

THE ROLE OF NGOs IN THE NSW CARE AND PROTECTION SYSTEM

Presented by Luke Geary

Managing Partner, Salvos Legal & Salvos Legal Humanitarian;
General Counsel, The Salvation Army Australia Eastern Territory



Luke has been the Managing Partner of Salvos Legal and Salvos Legal Humanitarian from the time the firms commenced in 2010.

Salvos Legal is a not-for-profit law firm that provides corporate advisory, commercial and property law services to corporations, government agencies and not-for-profits. The fees earned by Salvos Legal, less expenses, are used to fund Salvos Legal Humanitarian.

ACWA acknowledges the Cadigal People of the Eora Nation as the traditional owners of the lands where ACWA stands and wish to pay respect to their elders, past and present. ACWA recognises that these lands have always been places of teaching and learning.


OVERVIEW

- Guiding principles
 - Best interests of the child
 - Including the child's voice
- Legal framework and legislative developments
- Influence of NGOs in decision-making process
- Court processes
 - Care plans
 - Care orders & key reports:
 - Supervision orders and s 76 reports
 - Orders allocating parental responsibility and s 82 reports
 - Section 90 applications to vary or rescind care orders
- Case management
 - Case plans
- Evidence & affidavits



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CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) ACT 1998 NO. 157



New South Wales

Children and Young Persons (Care and Protection) Act 1998 No 157

Status information

Currency of version
Current version for 12 September 2013 to date (generated 25 November 2013 at 16:43).
Legislation on the NSW legislation website is usually updated within 3 working days.

Provisions in force
Some, but not all, of the provisions displayed in this version of the legislation have commenced. See Historical Notes.

Does not include amendments by:
Children and Young Persons (Care and Protection) Amendment (Permanency Planning) Act 2001 No 91, Sch 1 [21] (not commenced)
Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009 No 13, Sch 1.2 [24] and [25] (not commenced)
Civil and Administrative Legislation (Repeal and Amendment) Act 2013 No 95 (not commenced — to commence on 1.1.2014)

See also:
Government Sector Employment Legislation Amendment Bill 2013
Bail (Consequential Amendments) Bill 2013
Child Protection Legislation Amendment Bill 2013

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website.

Passed by both Houses



New South Wales

Child Protection Legislation Amendment Bill 2014

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CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) ACT 1998 NO. 157



Source:
<http://www.legislation.nsw.gov.au/fullhtml/inforce/act+157+1998+FIRST+0+N>

GUIDING PRINCIPLES

- All decisions made and actions taken concerning children should be in their **best interests**.

Article 3 of the United Nations Convention on the Rights of the Child (**UNCRC**), ratified by the Commonwealth in 1990
Section 9 of the Children and Young Persons (Care and Protection) 1998 (NSW)

- A **child has the right to express his or her views** freely in all matters affecting the child.

- **Participation** from children and young people should guide service delivery.

1998 Wood Report

- NGO practitioners should **provide children and young people with the support they need** to get their views across during the Court process.

"As far as I know, children have a great ability to be able to speak what they want and how they want certain things. If you have conversations with kids, they're actually very realistic about their parents and what their parents can and can't do and whether they want to live with them or not...

it's just about making them part of the process." – NGO practitioner

J Bolitho, E Fernandez, P Hansen, M Hudson, and S Kendall, UNSW Australia,

A Study of the Children's Court of New South Wales: Part of a National Assessment of Australia's Children's Courts (2014) 24 ('UNSW Report')

UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

A SIMPLIFIED VERSION OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD.



Article 1 Everyone under 18 years of age has all the rights in this Convention.

Article 2 The Convention applies to everyone whatever their race, religion, abilities, whatever they think or say, whatever type of family they come from.

Article 3 All organisations concerned with children should work towards what is best for each child.

Article 4 Governments should make these rights available to children.

Article 5 Governments should respect the rights and responsibilities of families to guide their children so that, as they grow up, they learn to use their rights properly.

Article 6 Children have the right to live a full life. Governments should ensure that children survive and develop healthily.

Article 7 Children have the right to a legally registered name and nationality. Children also have the right to know their parents and, as far as possible, to be cared for by them.

Article 8 Governments should respect a child's right to a name, a nationality and family ties.

Article 9 Children should not be separated from their parents unless it is for their own good. For example, if a parent is mistreating or neglecting a child. Children whose parents have separated have the right to stay in contact with both parents, unless this might harm the child.

Article 10 Families who live in different countries should be allowed to move between those countries so that parents and children can stay in contact, or get back together as a family.

Article 11 Governments should take steps to stop children being taken out of their own country illegally.

