COVER SHEET

Submission to the review of the
2017 Children and Community Services Act 2004

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2017 Legislative Review
General Law Unit
Department for Child Protection and Family Support
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ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA LIMITED

SUBMISSION TO THE REVIEW OF THE CHILDREN AND COMMUNITY SERVICES ACT 2004 (WA) CONSULTATION PAPER

13 April 2017

ABOUT THE ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA

ALSWA is a community based organisation which was established in 1973. ALSWA aims to empower Aboriginal peoples and advance their interests and aspirations through a comprehensive range of legal and support services throughout Western Australia. ALSWA aims to:

- Deliver a comprehensive range of culturally-matched and quality legal services to Aboriginal peoples throughout Western Australia;
- Provide leadership which contributes to participation, empowerment and recognition of Aboriginal peoples as the First Peoples of Australia;
- Ensure that Government and Aboriginal peoples address the underlying issues that contribute to disadvantage on all social indicators, and implement the relevant recommendations arising from the Royal Commission into Aboriginal Deaths in Custody; and
- Create a positive and culturally-matched work environment by implementing efficient and effective practices and administration throughout ALSWA.

ALSWA uses the law and legal system to bring about social justice for Aboriginal peoples as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation, legal education, legal research, policy development and law reform.

ALSWA is a representative body with executive officers elected by Aboriginal peoples from their local regions to speak for them on law and justice issues. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law, child protection and human rights law. Our services are available throughout Western Australia via 14 regional and remote offices and one head office in Perth.

INTRODUCTION

ALSWA values the opportunity to contribute to the review of the *Children and Community Services Act 2004* (WA) ('CCSA') being conducted by the Department for Child Protection and Family Support ('the Department').

Underpinning ALSWA's position in respect of the revision and improvement of the current child protection legislative framework in Western Australia is the daily involvement of its lawyers in child protection casework. Our lawyers deal closely and frequently with parents, grandparents and other relatives, kinship carers, young people in care, community members and agencies, Department workers at various levels, child representatives, expert witnesses and the Children's Court. ALSWA also holds positions on various steering committees, working groups and associations carrying out important work in the child protection space. Therefore, ALSWA has a unique insight into the operation of the child protection system and is able to identify the opportunities for meaningful improvement and change for Aboriginal people.[1]

The CCSA commenced operation in March 2006. During the second reading speech for the Bill in 2003, the then Minister for Community Development, Ms McHale stated that the Bill is 'a milestone for the wellbeing of children, families and communities in Western Australia. It is the culmination of much detailed work over many years, and repeals legislation that is more than 50 years old.' Furthermore, the Minister claimed that the Bill would provide a 'new way of responding to the complex social issues that have emerged in recent decades' and the legislation 'provides the framework to improve best practice that is evidence-based'. In particular, Ms McHale observed that:

> There is overwhelming research that supports the view that children's wellbeing is best maintained in their families and communities, and that the experience of being "in care" can result in its own set of negative consequences. It is also evident from research that there is clearly a need for investment in services to support families at risk of child abuse or neglect before they become involved in the child protection system.[2]

In ALSWA's view, little has changed over the past ten years for children and families who find themselves interacting with the child protection system. The child protection system as a whole is now in a state of worsening crisis, afflicted by many critical problems including delay, ineffective service delivery in many cases, inadequate and often poorly targeted resources, and inadequate resourcing and coordination of support services outside the system.

ALSWA submits that it is the position of Aboriginal children and families that has overwhelmingly deteriorated the most against this background. The following evidence clearly demonstrates the crisis for Aboriginal communities in the child protection sphere:

- Approximately 30% of children in care in Australia are Aboriginal; with a figure of 53 percent, Western Australia has the highest disproportionate rate of overrepresentation of Aboriginal children in care in the nation (Aboriginal children comprise approximately 6% of all children in Western Australia).

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1 In this submission, ALSWA uses the term 'Aboriginal people' to refer to 'Aboriginal and Torres Strait Islander people' except where the reference is an extract from legislation or a quotation from another source.

2 Western Australia, Parliamentary Debates, Legislative Assembly, 4 December 2003, 14244 (Ms SM McHale, Minister for Community Development).

- The number of Aboriginal children in care in Western Australia is continuing to increase each year and is increasing at a much faster rate than for non-Aboriginal children. As at 30 June 2006, Aboriginal children comprised 38 percent of children in care[3] and by 30 June 2016, 53 percent of all children under the care of the CEO of the Department were Aboriginal. In some areas, the figure is well above 90 percent and is 100 percent in the East Kimberley.[4]

- Long-term outcomes for children who have lived in out-of-home care – in areas such as education, substance misuse, physical health, mental health and incarceration – are known to be significantly poorer than for other children, and these patterns are continuing to worsen. The added impacts on Aboriginal children because of dislocation from their culture are particularly devastating.

- The suicide rate for Aboriginal people in Western Australia is 3.3 times higher than for non-Aboriginal people and, specifically, suicide rates for Aboriginal children and young people are significantly higher than for non-Aboriginal children and young people (especially for younger children).[5]

The links between the child protection system; juvenile and adult criminal justice; mental health and trauma; substance misuse; poverty and disadvantage; and social isolation are indisputable. This in turn highlights that genuinely dealing with and reducing the drivers for the harm, abuse and neglect of children requires a whole-of-government and whole-of-community approach. Any review of child protection legislation and practice must keep this understanding at the forefront of its reform efforts.

ALSWA readily accepts that an effective child protection system is of crucial importance to communities, and that the protection of children from immediate harm is paramount; however, the way in which the child protection system is currently administered in Western Australia is not suited to the needs and circumstances of Aboriginal children and families.

ALSWA believes that it is time to reinvent Western Australia's approach to child protection, especially for Aboriginal children. Any model that oversees increasing numbers of Aboriginal children coming into care year after year is clearly not effective and the system should only be regarded as operating effectively and fulfilling its role when the numbers of Aboriginal children entering and remaining in care begin to plateau and decrease.

Twenty years ago, the *Bringing Them Home* Report laid bare for all of Australia, and the world, the devastating impact upon Aboriginal people from the removal of children from their families and communities and from the failure to recognise the importance of keeping Aboriginal families and communities together. ALSWA considers that it must be honestly recognised, understood and accepted that our current child protection system has become the modern, gentrified method of facilitating this separation of families. More can be done to avoid the separation of Aboriginal children from their families. This reality is demonstrated by the experiences of ALSWA's clients and their families, discussed in this submission.

