NSW PARLIAMENTARY LIBRARY
RESEARCH SERVICE

Permanency Planning and Adoption

by

Abigail Rath

Briefing Paper No 2/2001

RELATED PUBLICATIONS

- Adoption and the Care and Protection of Children: The Proposed Legislative Changes by Marie Swain – Briefing Paper No. 10/2000

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:

www.parliament.nsw.gov.au/WEB_FEED/PHWebContent.nsf/PHPages/LibraryPublications

CONTENTS

EXECUTIVE SUMMARY

The Permanency Planning Bill
On 21 June 2000, the Minister for Community Services released the Children and Young Persons (Care and Protection) Amendment (Permanency Planning) Bill as an exposure draft for public consultation. The Minister said that the Bill seeks to ensure that permanency planning is firmly on the agenda when decisions are made about children in out-of-home care, and that it proposes to actively encourage the consideration of adoption as an option for children who are unable to live with their family of origin. (pages 1-2)

While there was broad support for the Minister's objective of strengthening the emphasis on permanency planning, the Bill received mixed responses. While some commentators supported the proposal to more actively consider adoption as an option for permanent placement, others were concerned about such a move. Some commentators argued that permanency planning was one of the principal objectives of the new child protection legislation (the *Children and Young Persons (Care and Protection) Act 1998*) and that substantial amendment is not required. (pages 2-7)

What is Permanency Planning?
The concept of permanency planning is not new. It emerged in the 1970s in the US and UK in response to studies which showed that there were many children in unstable fostering arrangements for long periods of time with no effort being made to find them more permanent arrangements. Although the concept is not precise, it generally refers to time-limited, goal directed efforts to help children live with nurturing adults who offer stability and an opportunity for lifetime relationships. It encompasses supporting families to prevent the removal of children from their homes, working with families to enable children to be re-united with their families, and where prevention or re-unification is not appropriate, providing services to enable children to be placed in another permanent family. (pages 7-10)

Developments in the United States and the United Kingdom
The Minister's focus on adoption follows recent developments in the US and the UK which emphasise adoption as an important and under-utilised aspect of permanency planning. In 1996, President Clinton set a goal of doubling by 2002 the number of children adopted or placed in other permanent homes, and current figures indicate this goal will be met. In 1997, Congress passed legislation aimed at promoting adoption and other permanent homes for children who need them. The legislation includes: increases in funding for family preservation and support services; adoption incentive payments; time limits for permanency plans; and time limits for initiating proceedings to terminate parental rights. Apart from the adoption incentive bonuses (which only apply to adoption), the legislation focuses on "permanency" generally with adoption treated as only one of various permanency options. However, guidelines released by the US Department of Health and Human Services express a clear preference for adoption. (pages 10-17)

The UK Government recently released a White Paper on adoption which proposes initiatives to increase the number of adoptions of "looked after" children. The proposals include: increasing funding for services and support for children and their adoptive families; setting timescales for permanency plans and adoptive placements; and setting a target to increase by 40% by 2004-05 the number of adoptions of looked after children. (pages 17-21)

Child Placement Research and Issues

The Minister's proposal to emphasise the adoption of children in out-of-home care raises the issue of whether research supports such a preference for adoption. The relative merits of adoption versus other long-term placement options has been a topic of continued discussion in child welfare circles. There are strongly held positions on both sides of the debate and both sides refer to research to support their arguments.

While there is general agreement on the importance of stability for children in out-of-home care, there is disagreement over the best way to provide for this, and the importance of other factors such as continued contact between the child and her/his birth family. (pages 22-33)

The Community Services Commission's Inquiry into Substitute Care

In November 2000, the Community Services Commissioner released the final report of his comprehensive inquiry into the substitute care system in NSW. The Report concludes that the substitute care system in NSW has failed to deliver adequate care and protection for children and young people. The Report provides a good picture of the care system in which the debate surrounding permanency planning and adoption is placed in practice. It provides a timely reminder that there are fundamental problems in the system that need to be addressed. (pages 33-37)

1 THE PERMANENCY PLANNING BILL – OBJECTIVES AND RESPONSES

1.1 The Minister's Objectives – Permanency Planning and Adoption

On 21 June 2000, the Minister for Community Services, the Hon F Lo Po' MP, introduced the Children and Young Persons (Care and Protection) Amendment (Permanency Planning) Bill ("**the Permanency Planning Bill**") into the New South Wales Legislative Assembly.[1] The Bill was prepared as a draft exposure bill to enable public comment and consultation.

In her second reading speech, the Minister stated that the Bill proposes amendments to the *Children and Young Persons (Care and Protection) Act 1998* (NSW) that will place greater emphasis on the need for permanency planning for abused and neglected children who have been removed from their birth parents.[2] The Minister outlined the aims and objectives of the Bill as follows:[3]

- It has been well documented that multiple placements for children in out-of-home care are damaging for the children concerned.
- 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.
- The Bill recognises that critical issues concerning permanency planning need to be determined at an early stage as research on children's development has highlighted how crucial a stable and nurturing environment is in a child's early years.
- The Bill aims to improve the case management of abused and neglected children who have been removed from their birth parents, where it is unlikely they will ever be able to safely return home.
- The Bill does not involve any shift in policy on the removal of children from their birth parents. The Bill relates only to the management of children's placements after they have been removed from their parents.
- The Bill seeks to ensure that permanency planning is firmly on the agenda when decisions are made about a child's future.
- The Bill does not seek to alter the general presumption that most children are better off with their birth parents and that removal should only be considered as a last resort.
- However, the Bill does challenge "the prevailing assumption among some child protection professionals that eventual restoration to birth parents is the goal to be pursued at all costs, in every single case".

---

[1] For a detailed discussion of the provisions of the Bill and responses to it see Swain M, *Adoption and the Care and Protection of Children: The Proposed Legislative Changes*, NSW Parliamentary Library Research Service Briefing Paper No 10/2000.

[2] *NSWPD*, 21/06/00, p 7327 per the Hon F Lo Po' MP.

[3] ibid.

The Minister also emphasised that the Bill represented a shift in policy to encourage the consideration of adoption:

> 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. I am also aware that most foster carers are wonderful, dedicated people, and I would be the first to pay tribute to the work they do for these children. Despite the dedication of the foster carers, **foster care itself has 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 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…
>
> Childhood is finite. Early years are precious, and we owe it to the children not to squander it by giving the parents too many chances to get their act together. **We can only draw the line with adoption** – it is the only permanent legal option where there is no possibility of return to the birth parents. Significantly, I note that adoption now is not what it used to be. Adoption often has a bad name because of past practices, which caused a lot of pain and suffering for all concerned. Thankfully, we are now more enlightened in our approach – we are more open about the process, and encourage those affected to maintain a sense of their true identity and the potential for a meaningful relationship with their birth family. When I talk about more proactively considering adoption I am talking about modern adoption practices.[4] [emphasis added]

Although the Minister emphasised the need to consider adoption, she also noted that adoption may not be feasible in some cases and it is not the only option:

> Adoption is one option in the spectrum of out-of-home care services and it needs to be actively considered in this light. It has a place for some children, and it should be part of a seamless array of services on offer, available to meet the needs of each child as required.[5]

1.2   Responses to the Bill

While there was broad support for the Minister's objective of strengthening the emphasis on permanency planning, the Bill received mixed responses. An overview of some of the responses is provided below.

ACWA: The Association of Childrens Welfare Agencies ("ACWA") urged the Minister to withdraw the legislation.[6] In ACWA's view the Bill would not achieve the laudable

---

[4] ibid.

[5] ibid.

[6] Association of Childrens Welfare Agencies, "Government Urged to Rethink Care Bill", Media

objectives articulated by the Minister. In its view "the framework for sound planning, permanency and stable decisions… are all possible under the 1998 Act".[7] Aspects of the Bill criticised by ACWA included:

- the onerous requirements to look at adoption so early in every case;
- the provisions that inhibit family contact in the early stages of a placement; and
- the watering down of the Aboriginal placement principle.

Professor Patrick Parkinson: Professor Parkinson was the chairperson of the Community Welfare Legislation Review[8] and one of the architects of the 1998 Act. Parkinson strongly criticised the Bill. In his view, the Minister's objectives could be met under the 1998 Act and substantial amendment of the Act was not needed. He wrote a detailed paper which criticised the majority of the provisions in the Bill.[9] In his view, many of the provisions were meaningless, unnecessary or would have unintended or disturbing consequences. As with ACWA, Parkinson also criticised:

- the requirement to consider permanency planning and adoption in all cases where an out-of-home care order is sought even in cases where restoration is a realistic possibility;
- the provisions that deprive all children in out-of-home care of the right to maintain contact with parents, family and friends for an interim period and perhaps forever; and
- the watering down of the Aboriginal placement principle.

Parkinson argued that it is important not to confuse support for the Minister's objectives with support for the Bill:

> I am not alone in supporting the Minister's objectives fully. Her views are widely shared by child protection professionals.
>
> I am not aware of any child protection professional who disagrees with [the need for greater emphasis to be placed on permanency planning] … or anyone who believes that eventual restoration to birth parents is the goal to be pursued at all costs, and in every single case…[10]

Release, 20 July 2000, <http://www.acwa.asn.au/acwa/news/PPMedia.html>.

[7] ibid.

[8] See NSW Parliamentary Library Briefing Paper 10/2000, n 1, pp 9-14.

[9] Information in this section is taken from Parkinson P, *The Children (Care and Protection) Amendment (Permanency Planning) Bill 2000*, Paper presented at the Forum on Permanency Planning on 28 July 2000, <http://www.acwa.asn.au/acwa/news/PPForum.html>.

[10] ibid, p 5.

> It is important not to confuse support for the Minister's objectives with support for this Bill. One can support one without supporting the other. I support those objectives. I do not support this Bill.[11]

Parkinson said that ensuring early permanency planning was one of the principal objectives of the reforms implemented in the 1998 Act. In Parkinson's view the debate is not about the Minister's objectives or whether restoration to parents is always desirable. Rather, a basic question is whether any amendments to the scheme of the 1998 Act are needed to achieve the Minister's objectives.

