



**CREATE Foundation's Response to the
Discussion Paper and Proposed
Amendments to the *Children, Young
Persons and Their Families Act 1997 (Tas)***

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CREATE Foundation

A Suite 3, 56 Peel Street
South Brisbane BC
Qld 4101

T 07 3255 3145

F 07 3255 3126

W www.create.org.au

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Disclaimer and context

This submission has been produced upon invitation from Dr Maria Harries AM and with reference to the Legislative Reform Project, Amendments to the *Child, Young Persons and Their Families Act 1997* Discussion Paper.

It is CREATE Foundation's preference and custom to directly inform our legislative reform submissions with the voices of children and young people with a care experience. However, due to tight timeframes children and young people with a care experience have not been consulted in relation to the proposed legislative changes.

For this reason this submission will make general statements in response to a selected number of issues raised in the Discussion Paper. It will do so with reference to what children and young people with a care experience have told CREATE in the past in Tasmania and in other jurisdictions.

CREATE Foundation looks forward to being more involved in Part B of the reforms and hopes to involve children and young people with a care experience in the submission process.

CREATE Foundation Overview

CREATE Foundation is a systems advocacy organisation that works with children and young people who are in, or have left, the child protection system to empower them to share their experiences in order to change the service system to improve services and outcomes.

CREATE Foundation's mission is to create a better life for children and young people in care. CREATE believes that all children and young people with a care experience should have the opportunity to reach their full potential.

CREATE is a systems advocacy organisation that works to:

- **Connect** children and young people with each other, CREATE and their community;
- **Empower** children and young people to build self-confidence, self-esteem and skills that enable them to have a voice and be heard; and
- **Change** the care system, in consultation with children and young people, through advocacy to improve policies, practices and services and increase community awareness

CREATE Foundation Limited was established in 1999 in the belief that a truly effective child protection system is one that listens to the views of the children and young people it seeks to protect and support. The importance of encouraging and facilitating the participation of children and young people in key decisions that affect their lives is a core principle of the organisation.

CREATE Foundation's position regarding specific reform items identified in the Discussion Paper:

1. Object and principles of the Act

The Objects of the Act are important for, among other things, interpreting the meaning of legislative provisions and therefore statutory interpretation prefers a construction that promotes the purpose and/or object underlying the Act.¹ CREATE acknowledges the importance of the Convention on the Rights of the Child and recognises the absence of Commonwealth legislation in this field.

2. Best interests principle

The principle that decisions be made in the best interests of the child is a fundamental principle in all jurisdictions. As the Discussion Paper suggests, in some jurisdictions this principle is identified as the paramount principle.²

CREATE recognises that children and young people with a care experience are not a homogenous group. They have diverse family backgrounds, many have high and complex needs, they may have families who also have high and complex needs and as such the determination of what is in a child or young person's best interests needs to take into account a number of things.

There is no doubt that the number of children and young people entering care in Tasmania has increased. In 2001 there were 572 and in 2011 there were 966.³ At 30 June 2012 there were 1004 children and young people in care.⁴ That equates to a 40% growth in 10 years. There is also strong evidence and legal requirements stating that children and young people should remain with their family if it is safe to do so.⁵

CREATE upholds this principle in conjunction with the participation of children and young people, where there is sufficient capacity, to articulate their interests. Therefore, **CREATE believes** that where a child or young person has the capacity to understand their interests, that these interests be taken into account when a decision is made based on the best interests of the child principle. All decisions that materially affect the child or young person should take into account the provisions in s 55 of the Act.

3. Child participation in decisions

Children and young people in care are, like everyone else, active participants in their own lives. These children have thoughts, dreams, desires, goals, abilities and capacities that, as they grow and mature, become more refined and increasingly define who they are as individuals. There is no doubt that

¹ *Carr v Western Australia* [2007] HCA 47; 232 CLR 138 at [5]-[6] per Gleeson CJ; *Acts Interpretation Act 1931* (tas), s 8A.

² Government of Tasmania. (2012). *Legislative Reform Project, Amendments to the Children, Young Persons and Their Families Act 1997, Discussion Paper*. Department of Health and Human Services.

³ Taken from various publications from Australian Institute of Health and Welfare, Child Protection Series the latest being Australian Institute of Health and Welfare. (2012). *Child Protection Australia, Child Welfare Series, Number 53*. Canberra.

⁴ Government of Tasmania. *Annual Report 2011-12*. Department of Human Services.