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3 Department for Child Protection, *Annual Report 2010–2011* (2011) 8.
4 Department for Child Protection and Family Support, *Annual Report 2015–2016* (2016) 34.
5 Parliament of Western Australia, Legislative Assembly, Education and Health Standing Committee, *Learnings from the Message Stick: The Report of the Inquiry into Aboriginal Youth Suicide in Remote Areas*, Report No. 11 (November 2016) [2.19] & [2.21].

While there is immediate harm caused by violence, abuse and neglect, there is also substantial and lifelong harm caused by keeping children in out-of-home care. The inter-generational trauma caused by family separation and disconnection is a key driver for many of the destructive, anti-social and harmful behaviours that are the basis of most child protection concerns.

A system which does not do all that can be done, *all of the time*, to support, encourage and facilitate reunification and preservation of families wherever possible, is not the right system for Aboriginal people. A move away from, and not towards, permanent out-of-home care is the correct approach.

ALSWA believes the overarching problem facing Aboriginal children in the modern child protection system was brilliantly summarised by Gerry Moore, the current Chief Executive Officer of SNAICC, in introducing SNAICC's Policy Position Statement of July 2016:

> *For an Aboriginal and/or Torres Strait Islander child, their stability is grounded in the permanence of their identity in connection with family, kin, culture, and country. Regardless of the positive intention of permanency reform, the permanent removal of Aboriginal and Torres Strait Islander children from their families presents harrowing echoes of the Stolen Generations for Aboriginal and Torres Strait Islander communities.*
>
> *Legal permanency measures have tended to reflect an underlying assumption that a child in out-of-home care experiences a void of permanent connection that needs to be filled by the application of permanent care orders.* ***This understanding is flawed in its failure to recognise that children begin their out-of-home care journey with a permanent identity that is grounded in cultural, family and community connections. This is not changed by permanent care orders. Inflexible legal measures to achieve permanent care may actually serve to sever these connections for Aboriginal and Torres Strait Islander children, in breach of their human rights, and break bonds that are critical to their stability of identity while they are in care and later in their post-care adult life.***

It is ALSWA's view that while the current legislation can and must be improved now for the benefit of Aboriginal children and families, and it addresses such measures below, eventually the entire child protection system as it applies to Aboriginal children, must be redesigned 'from the ground up' with culture and identity considerations as a fundamental and primary objective.

In addition, in ALSWA's view, the State should never rule out the potential for reunification of children with their families of origin, except in the most obviously dire and impossible of circumstances. Ultimately, decisions about the protection and best interests of Aboriginal children should be made by Aboriginal people and that is the model ALSWA hopes will one day come into being.

PART 1: FOSTER CARER ASSESSMENT, REVOCATION AND APPROVAL

ALSWA strongly supports reform of the existing processes governing assessment and approval of foster carers, and the revocation of foster carer status.

Assessment and Approval of Foster Carers

Key Issues and Concerns

Considerations of cultural safety and security, and measures which promote healthy identity formation in Aboriginal children, should be elevated to primary and fundamental considerations in assessing the suitability of any individual proposing to care for an Aboriginal child, where that individual is not a parent, close relative or recognised kin from the same family or community group.

In ALSWA's observation, the competence and capacity of general foster carers to understand and meaningfully facilitate cultural learning and ongoing immersion of Aboriginal children in their culture, is a factor that receives little and sometimes no attention in assessments conducted by the Department. Many out-of-home care arrangements appear to lack basic acknowledgment of and understanding around children's family, country and culture. The majority of arrangements crafted by the Department that ALSWA has sighted appear to contain little in the way of detailed plans for children to be frequently immersed in their culture, on country and among family, which is widely understood to be the only way to genuinely learn and be ingrained with one's culture.

By way of illustration, ALSWA is currently acting for a range of parties in different cases where the Department has:

- placed children in the long-term care of foster carers who were erroneously identified by the Department as related Aboriginal persons and who subsequently identified themselves to the parents as neither Aboriginal nor related to the children and this placement was left unchanged;

- failed in its written proposals and care plans for the children to even mention that the children in question were in fact Aboriginal children;

- placed children from regional and remote areas of Western Australia, where traditional and customary Aboriginal family life may be largely intact, with non-Aboriginal foster carers in the Perth urban area; and

- frequently elected to permit children to have contact only with their biological parents, to the exclusion of other important relatives and kin, and supervised by Department workers, rather than actively pursuing options for children to have extended contact on country facilitated and overseen by family and community members.

In a similar vein, a concerning practice has recently emerged where once a child is subject to a long-term protection order (ie, in force until the child turns 18 years) the Department will reduce a child's contact with family to only a handful of times per year, supervised by Department workers, for on average just a few hours. In most cases, there is no provision for travel to country for the children to spend extended time with important family, kin and community members. Such arrangements spell

death for any opportunity for cultural immersion and meaningful learning of culture, with resulting negative long-term impacts on the child's identity formation in many cases.

Generally, from ALSWA's experience, foster carers identified and approved through a Community Sector Organisation (CSO) tend to be more culturally competent and culturally secure than carers sourced through and approved by the Department. ALSWA believes this is because CSO assessments are likely to be more thorough, specialised and targeted to the specific needs of individual children.

Further, bearing in mind the localised and geographically fragmented nature of many Aboriginal communities, local CSOs are logically able to offer the best option because they have specific knowledge and understanding of local cultural traditions and practices, and are likely to have the acceptance and respect of the local people. In ALSWA's observation, this tends to result in greater engagement from families and better long-term outcomes for children.

Worryingly, there also appears to be inconsistency in information available to CSOs and to the Department in assessing carer suitability. For example, if because of repeated abuse-in-care complaints or other concerns, a carer approved by a CSO has his or her carer status revoked, that individual is able to apply for approval as a carer through a different CSO. In such situations, any history of complaints or even relevant charges or convictions that the individual fails to disclose may not be possible to detect. As there is no common database accessible equally by CSOs and the Department, the information available to a CSO may be incomplete.