Parkinson noted that the strong emphasis on adoption raises the issue of whether there should be a presumption towards adoption if restoration to birth parents is not likely to be possible. He stated that there is little doubt that adoption has been under-utilised, particularly in relation to infants and very young children for whom restoration to their birth parents is unlikely. However, he emphasised that the Act needs to provide for a wide variety of circumstances, not just for severely abused and neglected babies.

Parkinson argued that adoption may not be the best long-term placement option in all cases and that judgments need to be made on an individual basis. He made the following points:[12]

- The problem with adoption is that it severs the legal relationship between the child and his or her birth family. The birth family may include sisters, brothers, grandparents, aunts, uncles and others who care about the child. Adoption sends a clear message that the child is no longer a member of that family. The child becomes a member of another family. The child's grandparents are no longer legally his/her grandparents and thus would not be entitled to seek an order for contact from the Family Court as other grandparents can. Thus, an important issue in comparing adoption with other options for permanency is how much importance we should place on the extended family of the child.
- Although open adoption is encouraged, it does not tend to involve extensive contact with the birth parents or extended family. Unless an agreement is contained in an adoption plan, contact with the child after adoption is likely to be limited and at the discretion of the adopting parents. Birth parents may not be well placed to negotiate an adoption plan, or their consent to adoption may be dispensed with.
- The 1998 Act provides alternatives to adoption including orders allocating parental responsibility (section 79) or sole parental responsibility orders (section 149). A sole parental responsibility order has much the same effect as adoption without severing the legal relationships between the child and the family of origin.
- These alternatives are not as final as adoption as they may be revoked. However, the 1998 Act puts considerable hurdles in the way of the recision of long-term placements once the child is settled in a new family, and there is no reason to believe that these adoption alternatives are inherently insecure.

---

[11] ibid, p 7.

[12] ibid, pp 7-11.

Community Services Commission: The Community Services Commission ("**the Commission**") provided a detailed submission to the Minister regarding the Bill.[13] The Commission supported the Minister's intent to improve permanency for children in out-of-home care. However, the Commission criticised many aspects of the Bill. As with Professor Parkinson, the Commission believed that the objectives of the Bill have already been met in the 1998 Act and substantial amendment is not necessary. The Commission said that the 1998 Act should be given a chance to work. However, the Commission did make some recommendations for minor amendments to the 1998 Act.

In the Commission's view, one of the fundamental problems with the Bill was that although it was intended to address the circumstances of a small number of children (i.e. seriously abused or neglected infants), many of the provisions apply to all children in out-of-home care.[14]

The Commission summarised a number of problems with the Bill that it and others had identified. It stated that the Bill will, if passed:

⇒ serve to undermine the 'partnership' between parents seeking assistance and the Department;

⇒ lead to consideration of adoption and permanent placement in all instances of out-of-home care, even those which are planned as short-term respite to assist a family through a crisis;

⇒ deprive children and young people of contact with their families for an "interim period" of up to six months after placement, including those people in voluntary placement;

⇒ introduce the possibility of children and young people being fined if they reveal their address to their parents in the interim period without the carer's permission;

⇒ water down the intent and effect of the Aboriginal Child Placement Principle;

⇒ when determining whether there is a realistic possibility of restoration, not allow the Court to take into consideration changes to the parent/s circumstances and ability to care for their child since the decision to take the child into care; and

⇒ allow for a sole parental responsibility order to be made the day after a care order is made, if a parent consents, without any consideration of the need for ongoing support and external review of the placement.[15]

Barnardos Australia: Barnardos Australia urged people to support the core elements of the Bill because of its focus on permanency. In a paper delivered to the Permanency Planning Forum on 27 July 2000, Tina Smith of Barnardos Find-a-Family Program stated:

---

[13] Community Services Commission, *Submission by the Community Services Commission to the Minister for Community Services in relation to the Children (Care and Protection) Amendment (Permanency Planning) Bill 2000*, September 2000.

[14] ibid, p 2.

[15] ibid, p 3.

> We would urge people to support the core elements of the Bill, that is, the provision of permanency planning. We feel that A.C.W.A.'s call for a withdrawal of the bill and only [to] proceed with the Act is premature and may mean children will continue to drift through the system. Many people are saying that the [1998] Act secures the priority of the needs of children. But we feel that it should be strengthened to absolutely direct that children's needs for permanency is the overriding principle. To establish permanency planning with adoption as one of its components is especially important. We need to listen to the experiences of workers who have battled the system for years to find permanency for children, and to the voices of many children themselves.[16]

Although Barnardos supported the core elements of the Bill, there were some areas it did not support including the watering down of the Aboriginal placement principle.

Barnardos supported the emphasis on adoption and expressed the view that adoption provides the best hope for long term stability:

> It is our experience that Adoption has a negative image in the Substitute care field and that many Departmental and Welfare trained staff are not supportive of adoption as a means of providing permanency for children. Many commentators have little or no experience of how well open adoption can work in keeping children well connected to their extended family…
>
> Many children drift within the system when adoption care plans are considered or acted upon. I believe that when it is clear that restoration to a child's birth family appears unlikely, adoption should be seriously explored. The international evidence is overwhelmingly strong that adoption offers the best hope of long term stability for any child whose birth family is unlikely to be able to provide adequate care within a defined space of time. Children are entitled to a family for life. Adoption has a much better record of providing stability than open-ended foster care. The sole parenting provision is not adequate for all children as it lacks, for many children, the psychological impact of "belonging". Many previous difficulties have been overcome with the move to open adoption and payment of allowances as provided for in the new Adoption Act.
>
> Where the plan for a child is long-term care, workers should ask themselves if there is any good reason why the child should **not** be placed for adoption. The issues that need consideration at this time include the age of the child, the child's views about adoption, the family circumstances and involvement, and issues of identity…[17]

However, Barnardos also emphasised that adoption must be open:

> Open adoption is also critical; all children must be allowed knowledge of and most children contact with their birth family and the reality of the circumstances leading to adoption. In NSW, although open adoption has not been legally binding, contact arrangements can be made which are acceptable to the Supreme Court and this is now outlined in the new Act.[18]

---

[16] Smith T, *Form on Permanency Planning*, Paper presented at the Forum on Permanency Planning on 28 July 2000, p 8, <http://www.acwa.asn.au/acwa/news/PPForum.html>.

[17] ibid, p 6.

[18] ibid, pp 6-7.

The NSW Opposition: Although the Permanency Planning Bill was not debated beyond the Minister's second reading speech, the Shadow Minister for Community Services and Disability Services, S O'Doherty MP, issued a press release stating that the Opposition was reserving its final opinion on the Bill.[19] The Shadow Minister said that there was a need for further policy debate on whether improvements in stability and permanence for children should be provided by changes to the current foster-care based practice or by adoption. He also said that there was a suspicion in the community that the adoption proposal was partly driven by a desire to cut costs as adoption is a much cheaper option than family support or fostering. He also expressed concern about lack of follow up case work and support for adoptive families.

The former Shadow Attorney-General, the Hon J Hannaford MLC, expressed his disapproval of the Bill before his retirement from Parliament.[20] In his view, a push towards adoption would represent an abdication of the State's responsibility for meeting the needs of young people and their foster carers. In his view, the problems in the system need to be addressed by providing proper support to young people and foster carers. He drew a parallel between the policy direction of the Bill and the past policies of removal of Aboriginal children from their families. He said that the direction the Bill takes would result in a "white stolen generation".

2 WHAT IS PERMANENCY PLANNING?

The concept of "permanency planning" emerged in the 1970s, first in the US and later in the UK. 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.[21] A particularly influential study in the UK by Rowe and Lambert, published in 1973 under the name *Children Who Wait*, provided evidence that large numbers of children were spending their childhoods in public care and the system was not achieving stable, long-term family placements.[22]

The "permanency movement" developed in response to concern about the detrimental effects of this "drift" in foster care. Although a lot has been written on the concept of permanency planning, the concept is not precise.[23]

---

[19] *Adoption Proposals – Opposition calls for a full community debate*, Press Release issued by the Hon Stephen O'Doherty, 6 June 2000.

[20] *NSWPD*, 05/09/2000, p 8701, per the Hon J Hannaford MLC.

[21] Triseliotis J et. al, Adoption: theory, policy and practice, Cassell, London, 1997, pp 9 and 57-58.

[22] Kelly G, "The Survival of Long-term Foster Care", in Kelly G and Gilligan R, *Issues in Foster Care: Policy, Practice and Research*, Jessica Kingsley Publishers, London, 2000, p 12 at p 29.

[23] Maluccio A and Fein E, "Permanency Planning: a redefinition" (1984) 9(2) *Australian Child and Family Welfare* 3 at p 4.

Barnardos Australia provide the following definition of permanency planning:

> Permanency Planning is generally defined as time-limited, goal directed work with families which aims to help children live with nurturing adults who offer continuity and an opportunity for lifetime relationships.[24]

In the mid-1980s, Maluccio and Fein outlined the following priorities in permanency planning service delivery:

1. preventing separation of children from their homes by providing necessary supports to families;
2. where separation is necessary, developing plans and providing support services to enable children to be reunited with their families;
3. where these options are inappropriate, providing highly active services that enable children to be adopted, or where it is the plan of choice, to be placed in a permanent foster home.[25]

The term permanency planning has been applied to many different aspects of welfare practice, and what the concept encompasses has changed over time and between jurisdictions. Some writers have identified how the permanency movement in the UK developed with a different emphasis from the US. 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.[26] 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.[27] More recently, developments in the US and the UK (see sections 3 and 4) are focussed on adoption as an important and under-utilised aspect of permanency planning.[28]

Triseliotis et. al. explain how the permanency movement was also influenced by studies which indicated the success of older child adoptions.[29] Prior to the 1970s adoption practice concentrated on healthy infants. Theories on maternal deprivation and bonding suggested

---

[24] Tregeagle S, *Barnardos Policy on Permanency Planning*, Monograph 17, Barnardos Australia, undated, p 1.

[25] Maluccio and Fein, n 23, p 4.

[26] Kelly G, "The Influence of Research on Child Care Policy and Practice: The Case of Children Who Wait and the Development of the Permanence Movement in the United Kingdom" in Iwaniec D and Pinkerton J (eds), *Making Research Work: Promoting Child Care Policy and Practice*, John Wiley & Sons Ltd, 1998, p 47 at p 58.

