Children's Court of New South Wales

PAPER FOR LOCAL COURT MAGISTRATES
27 October 2014

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PRESIDENT OF THE CHILDREN'S COURT OF NSW

"CHILD PROTECTION LEGISLATIVE REFORMS"

INTRODUCTION

1. This paper has been prepared for Local Court Magistrates exercising Children's Court jurisdiction in Care and Protection matters. The aim of this paper is to provide guidance with regards to the Child Protection legislative reforms commencing on 29 October 2014.[1]

2. It is important to note that the legislative intent behind these reforms emphasises restoration to families and, where this is not possible, the provision of certainty and stability through permanent placements. As a result, the reforms focus on early intervention, highlighting the need to work with the Department of Family and Community Services (DFaCS), parents, carers, children and young people to resolve disputes before they reach the Court. To facilitate early intervention, provisions have been included in the amendments to ensure alternative dispute resolution mechanisms are utilised to their fullest extent.

3. In this paper, I have distilled the key elements of the reforms into 8 parts. It is my intention that you will read this paper alongside the marked up copy of the *Children and Young Persons (Care and Protection) Act* 1998, which incorporates the changes in the *Child Protection Legislation Amendment Act* 2014.

4. Firstly, this paper will discuss the changes regarding Parent Responsibility Contracts. The paper will then provide an outline of the nature and scope of the new Parent Capacity Orders. Thirdly, the paper will look at the reforms made in relation to Contact Orders and following this, the paper will look at the new provisions in relation to Guardianship Orders. The paper will then discuss the changes to permanency planning, Supervision Orders, Prohibition Orders and the Savings and Transitional Provisions. The conclusion of this paper will provide an overview of the processes that the Court will put in place to ensure Forms and Practice Notes are consistent with the reforms.

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[1] I acknowledge the considerable help and valuable assistance in the preparation of this paper provided by the Children's Court Research Associate, Paloma Mackay-Sim

5. The main areas of reform of the Care and Protection jurisdiction are: the power to make Parent Capacity Orders to require parents to address deficiencies in parental capacity, and to make Guardianship Orders for the permanent placement of a child or young person. Additionally, the Court will be empowered to hear contact disputes where agreement has not been reached through Alternative Dispute Resolution (ADR) and consider alleged breaches of Prohibition Orders.

PART 1 – PARENT RESPONSIBILITY CONTRACTS

6. Parent Responsibility Contracts (PRCs) exist under the current legislation: s 38A. The reforms alter the situation in relation to PRCs, removing the presumption that a child is in need of care and protection if the contract is breached and extending the applicability of PRCs to include expectant parents: s 38A(1)(b). It is anticipated that these changes will result in an increase in the use of PRCs.

7. Section 38A is amended by creating a new s 38A(1), which reads as follows:

(1) A *parent responsibility contract* is either or both of the following:

(a) An agreement between the Director-General and one or more primary care-givers for a child or young person that contains provisions aimed at improving the parenting skills of the primary care-givers and encouraging them to accept greater responsibility for the child or young person,

(b) An agreement between the Director-General and either or both expectant parents whose unborn child is the subject of a pre-natal report under section 25 that contains provisions aimed at improving the parenting skills of the prospective parent and reducing the likelihood that the child will be at risk of significant harm after birth.

8. Another significant reform is that under s 38E, a breach of a PRC does not give rise to a presumption that a child is need of care and protection. Section 61A was not amended to align with this change. This means that pursuant to s 61A, a contract breach notice of a PRC will operate as a care application. FaCS have acknowledged that this is a drafting oversight and will amend s 61A in 2015. However, the Secretary will need to file an application initiating proceedings in addition to the breach notice to ensure that the Court has sufficient information to establish proceedings.

9. Currently, s 38E provides:

(1) The Director-General may file a *contract breach notice* with the Children's Court in relation to a parent responsibility contract if:

a) A party to the contract has breached a term of the contract, and
b) The contract authorises the Director-General to file a contract breach notice with the Children's Court for breaches of the kind committed by any party to the contract.

