoptions delayed in order to achieve a perfect or near ethnic match between adoptive parents and the adoptive child;
- require swifter use of the national Adoption Register in order to find the right adopters for a child wherever they might live;
- encourage all local authorities to seek to place children with their potential adopters in anticipation of the court's placement order;
- radically speed up the adopter assessment process so that two months are spent in training and information gathering – a pre-qualification phase – followed by four months of full assessment;
- introduce a “fast-track” process for those who have adopted before or who are foster carers wanting to adopt a child in their care; and
- develop the concept of a “national Gateway to adoption” as a consistent source of advice and information for those thinking about adoption.

The Action Plan also outlined how improvements in tackling delay would be measured through a new adoption scorecard for local authorities.<sup>123</sup> The timeline for implementing the reforms was from March 2012 to July 2013. The Minister noted that the Action Plan was not the “last word on improving adoption”; and that it would publish further proposals later in the year.

In December 2012, the Prime Minister announced a new package of support for people who want to adopt.<sup>124</sup> One of the measures was “looking at ways to give adopters a more active role in the adoption process, with the chance to make a connection with a child in advance and play a greater role in finding the right match”. This would be done by encouraging Adoption Activity Days (where parents get to meet children waiting for adoption); and by looking at options for opening up the Adoption Register to approved prospective adopters. Other measures included ensuring more paid leave for people adopting a child, and a new helpline staffed by persons with first-hand experience of adoption.

In January 2013, the Department for Education published *Further Action on Adoption: Finding More Loving Homes*, which set out proposals to address “one outstanding challenge for the adoption system – finding enough adoptive parents”.<sup>125</sup> The main proposal in the paper is to move towards a system where there are fewer organisations recruiting adopters, and most of them operating at

---

<sup>122</sup> Department for Education, [‘Adoption system: action plan sets out radical overhaul’](#), Press Notice, 14 March 2012

<sup>123</sup> The adoption scorecards are published on the Department for Education’s [website](#).

<sup>124</sup> Department for Education, [‘New drive to help children find adoptive families’](#), Press Notice, 24 December 2012

<sup>125</sup> Department for Education, [Further Action on Adoption: Finding More Loving Homes](#), January 2013, p5

a much larger scale. This could be achieved by a legislative amendment giving the Secretary of State the power to require local authorities to outsource the recruitment and approval of adopters. The paper also proposes providing a one-off £150 million adoption reform grant to local authorities to enable them to address the backlog in children awaiting adoption as well as supporting wider improvements in the functioning of adoption services.

In February 2013, the Government introduced into the House of Commons the *Children and Families Bill*, which contains a number of the measures in relation to adoption that were included in the Action Plan and that were announced after that plan was released.<sup>126</sup> In March 2013, the House of Lords Select Committee on Adoption published its report on adoption law.<sup>127</sup> The Committee made this general comment about the Government's policy initiatives:

The Government wishes to increase the number of children being adopted; we agree that there is the potential for more children to benefit from adoption which is in many ways unique in its benefits. Adoption is, however, only one of several solutions for providing vulnerable children with the love, stability and support they need. Long-term fostering, friends and family care, and special guardianship also play a significant role in meeting the needs of many of the children who cannot be cared for by their birth parents, and for whom adoption may not be appropriate. We are concerned that the Government's focus on adoption risks disadvantaging those children in care for whom adoption is not suitable. Improving the outcomes for all children in care should be the priority; all routes to permanence merit equal attention and investment.<sup>128</sup>

## 11. COMPARING FOSTER CARE AND ADOPTION OUTCOMES

### 11.1 The evidence base for comparing outcomes is limited

In debates about permanency planning a key issue has been whether long-term foster care or adoption results in better outcomes for children. Studies have been conducted on outcomes from long-term foster care;<sup>129</sup> as well as on outcomes for children adopted from care.<sup>130</sup> However, according to Thoburn:

There are no data sets or recent large scale longitudinal studies on outcomes for children placed from care for adoption or with the intention of permanence in foster family care. There is therefore no robust way of comparing outcomes for children adopted from care with similar children who join 'permanent' foster families or leave care through guardianship orders.<sup>131</sup>