⁵ *Children, Young Persons and Their Families Act 1997* (Tas), s 8; Discussion Paper, above n 2; Channa, M.W. Al, Gert Jan J.M. Stams, Miranda S. Bek, Esther M. Damen, Jessica J. Asscher, and Peter H. Van der Laan. (2012). A meta-analysis of intensive family preservation programs: Placement prevention and improvement of family functioning. *Children and Youth Services Review*, 34, 1472-1479.

actively engaging in the opportunities our environment presents us produces rewards such as language acquisition, sporting prowess, artistic skill, musical ability, high academic achievement and leadership skills – all of which are refined by practice.⁶

Active participation, or actively participating in decisions that affect one's life is not a privilege; it is a developmental process, just like learning to walk.⁷ The more a child engages in a behaviour the better they become at it and the more confident they are. Rather than feeling like powerless victims, unable to express an opinion or have their opinion considered, their active participation in decisions that affect them gives children and young people a sense of being active agents in relation to their own care.⁸ For some, enabling a child or young person to actively engage in decisions affecting them may take a paradigm shift... from viewing children as the objects of concern to viewing them as the subjects with concerns.⁹

Being listened to is a way that adults can validate the thoughts and opinions of a child or young person and in turn help them to development confidence.¹⁰ Sometimes a young person is interested in expressing themselves in ways that adults may view as trivial. Therefore, just like adults, children and young people can become, angry, frustrated and distrustful when decisions are made about them, for them and not in consultation with them.

Formal approaches to participation tend to be those provided for in legislation and policy. They tend to include consultations, group meetings, input into case plans and transition plans, and child friendly processes for providing feedback such as suggestion boxes. Informal approaches include ongoing dialogue, spontaneous communication, and engaging in joint activities. Informal participation is about the quality of the relationship between a child and workers. Both forms of participation are valuable and need to be actively valued and encouraged in child protection work.

Informal participation is process oriented.¹¹ It is this form of participation that tends to be seen as most important by children and young people. Research suggests that when young people are involved in decisions regarding their next placement, that placement tends to be more stable.¹²

Empowering a child or young person might include their choice not to participate. For example, a young person may not want to attend a Family Group Meeting face-to-face, but may be interested in writing a letter or telling a worker what they would like said on their behalf. Children and young people should be informed about decisions that are made, have their opinions heard, and be given choice where possible. This can help develop a sense of responsibility and support the ability to be independent when they reach adult life.

⁶ Davies, D. (2011). *Child Development: A Practitioner's Guide*, (3rd edn.). New York: The Guilford Press.

⁷ Ibid.

⁸ Landsdown, G. 'The realisation of children's participation rights: critical reflections'. In Percy-Smith, B. & Thomas, N. (2010, eds). *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice*. New York: Routledge; Cashmore, J. (2002). Promoting the participation of children and young people in care. *Child Abuse & Neglect*, 26, 837-847; Roche, J. (1999). Children: Rights, Participation and Citizenship. *Childhood*, 6, 475-493.

⁹ Woodhead, M. (2005). Early childhood development: A question of rights. *International Journal of Early Childhood*.

¹⁰ Cashmore, above n 8.

¹¹ Testro, P. (2010). *Participation of children and young people: A review of the literature*. Sydney: CREATE Foundation.

¹² Ibid; Cashmore, above n 8.

Meaningful participation can promote citizenship and social inclusion, as well as personal and social education and development.¹³ Checkoway views (formal) participation as a fundamental right that is linked to citizenship and a healthy democratic society.¹⁴ As less powerful citizens, children and young people need to be encouraged to engage with adults and to learn the skills of critical thinking, planning and asserting their opinion. However, research suggests that time constraints, unsupportive work environments and high caseloads act as barriers to participation.¹⁵

Perceived lack of capacity to participate due to disability, age or other factors should not be assumed by the worker or any person making a decision about another person. A perceived lack of capacity should not result in the young person not having the opportunity to participate at all.

Involvement of children and young people in decisions that matter to them needs to be ongoing, with an emphasis on informal participation as well as engagement in court and departmental procedures. The participation of children and young people in decision making needs to start at the point where the child protection system makes a decision to intervene within a family.

The participation of children and young people cannot be thought of exclusively in terms of individual case management and decision-making. The full benefits of participation of young people will only be realised when there is maximum participation in service development, policy, legislation, and systemic reform.