(2) A contract breach notice must state the following matters:

a) The name of the party to the contract who is alleged to have breached the parent responsibility contract
b) Each provision of the parent responsibility contract that the party to the contract is alleged to have breached
c) The manner in which the party to the contract is alleged to have breached the provision
d) The care orders that the Director-General will seek from the Children's Court in respect of the child or young person concerned
e) Such other matters as may be prescribed by the regulations.

(3) The Director-General is to cause a copy of a contract breach notice filed with the Children's Court (along with a copy of the parent responsibility contract) to be served on each of the following persons as soon as is reasonably practicable after filing the notice

a) Each party to the parent responsibility contract
b) The child or young person for whom the party breaching the contract is a primary care giver

(4) A reference in this Act to the Director-General duly filing a contract breach notice is a reference to the Director-General filing the notice in accordance with the provisions in this section.

PART 2 – PARENT CAPACITY ORDERS:

10. The reforms introduce a new jurisdiction for the Children's Court, the Parent Capacity Order (PCO). A PCO can be used as a stand-alone provision, consistent with the early intervention aims of the reforms. Additionally, a PCO can be issued during proceedings or as a result of a breach of a prohibition order.

11. Section 91A defines PCO as:

"*parent capacity order* means an order requiring a parent or primary care-giver of a child or young person to attend or participate in a program, service or course or engage in therapy or treatment aimed at building or enhancing his or her parenting skills.'

12. An application for a PCO is not an application for a care order under Part 2 of Chapter 5 of the Care Act. Rather, Part 3 of Chapter 5 set out a discrete framework for PCOs including the process for variation or revocation of a PCO and appeal provisions.

13. A PCO may be made on the application of the Secretary or on the initiative of the Children's Court: s 91B.

14. An application for a PCO can be referred to a Dispute Resolution Conference (DRC).

15. Section 91D (3) provides that:

    "The purpose of a dispute resolution conference is to provide the parties with an opportunity to agree on action that should be taken to build or enhance the parenting skills of the parent or primary care-giver."

16. The threshold test as set out in Section 91E is lower than the threshold test for a care application: s 72.

17. Firstly, there must be an identified deficiency in the parenting capacity of a parent/primary care-giver that has the potential to place the child or young person at risk of significant harm. Secondly, the Court must be satisfied that the parent/primary care-giver is unlikely to attend or participate in the program, service or course or engage in the therapeutic service.

18. Section 91F provides that the Court may make a PCO by consent. This function may be exercised by a Children's Registrar in relation to an application made by the Secretary under s 91B(a).

19. Section 91H sets out the requirements regarding variation or revocation of a PCO and s 91I provides a right of appeal, limited to a question of law.

20. Practice Note 10 has been issued in relation to the listing arrangements, service requirements and the conduct of DRCs as they relate to applications for stand-alone PCOs. Legal Aid has informed the Children's Court that lawyers working in early intervention strategies will generally be assigned these applications. For this reason it is preferable that, where practicable, applications for PCOs are listed on the same day as Applications for Compulsory Schooling Orders.

PART 3 - CONTACT:

21. The reforms limit the Court's power to make contact orders for 12 months on the initial care application unless restoration is planned. However, the amendments create new processes for varying contact orders and making applications for contact orders following the conclusion of the initial proceedings.

22. Section 86(1A) provides:

(1A) A contact order may be made by the Children's Court:

(a) On application made by any party to proceedings before the Children's Court with respect to a child or young person, or

(b) With leave of the Children's Court – on application made by any of the following persons who were parties to care proceedings with respect to the child or young person:

(i) The Director-General,
(ii) The child or young person,
(iii) A person having parental responsibility for the child or young person,
(iv) A person from whom parental responsibility for the child or young person has been removed,
(v) Any person who considers himself or herself to have a sufficient interest in the welfare of the child or young person, or

(c) with leave of the Children's Court – on application made by any person who considers himself or herself to have a sufficient interest in the welfare of the child or young person.

(1B) The Children's Court may grant leave under subsection (1A)(b) or (c) if it appears to the Court that there has been a significant change in any relevant circumstances since a final order was made in the proceedings.

(1C) The Children's Court is not required to hear or determine an application made to it with respect to a child or young person by a person referred to in subsection (1A) (c) unless it considers the person to have a sufficient interest in the welfare of the child or young person.