RECOMMENDATIONS

In order to combat the inconsistencies and problems identified above, and to ensure that cultural learning and identity considerations are vigorously promoted for Aboriginal children, ALSWA recommends that the carer competencies set out Regulation 4 of the *Children and Community Services Regulations* 2006 (WA) ('the Regulations') be significantly amended for persons wishing to be general foster carers for Aboriginal children. The amendments should:

- ensure that the competencies include a proven willingness and ability on the part the proposed carer to meaningfully engage with, and spend time in, the child's family and community (including with the child) for the purposes of facilitating as often as possible the child's immersion in their culture and extended family;

- be such that the carer's said willingness and ability is independently assessed and approved by an Aboriginal agency or organisation, with active input from the child's family and community members;

- include mandatory intensive and specialised cultural training for proposed carers, delivered by independent Aboriginal controlled service providers, with such training to be region-specific to the maximum possible extent; and

- include mandatory periodic reviews of a carer's compliance with cultural immersion plans and evidence that the carer's willingness and ability to facilitate the child's cultural learning has not deteriorated over time.

The Department's own Aboriginal Practice Leaders ('APLs') – where they possess proven specific local knowledge and are accepted by the child's family and community as an appropriate person to make a contribution on behalf of that community – could also play an information-gathering role in this process, but APLs should not be the sole means by which approval is facilitated and finalised.

ALSWA otherwise supports the establishment of a decision-making body that is independent from the Department as described in 'Model C' in the Department's Consultation Paper.[6]

ALSWA further proposes that such a body should have a separate and distinct division responsible for final approval of all individuals who seek to care for Aboriginal children in Western Australia. The independent body should work in conjunction with the Department, for example pursuant to a detailed Memorandum of Understanding, but not be ultimately answerable to it.

From our discussions with other agencies, ALSWA is confident that cooperative and supportive efforts would coalesce around such a model so long as the model is co-designed in active consultation with Aboriginal CSOs.
ALSWA envisages CSOs retaining a primary role in the assessment and approval of carers (as they do now) with uniform oversight from the new body, but final endorsement, maintenance and upkeep of a central carer register, and rights of review would be the role and responsibility of the new body.

Persons responsible for the oversight of appropriate carers for Aboriginal children should be of Aboriginal descent without exception. Further, any decision-making panel whenever constituted should have access to the widest possible range of recognised and accepted family members, elders and agency staff from the child's community or region of origin. Whenever information or input is sought to be contributed in respect of a proposed carer, or a decision to be made, the child's family and community should be asked to first confirm that it is proper for that contribution to be made and regularly asked for their feedback throughout the process.

In terms of legislative amendment, ALSWA recommends that the CCSA should be amended to:

- refer to the proposed independent body where necessary in ss 79 to 81 and elsewhere as necessary;

- make clear that responsibility for final carer approval lies with the newly established independent body; and

- clarify that placement of any Aboriginal child with a general foster carer is conditional upon the carer obtaining approval from the independent body and that no placement – other than an emergency short-term arrangement – can be put into place without that approval. ALSWA notes that s 79(3) may need amendment so that cancellation and change of placements are clearly subject to these conditions.

Section 81 specifically would require, at a minimum, the following amendments:

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6 Department for Child Protection and Family Support, *Review of the Children and Community Services Act 2004*, Consultation Paper (December 2016) 11.

- repeal of s 81(a); and

- the removal of the words, 'in the opinion of the CEO' from ss 81(b) and (c).

ALSWA's views concerning further reform to s 81 are addressed in more detail below regarding the operation of the Aboriginal Child Placement Principle.

Regulation 4 of the Regulations require amendment to the effect that in respect of Aboriginal children, final approval of carers and other powers vest in the Aboriginal division of the new independent body.

In ALSWA's view, the oversight model proposed above – in conjunction with the proposed enhanced carer competencies – would give meaningful and constructive effect to the principles of self-determination and community participation for Aboriginal people, which are currently contained in ss 13 and 14 of the CCSA (further discussion of these provisions appears below). Such a model promises genuinely to empower Aboriginal people with the responsibility and authority to independently make decisions for the care of children from their own communities, rather than having outcomes prescribed for them in a paternalistic manner.

The above submissions constitute ALSWA's response to Consultation Question 1.

Revocation of Foster Carer Status

Currently, revocation of a carer's approval is a matter for the CEO of the Department, pursuant to subregulation 4(3) of the Regulations. No pathway exists for any review of such a decision, let alone an independent and impartial review conducted outside of the Department.

ALSWA regards this situation as unacceptable. It is a highly paternalistic and inward-looking model, which lacks basic transparency. ALSWA's concerns regarding the current model are informed by the experiences of carers who have lost their approval. Two case studies below illustrate the point.

Case Study 1 – Revocation – Timing
ALSWA acted for a client who was the mother of a young child aged approximately 6 years old. The client was not the child's biological mother – she was his mother by kinship. She had raised the child from infancy and the child knew her, and referred to her, as his mother. The Department indicated that it was concerned about the child being neglected and displaying challenging behaviours; and that an occupant of the mother's home presented a possible risk of harm to the child. The Department removed the child and placed him into a group home. The Court made a protection order (until 18) without the client's participation, and before ALSWA was ever involved in the matter.

The client sought review of placement and contact arrangements through the Department's Case Review Panel process. This was fruitless. The client tried to negotiate solutions to placement and contact issues, with strong advocacy from ALSWA, but the Department would not capitulate on any issue. Incidentally, it was noted that the child's behaviours were worsening – not improving – in the group home environment. The client was also excluded from case planning meetings despite the child having had a lifelong primary relationship with her and her family.

A further application to the Case Review Panel was refused and the client then instructed ALSWA to seek the widest possible review of the care arrangements in the State Administrative Tribunal (SAT). The Department was notified that a SAT case would be pursued. By this time, the child had been removed from the client's care for approximately 18 months. At no time had the Department ever expressed an intention, nor taken any action, to revoke the carer's approval.

Immediately upon being notified of the client's decision to proceed in SAT, the Department gave notice of its intention to revoke the client's carer approval. This too was strongly opposed by the client – with ALSWA's support – but the revocation proceeded unhindered.