[27] Maluccio et. al., *Permanency Planning for Children: Concepts and Methods*, Tavistock Publications, 1986, p 21.

[28] Cashmore J, "What the research tells us: Permanency planning, adoption and foster care" (2000) 25(4) *Children Australia* 17 at p 18.

[29] Information in this paragraph is taken from Triseliotis, n 21, pp 7, 28 and 58.

that children separated from their parents after about two years of age would fail to attach themselves to adoptive parents. It was thought that children separated from their parents early in life would not recover from the trauma. However, later studies showed that children could overcome the trauma of early experiences, and that older child adoptions could be successful. Thus, there was a push to encourage the adoption of children drifting in care who were previously thought to be unadoptable.

Maluccio and Fein outlined the values and theory behind permanency planning as follows:

> The permanency planning movement is based on various premises, particularly the value of rearing children in a family setting, the primacy of parent-child attachment, and the significance of the biological family in human connectedness.
>
> These premises are supported by theoretical perspectives and bodies of knowledge from diverse sources. Chief among these is the view that stability in living arrangements with parental figures promote a child's growth and development. Many writers have underscored the importance of permanence in living arrangements and continuity of parental relationships for every child. [30]

Similarly, Barnardos Australia states that permanency planning "is based on a belief that continuous, long-term living situations are significant for a child's development", but they note that "the factors contributing to permanency are complex and change over a child's life".[31] Barnardos explain that underlying "permanency" is a belief that young people need:

> *A sense of identity*: Children need to understand their personal history, significant people in their lives, their social origins and their social situation. (The need of many adult adoptees to uncover their origin has shown the life long importance of understanding identity.)
>
> *A sense of belonging*: Belonging to a nurturing group provides the capacity to develop close relationships for later life. A "family" provides the base for exploration and a source of comfort. It is a socially sanctioned source of values and when operating well provides social support for individuals over their whole lives.
>
> *Stability*: Stability and continuity is important to the socialisation of the child, as
>
> ♦ It gives understanding of the child's development to adult carers. This intimate knowledge allows carers to interpret behaviour and set expectations and limits.
> ♦ Development of trust of adult models and authority takes time to develop.
> ♦ Continuity, together with the young person's sense of belonging and identity, is essential to the development of self-esteem.
>
> Continuity of relationships is not exclusive to primary care givers, but also includes friends, significant "other" people, schools, social contacts and place.

---

[30] Maluccio and Fein, n 23, p 4.

[31] Tregeagle, n 24, p 1.

Attachment or bonding: Emotional attachment and commitment between child and carer have become an important factor in explaining child development since the "discovery" of bonding in the 1950s. Although the original work on bonding focussed on the mother-child relationship, it is now evident that bonding can occur with a number of adults, and is not exclusively related to biological ties even during infancy.[32]

3   UNITED STATES DEVELOPMENTS

3.1   The Adoption Assistance and Child Welfare Act of 1980

In the US, the child protection and foster care system is primarily governed by state law. However, the US federal Congress has passed legislation which sets out requirements States must meet in order to receive important federal funding.[33] In 1980, the US Congress passed the *Adoption Assistance and Child Welfare Act* (Public Law 96-272) ("**the AACWA**"). This Act was a response to the issues highlighted by the permanency movement. It was designed to address the problem of children languishing in foster care and to increase permanency planning:

> The 1980 Adoption Assistance and Child Welfare Act, widely considered to be the most significant legislation in the history of child welfare, was a response to the feeling that too many children were going into foster care, with too few coming out, and costs rising exponentially. Its 'permanency planning' was 'a revolutionary change in child welfare practices': an attempt to introduce some structure, long-term perspectives and stability, with 'clearly defined pathways and time-frames for children and families'. The aim was prompt and decisive action to keep children at home, restore them to their biological families, or place them for adoption as quickly as possible, thus reducing entrance to foster care and expediting exits. The intention was that children would no longer enter care inappropriately, drift in care or remain in care for years on end. Together with six-monthly reviews of the child's situation, the Act required that, within 18 months of opening a case, a permanent plan must be in place.[34]

Significantly, family preservation was the first priority under the AACWA. The Act required States to make "**reasonable efforts**" to maintain a child in the home whenever possible, and to return a child who had been removed from home.[35]

---

[32] ibid, pp 1-2.

[33] This section discusses two important pieces of federal legislation passed in 1980 and 1997 relating to adoption. However, note that there are other important pieces of federal legislation, including for example, the *Multiethnic Placement Act of 1994* (P.L. 103-382) and its 1996 *Interethnic Placement Provisions* (P.L. 104-188) (IEP). MEPA forbids the delay or denial of a foster or adoptive placement solely on the basis of race, colour or national origin. IEP clarifies the original MEPA legislation and creates sanctions for failure to comply with the legislation: see United States, Department of health and Human Services ("**DHHS**"), *Adoption 2002: The President's Initiative on Adoption and Foster Care: Guidelines for Public Policy and State Legislation Governing Permanence for Children*, June 1999, <http://www.acf.dhhs.gov/programs/ cb/special/02final.htm>.

[34] Morgan P, *Adoption and the Care of Children: The British and American Experience*, Choice in Welfare No. 42, IEA Health and Welfare Unit, London, 1998, p 51.

[35] Weinberg A and Katz L, "Law and Social Work in Partnership for Permanency: The Adoption and

The AACWA was expected to have a dramatic effect on the operation of child welfare systems. However, it did not have the intended impact.[36] Some commentators have argued that a significant the problem with the Act was the emphasis on family preservation. Critics argue that the Act was interpreted by many as requiring efforts to preserve families at all costs, and that the reasonable efforts requirement led to some children being returned to unsafe homes or left to languish in foster care.[37]

3.2 The Adoption and Safe Families Act of 1997

In 1996, President Clinton issued an Executive Memorandum seeking advice on steps to increase adoptions and alternative permanent placements for waiting children in the public child welfare system.[38] One of the central goals in the memorandum was to double by 2002 the number of children adopted or placed in other permanent homes each year. In February 1997, the Department of Health and Human Services released its Adoption 2002 report in response to the Presidential Memorandum. In November 1997, Congress passed the *Adoption and Safe Families Act* (Public Law 105-89) ("**the ASFA**") with bipartisan support.

The ASFA is designed to address some of the perceived problems with the AACWA. The ASFA continues some of the reforms made under the AACWA, but modifies and adds other reforms.[39] Weinberg and Katz state that "[a]rguably, the ASFA is more focused on moving children into alternative permanent placements than strengthening families".[40]

Some of the major provisions of the ASFA are as follows:[41]

Child's health and safety paramount concern: The Act continues the general requirement

---

Safe Families Act and the Role of Concurrent Planning", (1998) 18(4) *Children's Legal Rights Journal* 2 at p 4. Bartholet E, *Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative*, Beacon Press, 1999 at p 25.

[36] Information in this paragraph is taken from Weinberg and Katz, ibid, p 4.

[37] Bartholet, n 35, pp 23-26. Weinberg and Katz, ibid, p 4. Adoption Policy Resource Center, *Comment and Analysis: Congress Passes New Adoption Law*, <http://fpsol.com/adoption/research/HR867.html>.

[38] For a discussion of the Presidential Memorandum and the Adoption 2002 report see NSW Parliamentary Library Briefing Paper 10/2000, n 1, pp 32-25.

[39] Weinberg and Katz, n 35, p 2.

[40] ibid.

[41] This is taken from: The Congressional Research Service (CRS) Summary of the ASFA Bill as of 11/13/1997 (the version of the Bill that was signed into law on 11/19/1997) at <http://thomas.loc.gov/cgi-bin/bdquery/z?d105:HR00867:>; Child Welfare League of America (CWLA), *Summary of The Adoption and Safe Families Act of 1997 (P.L. 105-89)*, <http://www.cwla.org/advocacy/asfapl105-89summary.htm>; and Adoption Policy Resource Center, n 37.

on States to make reasonable efforts to prevent the removal of children from the home and to reunify children to the home. However, the Act expressly says that in making reasonable efforts to preserve and reunify families, the child's health and safety is the paramount concern.

Modification of Reasonable Efforts provision: The Act also specifies that reasonable efforts to preserve and reunify families do not need to be made where:
⇒   a court has determined that the parent has subjected the child to aggravated circumstances (as defined in State law which may include, but need not be limited to, abandonment, torture, chronic abuse, and sexual abuse);
⇒   a court has determined that the parent has committed murder, or voluntary manslaughter of another child of the parent;
⇒   a court has determined that the parent has committed an assault that resulted in serious bodily injury to the child or another child of the parent; or
⇒   the parent's rights have been involuntarily terminated in relation to one of the child's siblings.

If a court determines that reasonable efforts to retain the child in the home or to reunify the child with the family are not required, then States are required to:
⇒   hold a permanency hearing within 30 days following the court's determination; and
⇒   make reasonable efforts to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalise the permanent placement of the child.

Concurrent Planning: The Act states that reasonable efforts to place a child for adoption or with a legal guardian may be made concurrently with reasonable efforts to preserve and reunify families.

Shorter time frame for Permanency Hearings: Permanency Hearings must be held within 12 months after the child enters foster care (under the AAWCA the time limit was 18 months). At the hearing there must be a determination of whether and when a child will be: returned home; placed for adoption and a termination of parental rights petition filed; referred for legal guardianship; or placed in another planned permanent living arrangement.

Requirement to document permanency efforts: Where the permanency plan for a child is adoption or other permanent placement outside the family, States are required to document the steps taken by the agency to place the child with an adoptive family, with a relative or guardian, or in another planned permanent living arrangement.

Termination of Parental Rights requirements: States must file for termination of parental rights ("**TPR**"") where:
⇒   the child has been in foster care for 15 of the most recent 22 months;
⇒   a court determines that the parent has committed murder, voluntary manslaughter or assault resulting serious bodily injury to the child or another child; or
⇒   a court determines the child to be abandoned.

However, States do not need to comply with these TPR requirements if:

⇒   at the option of the State, the child is being cared for by a relative;

⇒   the State agency has documented a compelling reason why a TPR petition would not be in the best interests of the child; or

⇒   the State has not provided to the family in a timely manner "such services as the State deems necessary for the safe return of the child to the child's home" in cases where reasonable efforts to reunify the child with her/his family are required.