<sup>126</sup> For more information on the Bill, see R Long et al, [Children and Families Bill No 131 of 2012-13](#), Research Paper 13/11, House of Commons Library, 14 February 2013

<sup>127</sup> House of Lords Select Committee on Adoption, [Adoption: Post-Legislative Scrutiny](#), 6 March 2013

<sup>128</sup> House of Lords Select Committee on Adoption, note 127, p5

<sup>129</sup> See E Fernandez and R Barth (eds), *How Does Foster Care Work? International Evidence on Outcomes*, Jessica Kingsley Publishers, London and Philadelphia, 2010

<sup>130</sup> See J Simmonds, 'Adoption: developmental perspectives within an ethical, legal and policy framework', Chapter 12 in G Schofield and J Simmonds (eds), *The Child Placement Handbook: Research, Policy and Practice*, BAAF, 2009.

<sup>131</sup> J Thoburn, 'International Perspectives on Foster Care', Chapter 1 in E Fernandez and R Barth (eds), note 129, p38

No attempt is made here to cover this field of research. Instead, this section presents the findings from a 2002 review of the evidence on adoption and foster care; and also the findings from two fairly recent longitudinal studies comparing outcomes for children in foster care and children adopted from care.

### 11.2 Comparative analysis of research on foster care and adoption

In an article published in 2002, Triseliotis examined the research on long-term fostering and, separately, on adoption; and he compared the outcomes in six areas including stability, adjustment, sense of security and belonging; and personal and social functioning.<sup>132</sup> A number of limitations of the review were noted. First, there was a “dearth of studies in long-term fostering that go beyond the snapshot type approach”. Second, the studies were not always comparable, for a range of reasons (e.g. the dearth of longitudinal studies). He also noted that “contrasts with past studies are also made more difficult because not only has the social context between then and now changed, but so have policies and practices in relation to children and families”.

On the basis of the available evidence, Triseliotis made two main findings. One was that “differences in breakdown rates and in adjustment between these two forms of substitute parenting are diminishing and in some age groups evening out”. The other was that “compared with long term fostering, adoption still provides higher levels of emotional security, a stronger sense of belonging and a more enduring psychosocial base in life”. He concluded that when deciding between these long-term foster care and adoption:

...account has to be taken of each child’s individual needs and circumstances and those of their carers, including the range of available resources in terms of placements. In the same way that the same shoe cannot fit every foot, adoption is not the answer for every child who cannot return to their family. Long-term fostering still has a firm place in planning...Furthermore, a significant number of those whose placements last find a family for life, albeit lacking some of the more intense qualities found with adoption...<sup>133</sup>

### 11.3 Longitudinal studies comparing foster care and adoption

**A 2009 paper from the UK:** In 2009, the social policy research unit at the University of York published the findings of a study which compared three types of permanent placement: adoption by strangers, adoption by carers and long-term foster care.<sup>134</sup> The study followed up 196 children who were in foster care in 1998/99 and who, three years later, were still in the same placement or had been adopted (either by a stranger or by their foster carer). The study was based on a survey of the carers and social workers of the children, interviews of 37 children and their foster carers or adoptive parents; and data collected on 90 of the children who had been surveyed five and eight years earlier.

<sup>132</sup> J Triseliotis, ‘Long-term fostering or adoption: the evidence examined’ (2002) 7(1) *Child and Family Social Work*, p23

<sup>133</sup> Triseliotis, note 132, p32

<sup>134</sup> N Biehal et al, [Characteristics, Outcomes and Meanings of Three Types of Permanent Placement – Adoption by Strangers, Adoption by Carers, and Long-term Foster Care](#), Research Brief, Social Policy Research Unit, University of York, September 2009



The study found that disruption rates for children in foster care (28 per cent) compared unfavourably with those for children who had been adopted (13 per cent). However, it was difficult to compare the two types of placement because children in long-term foster placements generally enter these placements at a significantly older age than children enter adoptive placements. One of the key predictors of placement stability in foster care was age: children in stable placements entered their placements at an average age of 4.1 years, whereas those in disrupted placements had only begun their final placement at an average age of 5.3 years. The severity of the children's emotional and behavioural problems also appeared to increase the risk of disruption.