ALSWA considers that the revocation was an abuse of process because it effectively denied or greatly compromised the client's right to proceed in SAT. Under the existing regime, SAT has no power to review the revocation decision and SAT would be extremely unlikely to have placed the child with a person who did not have carer approval (even for respite care or extended contact).

It remains ALSWA's view that if the Department had been genuinely concerned about the client's ability to act as a competent carer for children, it would not have taken 18 months to finally revoke the client's approval. Because of the existing regime governing revocation, the client had no recourse in respect of the Department's decision.

Case Study 2 – Revocation - Accountability
ALSWA represented the maternal aunt and uncle of two children. The children had been placed with the carers in 2004, aged just 5 months and 3 years. Both children were the subject of long-term protection orders. In 2013, after the children had been living continuously with the carers for 9 years without any concerns ever being raised by the Department, the aunt suffered a stroke, which left her hospitalised. At about the same time, the family home was destroyed by fire, which left the carers homeless for a time. Because of these events, the carers asked the Department to arrange temporary respite care for the children, with a nominated family member, while they obtained new accommodation and tended to the aunt's medical issues.

The children were placed with the nominated family member. The Department confirmed the arrangement was temporary and the children would return to the carers. The aunt proceeded to recover well from the stroke, and the carers had their home rebuilt.

The carers then spent almost a year following up with the Department to have the children returned to their care. The Department not only remained silent on the issue of returning the children, but also did not even facilitate contact between the children and the carers. At this point, the carers sought assistance from ALSWA.

The Department's case manager informed ALSWA that the carers' approval had been revoked due to 'ongoing neglect and substantiated harm'. The carers had no knowledge of this; the Department had never put any allegations to them. ALSWA requested a copy of the written reasons explaining the revocation, which are required to be provided pursuant to subregulation 4(3)(a). The case manager claimed that the children had been 'severely neglected' by the carers.

The Department never provided the written reasons. Months after ALSWA had requested the written reasons a senior legal officer from the Department advised ALSWA that the carers' approval had never been revoked. Instead, the records showed that in 2013, when the uncle had called the Department to explain that temporary respite care was needed because of the aunt's stroke and the fire, the case manager had assumed that the uncle and aunt did not wish to act as carers. Their status was then recorded as 'withdrawn'. Inexplicably, there was no evidence the carers had ever been the subject of neglect or harm allegations. The Department has never explained how these events could have occurred.

As of 2015, two years after the children left the care of their aunt and uncle, the children were living in separate placements and neither of them were living with family members. The aunt and uncle had no indication at that time from the Department whether the children would ever return.

In both of the above cases, it is concerning the carers in question had no right to seek further review of the decisions to revoke their approval. In the first case, the concerns initially raised by the Department had been addressed by the carer and there was some evidence that the new arrangements for the child were in fact contributing to a deterioration in his difficult behaviours. The timing of the revocation also suggested that it was quite possibly not done out of genuine concern about the carer. In the second case, an independent review would likely have quickly revealed that a revocation had never actually occurred and the Department was proceeding on incorrect information in any event. An independent reviewer could have easily remedied the position for those carers.

ALSWA believes that in both cases, independent review may well have resulted in the revocation(s) being overturned. The relevant children would then have still have had an opportunity to be reunified with their long-term carers. In both cases, the outcomes for the children appear to have been worse – and certainly no better – than the initial arrangements.

RECOMMENDATIONS

ALSWA therefore recommends that any decision by the Department or a CSO revoking a foster carer's approval must be reviewable by the independent body proposed in the submissions above.

The CCSA should be amended by adding to s 79 a further subsection (5) to provide that in the event an individual's approval pursuant to s 79 is revoked, that person may apply to the independent body for a review of that decision. The legislation creating and governing the new body should then provide that:

- the Aboriginal division of the independent body deals with the review where the children or the carer(s) are Aboriginal persons; and

- the independent body may grant relief including the reinstatement of the carer's approval.

The preceding two pages constitute ALSWA's response to Consultation Paper Question 2.

PART 2: IMPROVING OUTCOMES FOR ABORIGINAL CHILDREN, FAMILIES AND COMMUNITIES

Background

In ALSWA's opinion, the CCSA does not adequately protect and promote the interests of Aboriginal children and families and requires significant strengthening on an urgent basis.

In some respects, the lack of protection for Aboriginal children and families stems from the legislation itself. However, in other respects, it is the result of the Department's culture and internal policies; interpretation of the legislation in practice; and approach to carrying out its duties.

ALSWA prefaces its specific recommended legislative changes below (in response to Consultation Questions 3–5) by first briefly addressing some issues and solutions that are outside the legislative framework. These issues and recommended solutions are fundamentally relevant because of their influence over child protection decision making and outcomes.

One of the most significant developments in child protection practice in Western Australia in recent years is the introduction of the Department's *Policy on Permanency Planning* ('Permanency Planning'). Permanency Planning has become the primary driver of the Department's decision-making patterns in respect of children in care, and as such, it demands much attention.

One of the Department's great hopes for Permanency Planning was that it would limit 'placement drift' (the movement of children in care from placement to placement, due to placement 'breaking down'). ALSWA is not aware of any evidence that placement drift has been significantly reduced. This is to be expected because firstly, the main drivers for placement breakdown remain unchanged and, secondly, there has been no significant increase in the number of carers and the services and supports available to carers, which could make a corresponding impact on placement drift.

ALSWA acknowledges that for a small proportion of children in care, Permanency Planning may be a useful case-planning tool, but it is not appropriate for the majority of children in or at risk of coming into care.

Most critically, ALSWA emphasises that Permanency Planning is a *policy* – it is not the law and has no legislative force or effect. Despite this, the Department invariably imposes Permanency Planning upon families and children with an unwavering firmness.

Permanency Planning relies upon and cites 'attachment theory' as one of its primary bases. In broad terms, this theory posits that the best option for guarding a child from the vicissitudes of life is for the child to permanently attaching to specific carers in one primary environment This Western-centric approach fails to recognise that within Aboriginal culture, attachment can be far more complex and varied. It may be quite usual and healthy for an Aboriginal person to live with different persons in different environments, and at different times, throughout their childhood. Permanency Planning does not acknowledge this. It also fails to recognise the fundamental importance of identity – especially one's cultural identity – to an individual's long-term psychological health and sense of self-worth.