(1D) Before granting leave under subsection (1A)(b) or (c), the Children's Court:

(a) must take into consideration whether the applicant for the contact order and persons to whom the contact order applies have attempted, or been ordered by the Children's Court to try to reach an agreement about contact arrangements by participating in alternative dispute resolution, and

(b) may order the applicant and those persons to attend a dispute resolution conference conducted by a Children's Registrar under section 65 or alternative dispute resolution process under section 65A.

Note. Legal Aid has received specific funding to provide an alternative dispute resolution service for contact disputes. Dispute resolution services for other applications under the Care Act will ordinarily be provided by Children's Registrars. (see Practice Note 3 – paragraph 17.1)

(1E) Subject to any order the Children's Court may make, an applicant for a contact order under subsection (1A)(b) who was a party to care proceedings must notify other persons who were parties to the proceedings of the making of the application.

Note. Section 256A sets out the circumstances in which the Children's Court may dispense with the requirement to give notice.

(1F) A contact order made under subsection (1A)(b) on application of a person who was a party to proceedings in which an earlier contact order was made that has expired may be made in the same or different terms to the expired order.

(2) The Children's Court may make an order that contact be supervised by the Director-General or a person employed in that part of the Department comprising those members of staff who are principally involved in the administration of this Act only with the Director-General's or person's consent and must not be made in relation to contact with a child or young person who is the subject of a guardianship order.

(3) An order of the kind referred to in subsection (1)(a) (this refers to 86(1)(a)) does not prevent more frequent contact with a child or young person with the consent of a person having parental responsibility for the child or young person.

(4) An order of the kind referred to in subsection (1)(b) (this refers to 86(1)(b) may be made only with the consent of the persons specified in the order and the person who is required to supervise the contact.

(5) A contact order made under this section has effect for the period specified in the order, unless the order is varied or rescinded under s 86A or 90.

(6) Despite subsection (5), if the Children's Court decides (whether by acceptance of the Director-General's assessment under section 83 or otherwise) that there is no realistic possibility of restoration of a child or young person to his or her parent, the maximum period that may be specified in a contact order made under subsection (1A) concerning the child or young person is **12 months** (my emphasis).

(7) Subsection (6) does not apply to a contact order made on the application of a former party to proceedings in which an earlier contact order was made that has expired.

23. The implications of these new contact arrangements is articulated by Roderick Best, Director of Legal Services at DFaCS:

"Where there is an application for the Court to make a contact order and the plan is for restoration then there is no limitation on the duration of the contact order however once the Court determines that there is no realistic possibility of restoration the maximum duration of an initial final contact order is 12 months. By way of contrast, contact arrangements in a care and permanency plan unsupported by an order under section 86 could be for any duration notwithstanding an absence of any plan for restoration. Again, there is greater flexibility and encouragement to proceed to put in place contact arrangements if parties proceed by way of case planning than by application for court orders. If parties are proceeding by way of plans then that shifts the emphasis away from hearings and places the emphasis on the dispute resolution processes where the plans will be buffeted and refined."[2]

24. Section 86A sets out the circumstances under which contact orders may be varied by agreement. The section states:

(1) *A contact variation agreement* is an agreement to vary the terms of a contact order in the light of a change in any relevant circumstances since the contact order was made or last varied.

(2) A contact variation agreement must:

(a) Be in writing, and
(b) Be signed and dated by those parties to the proceedings in which the contact order was made who are affected by the variation and, if the contact variation agreement is made less than 12 months after the contact order was made, the legal representative of the child or young person, and
(c) Be registered with the Children's Court by those parties within 28 days after the date on which the agreement was signed.

(3) The contact variation agreement is taken to be registered with the Children's Court when filed with the registry of the Court without the need for any order or other action by the Court.

(4) The contact variation agreement takes effect only if (and when) it is registered.

(5) The contact variation agreement has effect from the date of registration until the end of the period specified in the variation agreement.

(6) Nothing in this section prevents the variation of a contact order under section 90.

[2] Best, R. 'Planning for Contact Changes', A talk presented to joint training of care lawyers on 2 October 2014.