Article 12 Children have the right to say what they think should happen when adults are making decisions that affect them and to have their opinions taken into account.

Article 13 Children have the right to get and to share information, as long as the information is not damaging to them or to others.

Article 14 Children have the right to think and believe what they want and to practise their religion, as long as they are not stopping other people from enjoying their rights. Parents should guide children on these matters.

Article 15 Children have the right to meet with other children and young people and to join groups and organisations, as long as this does not stop other people from enjoying their rights.

Article 16 Children have the right to privacy. The law should protect them from attacks against their way of life, their good name, their family and their home.

Article 17 Children have the right to reliable information from the media. Mass media such as television, radio and newspapers should provide information that children can understand and should not promote materials that could harm children.

Article 18 Both parents share responsibility for bringing up their children and should always consider what is best for each child. Governments should help parents by providing services to support them, especially if both parents work.

Article 19 Governments should ensure that children are properly cared for and protect them from violence, abuse and neglect by their parents, or anyone else who looks after them.

Article 20 Children who cannot be looked after by their own family must be looked after properly by people who respect their religion, culture and language.

Article 21 When children are adopted the first concern must be what is best for them. The same rules should apply whether children are adopted in the country of their birth or if they are taken to live in another country.

Article 22 Children who come into a country as refugees should have the same rights as children who are born in that country.

Article 23 Children who have any kind of disability should receive special care and support so that they can live a full and independent life.

Article 24 Children have the right to good quality health care, clean water, nutritious food and a clean environment so that they will stay healthy. Richer countries should help poorer countries achieve this.

Article 25 Children who are looked after by their local authority rather than their parents should have their situation reviewed regularly.

Article 26 The Government should provide extra money for the children of families in need.

Article 27 Children have the right to a standard of living that is good enough to meet their physical and mental needs. The government should help families who cannot afford to provide this.

Article 28 Children have the right to an education. Discipline in schools should respect children's human dignity. Primary education should be free. Wealthier countries should help poorer countries achieve this.

Article 29 Education should develop each child's personality and talents to the full. It should encourage children to respect their parents, their cultures and other cultures.

Article 30 Children have the right to learn and use the language and customs of their families, whether or not these are shared by the majority of the people in the country where they live, as long as this does not harm others.

Article 31 Children have the right to relax, play and to join in a wide range of leisure activities.

Article 32 Governments should protect children from work that is dangerous or that might harm their health or education.

Article 33 Governments should provide ways of protecting children from dangerous drugs.

Article 34 Governments should protect children from sexual abuse.

Article 35 Governments should make sure that children are not abducted or sold.

Article 36 Children should be protected from any activities that could harm their development.

Article 37 Children who break the law should not be treated cruelly. They should not be put in a prison with adults and should be able to keep in contact with their family.

Article 38 Governments should not allow children under 15 to join the army. Children in war zones should receive special protection.

Article 39 Children who have been neglected or abused should receive special help to restore their self-respect.

Article 40 Children who are accused of breaking the law should receive legal help. Prison sentences for children should only be used for the most serious offences.

Article 41 If the laws of a particular country protect children better than the articles of the Convention, then those laws should override the Convention.

Article 42 Governments should make the Convention known to all parents and children.

The Convention on the Rights of the Child has 54 articles in all. Articles 43-54 are about how adults and governments should work together to make sure that all children get all their rights. Go to www.unicef.org/crc to read all the articles.




Source:
www.unicef.org/crc

LEGAL FRAMEWORK & LEGISLATIVE DEVELOPMENTS

- Changes to the child protection system have led to an **expansion of the roles and responsibilities of the NGO sector**

NSW Ombudsman, Review of the NSW Child Protection System: Are things improving? A Special Report to Parliament under s.31 of the Ombudsman Act 1974 (April 2014) 19.

- SPECIAL COMMISSION OF INQUIRY INTO CHILD PROTECTION SERVICES IN NSW

1998 Wood Report

- NGOs should deliver services in partnership with the Department of Family and Community Services (FaCS), the statutory child welfare department in NSW.
- 'Best interests of the child' principle
- Recommendations included:
 - developing integrated, **multi-disciplinary** child and family services;
 - furthering the **development of NGO services**; and
 - transferring **out-of-home care to the NGO sector**

See UNSW Report, p12

- CHILDREN LEGISLATION AMENDMENT

(Wood Inquiry recommendations) Act 2009 (NSW)

- Introduced into law 106 of 111 recommendations made in the Wood Report.