In its submission to this review, Aboriginal Family Law Services (AFLS) addressed the issue of attachment in the Aboriginal context, and ALSWA agrees with and adopts AFLS' submission in that respect.

Permanency Planning is therefore vigorously opposed by ALSWA on the basis that it is largely incompatible with the values, culture, traditions and ways of living of many Aboriginal people.

Further, Permanency Planning by its very design curtails effective decision-making about children by imposing artificial and prescriptive time limits for the making of decisions. All decision-making processes must be flexible and capable of adaption to suit the best interests and circumstances of the particular child. In fact, numerous Department workers have expressed to ALSWA dissatisfaction with Permanency Planning because it interferes with their capacity to perform their duties and responsibilities and their ability to exercise properly their professional skill and judgment.

ALSWA is of the view that there is no place for an artificial and formulaic approach such as is prescribed by Permanency Planning in a jurisdiction where the best interests of the child are paramount and where every child's needs are supposed to be individually evaluated, understood and provided for. Permanency Planning should not apply to Aboriginal children and ALSWA calls upon the Department to immediately renounce and discontinue the policy. ALSWA regards this as an urgent issue.

ALSWA further believes that improving outcomes for Aboriginal children, families and communities requires the tackling of a variety of factors and concerns with the current legislation, in conjunction with taking a 'bigger picture' view in respect of the fundamental drivers for child protection concerns in Aboriginal communities.

ALSWA observes that one of the most common predictors for child protection intervention resulting from family violence, child harm and neglect, poor parental modeling and mental health issues, is poly substance abuse. It is ALSWA's firm view that unless and until this is meaningfully reduced, child protection interventions will be likely to continue to rise, and poor long-term outcomes will continue unabated.

Massive capacity building is needed for culturally safe and secure drug and alcohol treatment services, including significant expansion of residential drug treatment services where children can live with their parents, both in Perth and in the regional areas. The Department has a valuable role to play in persuading the government to invest in these preventative measures.

The role of trauma – and the connection between trauma, violence and substance misuse – is also a critical consideration. In the Aboriginal context, trauma includes intergenerational trauma caused by past child removal practices and family separation, and one of the keys to limiting this cycle of trauma is the reduction, as quickly as possible, of child removals and family separation in the present day.

Finally, judicial education around the interconnections between substance misuse, trauma (especially intergenerational trauma) and cultural identity that so negatively affect Aboriginal people, should be mandatory and ongoing for all judicial officers involved in child protection work (including metropolitan and regional magistrates).

RECOMMENDATIONS

Based upon the discussion above, ALSWA recommends:

- The Department should immediately abandon its Permanency Planning policy.
- The Western Australia Government should provide resources and support for the development and establishment of culturally safe and secure drug and alcohol treatment services.
- The Western Australian Government should provide sufficient resources to ensure that all judicial officers involved in child protection matters have appropriate training around the interconnections between substances misuse, trauma and cultural identity.

Improving the Law for Aboriginal People

In this section of its submission, ALSWA deals with specific areas of concern in the operation of the CCSA in its current form and set outs relatively straightforward legislative reforms to promptly create meaningful change for Aboriginal people involved in the child protection system whether prior to, during or after protection proceedings have been instituted.

The specific areas where ALSWA seeks immediate legislative reform to improve outcomes under the CCSA for Aboriginal children, families and communities, and to correct flaws in the legislation, are:

1. The principles of self-determination and community participation for Aboriginal people.
2. The Department's compliance with the Aboriginal Child Placement Principle.
3. Written Proposals for Children and 'Cultural Plans'.
4. Changes to protection orders by type and restrictions in respect of protection orders (until 18).
5. Final orders and enforcement of conditions in orders.
6. Additional issues which require correction including provisional protection and care and negotiated placement agreements.

1. The Principles of Self-Determination and Community Participation

Sections 13 and 14 of the CCSA recognise the principles of Aboriginal people's self-determination and Aboriginal community participation in child protection decision-making. The current ss 13 and 14 are vague, lacking in meaning and appear to have no effect on the decision making patterns of the Department and little impact on the Court. ALSWA's view is that both these sections are drafted poorly and require urgent reform in order to strengthen the application of the principles in practice.

ALSWA gratefully acknowledges the shared discussions and learning undertaken with the SNAICC Family Matters WA Jurisdiction Working Group in relation to the recommendations immediately below.

Section 13 of the CCSA provides that:

> In the administration of this Act a principle to be observed is that Aboriginal people and Torres Strait Islanders should be allowed to participate in the protection and care of their children with as much self-determination as possible.

ALSWA is of the view that there are a number of deficiencies with this provision:

- The section provides that that the principle of self-determination is 'to be observed'. In contrast, in relation to the general principles under the CCSA, s 9 uses the phrase 'must be observed'. ALSWA considers that s 13 should equally require a mandatory requirement to take into account the relevant principle.

- The CCSA does not define the term 'self-determination' and a definition could not be found in any other Western Australian legislation. The absence of a definition dilutes the force or effectiveness the section might otherwise have.

- The section itself is an oxymoron, because it states that Aboriginal and Torres Strait Islander people should be 'allowed to participate ... with ...self-determination'. The concept of being allowed to do something directly contradicts the concept of self-determination, which is about people having control over their own lives and futures. If one must be allowed to do something, this cannot be self-determinative – it is giving the power of determination to someone other than oneself.

- It is not clear whether the phrase, 'administration of this Act' refers only to the Department's administration of the Act or whether it applies to both the Department and the Court. In *Farnell and Chanbua*[7], Judge Thackray CJ stated that:

  > Although it has been assumed in some decisions of single judges of the Supreme Court that s 9 has application to judicial proceedings, I would respectfully doubt that courts are concerned with the 'administration' of the legislation, which seems to me to be the responsibility of the relevant Minister and the Chief Executive Officer of her department.[8]

  ALSWA considers that it would be preferable to have this clarified to ensure that the principle in s 13 (as well as the principles in ss 9 and 14) must be adhered to by the Department and the Court.

RECOMMENDATIONS

In order to address these concerns, ALSWA recommends that the existing s 13 should be repealed and replaced with the following provision:

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7 [2016] FCWA 17.
8 Ibid [649].