4. Permanency provisions

Being raised in a safe and stable living environment maximises opportunities for a child or young person to grow and develop to meet their potential.¹⁶ Safe and stable environments tend to include a stable connection with family and community (where appropriate), providing for the child or young person's developmental, educational, emotional, health, intellectual and physical needs.¹⁷ In other words, a safe and stable living environment is a durable placement that enables a child to flourish.

Most of the children and young people in statutory care are victims of some form of abuse or neglect and have not had the benefit of a family that has been able to protect them from harm. Australian researchers, Osborn and Delfabbro found that most families in their study had been contacted by child protection authorities four years prior to their son or daughter being placed in out-of-home care. They suggest that 'it is likely that children were usually exposed to four more years of difficult circumstances after the initial child protection notifications had been made.'¹⁸ The four year delay between notification and placement in out of home care may be due to efforts to ensure families have the capacity to meet the child's care and protection needs within the family home.¹⁹ If this is the case, the

¹³ Checkoway, B. (2011). What is youth participation? *Children and Youth Services Review*, 33, 340-345.

¹⁴ Ibid.

¹⁵ Darlington, Y., Healy, K., & Feeney, J.A. (2010). Challenges in implementing participatory practice in child protection: A contingency approach. *Children and Youth Services Review*, 32, 1020-1027.

¹⁶ The Act, above n 5, s 7(1); Cashmore, J., & Paxman, M. (2006). Predicting after-care outcomes: the importance of 'felt' security. *Child and Family Social Work*, 11, 232-241; Schofield, G. (2002). The significance of a secure base: A psychosocial model of long-term care. *Child and Family Social Work*, 7(4), 259 – 272; Schofield, G., (2001). Resilience and family placement: A lifespan perspective. *Adoption & Fostering*, 25(3), 6-19.

¹⁷ *Child Protection Act 1999* (Qld), s 5B(k); Cashmore and Paxman, above n 16.

¹⁸ Osborn, A., & Delfabbro, P. (2007). Children with stable and unstable placements in South Australian out-of-home care: A comparison of their family background, care history and behavioural functioning, *Communities, Children and Families Australia*, 3:1, 55-67; Osborne, A.L., Delfabbro, P., & Barber, J.G. (2008). The psychosocial functioning and family background of children experiencing significant placement instability in Australian out-of-home care. *Children and Youth Services Review*, 30, 847-860, p 857.

¹⁹ Ibid, 2007.

capacity of the state to provide effective early interventions resources within the family home is a key consideration in determining whether the child's best interests are being met.

Research published by the Australian Institute of Health and Welfare in 2012 indicates that approximately 62% of children and young people in care in Tasmania had been in the same placement for more than two years.²⁰ Cashmore and Paxman define a stable care experience as a child spending at least 75% of their time in care in a single placement.²¹ The most recent Tasmanian Annual Report states that almost 21% of 'children in care had three or more placements in the previous 12 months.'²² According to the xxx almost 50% of the children who exited care in 2010-11 had experienced 3 or more placements.²³ The Commission suggests this is 31% higher than Australia as a whole.²⁴

Children require a stable environment in order to form positive attachments and trusting relationships with the significant people in their lives.²⁵ This includes developing a sense of belonging within the family environment and the school environment. It is the development of this secure base that enables the child to develop cognitively and emotionally.²⁶ Schofield says that in childhood, protective factors include:

... placements that built internal resources of resilience through offering a secure base and promoting self-esteem and self-efficacy, not only within the family relationships but also in the range of other relationships/activities where children need to feel confident and effective. These internal resources included the young adult's capacity to achieve comfortable intimacy, to think and reflect on situations, to make choices and to seek out/use support. [In adulthood, protective factors include] the continuing availability of significant adults, former caregivers in particular but also other networks, who offered love and support to young people who remain vulnerable and continue to need family.²⁷

Australian research has suggested that stability in care is a key factor in developing a sense of security, belonging and a network of social support.²⁸ These three elements have been found to be vital for children and young people who will one day, transition from care and enter adulthood where all of the skills they have learnt are tested. However, research suggests that '[p]lacement instability, in part, is a result of poor administrative processes, lack of agency support of foster parents and behavioural problems of youth.'²⁹

CREATE submits that placement stability and permanency placements are directly related to each other. Whilst the Discussion Paper states that permanency, is an outcome, CREATE believes that permanency is also a process that needs to start early.

²⁰ Australian Institute of Health and Welfare, above n 3, p 34.