Funding for family preservation and support services: The Act continues and increases (by $60 million over three years) the funding for family preservation and support services.[42] The Act also expands the categories of services. Services include:

⇒   time limited family reunification services including: individual, group and family counselling; inpatient, residential or outpatient substance abuse treatment services; mental health services; assistance to address domestic violence; services designed to provide temporary child care and therapeutic services for families; and transportation to or from any of these services; and

⇒   adoption promotion and support services.

Adoption Incentive Bonuses: The Act provides for bonuses to be paid to states for increasing the number of foster child adoptions and special needs adoptions. Bonuses are $4000 for each additional foster child adoption and $6000 for each additional special needs adoption over the State's "base rate" (calculated according to the number of adoptions in previous years).

3.3   Responses to the Adoption and Safe Families Act

The ASFA has encountered criticism from a number angles. Some commentators support the emphasis on terminating parental rights more swiftly and increasing adoptions, but criticise the Act for not going far enough towards achieving these goals. Others disagree with the emphasis on TPR and adoption. While others argue that the Act fails to address the underlying systemic issues.

Criticisms of the Act raised by those in support of adoption include the following:[43]

•   The Act **allows** states not to make reasonable efforts to preserve or reunify families in certain egregious circumstances, but it does not **forbid** the state from making such efforts.

•   The Act has tough-sounding TPR requirements, but the three exceptions to these requirements threatens their effectiveness.

•   The Act emphasises safety and abuse, but there is no mention of neglect, not even severe or chronic neglect.

•   The Act does not put enough emphasis on adoption. Apart from the adoption incentives

---

[42] The amounts authorised for appropriation were $275 million for 1999, $295 million for 2000 and $305 million for 2001.

[43] Bartholet, n 35, pp 194-198.

provisions (which apply only to adoptions), the Act focuses on "permanency" generally with adoption treated as only one of various acceptable permanency options.

In contrast, others argue that the Act places too much emphasis on easing the processes of terminating parental rights and adoption. Brooks argues that permanency for children has little to do with legal status and that a vocal group of adults prefer adoption because of their own concerns about feeling secure and stable.[44] She argues that:

- The zeal to terminate parental rights has created a population of legal orphans where rights have been terminated and adoptive parents have not been found.
- The push towards terminating parental rights has unnecessarily severed children's ties to their biological families at tremendous cost to children.
- Terminating parental rights and prohibiting contact between children and their biological families should be reserved "for the rare, extreme situations in which the harm caused by severing legal ties and contact is outweighed by the risk of harm from maintaining such contact".

Brooks states that:

> Adults must expand their thinking about what constitutes permanency for children and the ways in which permanency for children can be achieved. Permanent foster care and guardianship, which also may be permanent options for children, must be considered. These options may be preferable for many children who do not want parental rights severed or for whom it is really not in their best interests, when those interests are understood properly…
>
> There is a desperate need for laws and policies facilitating these more complex and creative arrangements, which may be challenging for adults to accept, but which truly serve children's best interests.[45]

Other commentators argue that the Act does not address the fundamental problems. Hollingsworth argues that the Act ignores systemic factors such as poverty and single parenthood.[46] Similarly, Negrau argues that the renewed interest in moving children more quickly out of foster care is admirable and necessary, but that:

> the ASFA is a reactive law that merely deals with the symptoms of a malaise in our society. True reform is not reactive. What our children need is an aggressive, pro-active policy that supports families in crisis with preventative services that will enable children to remain in their homes under the care of their parents.[47]

---

[44] Brooks S, "Permanency through the Eyes of a Child: A Critique of the Adoption and Safe Families Act" (1999) 19(1) *Children's Legal Rights Journal* 2.

[45] ibid, at p 4.

[46] Hollingsworth L, "Adoption policy in the United States: A word of caution" (2000) 45(2) *Social Work* 183.

[47] Negrau N, "The Adoption and Safe Families Act of 1997: Will the Much-Heralded Act Live Up to Its Name?" (1999) 19(1) *Children's Legal Rights Journal* 5 at p 17.

3.4   US Government Guidelines for Governing Permanence for Children

In June 1999, the US Department of Health and Human Services released its *Guidelines for Public Policy and State Legislation Governing Permanence for Children*.[48] The Guidelines were developed by a cross-disciplinary working group of experts in child welfare including administrators, judges, advocates and front-line workers. The Guidelines "reflect their best thinking about child welfare policy frameworks and what ought to be".[49] The Guidelines are designed to "help States review their own laws and develop statutes and policies that reflect the best practices in child welfare today".[50] Chapter II of the Guidelines discusses the options for permanent placements for children. Major features of this chapter are as follows:

Preference for Adoption: The Guidelines express a clear preference for adoption. They set out the following hierarchy of preferences for child placement:

> 1. *Principles*. We recommend that State law reflect the following principles:
>
>   a.   The most preferred permanent placement for a child is safe and permanent reunification with the birth parent or extended family of origin.
>
>   b.   For children who cannot be reared by their parents or within their extended family of origin, adoption is the preferred permanent placement.
>
>   c.   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.[51]

The Guidelines state that this hierarchy is not inflexible and requires individualised judgements based on the circumstances of each individual child. However, they also state that alternatives to adoption should only be used when adoption has been thoroughly explored and found inappropriate for the needs of the child.

The Guidelines give the following reasons for the preference toward adoption:

> Adoption remains the placement of choice when a child cannot be returned to his or her birth family, because it gives the child a new, permanent, legal family with the same legal standing and protection as a family created through birth. Adoption is the permanent transfer of all parental rights and responsibilities concerning a child to the adoptive parents. An adopted individual is entitled to inherit from and through the adoptive parents and is treated as the child of the adoptive parents for purposes of social security, insurance,

---

[48] DHHS, n 33.

[49] ibid, Preface.

[50] ibid, Introduction.

[51] ibid, Chapter II.

retirement, pension, and all other public and private benefit programs. Conversely, adoptive parents acquire rights to inherit from and through the adopted child. Adoption thus provides, for the most part, the same autonomy, security and durability of family relationships that children experience in their families of birth. Children, adoptive parents, birth parents, and the general public also understand and are familiar with this type of legal relationship.[52]

Legally enforceable post-adoption contact agreements recommended: The Guidelines also recommend that states make provision for legally enforceable agreements regarding post-adoption contact between the child and members of the birth family or other individuals with emotional ties to the child.[53] It is noted that many foster children have psychological connections to their birth families and other significant persons such as foster parents, and so it would be in the child's best interests to maintain some level of contact after adoption. The Guidelines state that post-adoption contact may provide the following benefits:[54]

- The child may need to know and understand his or her ethnic background and heritage.
- There may be a need to share medical information and health histories.
- Preservation of an emotional tie may be beneficial to the child.
- Continued contact may relieve an older child's guilt about the birth parent.
- Contact may help the child come to terms with his or her past.
- Continued contact may prevent the child running away or disrupting a new placement where the child desires continuing ties.
- Continued contact may avoid the trauma of long and contested termination of parental rights proceedings.
- Children generally benefit from contact with siblings.

Permanent Guardianship: Despite the preference for adoption, the Guidelines state that permanent guardianship may be preferable in some cases, for example where a child is psychologically attached to a relative and that relative cannot or will not adopt. The Guidelines state that permanent guardians should have legal custody and control of the child including the power to make decisions concerning the child's care, education, discipline and protection. Guardianship is different to adoption in that it does not affect a child's inheritance rights or rights to other benefits from and through the birth parents.

The Guidelines provide that courts should not be able to set aside a permanent guardianship unless there is clear and convincing evidence what the guardian has failed, or is unable, to provide proper care and custody of the child.

---

[52] ibid.

[53] Note a minority of the Expert Work Group compiling the Guidelines disagreed with this recommendation: "They felt that an enforceable right of contact, even when based on initial agreement amongst the parties, erodes the exclusive right and prerogatives of the adopting parents: ibid.

[54] ibid.

Standby Guardianship: The Guidelines recommend that states provide for the legal of "Standby Guardianship", which allows a chronically or terminally ill parent to authorise another adult person to serve as guardian of child when the parent is unable to care for the child or upon the parent's death. The concept of Standby Guardianship is also recommended in the ASFA and a number of states have enacted such laws.

Long term fostering: The Guidelines clearly express that long term living arrangements with a specific family (long term fostering) is the least preferred placement choice and should only be allowed in strictly limited circumstances. They state that long term fostering is least desirable because:[55]

- the foster parent and the children placed with them have the least protection against change of placement or overly cautious decision-making by agencies and courts;
- the state continues to have decision-making power over the child, thus fragmenting both responsibility and decision-making and minimising the foster parent's role; and
- there is the greatest practical risk of placement disruption

3.5   Recent increases in adoption in the US

In September 2000, President Clinton (as he then was) issued a statement on the Adoption Bonus Awards which outlined the dramatic increases in adoption since 1996.[56] The President stated that last year 46,000 foster care children were adopted – an increase of 65% since 1996. The President said that these figures put them well on the way to meeting his goal of doubling the number of adoption from 28,000 to 56,000 by 2002.

4   UNITED KINGDOM DEVELOPMENTS

Childcare policy in the United Kingdom has moved through several phases[57] and the role of adoption has been subject to wide swings in opinion.[58] In the 1960s emphasis was placed on "prevention", that is, providing support to families to enable them to look after their children. However, the rhetoric was not backed up with resources and prevention services were patchy.

In the 1970s, there were a series of high profile tragedies such a the death of Maria Colwell at the hands of her step father after she had been returned from foster care to her mother. In addition, studies such as Rowe and Lambert's *Children Who Wait* led to a realisation that

---

[55] ibid.

[56] Clinton W, "Statement on the Adoption Bonus Awards", Weekly Compilation of Presidential Documents, 20 September 2000, accessible from <http://www.access.gpo.gov/nara/nara003.html>

[57] Thoburn J, Success and Failure in Permanent Family Placement, Avebury, 1990, pp 1-2.