13 Fundamental principle of self-determination

In performing a function or exercising a power under this Act in relation to a child, a person, the Court or the State Administration Tribunal, must observe the fundamental principle that Aboriginal people and Torres Strait Islanders are entitled to make decisions about the protection and care of their children with self-determination.

This model provision makes clear the importance of the principle, and that it must form part of decision-making processes concerning Aboriginal children. It promotes the primary involvement of Aboriginal people in making decisions about their own children, which is a move away from the existing paternalistic child protection model.

Secondly, ALSWA recommends that s 3 of the CCSA be amended to include a definition of self-determination, which should incorporate the following concepts:

- self-determination is the process by which a person controls their own life; and
- self-determination is the right to freely pursue one's own economic, social and cultural development.

Section 14 of the CCSA provides that:

> In the administration of this Act a principle to be observed is that a kinship group, community or representative organisation of Aboriginal people or Torres Strait Islanders should be given, where appropriate, an opportunity and assistance to participate in decision-making processes under this Act that are likely to have a significant impact on the life of a child who is a member of, or represented by, the group, community or organisation.

In respect of s 14:

- The section currently suffers from a similar vagueness and lack of meaning as is the case with s 13 due to its wording and ALSWA recommends that this provision should be significantly strengthened. The uncertainty around the extent to which s 13 applies to decisions of the Court, not just the Department, also affects s 14 and should be corrected.
- In order to better capture and promote the object and purpose of the provision, the term 'participation' should be replaced with 'engagement'.
- The phrase 'representative organisation' is too broad and lacks clarity and meaning. Due to the highly localised nature of Aboriginal community life, any agency or entity which might become involved with a child pursuant to the s 14 principle should be one that is recognised, accepted and respected by the child's community of origin and family. In ALSWA's view, such entities are more likely to be trusted and accessed by local people where there may be child protection concerns.
- To the extent appropriate in any particular case, the section should expressly operate in conjunction with the self-determination principle in s 13.

RECOMMENDATIONS

In order to address these issues, ALSWA recommends that the existing s 14 should be repealed and replaced with the following provision:

> ***14 Principle of Community Engagement***
>
> *(1) In performing a function or exercising a power under this Act, in relation to a child, a person, the Court or the State Administrative Tribunal must observe the principle that an Aboriginal or Torres Strait Islander child's kinship group, together with community members and entities recognised and accepted by the child's community of origin, must be supported to engage fully in any decision making process under this Act that affects the child's life.*
>
> *(2) This section is to operate in conjunction with section 13.*

In ALSWA's experience, when making decisions about Aboriginal children, the Department rarely proactively seeks meaningful input and guidance from a child's kinship group, elders and others from the community of origin. Frequently, as will be discussed further in the next section, the Department relies upon its own Aboriginal Practice Leaders (APLs) to inform its decision-making in respect of Aboriginal children. ALSWA considers this model to be flawed because APLs are direct employees of the Department; there are very few of them (only 11 for the entire state); and they are not required to possess specific local knowledge regarding a child's family and community. The extent to which an APL can genuinely and comprehensively inform the Department's understanding of a particular child's culture and identity needs in some instances must be questioned.

ALSWA therefore strongly favours giving further effect to the principle of Aboriginal community engagement by direct involvement of independent persons and agencies possessing knowledge of and expertise in a child's particular family, community and culture.

In this regard, ALSWA proposes that the model adopted in Queensland regarding 'recognised entities' should be closely considered for introduction into Western Australia. The Queensland Department of Communities *Child Safety Practice Manual* provides that

> The *Child Protection Act 1999* [Qld] requires that Aboriginal and Torres Strait Islander children and their families and communities receive services from the department **that meet the cultural and identity needs of Aboriginal and Torres Strait Islander children, and reflect the unique needs of Aboriginal and Torres Strait Islander families, stemming from their history as Indigenous Australians** (*Child Protection Bill 1998*, clause 6, explanatory notes).
>
> Under the *Child Protection Act 1999*, section 6, the department is required to work with a recognised entity when making all decisions about an Aboriginal or Torres Strait Islander child. In accordance with the *Child Protection Act 1999*, section 6(1) and (2), the department is required to either:
>
> - provide the recognised entity with an opportunity to participate in the decision-making, where the decision is significant
> - consult with the recognised entity on all other decisions.
>
> A recognised entity may be an individual or organisation that is appropriate to be consulted about the child's protection and care under an agreement between the department and the entity. If the entity is an individual, he or she must:
>
> - be an Aboriginal or Torres Strait Islander person

- have appropriate knowledge of or expertise in child protection
- **not be an officer or employee of the department.**

If the recognised entity is an organisation, its members must include Aboriginal or Torres Strait Islander persons who have appropriate knowledge of or expertise in child protection and are not officers or employees of the department. It must also provide services to Aboriginal persons or Torres Strait Islanders (*Child Protection Act 1999*, section 246I). The department must also keep a list of the recognised entities with whom to consult about the protection and care of Aboriginal or Torres Strait Islander children (*Child Protection Act 1999*, section 246I).[9]

ALSWA submits that the above model should be further strengthened by ensuring that recognised entities not only have knowledge of and expertise in child protection, but also cultural identity and related understanding specific to that child's community of origin.

Other Barriers to Engagement

In addition to the above changes, existing barriers to Aboriginal kinship carers and community members fully participating in child protection decision making, and in associated legal proceedings, should be reduced by:

- amending the definition of 'parent' in s 3 to include any person who is recognised by the child's family and community as having occupied or fulfilled the role of a parent through cultural or traditional obligation; and

- reform of s 147(e) 'direct and significant interest' test for certain persons seeking to be joined to proceedings.

The current definition of 'parent' in s 3 of the CCSA refers to a person who 'at law has responsibility' for 'the long-term care, welfare and development of the child' or 'the day-to-day care, welfare and development of the child'. This is inappropriate from the perspective of Aboriginal people.

In many instances, Aboriginal persons who are not the biological parents of a child such as aunts, uncles and grandparents have a responsibility for that child which may be equivalent to or greater than that of the child's parents. There may also be kinship carers who are not closely or even biologically related. Particular family or regional groups will function in unique ways and, while this will be recognised and accepted among the relevant family and community group(s), the legislation does not properly recognise such cultural relationships and obligations. The present review is an opportunity to enshrine greater recognition of these features of Aboriginal life and culture into the statute.