- CHILD PROTECTION LEGISLATION AMENDMENT ACT 2014 (NSW)

- Amended CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) ACT 1998 (NSW) (CARE ACT) the act of primacy relevance to the Children's Court - the changes include:
 - defined priorities in relation to **permanency planning**,
 - changes to **contact orders** that may be made,
 - changes to **applications to vary contact orders**, and
 - introduction of **guardianship orders** and **Parenting Capacity Orders**

See UNSW Report, p13

SECTION 10A – PERMANENT PLACEMENT PRINCIPLES

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

(3) The **permanent placement principles** are as follows:

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

<http://www.legislation.nsw.gov.au/fullhtml/inforce/act+157+1998+FIRST+0+N>

THE EVOLVING ROLE OF NGOs

“A decentralised service system must have comprehensive systems to monitor, and report on, the nature of outcomes delivered by funded agencies.

As [FaCS] continues to devolve responsibility for out-of-home care and other child protection work to its NGO partners, it will be important to develop in partnership with the NGO sector a robust quality assurance framework to assess and drive ongoing improvements to NGO practice.

For example, given the transition of out-of-home care to the NGO sector, [FaCS] is developing a Quality Assurance Framework to monitor outcomes for children in out-of-home.”

NSW Ombudsman, Review of the NSW Child Protection System: Are things improving?
A Special Report to Parliament under s.31 of the Ombudsman Act 1974 (April 2014) 19-20.

THE INFLUENCE OF NGOs ON THE DECISION-MAKING PROCESS



- NGOs are fundamental actors in furthering the **best interests of children and young people** in the care and protection system.
 - Examples: Permanency planning and restoration;
Section 90 application to vary or rescind Court orders
- While **FaCS will consult the NGO** about the decision it submits to Court, **it is not required to submit an NGO's evidence**
- Legal responsibility for the child remains with FaCS.

See FaCS, 'Legal Aid Conference'
(PowerPoint presented at the Legal Aid Conference,
22 August 2014)

COURT PROCESSES

- Care and protection applications by the Director-General are heard at first instance in the Children's Court.
- Cases are conducted as informally as possible.
 - The informality of the courts may benefit children and assist in the appropriate resolution of care and protection matters **in the best interests of the child.**
- NGOs assist in decision-making by:
 - Liasing with FaCS
 - Providing information and recommendations

CARE PLANS

- Before the Court makes a final order allocating parental responsibility, or aspects of parental responsibility, it must have had a **care plan** presented to it by FaCS (except in the case of an emergency care and protection order).

Section 78(2) of the Care Act
Regulation 22 of the Children and Young Persons (Care and Protection) Regulation 2012

- A care plan must make provision for:
 - the **allocation of parental responsibility**,
 - the **type of placement** that FaCS proposes for the child or young person,
 - any **agencies that will be required to supervise** the child or young person, and
 - any **services that the child or young person may require**.

Sources:

Department of Family and Community Services, Care and protection proceedings in the Children's Court

http://www.community.nsw.gov.au/kts/guidelines/court/care_protection.htm

Judicial Commission of New South Wales, Children's Court – Care and Protection Jurisdiction

http://www.judcom.nsw.gov.au/publications/benchbks/local/care_and_protection_jurisdiction.html#p47-340

CARE PLAN TYPES

- Care plans registered with the agreement of the family and child or young person under [s 38\(1\) of the Care Act](#)
- Care plans which require consent for a change in parental responsibility under [s 38\(2\)](#)
- Care plans requiring consent orders with no change in parental responsibility [under s 38\(3\)](#)
- Care plans presented to the Children's Court before a final order is made in relation to a [s 78 care plan application](#), where the Director-General applies for an order for the removal of a child or young person from his or her parent(s)

CARE PLANS

- Considerations to be taken into account in **devising a care plan**:
 - a care plan is used to formalise agreements between parties (usually between FaCS and parent(s) or caregiver(s)),
 - it addresses the risk of significant harm affecting a child or young person, and
 - it must be made as far as possible with the agreement of the child's parents
- The care plan will assist the Court in considering **whether there is a realistic possibility of restoration** or return of a child to a parent who will provide adequate care.
- The Court must see:
 - that a parent has already commenced the process of improving his or her parenting,
 - that there has already been significant success, and
 - that continuing success can confidently be predicted.