PART 4 – GUARDIANSHIP ORDERS:

25. With the commencement of the legislative reforms on 29 October, the Court will have the power to make a guardianship order allocating to a suitable person all aspects of parental responsibility until the child attains the age of 18 years: s 79A.

26. Clause 35 of the Savings and Transitional Provisions provides that on 29 October, current orders allocating Parental Responsibility to a relative or kin will automatically transfer to guardianship orders: cl 35(1). DFaCS have indicated that carers have been given the opportunity to opt out of this automatic transfer. However, a section 90 application would need to made in these circumstances.

27. The characteristics of guardianship are not entirely distinct from an order allocating PR to the Minister, in that the responsibility of the guardian ends at the age of 18. In order to make a guardianship order, s 79A (3) provides that:

(3) The Children's Court must not make a guardianship order unless it is satisfied that:

(a) There is no realistic possibility of restoration of the child or young person to his or her parents, and
(b) That the prospective guardian will provide a safe, nurturing, stable and secure environment for the child or young person and will continue to do so in the future, and
(c) If the child or young person is an Aboriginal or Torres Strait Islander child or young person – permanent placement of the child or young person under the guardianship order is in accordance – with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles that apply to placement of such a child or young person in statutory out-of-home care under section 13, and
(d) If the child or young person is 12 or more years of age and capable of giving consent – the consent of the child or young person is given in the form and manner prescribed by the regulations.

28. A helpful way of looking at guardianship is to picture it on a continuum, with parental responsibility at one end and adoption at the other. Guardianship falls somewhere in between these two concepts, it ends at 18 and is thus distinct from adoption. However, it picks up some aspects of adoption, in that a child over 12 is required to consent to a guardianship order.

29. Section 79B provides for where applications for guardianship orders may be made (other than those orders automatically transferring over to guardianship orders on 29 October).

30. Section 79B states:

(1) Despite section 61(1), an application for a guardianship order may be made by the following:

(a) The Director-General
(b) With the written consent of the Director-General – the designated agency responsible for supervising the placement of the child or young person,
(c) With the written consent of the Director-General – a person who is an authorised carer or who has been assessed, in accordance with the regulations, by the Director-General or designated agency in relation to a child or young person to be a suitable person to be allocated all aspects of parental responsibility for the child or young person.

(2) The Children's Court may order an applicant for a guardianship order to notify those persons specified by the Children's Court of the making of the application.

Note. S 256A sets out the circumstances in which the Children's Court may dispense with service.

(3) Subject to any order the Children's Court may make, the applicant for a guardianship order is to make reasonable efforts to notify each parent of the child or young person of the making of the application for the order.

(4) Each parent must be given a reasonable opportunity to obtain independent legal advice about the application and is entitled to be heard at the hearing of the matter.

(5) Without limiting section 90(1A), an applicant for variation or rescission of a guardianship order made in respect of a child or young person must notify the principal officer of the designated agency that was supervising the placement of the child or young person in out-of-home care immediately before the guardianship order was made of the making of the application.

(6) Without limiting subsection (2), an applicant for a guardianship order other than the Director-General is to notify the Director-General of the making of the application for the order on the day the application is filed and the Director-General is entitled to be a party to the proceedings.

(7) An application cannot be made under subsection (1)(c) by a person who is an authorised carer solely in his or her capacity as the principal of a designated agency.

(8) Subject to any order the Children's Court may make, an applicant for a guardianship order must present the following to the Children's Court before the order is made:

(a) Copies of any written consent required to be given in relation to the applicant by subsection (1)
(b) A care plan prepared by the applicant
(c) A copy of any report on the health, educational or social well-being of the child or young person that is available to the applicant and that is relevant to the care plan.

(9) Without limiting the information that must be contained in a care plan, it must contain information about the following:

(a) The residence of the child or young person
(b) If the Children's Court has made any contact order under section 86 in relation to contact of the child or young person with his or her parents, relatives, friends or other persons – the arrangements for contact,
(c) The education and training of the child or young person,
(d) The religious upbringing of the child or young person,
(e) The health care of the child or young person,
(f) The resources required to provide any services that need to be provided to the child of young person and the availability of those resources,
(g) Any views the child or young person has expressed about any aspect of the care plan,

(10) Other requirements and the form of care plan under this section may be prescribed by the regulations.