[58] United Kingdom, Cabinet Office, Performance and Innovation Unit (PIU Report), *Prime Minister's Review of Adoption*, July 2000, p 16, <http://www.doh.gov.uk/adoption/pmreview.htm#piu>. Information in this section is taken from this report (pp 15-16) and Thoburn, ibid, pp 1-3.

there were many children drifting for years in unplanned care. These factors contributed to a policy rethink. The growing permanency movement in the US captured the attention of those in the UK. In particular, the adoption side of the US permanency policies, rather than the rehabilitation side, were emphasised. In the mid-1970s, the *Children Act 1975* (UK) and the *Adoption Act 1976* (UK) were enacted. This legislation made it easier to dispense with the birth parent's consent in adoption cases and made it more straightforward for foster carers to adopt.

However, by the late 1980s, the "investigate, rescue and remove" approach which developed in the 1970s, and predominated throughout the 1980s, began to be questioned. The *Children Act 1989* (UK) represented another change in policy. The new policy promoted a simultaneous emphasis on partnership with parents, support to families and strong child protection. The 1989 Act came to be seen as emphasising the primary importance of working with birth families and the emphasis on adoption decreased. This led to growing concern that the pendulum had swung too far in favour of family reunification.

In 1998, the Government sent a circular to all local authorities stating that the 1989 Act was being misinterpreted by many in the field.[59] The Government stated that there was a common perception that the Act required exhaustive efforts to reunite a child to her/his family no matter how long that took. The Government stated that this perception lacked proper balance and that where it was clear that a child could no longer live with his/her birth family, decisions about a permanent placement should be made as a matter of priority.

In February 2000, Prime Minister Tony Blair announced that he would lead a major review of the adoption of "looked after" children. In June of that year, the Government released a consultation paper written by the Performance and Innovation Unit in the Cabinet Office ("**the PIU Report**"). In December 2000, the Government released a White Paper on its adoption proposals. These developments are discussed below.

4.1   UK Consultation Paper on Adoption

In the Foreword to the PIU Report, the Prime Minister said:

> It is hard to overstate the importance of a stable and living family life for children. That is why I want more children to benefit from adoption. We know that adoption works for children… Too often in the past adoption has been seen as a last resort. Too many local authorities have performed poorly in helping children out of care and into adoption. Too many prospective parents have been confused, or put off, by the process of applying to adopt, and the time the whole procedure takes.[60]

To address these perceived problems, the Prime Minister commissioned the PIU to conduct a study to assess the evidence, explore the options for action and to make recommendations

---

[59] See NSW Parliamentary Library Briefing Paper 10/2000, n 1, pp 30-32.

[60] PIU Report, n 58, p 3.

on options for Government policy. In accordance with the Prime Minister's views, the PIU Report found that:

- too often the current system was not delivering the best for looked after children in terms of finding them long-term placements generally or adoptive families in particular;
- there was scope for a substantial increase in the use of adoption as an option for looked after children.[61]

In assessing the evidence, the PIU concluded that:[62]

- The outcomes for children who grow up in the care system are poor.
- The research evidence on the success of adoption relative to alternative placements is scarce, but there is no suggestion that adoption outcomes are worse than the alternatives.
- There is a well established evidence base demonstrating that adopted children do as well, if not better, than those in the general population.
- There is no clear evidence of a difference in the rates of disruption between adoption and long term fostering once the differing age of children is taken into account. However, there are indications from studies that children generally prefer the sense of security that adoption gives them over long term foster placements, even if these are intended as "permanent".
- However, some children, mainly older, do not wish to make the absolute legal break with their birth family associated with adoption.

In assessing the problems with the current system, the PIU Report concluded that the limited use of adoption was most likely caused by the fact that workers in field were highly committed to reunifying children with their birth parents and "the structures and procedures are not in place to ensure they think more widely than that".[63] The Report also noted that workers were relatively untrained and inexperienced in adoption work. It concluded that decisions on permanent placements were not made early enough, plans for permanence are not delivered quickly enough, and families were not provided with needed support in securing and supporting adoption. The Report stated that:

> Adoption should be seen as a key means of providing permanence within a full spectrum of options that starts with return to their birth family, as the clear first choice, but moves swiftly to delivering genuinely permanent alternatives when this is clearly not in prospect. Fostercare should be the transitional route to securing permanence. The whole process of planning, decision-making and implementation should be driven and shaped by the needs of the child and progress made according to timescales that reflect those needs.[64]

---

[61] United Kingdom, Department of Health (DoH), *Adoption: a new approach*, A White Paper, December 2000, <http://www.doh.gov.uk/adoption/pmreview.htm#piu>, p 16.

[62] PIU, n 58, pp 16 and 18.

[63] ibid, p 27.

[64] ibid, p 53.

The PIU Report made 85 recommendations to improve the system. The first recommendation was that the Government set a target for increasing the use of adoption. The other recommendations were directed at: recruiting and supporting more adopters; improving the quality and consistency of local authority performance; making the court system work better and making legislative changes.

4.2   Responses to the consultation paper

Two of the leading organisations working with children in the UK – the British Agencies for Adoption and Fostering (BAAF) and Barnardos – gave qualified support to the PIU Report.[65] While a number of recommendations were supported by both organisations, other recommendations caused concern.

Both organisations were concerned about the lack of recognition given in the report to alternatives to adoption. Barnardos stated that the emphasis on adoption should not be at the expense of providing either family support or good quality foster and residential care. Barnardos noted that adoption is not the right option for some children, particularly older children who have a strong sense of identity as a member of their birth family.

Similarly, BAAF stated that there should be greater recognition of alternative routes to permanence, including placement within the wider birth family network and fostering. BAAF said it was essential that the benefits of adoption are balanced against the risks, threats and challenges of adoption. They also emphasised committing resources to prevention and reunification services so that children can remain with their birth family if possible.

BAAF cautiously agreed that numerical targets as performance indicators can be useful but warned that they will be invariably simplistic. BAAF stated that they were committed to the use of adoption as a route to permanent family life for those who cannot return safely to home, but they recognised that alternatives to adoption are appropriate in some cases. BAAF argued that the "target should be to achieve permanence whether by adoption, fostering, family reunification or by extended family placements. Each child's welfare should be paramount".[66]

BAAF also argued that further research needs to be done. They noted that the evidence on outcomes in the report largely related to infant adoptions and that outcomes for children adopted from care are still poorly researched, and the research that was quoted related to very small studies.

---

[65] Barnardos, *Barnardo's Response to the Adoption Law Review*, <http://www.barnardos.org.uk/ adoptrev.html>. British Agencies for Adoption and Fostering (BAAF), *Prime Minister's Review on Adoption: Response to the consultation report from the Performance and Innovation Unit*, 5 October 2000, <http://www.baaf.org.uk/pages/news/pmrevcom.htm>.

[66] BAAF, ibid.

Professor Chris Barton, the Director of the Centre for the Study of Family, Law and Social Policy at Staffordshire University, strongly criticised the PIU Report.[67] He stated there was little evidence in the Report to support the Prime Minister's flat assertion that "We know that adoption works for children".[68] Professor Barton was also critical of the setting of targets for adoptions as pushing public officials to fill quotas which will not necessarily serve the interests of the individual children involved.[69]

4.3   UK White Paper on Adoption

Following consultation on the PIU Report, the Government released its White Paper - *Adoption: a new approach* – in December 2000.[70] In announcing the publication, the Health Secretary said:

> Adoption must become the first choice option for looked after children who can't return home… Our aim is to give hundreds more looked after children the chance to live as a permanent member of a stable, secure and loving new family.[71]

Key proposals contained in the White Paper include:[72]

- investing over £66.5 million over three years to improve services and support for children and their adoptive families;
- setting a target to increase by 40% by 2004-05 the number of looked after children adopted, and aim to exceed this by achieving, if possible, a 50% increase;
- setting timescales for children so that a sound plan for their permanent future will be made within 6 months of becoming continuously looked after, and implemented promptly. Where the decision is made that adoption is the plan, a new family should be found within a further six months;
- introducing a new legal option for delivering permanence for looked after children, short of the legal severance with birth parents that adoption involves;
- setting out a new legal framework for adoption allowances;
- giving all families adopting children, especially those who have been looked after, the right to an assessment for post-placement support.

---

[67] Barton C, "Adoption – The Prime Minister's Review" (October 2000) *Family Law* 731.

[68] ibid, p 732.

[69] ibid, p 735.

[70] DoH, n 61.

[71] United Kingdom, Department of Health, *Adoption – A New Approach*, Press Release, 21 December 2000, <http://www.doh.gov.uk/adoption/whitepaper/pressrelease.htm>.

[72] This is taken from the White Paper, ibid, p 5 and Executive Summary of the White Paper at <http://www.doh.gov.uk/adoption/whitepaper/index.htm>.

5   CHILD PLACEMENT RESEARCH AND ISSUES

5.1   The role of research in child placement practice and policy

Policy and practice regarding the placement of children in out-of-home care is influenced by a number of factors including social, political and economic considerations.[73] While research no doubt plays an important role, the impact of research on child welfare policy and practice is unpredictable.[74] Child welfare academic, Greg Kelly, states that some reliable research has little impact on policy and practice, while other studies are credited with major influence on legislation, policy and practice.[75]

Social work in general, and child welfare in particular, are inexact "sciences". Although, arguments for or against particular child placement practices are generally supported by research, a number of commentators have argued that there is a need to proceed warily such arguments due to the following considerations:

Hidden values: Although child placement theories are generally heavily informed by research, inevitably values (or belief systems) play an important role. Kelly notes that "[v]alues can have a profound influence on what is studied to develop theory and they may also influence how findings are interpreted and put into practice".[76] Triseliotis et. al. note that "prejudices and biases can enter at all stages, including when the problem is being identified and defined, in the design of the study, during the data collection and in the analysis and interpretation of the data".[77]

Child welfare policy and practice is particularly prone to be influenced by values as it involves fundamental and emotive issues such as the care of children, the role of family and the interface between the state and the family.[78] However, the values behind different arguments and theories are often hidden as issues are debated on less emotive theoretical, practical or legal grounds.[79]

Kelly notes that the core value in child welfare today is widely accepted to be that all decisions and actions should be made to further "the best interests of the child".[80] However, he notes that there are a wide variety of sincerely held views as to what practices

---

[73] Kelly, n 26,.p 48.

[74] ibid.

[75] ibid.

[76] Kelly, n 22, p 13.

[77] Triseliotis, n 21, p 20.

[78] Kelly, n 22, p 14.

[79] ibid, p 14.