Sources:

Department of Family and Community Services, Care and protection proceedings in the Children's Court

http://www.community.nsw.gov.au/kts/guidelines/court/care_protection.htm

Judicial Commission of New South Wales, Children's Court – Care and Protection Jurisdiction

http://www.judcom.nsw.gov.au/publications/benchbks/local/care_and_protection_jurisdiction.html#p47-340

ORDERS

The Children's Court may make various care and protection orders, including:



The Hon. Brad Hazzard,
Minister for Family and
Community Services

Source:

[http://www.facs.nsw.gov.au/
about_us/our_ministers](http://www.facs.nsw.gov.au/about_us/our_ministers)

- Emergency Care and Protection order
- Interim orders, which are usually made in urgent cases until other orders or final orders are made
- Supervision orders
- Order allocating parental responsibility to other relatives, appropriate people, or the Minister
- Guardianship to the Minister

SECTION 76 REPORTS: Supervision Orders

The Court may:

- Place the child under the supervision of the Director-General for a maximum period of 12 months: *Care Act* s 76(1) , and
- Order that a **section 76 report** be prepared and filed.
- The report should state:
 - the outcomes of supervision, and
 - whether there is a need for further supervision or orders to protect the child or young person.

Source:

Department of Family and Community Services, section 76 reports

http://www.community.nsw.gov.au/docs_menu/parents_carers_and_families/out_of_home_care_transition/policies_procedures_and_tools/children_court_case_management/section_76_reports.html?s=1985038363

ORDER ALLOCATING PARENTAL RESPONSIBILITY

Involves:

- Section 82 report on the suitability of arrangements, completed by the NGO and forwarded to FaCS after an order allocating parental responsibility to a non-parent is issued
- FaCS will:
 - endorse the report,
 - file it with the Court, and
 - liaise with the NGO regarding any concern about the report's compliance with the order, where applicable

SECTION 90 APPLICATIONS TO VARY OR RESCIND CARE ORDERS

- An NGO can recommend that the Minister submit an application to vary, rescind, or appeal against a Court order.
- The NGO would need to provide **evidence** for the Court to support its reasons.
- The Minister would present all the views to the Court.

CASE MANAGEMENT

- NGO practitioners should review:
 - Case management during interim orders
 - The placement of Aboriginal children with non-Aboriginal NGOs
 - Care plan documents
 - Proposed contact arrangements
 - Arrangements that can be varied to meet the needs of the child or young person

Source: FaCS, 'Legal Aid Conference' (PowerPoint presented at the Legal Aid Conference, 22 August 2014)

CASE MANAGEMENT: General Comments

Everything should relate to how it assists the child or young person's situation.

- Court reports must focus on the **best interests of the child**, **not** on the carers.
- However, the carers' views must be incorporated in the reports as considerations of decision-making, even if the views are different from that of the NGO practitioners.
- Drafting each report with this principle in mind will assist FaCS case workers to present the most accurate and best possible case to the Court.

CASE PLANS AND THE CHARTER OF RIGHTS

- When children are placed under care and protection orders that require them to live away from their families, or they are voluntarily placed in care by their families, detailed case plans should:
 - describe the goals for that child,
 - specify the services and co-ordination necessary to reach those goals,
 - be formulated in consultation with the child and those involved with the child, and
 - accommodate the changing circumstances of children under care and protection orders.

Source:

Australian Law Reform Commission, Australian Government,

Seen and heard: priority for children in the legal process (ALRC Report 84, [17.81]

<http://www.alrc.gov.au/publications/17-childrens-involvement-care-and-protection-system/case-plans-and-reviews#>

- If the child is in out-of-home care, the case plan should specify the services that would ensure the basic guarantees in the Charter of Rights for Children and Young People in Out-of-Home Care.

Source:

Department of Family and Community Services, Charter of Rights for Children and Young People in Out-of-Home Care

http://www.community.nsw.gov.au/docswr/_assets/main/documents/charter_fact.pdf

EVIDENCE

- All evidence is filed in affidavit form unless the Court otherwise directs.
- Exceptions:
 - a written report under s 61(2)(b) of the *Care Act* pertaining to an application for care order, and
 - a report from an Authorised Clinician.

Source:

Children's Court of New South Wales, Practice Note No. 5 'Case Management in Care Proceedings'

TYPES OF EVIDENCE

- **FIRST HAND**, aka direct evidence
 - Based on personal knowledge of the facts
 - Eg, what the witness saw, heard, or perceived
 - **Not** what the witness was told by someone else
- **HEARSAY EVIDENCE**
 - Evidence of what X told the witness
 - Eg, The child said to me, 'My parents are always arguing.'
 - Hearsay evidence of statements by the child or young person should be presented in his or her own words.