The existing definition should also simply refer parental responsibility, which term is already defined in the CCSA immediately below the definition of 'parent'. In ALSWA's view, the distinction between long-term and day-to-day care welfare and development in the existing provision is unnecessary, as is use of the term 'at law'. The existing definition of parental responsibility includes the words 'by law'.

9 See https://www.communities.qld.gov.au/childsafety/child-safety-practice-manual/introduction/recognised-entities (emphasis added).

RECOMMENDATION

ALSWA therefore recommends that the definition of 'parent' in section 3 be amended to read as follows:

> ***parent**, in relation to a child, means a person, other than the CEO, who –*
>
> *(a) has parental responsibility for the child;*
>
> *(b) in the case of the Aboriginal or Torres Strait Islander child, has parental responsibility for the child arising from cultural, customary or traditional relationships or obligations.*

Section 147 of the CCSA stipulates who is a party to child protection proceedings, namely:

- the child;
- each parent;
- the CEO;
- where the proceedings relate to a protection order (special guardianship), the person(s) given or proposed to be given parental responsibility; and
- **any other person considered by the Court to have a direct and significant interest in the wellbeing of the child**

In ALSWA's experience, this provision can act as a barrier to Aboriginal people seeking to join proceedings so that they can participate fully in the judicial process, which will ultimately decide a child's future.

The amendment to the definition of 'parent' proposed above would go some away to improving the situation for certain kinship carers or close relatives who are recognised as fulfilling the role of parent of an Aboriginal child. However, further reform is needed and, in ALSWA's view, this is amply demonstrated by the case study below.

> *Case Study 3 – Joining Proceedings – Direct and Significant Interest*
> ALSWA represents the maternal aunt of three children. The client is actually a cousin of the children's mother but because of traditional kinship, she is regarded as the mother's sister and therefore the children's aunt. The sibling group consists of one older child aged 4 and twins aged 3 years. All three children are the subject of protection proceedings. The older child resides with a non-Aboriginal general foster carer. The twins reside with the maternal aunt with the full endorsement and support of the Department. The Department's position is that all three children should be residing together in the care of the maternal aunt. The older child's foster carer does not seek the care of the younger children.
>
> The Department commenced taking steps to transition the older child into the care of the maternal aunt. The older child's foster carer – who was already a party to the proceedings in respect of the

child – vigorously resisted this approach and made an application to the Court to prohibit the Department from changing the care arrangements on an interim basis. The maternal aunt made an application seeking to be made a party to the proceedings on the basis that she (a) was the carer of the older child's two younger siblings, (b) was the Department's preferred placement option for all three children and (c) was having regular contact with the older child.

The Court refused to make the maternal aunt a party to the proceedings, finding in effect that she did not have a "direct and significant" interest sufficient to satisfy s 147(e), primarily because she had not had a long relationship and significant contact with the older child. There was a peripheral concern that the matter was already listed for trial and the addition of another party might complicate and delay the matter.

The result was that the proceedings remained before the Court with the older child's general non-Aboriginal foster carer being a party to the proceedings, but with the maternal aunt – who is Aboriginal, a direct relative, and the carer of the child's two siblings –left unable to participate as a party and on an equal footing.

In dealing with submissions made by counsel for the maternal aunt the Court seemed to accept that, in considering s 147(e), regard should be had to the principle of community participation in s 14; however, the Court's position could not be described as clear and unambiguous, and the lack of certainty causes ALSWA some disquiet.

Relevantly, in *PR v Chief Executive Officer of the Department for Child Protection*,[10] an appeal decision which instructively deals with the operation of s 147(e), Jenkins J described the denial of the right to be a party and to be heard as a party to proceedings as a 'denial of procedural fairness' which was 'an important issue'.[11]

In ALSWA's view, it is necessary to strengthen the operation of s 147(e) in favour of Aboriginal applicants not by changing the wording of the subsection itself but by ensuring that the principles of self-determination and community participation set out in ss 13 and 14 are expressly required to be considered in applying s 147(e). Such an amendment would be a further means of giving real effect to the relevant principles.

RECOMMENDATION

ALSWA recommends, therefore, that s 147 should be amended so that all of its existing content becomes s 147(1) and the following subsection is added:

> *(2) When exercising the discretion pursuant to subsection 147(1)(e) in any case concerning an Aboriginal or Torres Strait Islander child, the Court must have regard to the principles of self-determination and community participation set out in section 13 and section 14 respectively.*

10 [2008] WASC 228.
11 Ibid [73].

Improving the Court Process

ALSWA believes that to ensure self-determination and community participation and engagement is achieved to the greatest extent possible for Aboriginal people in the child protection jurisdiction, it is not just the legislation that needs to be improved. The process used by the Children's Court to manage child protection cases can be substantially improved for Aboriginal people, and the present review should be the trigger for such improvements to be introduced.

More than half of the applications for protection orders in the Children's Court concern Aboriginal children.[12] Therefore, in ALSWA's view, it is vital that the court process is better tailored for the families of those children.

Critically, in virtually all cases before the Court the Department is the applicant. The Department is a large government agency with significant legal and organisational resources with which to prosecute litigation. Respondents are individuals who are invariably vulnerable in some respect – they may suffer addiction, homelessness, trauma, mental health issues or be victims of violence – and usually have very limited personal resources. Respondents usually therefore rely on scarce publicly funded legal services to assist them with the Court process. There is a power imbalance inherent in this situation.

The introduction of the *Signs of Safety* pre-hearing conference process has arguably gone some way towards ameliorating this power imbalance; however, the Department is still in the more powerful position. Further, in ALSWA's experience, the Department does not view *Signs of Safety* conferences as opportunities to negotiate genuinely on different outcomes for cases, rather, they are seen as an opportunity for the Department to simply repeat, explain and justify its position.

In most cases, the Department makes an application for a protection order and the application is listed for an initial mention (or, directions hearing). Generally, at a mention, there is little scope for the consideration of substantive issues such as the placement of the children and contact between the children and their family members. Respondents usually need time to access legal advice and the Department will seek to be granted time to undertake certain tasks such as preparing a Written Proposal for the care of the children pursuant to s 143 of the CCSA. In fact, while these matters are addressed, it is very common for multiple adjournments of proceedings to take place.