[80] ibid, pp 16-17.

and policies will achieve this goal. Plausible arguments supported by research findings can be raised to justify quite different policies and practices. Thus, the choices made to achieve the best interests of the child will frequently be heavily influenced by values.

In a paper written for Barnardos in the UK, child welfare researchers, Clive Sellick and June Thoburn agree that a good deal of social welfare is value driven and that values change over time:

> Many of the 'certainties' which are often cited are actually value statements about what should be done rather than what has been shown by research to be more effective.[81]

> …we need to exercise humility in recognising that what is absolutely 'known' to be right at one time will be 'known' to be wrong at another. In no area is this more true than that of adoption and fostering.[82]

Contradictory or incomplete research findings: Another problem that has been identified is the existence of contradictory research findings.[83] This problem is compounded by the fact that there are still many gaps in the research. Sellick and Thoburn noted that there is a dearth of well conducted studies which address very basic questions of longer term outcomes in child placement.[84] Although the major focus of the UK White Paper on Adoption is the increase in adoption of children from care, the Paper recognises that more research is needed on a number of issues including outcome comparisons between adoption and long-term foster care.[85]

Difficulties in research subject: Triseliotis et. al. note that "[a]ll studies involving human beings are complex and difficult to carry out". Difficulties they identify include: providing controls to ensure that like are compared with like; identifying outcome criteria and suitable measuring tools; relating outcomes to decisions made five, ten or even twenty years ago; and measuring intangibles such as adjustment, identity, self-esteem, sense of security and well-being.[86]

No global prescriptive solutions: A number of commentators have argued that there are no easy answers, that is, there are no global prescriptive solutions. Straightforward links between research findings and individual cases cannot be made. What is appropriate in one case may be inappropriate in another. Howe strongly argues against "single truths":

---

[81] Sellick C and Thoburn J, *What works in Family Placement?*, Barnardos, UK, 1996, p 11

[82] ibid, p 5.

[83] Howe D, "Adoption outcome research and practical judgment" (1998) 22(2) *Adoption & Fostering* 6 at pp 12-13

[84] Sellick and Thoburn, n 82, p 6.

[85] United Kingdom, n 61, para 7.10.

[86] Triseliotis, n 21, pp 19-20.

> Social work in general, and adoption in particular, is a world of difficult moral choices and
> hard, often agonising decisions. The appeal of a single truth, a dominant fashion, or a
> simple formula to cut through moral dilemmas is highly seductive. But in the extreme,
> single truths sweep all in their path; they brook no exceptions; they claim global compassion
> but become case insensitive.[87]

Howe summarises the problems faced by child welfare practitioners and policy makers who
have to make decisions and formulate policy based on incomplete research and in a fierce
moral and political climate:

> Our present state of knowledge is such that child placement workers have no choice but to
> make practical, reasoned *judgments* based on a science that is still far from exact and whose
> findings have to find their place in an often fierce moral and political climate that itself
> rarely stands still…[88]

> Our increasing knowledge of the complex interactions that propel adopted children along
> different developmental trajectories will continue to refine our thinking and practice. But
> it will never be complete and the certainty of our predictions will never be absolute. Social
> practices are irredeemably moral and political practices, which, though heavily informed by
> science, have, in the final analysis, to be conducted using the art of sound argument.[89]

5.2   The importance of permanence

There is general agreement on the importance of stability for children in out-of-home care.
Cashmore and Paxman describe the adverse effects of instability as follows:

> The long term effects of repeated moves involving separation from care-givers are an
> impaired capacity for trusting relationships, "antisocial and asocial behaviors, chronic
> depression and low self-esteem, exaggerated dependency, and the tendency to compulsively,
> though unconsciously, evoke from the new environment a repetition of the original
> rejection"… In addition, children moving from one placement to another are likely to
> change schools, and this in turn increases the likelihood of placement breakdown… and
> contributes to their poor performance at school.[90]

Since the early 1950s, "attachment theory" has developed to explain children's need to be
attached to at least one consistent and caring adult, and the consequences if a child's
attachments are disrupted.[91] The basis of attachment theory is that children have a natural

---

[87] Howe, n 87, p 12.

[88] ibid, p 12.

[89] ibid, p 14.

[90] Cashmore J and Paxman M, *Longitudinal Study of Wards Leaving Care*, Social Policy Research
Centre, University of New South Wales, January 1996 (Report of Research Project commissioned
by the NSW Department of Community Services).

[91] Kelly, n 22, pp 20-24.

propensity to form attachment relationships.[92]   The denial or disruption of these relationships can cause extreme distress, anxiety and insecurity. Kelly states that "[t]here is now widespread acceptance … that disrupted attachments without compensating, stabilising experiences in childhood lead to unhappiness and often the development of antisocial behaviour".[93]

While there appears to be general acceptance that the harmful effects of damaged and disrupted attachments are potentially long-term and serious, there has been debate about extent to which these harmful effects can be remedied.[94]   Early theories (such as the influential work of John Bowlby) were pessimistic about the possibility of recovery after about two years of age. However, later studies showed that many older children could recover and make secure attachments with adopted or foster parents.[95]

For many years, researchers Ann and Alan Clarke have argued that there can be substantial recovery from the effects of early deprivation.[96]   They argue that although the early years are undoubtedly important, for most children the effects of early experiences represent just the first steps in an ongoing and complex life path. They state that the theories ascribing overwhelming, disproportionate and predeterministic importance to the early years are clearly erroneous, and such a view is likely to lead to an underestimation of what can be done for deprived children. In their view, all stages of development in the life path are important with little indication that one point is more critical than another.

More recently, some neurobiologists have argued that the experiences of abused and neglected children adversely influences the development of their brains. Dr Bruce Perry, a major proponent of this view, argues that aggressive early identification and intervention which restores a sense of safety and control to abused and neglected children is required.[97]

5.3   Importance of factors other than permanence

Despite general agreement on the importance of permanence, some writers have argued that the reliance on permanence has gone too far.[98]   Gilligan explains the problems with focussing only on permanence as follows:

---

[92] ibid, p 21.

[93] ibid, p 20.

[94] ibid, 23.

[95] ibid, p 23-24. Triseliotis et. al, n 21, pp 15-16.

[96] Clarke A and Clarke A, *Early Experience and the Life Path*, Jessica Kingsley Publishers, London, 2000.

[97] Perry B and Marcellus J (1997) The Impact of Abuse and Neglect on the Developing Brain. *Colleagues for Children.* 7:1-4, Missouri Chapter of the National Committee to Prevent Child Abuse, <http://www.bcm.tmc.edu/cta/AbuseBrain.htm>.

[98] Gilligan R, "Beyond permanence? The importance of resilience in child placement practice and planning" (1997) 21(1) *Adoption & Fostering* 12.

> A focus on permanence alone risks a too narrow response to a child's complex needs. It may obscure important factors in a child's social development… Prioritising permanence seems to assume the superior developmental and rehabilitative value of primary attachment relationships for a child who has suffered loss and separation. Attention to these relationships in isolation may lead to neglect of other resources and relationships in a child's life which may have an important role to play as supplements, or indeed substitutes, should the attempted (re-) establishment of primary attachment relationships fail.

Gilligan argues that instead of focussing on permanence in child placement, the focus should be on "resilience".[99] Resilience is a concept that is emerging in the wider field of child development. The concept of resilience focuses on the factors that enable a child to cope and survive (and even thrive) in the face of adversity. It points to factors that may explain why some children manage to develop well in the face of great odds. Resilience can incorporate permanence, but extend beyond it.

Gilligan argues that an important problem with permanence is that is focuses on means (a permanent placement) rather than ends (a good developmental outcome for the child). By contrast, resilience considers the complexity of factors that contribute to good outcomes. This may include a permanent placement, but may also includes focussing on other factors such as:
- encouraging purposeful contact with birth family members and other key adults from the child's past;
- encouraging positive school experiences;
- encouraging friendships with peers;
- actively fostering an interest in sport, music, hobbies or cultural pursuits;
- helping the child to develop problem-solving and coping skills and strategies; and
- promoting pro-social qualities in the child.

5.4   Continued contact with birth family

In the past, adoption was a secret process. The child was often not told of her or his adoption and the birth mother received little or no information on the child or adoptive family. Studies have shown that secret and closed adoptions were not in the best interests of the child and birth parents.[100] The recent report of the New South Wales Legislative Council Standing Committee on Social Issues on past adoption practices has highlighted the damage done by past adoption practices which focused on secrecy.[101] Adoption is now a much more open process. The term "open adoption" is a general term that is used to describe a variety of patterns and scenarios.[102] There are degrees of openness which may

---

[99] Information in this section is taken from Gilligan, ibid.

[100] Triseliotis et. al., n 21, p 90.

[101] New South Wales Parliament, Legislative Council, Standing Committee on Social Issues, *Releasing the Past: Adoption Practices 1950-1998: Final Report*, Report 22, December 2000.

[102] Triseliotis et. al., n 21, p 90.

vary from the occasional exchange of letters and photographs on occasion to regular face to face visits.

There has been continuing debate on the merits of ongoing contact between a child and her/his birth family after she/he has been permanently removed from home. Cashmore states that "the research evidence about the value of contact is mixed and contentious".[103] Some commentators argue strongly in favour of "the right of a child and extended birth family to maintain a continuing relationship".[104]

Some studies have found positive effects of contact including a reduced risk of placement breakdown. Others studies have found little or no difference between open and closed placements. Cashmore concludes that more research is needed, but at this stage there is no evidence that contact undermines or disrupts placements.[105] She also notes that most children generally want more contact than they are able to have.

Triseliotis et. al. conclude that available research broadly supports the idea of contact especially for older children, but that more research on the long-term impact of contact is needed:

> From the research evidence available, it appears that provided the parties involved can handle the situation in a constructive and positive manner without acrimony and recriminations, there is no reason why contact should be harmful to the child. On the contrary, the maintenance of existing meaningful links, especially for the older adopted child, appears to be beneficial to children, to their sense of identity and self-esteem and for gaining a better understanding of their genealogical background and adoption circumstances…
>
> …because of the kind of children now involved in adoption, issues of contact are likely to increase rather than disappear. However, openness has to be considered separately for each case, to ensure first and foremost that it is based on a child-centred approach. The research studies support a cautious move towards semi-openness until more is known.[106]

5.5   Adoption versus fostering or other permanency alternatives

The relative merits of adoption versus other long-term placement options where a child cannot be looked after by his/her birth parent(s) has been a topic of continued discussion in child welfare circles. There are strongly held positions on both sides of the debate and both sides refer to research to support their arguments. Kelly states that this debate is a "good example of a debate conducted on the basis of the theory and knowledge base but with a strong thread of values running through the arguments on both sides".[107]

---

[103] Cashmore, n 114, p 20.