²¹ Cashmore, J., & Paxman, M. (2007). Longitudinal study of wards leaving care: four to five years on. Report of Research Project commissioned by the NSW Department of Community Services; Cashmore, above n 16; Cashmore, J. & Paxman, M. (2006). Wards leaving care: Follow up five years on. *Children Australia*, 31:3, 18-25.

²² Annual Report, above n 4, p 40.

²³ Commissioner for Children, Tasmania. (2012). *An uncertain road ahead – Young people leaving care in Tasmania: Issues Paper No. 3*. Hobart, p 9.

²⁴ Ibid

²⁵ Cashmore, above n 16; Schofield, above n 16.

²⁶ Schofield, above n 16.

²⁷ Schofield, above n 16, p 17.

²⁸ Cashmore, above n 21; Cashmore, above n 16.

²⁹ Pecora, P.J. (2012). Maximising educational achievement of youth in foster care and alumni: factors associated with success. *Children and Youth Services Review*, 34, 1121-1129.

The Discussion Paper and the Act states that the first consideration for permanency is either staying with the family or reunification with the family.³⁰ The Discussion Paper also suggests that failing reunification, adoption and transfer of guardianship are alternatives for securing a permanent placement for children and young people in care.³¹

CREATE notes that the Act defines 'family' to include extended family however we note that 'reunification with family' is different from being cared for by 'kin or extended family'. The family is 'the fundamental group unit of society'.³² It is a principle of international and domestic law that family based care offers the best opportunities for children to grow and develop to reach their potential.

Some children and young people have informed CREATE that they have had extended family members willing and able to care for them but that those family members were not contacted by departments. Kinship care is a form of care provided in Tasmania and **CREATE submits** that, consistent with the NSW proposal,³³ that placement with extended family be provided for as a permanent placement option after family reunification and before adoption.

CREATE also submits that agencies should be able to demonstrate that they have explored all options for permanency planning before moving to the second, third and fourth preferable option.

CREATE also recognises the conflict between needing to permanently place a child or young person in a safe and stable family situation and providing the family with enough time and resources to increase their parenting capacity in order to be reunified with their child or children. Due to the diversity of issues facing families, **CREATE submits** that time frames for making permanency placements can be restrictive on families and can be to the detriment of the child or young person.

Therefore, **CREATE submits** that decisions should be made on a case by case scenario and should take into account factors such as whether and to what degree the parent(s) are offered and accessing relevant support services; the type of harm caused to the child or young person prior to entering care and the wishes and opinions of the child or young person where the child or young person is able to make their wishes and opinions understood.

5. Maximising non-adversarial dispute resolution mechanisms

Some children and young people have reported to CREATE that Family Group Conferences that involved extended family members, parent(s), case workers and other key decision makers may have helped their family deal with issues relevant to their care and protection. Other children and young people have reported that meetings such as these may not have done anything constructive.

Therefore, **CREATE suggests** that provision be made for a wider use of Family Group Conferences, either formally or informally, and that the use of Family Group Conferences, when properly facilitated, can help the family take ownership of their issues and develop solutions toward the better care and protection of the child or children.

Some children and young people have informed CREATE that they have or would have liked to participate in Family Group Conferences. Others have suggested that their participation should be voluntary but that they should be given a choice. Others have suggested that their participation would

³⁰ Discussion Paper, above n 2; the Act, above n 5.

³¹ Discussion Paper, above n 2.

³² UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 16(3).

³³ Government of NSW. (2012). *Discussion Paper, Child Protection: Legislative Reform Legislative Proposals, Strengthening parental capacity, accounting and outcomes for children and young people in State care*. Sydney: Department of Family and Community Services.

have been tokenistic because their parents would have pressured them into conforming with their wishes in the group dynamic. Therefore, children and young people can be the subjects of power and control in these formal group settings and can be coerced or otherwise feel pressured to say things that they would not otherwise say. Clearly this could lead to a detrimental outcome for the child or young person and could lead to further harm.

CREATE submits that Family Group Conferences should not be used to the exclusion of discussing issues and identifying solutions with key stakeholders and the child or young person. Power imbalances need to be taken into account when relying on group based discussions and where speakers are readily identifiable.

6. Strengthening child advocacy provision

a. Representation in court

Children and young people the subject of child protection matters and proceedings have a right to have a right to express their views.³⁴ Their vulnerability due to age and substantiated abuse and neglect increases their vulnerability. Formal proceedings and meetings can create a power imbalance that increases and the gravity of decisions made can result in them having to leave the family home and this also increases their vulnerability.