For children in foster care whose placements were stable, the study found no significant difference in emotional and behavioural difficulty compared to those who had been adopted. In addition, children in stable foster care were doing as well on measures of participation and progress in education as those who were adopted. The study also explored perceptions of belonging and permanence. It found that children who had been adopted (whether by strangers or carers) appeared to feel emotionally secure in their adoptive families. Most of the children in stable foster care also had a strong sense of belonging to their foster families, although for some of the children this was more qualified.

**A 2011 paper from the US:** In 2011, Barth and Lloyd published the results of a study comparing developmental outcomes after five years for young children in foster care who had returned home, remained in care, or been adopted.<sup>135</sup> The study was based on a sample of 353 children who were younger than 13 months when the sample was compiled. Interviews or assessments were conducted with the child and with the current caregiver. The key findings were:

Returning to the home of origin and adoption were associated with the most similar and, generally, positive outcomes. Children in foster care had the poorest developmental outcomes on all measures even though the children in the in-home condition had less responsive parents and much greater poverty.<sup>136</sup>

Barth and Lloyd concluded that the "crucial" policy implication was that:

...the foster care intervention itself appears to be a hazard to children's development if it becomes prolonged. While placement in foster care may be a necessity in some instances, child welfare policy-makers and practitioners should consider the developmental consequences of foster care placement. Family preservation or other intensive services that allow foster care to be avoided would seem well-advised in light of these findings, although the study lacks a comparison group of children who were diverted from foster care with in-home services. A too often overlooked program model that could make a difference for children and their often young parents is *shared family care* which involves placing the parents and children together into foster care.<sup>137</sup>

<sup>135</sup> C Lloyd and R Barth, 'Developmental outcomes after five years for foster children returned home, remaining in care, or adopted' (2011) 33 *Children and Youth Services Review* 1383

<sup>136</sup> Barth and Lloyd, note 135, p1389

<sup>137</sup> Barth and Lloyd, note 135, p1389

## 12. CONCLUSION

Permanency planning has been a part of child protection law in NSW for over a decade. However, it appears that this State, like many other jurisdictions, is still a long way from securing stability and continuity for many children and young people in care. One indicator of this is that more than one third of the current out-of-home care population in NSW have experienced three or more placements during their current care period. The importance of securing stability for those in out-of-home care has been confirmed by research showing poorer outcomes for those who experience placement instability. A recent longitudinal study in NSW has found that stability, and more importantly, a sense of emotional security in care were highly significant predictors of young people's outcomes four to five years after leaving care.

The NSW Government has outlined a number of legislative reform proposals to achieve better permanency outcomes for children and young people in care. These include a new preferred placement hierarchy (with adoption placed above long-term foster care), legislative timeframes for making decisions about restoring the child to their family, a new long-term guardianship order, and several measures to streamline adoption. The proposals have received mixed responses from several important stakeholders. For example, while some stakeholders (e.g. NSW Children's Guardian) support the promotion of adoption as a permanent placement option (with some qualifications), Legal Aid NSW argues that lessons need to be learned from the past and that adoption should only be considered once a child is established in long-term foster care, with a carer with whom they have developed a strong bond.

Permanency planning has also recently come under scrutiny in other Australian States. A recent Victorian child protection inquiry report recommended that the Government should identify and remove barriers to achieving permanent placements for children in care, including by reviewing every child in care who is approaching the statutory stability timeframes to determine whether an application should be made for a permanent care order. In Queensland, a discussion paper released by the Child Protection Commission of Inquiry identified two options to improve placement stability for children in care. One option is the increased use of long-term guardianship orders; and the other is a new form of order between long-term guardianship and adoption. The discussion paper noted that "significantly increasing the use of adoption in the care system in its present form would be widely opposed".

The NSW reform proposals are consistent with government policy in the US and England over the past decade or so to promote adoption of children in out-of-home care. In England, the Blair Government enacted reforms in 2002 and the Cameron Government has made adoptions a priority since taking office. In March 2012, it released an action plan to tackle delays in adoptions of children in care; in December 2012, it announced a new package of support for people who want to adopt; and in January 2013 it announced proposals to address the shortage of adoptive parents. There is limited research from these countries comparing outcomes for children in foster care with those who are adopted. Two fairly recent longitudinal studies reported very different findings.