[104] O'Neill C, "Support, timeliness and hard decisions" (2000) 25(4) *Children Australia* 7 at p 10.

[105] ibid.

[106] Triseliotis et. al., n 21, p 90.

[107] Kelly, n 22, p 28.

5.5.1   Arguments in favour of adoption as the preferred placement choice

Those in support of adoption of children who cannot be looked after by their families generally agree that adoption will not be appropriate in all cases, but that for the majority of cases, adoption is the preferred placement choice. Arguments raised in support of adoption as the preferred placement choice include:

Research shows the success of adoption: It is argued that adoption results in successful outcomes. The UK consultation paper on adoption stated that "[t]here is a well established evidence base demonstrating that adopted children do as well, if not better, than those in the general population".[108]

A distinction is often made between children adopted as babies and older child adoptions. It is argued that outcomes for children adopted as infants are very good. Older child adoptions are more difficult, but it is argued that they can still be successful. Howe summarises the position in relation to children adopted as babies as follows:

> Overall, the developmental outcome for children adopted as babies appears very good…
> They compare favourably with both the general population of children and non-adopted
> children of similar socio-economic backgrounds to those of adoptive parents. Their levels
> of psychosocial functioning tend, on the whole, to be much more favourable than those for
> children raised in adversity by biological parents and children looked after in foster and
> residential care.[109]

Howe summarises the position in relation to older child adoptions as follows:

> Rates of placement disruption and breakdown for older-placed children are much higher
> than for baby-placed children… On most psychosocial and behavioural measures, the rates
> of poor social adjustment are higher for older-placed children than for either the general
> population of children or children adopted as babies… But in spite of these increased rates
> of problem behaviours, in general, developmental outcomes for older-placed children seem
> to be more favourable than for children who remain in or who are returned to families in
> which they suffer maltreatment or severe neglect… Moreover, there is some evidence that
> with increasing age and maturity, continued improvement in the behaviour of late-placed
> children occurs.[110]

It is argued that adoptive placements are least likely to breakdown or be disrupted and therefore offer the best chance of stability. In a paper written for Barnardos in the UK, Jackson and Thomas argue that adoption should be considered for a far greater proportion of children:

---

[108] PIU Report, n 58, p 16.

[109] Howe, n 87, p 8. However, Howe also noted that there was "persistent evidence that rates of
poorer social adjustment are slightly higher for children adopted as babies than the general
population of children, particularly in middle childhood and early adolescence".

[110] ibid, pp 9-10.

The evidence is overwhelmingly strong that adoption offers the best hope of long-term stability, a family for life, for *any* child whose birth family is unlikely to be able to provide adequate care within a defined space of time. Adoption has a much better record of providing stability than open-ended foster care, and many previous difficulties have been overcome with the move to open adoption and payment of allowances. Where the plan for a child is long-term care, social workers should ask themselves if there is any good reason why the child should *not* be placed for adoption.[111]

Adoption is the only legally secure option: Once a child is legally adopted, the adoption cannot be overturned. It is not subject to appeal. The adoptive parent has the same rights and responsibilities in law as a birth parent. In contrast, a child in foster care may be subject to multiple placements including unsuccessful attempts at reunification. Although other placement options, such as parental responsibility orders, may offer more permanency than fostering, these may still be revoked. Thus, it is argued that adoption is the only legally secure option.[112]

Children generally prefer adoption: Some research studies have indicated that children prefer the status of being adopted. The UK consultation paper stated that "there are indications from qualitative studies that children generally prefer the sense of security that adoption gives them over long term foster placements, even if these are intended as permanent".[113] It is argued that children prefer the feeling of belonging and sense of permanence that adoption brings.[114] Some studies have indicated that adoption removes the stigma and embarrassment of being in care.[115]

Adoption normalises the parent-child relationship: It is argued that adoption normalises the parent-child relationship in a number of ways:
- Adoption is well understood in our society. Children, adoptive parents and the general public understand this type of legal relationship.[116]
- In foster care, decision-making power is fragmented between the foster parents and the state. Adoption removes the state intrusion (although this is changing with post-adoption support).[117]
- Adoption provides for life long relationships and thus "removes some of the

---

[111] Jackson S and Thomas N, *On the Move Again? What works in creating stability for looked after children*, Barnardos, Essex, 1999, p 100.

[112] See the Minister's second reading speech: n 2.

[113] PIU Report, n 58, p 18.

[114] Cashmore J, "What the research tells us: Permanency planning, adoption and foster care" (2000) 25(4) *Children Australia* 17 at p 20.

[115] Morgan, n 34, pp145-148.

[116] DHHS, n 33, Chapter II.

[117] Cashmore, n 114, p 21.

ambiguity and apprehension that young people may feel about their status in the family after being discharged from care".[118]

- Adoption normalises the legal relationship between child and adoptive parent. It gives the adoptive child and parent the same legal standing and protection as a birth parent and child. The child is entitled to inherit from and through the adoptive parents, and is treated as the child of the adoptive parents for the purposes of social security, insurance, taxation etc.[119]

Problems with adoption have been overcome: A number of commentators have noted that the nature of adoption has changed dramatically and that previous problems with adoption have been overcome. It is argued that modern adoption practices can provide for post adoption support and allowances, and can provide well for ongoing contact between a child and her/his birth family.

5.5.2   Arguments against a preferential approach towards adoption

Those on the other side of the debate generally argue that adoption should be seen as one of a range of placement choices. They recognise that adoption will be the best placement choice in some cases, but argue that there should not be a preference towards adoption – each case should be determined according to its individual circumstances. Arguments raised against a preferential approach to adoption include:

Research does not unequivocally support a preferential approach towards adoption: A number of commentators note that research evidence on the success of adoption relative to alternative placements is scarce. This was expressly admitted in the UK consultation paper[120] and the UK White Paper recognised the need for research on comparisons between adoption and long-term foster care.[121]

One important indicator in determining the success of permanent placements is the rate at which they break down. A number of commentators have noted that when the age of the child is taken into consideration, there is no difference between adoption and long-term fostering. Sellick and Thoburn argue that the research does not show better outcomes for adoption over long-term fostering in either disruption rates or assessments of the well-being of the child:

> There is insufficient evidence on the desirability of adoption, permanent fostering or residence orders, from the child's point of view. There is, however, ample evidence that the generally negative view of long-term or 'permanent' foster care is not supported by recent research. There appear to be no differences in terms of breakdown rates. The evidence on

---

[118] ibid, pp 20-21.

[119] DHHS, n 33, Chapter II.

[120] PIU Report, n 58, p 16.

[121] United Kingdom, n 61, para 7.10.

wellbeing is inconclusive.[122]

It has also been noted that much of the research on adoption is dated and relates to adoptions of very young children who were voluntarily relinquished by their birth mothers.[123] It is argued that the lessons from these studies are not easily transferred to the adoption of abused and neglected children, [124] and that outcomes for children adopted from care are still poorly researched.

It has also been noted that any reports of greater success rates of adoption over fostering may have more to do with organisational factors rather than the intrinsic superiority of adoption over foster care.[125] Adoption services have been more formally structured and carefully organised than fostering services.[126] Adoption placements also had to be approved by a court, whereas foster placements often lacked planning with short term emergency placements drifting into permanent situations.[127]

A sense of security is more important to children than legal status: Some studies have concluded that a child's *sense of permanence* was related to placement success, but that this was not necessarily associated with a child's legal status.[128] It is argued that a sense of permanence and security can be imparted to child in foster care, and that it may also be absent in an adoptive placement.[129] Brooks argues that it is adults who desire adoption because of their own concerns about feeling secure and stable.[130]

Some children do not want adoption: It is widely recognised that some children do not want to be adopted. These children are generally older and have a strong sense of their identity within their birth family.[131]

Alternatives are secure: Although it is recognised that adoption is the most legally secure permanent placement, some commentators have argued that alternatives to adoption can be secure. For example, Professor Parkinson argues that the new child protection legislation puts considerable hurdles in the way of the recision of long-term placements once the child

---

[122] Sellick and Thoburn, n 82, p 69.

[123] ibid, p 62. BAAF, n 65.

[124] BAAF, ibid.

[125] Kelly, n 22, pp 32-33.

[126] ibid.

[127] ibid.

[128] Kelly, n 22, p 33.

[129] ibid.

[130] Brooks, n 44, p 2.

[131] PIU Report, n 58, p 18.

is settled in a new family, and there is no reason to believe that these adoption alternatives are inherently insecure (see section 1.2 above).[132]

Loss of contact with relatives more likely to result with adoption: Those in favour of continued contact between a child and her/his extended family are concerned that adoption is likely to result in the loss of such contact. It is thought that alternatives to adoption may "promote openness in a way that is more satisfactory than adoption".[133] Professor Parkinson notes that although open adoption is encouraged, it does not tend to involve extensive contact between the child and birth family. Parkinson also notes that as the legal relationship between the child and the birth family is severed, there may be loss of important legal rights, such as the right of birth grandparents to seek an order for contact from the Family Court (see section 1.2 above).

Adoption has risks: Potential risks relating to adoption which have been identified include:
- Loss of important contact with the birth family as discussed above.
- Where a child is "freed" for adoption without being "chosen" by adoptive parents, the child may be left with less permanency and security than being in foster care.[134]
- Adoptions sometimes breakdown. As discussed above, when age is held constant there is no difference in breakdown rates between adoption and long-term fostering. However, the breakdown of an adoptive placement may be more devastating for the child because of the expectation of permanence.
- Where adoption is contested by birth parents, bitter and protracted court proceedings may be harmful to the child.