(11) The care plan is only enforceable to the extent to which its provisions are embodied in or approved by orders of the Children's Court.

31. Supporting or ancillary orders that require the involvement of the DFaCS, such as orders for supervision pursuant to s 76(1) are not available in relation to guardianship orders. However, given that guardians will still receive a payment from DFaCS pursuant to s 79C, there will be a practical connection between the guardian and DFaCS.

32. Whilst an application for a guardianship order may be made in relation to the initial care application, DFaCS has advised that it is more likely that an initial application will seek a time limited PR order to either the Minister or the prospective guardian and that guardianship will be identified as the permanent placement option in the care plan. Where the Court approves such an application a section 90 application would subsequently be made seeking to convert the PR order to a guardianship order.

33. Clause 5 of the amending regulation sets out special provisions in relation to the leave requirement in s 90 as it relates to guardianship orders. DFaCS has advised that over time they also plan to lodge applications for guardianship in relation to a number of cases where the child is subject to a PR order to the Minister but has been in a stable placement with a relative or kin for a considerable period of time.

34. The practical implication is that the Court may see an increase in section 90 applications over time.

PART 5 – CHANGES TO PERMANENCY PLANNING:

35. The legislative reforms introduce a hierarchy of permanency planning, entitled the Permanent Placement Principles: s 10A. The intent behind these reforms are to change the focus of case planning to long term options that are more likely to offer greater stability for the child and carers.

36. Section 10A provides:

(1) In this Act:

Permanent placement means a long-term placement following the removal of a child or young person from the care of a parent or parents pursuant to this Act that provides a safe, nurturing, stable and secure environment for the child or young person.

(2) Subject to the objects in section 8 and the principles in section 9, a child or young person who needs permanent placement is to be placed in accordance with the permanent placement principles.

(3) The permanent placement principles are as follows:

(a) If it is practicable and in the best interests of the child or young person, the first preference for permanent placement of the child or young person is for the child or young person to be restored to the care of his or her parent (within the meaning of section 83) or parents so as to preserve the family relationship,
(b) If it is not practicable or in the best interests of the child or young person to be placed in accordance with paragraph (a), the second preference for permanent placement of the child or young person is guardianship of a relative, kin or other suitable person,
(c) If it is not practicable or in the best interests of the child or young person to be placed in accordance with paragraph (a) or (b), the next preference is (except in the case of an Aboriginal or Torres Strait Islander child or young person) for the child or young person to be adopted,
(d) If it is not practicable or in the best interests of the child or young person to be placed in accordance with paragraph (a), (b) or (c), the last preference is for the child or young person to be placed under the parental responsibility of the Minister under this Act or any other law

(e) If it is not practicable or in the best interests of an Aboriginal or Torres Strait Islander child or young person to be placed in accordance with paragraph (a), (b) or (d), the last preference is for the child or young person to be adopted.

37. By introducing a hierarchy of placement principles, including guardianship orders, and placing greater emphasis on adoption, it may be less likely that parents will concede that there is no realistic possibility of restoration. Therefore, we may see an increase in the number of contested applications that appear before us.

38. Additionally, it is anticipated that the identification of whether someone is Aboriginal/non-Aboriginal will play a greater part in care proceedings. This may be challenging, particularly where identification of a child's Aboriginality is not clear as it does not meet all of the requirements in s 5.

PART 6 – CHANGES REGARDING SUPERVISION ORDERS AND PROHIBITION ORDERS:

39. The introduction of s 76 (3A), changes the maximum period of supervision as follows:

    (3A) Despite subsection (3), the Children's Court may specify a maximum period of supervision that is longer than 12 months (but that does not exceed 24 months) if the Children's Court is satisfied that there are special circumstances that warrant the making of an order of that length and that it is appropriate to do so.

40. The reforms have also impacted upon orders prohibiting action (prohibition orders) pursuant to s 90A. The changes include an extension of the class of persons subject to a prohibition order. The persons subject to a prohibition order can now include 'any person who is not a party to the care proceedings', in addition to a parent of a child or young person.