Source:
Australian Law Reform Commission, Australian Government,
Seen and heard: priority for children in the legal process (ALRC Report 84)

TYPES OF EVIDENCE

LAY OPINION

- Non-expert opinions, including those about:
 - descriptions (eg, apparent age),
 - emotional state (eg, upset),
 - physical state of things (eg, tidy house), and
 - the attribution of a child's behaviour or emotion from experienced carers (eg, 'The child was hungry because it was crying')

EXPERT OPINION

- Opinion of a person who has specialised knowledge based on his or her training, study or experience that is wholly or substantially based on that knowledge:
 - Eg, childcare experts, clinical psychologists and psychiatrists, forensic document examiners and handwriting experts
 - Must be based on facts that the expert knew and that can be proven
 - **Not** a matter of common knowledge and *not* speculative
 - Reports containing expert evidence must be separately filed

Evidence Act 1995 (NSW) s 79)

Source:
Australian Law Reform Commission, Australian Government,
Seen and heard: priority for children in the legal process (ALRC Report 84)

AFFIDAVITS

- An **affidavit** is a verified statement of a deponent (witness) that is filed in Court and served on the other parties.
- The affidavits provided to FaCS must be:
 - **objectively written** (ie, the affidavit should *not* reflect how the writer personally feels at the time), and
 - **supported by evidence** (eg, case plan, case review).

Source: *Rochdale, BC v A and others* (1991) 2 FLR 192, 231-2 (Brown J)

AFFIDAVIT FORM 35

Available on the Children's Court website at: <http://www.childrenscourt.justice.nsw.gov.au>

Form 35 (version 1)

**IN THE CHILDREN'S COURT
OF NEW SOUTH WALES
AT**

CASE NUMBER

Affidavit

Children and Young Persons (Care and Protection) Act, 1998

Children and young person

Name

Application details

Type of application
Date application filed

Affidavit

Name [name]
Address
Date sworn/affirmed

I swear/affirm:

-
-

Signature

Sworn/affirmed at
Signature of deponent
Date

Before me:
Name of witness
Capacity Justice of the Peace Other [please specify]
Registration number

I certify the following matters concerning the person who made this affidavit (the deponent):

- I saw the face of the deponent; or [delete whichever option if inapplicable]
 I did not see the face of the deponent because the deponent was wearing a face covering but I am satisfied that the deponent had a special justification for not removing the covering.

Page 1 of 2

Form 35 (version 1)

- I have known the deponent for at least 12 months; or [delete whichever option if inapplicable]
I have confirmed the deponent's identity using the following identification document:
Identification document relied on
Signature
Date
[NOTE: The deponent and witness must sign each page of the Affidavit]

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AFFIDAVITS

Form & Style Requirements

- Written in the **first person**.
- Use **numbered paragraphs**.
- Use **precise words** or '**words to the effect of**'.
- Use **direct speech** as much as possible.
- **Conversations** – Include:
 - Where and when the conversation occurred
 - Who was present
 - The medium used (eg, telephone or in person)
 - If by telephone, include:
 - whether the witness knew the caller, and
 - who initiated the call.
- Eg, During my visit, Ms Smith and I had a conversation with words to the following effect:
 - I said to her: *I am here because a report has been received regarding the care of your children.*
 - Ms Smith said: *What report? My children are fine.*
- Affidavits should **not** contain:
 - recommendations about the care of a child, or
 - statements of law
- While an NGO practitioner may include his or her personal opinion about the care of a child, such lay opinion does *not* qualify as expert opinion under s 79 of the *Evidence Act 1995* (NSW).

Source:

Scott Mitchell CM, 'The Children's Court of New South Wales Practice Direction No. 28: Case management in the Care Jurisdiction' (12 September 2007)

AFFIDAVITS: Annexures

- Annexures are usually identified as letters, commencing as 'A' and proceeding in order of appearance.
- Refer to annexures in the body of an affidavit, where applicable.
- Avoid annexing original documents.
- Large documents should not be annexed.
 - It is recommended that that they be exhibited instead.

Source: Alan Robertson J, 'College of Law 2014 Judges' Series: Affidavit Evidence' (Paper presented at the Federal Court of Australia, 26 February 2014)

Letter from a Young Person

To everyone at [NGO]

Thank you so much for everything and for putting up with all my tantrums and all those long nights at hospital.

What you guys have done for me I won't forget – I love all of you' all so much. I honestly don't think I'd be alive if I didn't come here.

What all of you do is awesome and I don't know if you all realise but you do save kids everyday and give them that little bit of hope and love they need.

And what makes you all so awesome is that it is pretty much unconditional care. You don't care where kids come from, or where they are now your still there and are always trying to make each day better than the last.

And that's something only too few people can do.

Keep smiling – always – forever

From FaCS, 'Legal Aid Conference'
(PowerPoint presented at the Legal Aid Conference,
22 August 2014)