Placement should not be determined according to a rigid formula: As discussed in section 5.1 above, a number of writers have warned against global, prescriptive solutions. Kelly argues that rather than applying a rigid formula, "placements should be creatively negotiated with the child's needs as paramount but also, as most children would appreciate, the needs of their birth families and substitute parents actively considered".[135] As discussed in section 5.3 above, there are a complexity of factors that contribute to good outcomes. Thus, laws and policies that support flexible decision-making supported by a range of placement options are needed.[136]

5.5.3   Convergence of adoption and fostering

Kelly has identified a convergence of long-term fostering and adoption whereby each 'borrows' from the other to counteract its own deficiencies.[137] He argues that in planning

---

[132] See section 1.2 above.

[133] O'Neill, n 104, p 9.

[134] Cashmore, n 114, p 21. Brooks, 44.

[135] Kelly, n 22, p 35.

[136] Wise S, "The discussant's response" (2000) 25(4) *Children Australia* 23 at p 23.

[137] Kelly, n 22, p 34.

long-term foster care more attention should be paid to the following considerations which have usually been more evident in adoption:

- consciously planning the placement to best practice standards to minimise the chances of breakdown
- nurturing the child's need for a sense of permanence
- eliminating or reducing the stigma of being in care
- creating a placement where both the child and the foster parents feel he or she belongs and which will potentially provide lifelong relationships[138]

Conversely, he argues that in planning for adoption more attention should be paid to the following considerations which have usually been more evident in foster care:

- ways of meeting the child's need to have knowledge of and possibly contact with his or her birth family, including siblings
- the post-placement support offered to the child and adopters
- the funding of the placement to encourage a range of prospective adopters
- giving the child and the birth parents a say in decisions in relation to the planning and development of the placement[139]

6 THE ADOPTION DEBATE IN CONTEXT - THE COMMUNITY SERVICES COMMISSION'S INQUIRY INTO SUBSTITUTE CARE

It is important to place the debate surrounding the adoption of children who cannot return home in perspective. When the Minister indicated her intention to introduce the Permanency Planning Bill in June 2000, the Community Services Commissioner, Robert Fitzgerald, was reported as saying that the Bill will only help about 100 children, an almost insignificant number in system which deals with over 72,000 reported cases, and 10,000 confirmed cases, of abuse and neglect each year.[140]

In November 2000, the Community Services Commissioner released the final report of his comprehensive inquiry into the substitute care system in NSW ("**the Report**").[141] The substitute care system is "the system which provides care for children and young people who are unable to live with their families".[142] It covers: intensive family support to prevent placement; placements with kin and relatives where there is payment or some sort of recognised support; residential care; foster care; brokerage; community care; intensive

---

[138] ibid.

[139] ibid.

[140] West A, "Little comfort for kids at risk", *The Sun-Herald*, 18 June 2000, p 49.

[141] Community Services Commission, Inquiry into the practice and provision of Substitute Care in NSW: New Directions – from Substitute to Supported Care: Final Inquiry Report, November 2000, <http://www.csc.nsw.gov.au/Publications_/publications_.htm>.

[142] ibid, p 1.

youth support; and leaving care and after care services.[143]

The Report concludes that the substitute care system in NSW has failed to deliver adequate care and protection for children and young people. The Report identifies the problems with the current system and makes recommendations for major reforms. The Report provides a good picture of the care system in which the debate surrounding permanency planning and adoption is placed in practice. It provides a timely reminder that there are fundamental problems in the system that need to be addressed.

This section provides a brief overview of aspects of the Commissioner's report.

The problems with the substitute care system

The Report states that successive reform initiatives have failed to create a quality support and care system for children and young people in out-of-home care. Problems identified in the Report include:

- Key decisions are often made on an ad hoc or by chance basis. Such decisions include: how a child or young person enters care; where they are placed; the quality of care they receive; how many placement changes they have; whether or not they keep in touch with family or friends; whether they feel loved and wanted; and what happens to them after care. The Report states that "[t]hese decisions are often determined by what is available at the time and the efforts – or lack thereof – of individual workers or carers, rather than by careful planning around the individual needs of the child within a well functioning support and care system".[144]
- An underlying problem has been the limited emphasis generally placed on permanency planning in both policy and practice.[145]
- Many workers are bearing inappropriately high caseloads and despair at the inability to place children quickly and appropriately, and the inability to form relationships with children due to time constraints.[146]
- The system has provided insufficient early intervention and intensive support to allow children to be maintained within the family unit.
- The system has been "weakened and fragmented by the ad hoc nature of programs; a lack of clear definitions and clear objectives in programs; a lack of strategic planning and absence of an integrated approach to service delivery; and a failure to strategically resource basic infrastructure needs".[147]
- There have been a number of reform initiatives that have failed because they are

---

[143] ibid.

[144] ibid, p III.

[145] ibid, p 34.

[146] ibid, p IV.

[147] ibid.

implemented upon fundamentally flawed or fragile systemic foundations.[148]

- The Report states that "[g]overnments have continued to place additional resources into the area of substitute care, but those resources are often not well targeted or applied and are funding past and present failures of the substitute care system".[149]

More specifically, the Report lists the following problems:

◊ tensions between the Department of Community Services and the funded non government sector around placement decisions in an environment of limited placement options;

◊ a dearth of intensive family support services;

◊ a lack of specialist support services;

◊ a lack of funded substitute care agencies in rural and remote areas;

◊ a lack of options for placing siblings;

◊ difficulties in attracting suitable, competent carers;

◊ an over-reliance on [supported accommodation assistance services] … as the provider of residential care and placements for older and/or hard to place young people;

◊ limited knowledge about the situation of children and young people in extended family care placements;

◊ difficulties in attracting funding to undertake family support work.[150]

However, the Report does note that the news is not all bad and that many children felt better off in care than in their original circumstances.[151] The Report also notes a number of initiatives that have been introduced or proposed (including the new child protection legislation) that provide a good basis upon which a reformed system can be established.[152]

Statistics relating substitute care in NSW

The Report provides the following statistics relating to the substitute care system in NSW:

- At 30 June 1999:
  ◊ 7,757 children and young people were in care in NSW. Just under a quarter were Indigenous and 6% were recorded as having a disability;
  ◊ 95% of children and young people in care were the subject of a Children's Court care order;
  ◊ just under 30% (2,805) of those in care had been in care for a year or longer.

- During 1998-99:
  ◊ there were 9,548 care episodes. 5,573 children and young people entered care

---

[148] ibid.

[149] ibid.

[150] ibid, p 23.

[151] ibid, p III.

[152] ibid, p V.

and 4,346 exited care;
◊ 63% of the care episodes were of six weeks or less duration;
◊ 76.6% exited the system after six months or less while 23.4% exited after more than six months;
◊ over half (55.3%) of all children and young people were in care to support the child and/or family through crisis. The others were considered to be in care for an 'extended' period;
◊ of the children who entered care, 30% entered for 'child at risk' reasons. The main reason for children and young people entering care related to their carer being unable to care for them without periodic relief (45%).[153]

The following table, taken from the Report, shows the type of care provided for the 7,757 children and young people in care at 30 June 1999:[154]

Placement Type	Number	% of Total in Care
relatives (excluding parents)	3,004	38.7
foster care	2,509	32.3
'non related family' (including god parents, close family friends, neighbours)	779	10
living at home with parents (includes children and young people restored to their parents' care)	471	6.1
living in non specified placements	318	4.1
residential care	286	3.7
living independently	175	2.3
living in supported accommodation	106	1.4
supported adoptions	87	1.1
no fixed place of abode	18	0.2

The Report identifies the following trends in substitute care in NSW:

---

[153] ibid, p 3.

[154] ibid, p 4.

◊ the majority of children and young people entering care (70%) remain in care for less than a year, with most (63%) being in care for less than six weeks…

◊ the use of foster care placements is gradually declining while the prevalence of family or relative placements has risen sharply, constituting 38.7% of placements at 30 June 1999…

◊ figures indicate that DoCS continues to be the largest provider of substitute care services in NSW…

◊ large institutions have closed and there has been a sharp decrease in the availability and use of residential care, with much of it now being provided by supported accommodation assistance services…

◊ there is an increasing emphasis on 'in-home' family support and assisting families to cope with their caring responsibilities;

◊ there has been a recent emergence of non-traditional service models for the provision of care, including brokerage, provision of services through private for profit agencies and the use of individual funding packages.[155]

Key recommendations for reform

Key recommendations made by the Commissioner for reforming the substitute care in NSW include the following:

- DOCS should no longer provide long-term care
- DOCS should separate child protection from "substitute care"
- Welfare agencies to be funded for the real cost of services
- Same standards and workloads for DOCS and welfare groups
- Review of the circumstances of all children in long-term care "as a priority"
- Children with disabilities to be cared for by mainstream agencies
- Better services for Aboriginal Children in care
- Adequate funding for the expected increase in children in care
- Better monitoring, accountability and training
- Treasury and Cabinet Office to be involved in the implementation [of the proposed reforms]
- A Supported Care Advisory Council to regularly review the sector
- Reforms to be implemented within three years[156]

7   CONCLUSION

There is general agreement on the importance of stability for children in out-of-home care. There is a lot of evidence that children who grow up in stable, loving families achieve better psychological outcomes than children who grow up experiencing multiple moves through different foster families and/or repeated attempts to return them to their family of origin.

---

[155] ibid, p 23.

[156] Jacobsen G, "We're failing the children: urgent call for foster care overhaul", *The Sydney Morning Herald*, 2 November 2000, p 4.

However, there is disagreement over the best way to provide for stability for children who are unable to live with their families of origin. Recent legislative and policy developments in the US and the UK emphasise adoption as a principal permanency option for these children. The Minister for Community Services has raised the issue of whether NSW should be moving in the direction of the US and the UK in this regard.

The question of whether adoption should be the preferred long-term placement choice has been a topic of much discussion in child welfare literature. There are strongly held positions on both sides of the debate and both sides refer to research to support their arguments. Adoption is a highly emotional issue. Some writers have noted that although arguments are often conducted on less emotive theoretical, practical or legal grounds, strong (often hidden) values inform the arguments on both sides.

In general, it appears that the research does not come down unambiguously in favour or against a preference for adoption. Even those in favour of emphasising adoption recognise that further research is required. In addition, there is general agreement that adoption will not always be appropriate and that it should be one of a seamless array of services available to children and families who require assistance and support.