There is no doubt that children and young people should have quality, independent and fully briefed legal representation for all proceedings.

b. Representation in Family Group Conferences

Alternative dispute mechanisms such as conferencing can be viewed as non legal in philosophy however when they are statutory conferences there is no doubt that they form a critical part of the legal process.

Children and young people have shared their stories of family group conferences with CREATE. Some have suggested that the group dynamic was a productive process for them whilst others felt pressured to conform to their parents directives. It may be the case that older children can speak more openly in the group process, however this is not a hard and fast rule because it will depend on individual personalities and individual family dynamics.

If conferences aim to raise family or parenting capacity issues and to develop solutions for the purpose of keeping the child or young person free from harm and/or to keep the child or young person from entering or re-entering care, then the gravity of decisions at the conferences requires a skilled, independent and fully briefed child advocate.

CREATE submits that children and young people the subject of child protection matters should be allocated an Australian legal practitioner as soon as practicable. Due to the gravity of substantiation, this should occur prior to entering care.

Children and young people who are subject to child protection matters can be excluded from the legal system. In limiting the use of advocates the voice of the child is also limited. Therefore, in order to uphold a child's rights to be heard in matters that affect them, the child or young person should be free to choose when and where their advocate is present and active.

Another approach that may be useful in terms of enhancing child advocacy is to enable the Child Commissioner to join the proceedings as a third party in order to advocate for the child. This is likely to require legislative amendment to enable that function and power.

³⁴ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, Article 12.

Other questions will be whether the Family Group Conferences will be without prejudice and whether professional privilege applies.

7. Restrict contact by leaving the child and removing the risk

A child or young person can experience trauma by being removed from the family home. In many cases the child or young person is a victim of abuse and/or neglect and as such they are powerless and fault free. In some cases abusive and/or neglectful parent(s) remain in the family home whilst the child's future alters dramatically.

Legal provision that enables a child to safely remain in the family home or to reside with relatives or friends is likely to reduce trauma and feelings of guilt and therefore supported by CREATE. Alleged perpetrators, and particularly those who are alleged to be abusive toward the child(ren) or young person(s) should be removed from the safe place.

8. Powers of the Commissioner for Children

Children's Commissioners powers and functions vary considerably across Australia as exemplified in the Discussion Paper. The current functions and powers enable, among other things the Commissioner to investigate a decision or recommendation made or an act done or omitted under the Act in respect of a child other than a decision or recommendation made by a Court. However, it appears that this can only be done upon the request of a Minister.³⁵

CREATE believes in an accountable and transparent child protection system. Decisions must be able to be monitored by an external party and an external advocate should be able to intervene and investigate an issue involving a child or young person, and this is particularly the case for a child or young person in care. Therefore, the Commissioner for Children should have wider investigatory powers in relation a child or a class of children and should be able to act upon their own initiative.

CREATE recognises that the Ombudsman is the current office for resolving individual complaints and that the Commissioner is a systems advocate. However, it is likely that the Commissioner for Children, in being a child specialist, should also have the capacity to receive and investigate individual complaints. It may be that numerous individual complaints in synergy evidence a systemic issue. Without the power to hear individual complaints and investigate them, the Commissioner is limited in their advocacy role.

Conclusion

CREATE Foundation advocates for the rights and welfare of children and young people with a care experience. We consult with children and young people with a care experience across Australia in every jurisdiction. We recognise that good law is essential to protecting children and young people from harm and that effective systems are required to help children and young people reach their maximum potential.

CREATE also recognises that departments are often overwhelmed by notifications, substantiations and the number of children and young people in and entering care. This is a national phenomena and has been experienced in other countries. CREATE believes that where possible children and young people should remain with their families if it is safe to do so and recognises that entering and remaining in care can detriment their futures.

³⁵ Discussion Paper, above n 2, p 27; the Act, above n 5, s 79(1)(a).

It is well recognised that the pool of foster carers is reducing and the complexity of cases is increasing. CREATE believes that quality child care and protection requires resources, training and most of all participation by each child and young person where participation is possible.

CREATE supports the Tasmanian government's willingness to reform the child protection legislative framework in a way that reduces the risk of harm and increases the happiness and welfare of all children and young people.

Contact

CREATE Foundation thanks the Tasmanian Government for the opportunity to participate in the legislative reform project and amendments to the Children, Young Persons and Their Families Act 1997 (Tas).

For more information about this submission please contact:

Jacqui Reed
Chief Executive Officer
CREATE Foundation

T: (07) 3255 3145

E: jacqui.reed@create.org.au