41. Further, section 90A will now also provide a mechanism to deal with a breach of a prohibition order. The amended s 90A reads as follows:

    The Children's Court may, at any stage in care proceedings, make an order (a *prohibition order*) prohibiting any person, including a parent of a child or young person or any person who is not a party to the care proceedings, in accordance with such terms as are specified in the order, from doing anything that could be done by the parent in carrying out his or her parental responsibility.

(2) A party to care proceedings during which a prohibition order is made may notify the Children's Court of an alleged breach of the prohibition order.

(3) The Children's Court, on being notified of an alleged breach of a prohibition order:

(a) Must give notice of its intention to consider the alleged breach to the person alleged to have breached the prohibition order, and
(b) Must give that person an opportunity to be heard concerning the allegation before it determines whether or not the order has been breached, and
(c) Is to determine whether or not the order has been breached, and
(d) If it determined that the order has been breached – may make such orders (including a parent capacity order) as it considers appropriate in all the circumstances.

(4) The person who is alleged to have breached the prohibition order is entitled to be heard, and may be legally represented, at the hearing of the matter.

PART 7 – SAVINGS, TRANSITIONAL AND OTHER PROVISIONS:

42. The amending legislation will not affect proceedings currently on foot, unless otherwise provided: s 30 *Interpretation Act* 1987. Notwithstanding, Schedule 3 provides specific savings and transitional provisions that will apply upon the commencement of the legislation.

43. Pursuant to cl 32, the following provisions apply regarding PRCs:

(1) An amendment made to sections 38A-38E by the amending Act extends (except as provided by subclause (2)) to a parent responsibility contract that is in force immediately before the commencement of the amendment.

(2) Section 38E (4) as in force immediately before its repeal by the amending Act continues to apply to and in respect of a parent responsibility contract that is in force immediately before that repeal unless its terms are varied under sections 38A-38E as amended by the amending Act.

44. Pursuant to cl 33, the following provisions apply regarding Contact Orders:

(1) An application may be made under s 86 (1A), as inserted by the amending Act, by a party to proceedings commenced (irrespective of whether or not finally determined) before the commencement of the insertion.

(2) Section 86A, as inserted by the amending Act, extends to the variation of a contact order made before that insertion.

45. Under c 34, an order allocating sole parental responsibility under s 149 of the Act, will continue to have effect.

46. Clause 35(1) provides for the automatic transition of PR orders to guardianship orders as at 29 October. Clause 35(2) provides for the continuation of financial assistance where a PR order has automatically transferred to a guardianship order and cl 35 (3) provides that parties in receipt of such financial assistance are to make an annual report to the Director-General.

47. Clause 36 provides that any provision of Chapter 8 applying to a child or young person in supported out-of-home care continues to apply as it did before the amendments took effect.

48. Clause 37 provides that the new s 91B(b) extends to a prohibition order breached before s 91B(b) was inserted.

49. Clause 38 provides that the inserted Chapter 15A does not apply to ADR conducted prior to the amendment, under s 37, 65 or 114.

50. Clause 39 provides that the amended s 83 (4) extends to a plan that has been prepared but not yet submitted to the Children's Court in accordance with s 83(3).

PART 8 – CHANGES TO COURT FORMS AND PRACTICE NOTES:

51. The Children's Court is currently in the process of creating the following forms:

i) Application for Parent Capacity Order
ii) Application for Variation or Revocation of Parent Capacity Order
iii) Parent Capacity Order
iv) Application for Contact Orders
v) Contract Breach Notice (PRCs)
vi) Notification of Breach of Prohibition Order

52. Amendments have been made to the Application Initiating Care Proceedings and the application to vary or rescind a Care Order. Once finalised, the forms will be available online on the Children's Court Website.

53. The Children's Court has amended Practice Note 3 – Alternative Dispute Resolution Procedures in the Children's Court. Practice Note 10 has been issued in relation to stand-alone Parent Capacity Orders

54. The Children's Court is reviewing the guidelines for Children's Registrars and guidelines for registry staff.