ALSWA submits that the real concern is that Court's ability to fully enquire into and evaluate the best interests of children in a timely manner, is significantly curtailed by this state of affairs. Issues that are directly relevant to a child's best interests such as placement and contact must be the subject of individual interim applications made by parties. In most cases, such applications must be prepared, filed and served with time allowed to the other party to respond; they will usually not be heard orally without notice. It is very difficult for respondents to obtain legal aid to prosecute such applications in any event.

RECOMMENDATION

In urging all relevant stakeholders and the Court to look for solutions to these issues, ALSWA recommends closely considering an initiative introduced by the Children's Court of Victoria at Broadmeadows in Melbourne. The Court operates a Koori Care and Protection List once a week, which is managed by a Koori Services Coordinator employed by the Court.

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12 See Department for Child Protection and Family Support, *Annual Report 2015–2016* (2016) 30.

The President of the Children's Court of Victoria has directed that all protection cases concerning Koori children commence in this list. The model uses collaborative 'family group' conferencing in the early stages of proceedings with an emphasis on resolving issues, such as placement of and contact with the children, by agreement. The model is inclusive – it welcomes direct involvement of extended family members and representatives from Aboriginal agencies involved in service delivery relevant to the child protection concerns specific to the case. The Department is expected to send to the court a senior worker with the authority and expertise to quickly make decisions about the care of the children. Trained Koori mediators are available on the day of the list to assist in negotiations.

The Koori Care and Protection List is a dramatically different case management model from that which is currently used in Western Australia and one that, in ALSWA's view, the Department should be proactively seeking to be implemented as soon as possible. This innovative model promises to quickly put before a Court a comprehensive and balanced picture of each child's circumstances with input from the Department, family members, community members and relevant service providers and with a focus on resolving issues quickly rather than adjourning proceedings to enable various legal processes to play out over time. Such a model also represents another way of ensuring that the principles of self-determination and community participation for Aboriginal people are promoted and facilitated in a meaningful way.

In ALSWA's view, the introduction of such a model in Western Australia does not require any legislative reform. The existing powers in respect of the listing of and arrangements for pre-hearing conferences under s 136 of the CCSA are sufficient. The Court, in consultation with stakeholders, is at liberty to create and implement a case management process, employ an appropriate number of Aboriginal Services Coordinators and Aboriginal mediators, and to notify parties, stakeholders and service providers of the commencement and particulars of the new model.

Consideration should also be given to how, and the extent to which, the model can be introduced in the regional courts to maximise the benefits flowing to Aboriginal children and families.

In addition to the Koori Care and Protection List, the Children's Court of Victoria at Broadmeadows operates a second initiative being the Family Drug Treatment Court, described by the Court as follows:

> The Family Drug Treatment Court (FDTC) has been established as a three year pilot program in the Children's Court of Victoria. The aim of the FDTC is to:
> - help parents stop using drugs/alcohol; and
> - promote family reunification.
>
> The FDTC is chaired by a Children's Court magistrate and is supported by a multi-disciplinary team. The team comprises drug and alcohol clinicians and a dedicated social worker.
>
> The FDTC works with agencies providing services for parents in the program. They include:
> - residential treatment;
> - drug and alcohol counselling;
> - mental health counselling;
> - parenting programs; and
> - housing programs.

Professionals also work with children to help them with the journey to family reunification.[13]

Given the overwhelming prevalence of substance misuse issues in child protection cases, ALSWA recommends stakeholders seriously consider a similar pilot be adopted in Western Australia. Delegates from Western Australian service providers, including the Department, should study the Victorian initiative closely with a view to making submissions directly to the Children's Court for the introduction of a similar model for parents with substance abuse issues in protection proceedings.

As can be seen from the above examples, an opportunity exists for innovative, inclusive and collaborative case management methods to be introduced in parallel with the present review, and for therapeutic jurisprudence to be begin to play a more central role in the child protection jurisdiction in Western Australia. In ALSWA's view, judicial officers can also further specialise in child protection work by undertaking education in Aboriginal cultural identity and related issues and effective management of parents or caregivers with addiction and trauma issues.

2. Compliance with the Aboriginal and Torres Strait Islander Child Placement Principle

Background

In Western Australia, Aboriginal children are dramatically overrepresented in out-of-home care – some 53% of children under the care of the CEO are Aboriginal children. This is the highest proportion in Australia. In some areas of Western Australia, such as the East Kimberley, the proportion of children in care who are Aboriginal stands at 100%.

ALSWA submits that, on any view, this is an unacceptable situation. The number of Aboriginal children in care must be addressed by a focus on and investment in culturally appropriate prevention and early intervention strategies, coupled with genuine adherence to the Aboriginal and Torres Strait Islander Child Placement Principle ('the Child Placement Principle').

The Child Placement Principle was developed over 30 years ago 'from an understanding of the devastating effect of the forced removal of Aboriginal children from their families and communities, which created the legacy of what is now known as the Stolen Generations'.[14]

It has been observed that the Child Placement Principle is often misunderstood as being solely a hierarchy of placement options for Aboriginal children who are in out-of-home care. However, it has been argued that the 'history and intention of the Child Placement Principle is about keeping Aboriginal and Torres Strait Islander children connected to their family, community, culture and country'.[15]

> Placement in out-of-home care is one of a range of interventions to protect an Aboriginal or Torres Strait Islander child at risk of harm. The Child Placement Principle recognises the destructive and ongoing impact of policies and practices of assimilation and the separation and removal of Aboriginal and Torres Strait Islander children from their parents and communities. It recognises that Aboriginal and Torres Strait Islander people have the knowledge of each child staying connected to their family, community, culture

13 See http://www.childrenscourt.vic.gov.au/jurisdictions/child-protection/family-drug-treatment-court. Other examples of similar therapeutic models exist including, for example, the Family Drug Court of Arizona in the United States.

14 Arney F et al, *Enhancing the Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Policy and practice considerations* (Australian Institute of Family Studies, Child Family Community Australia, Paper No 34, 2015) 2.

15 Tilbury et al, *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and core elements* (SNAICC, 2013) 7.

> and country. It promotes a partnership between government and Aboriginal and Torres Strait Islander communities in decision making about children's welfare, in order to ensure that the connections are understood and maintained. 16

The Child Placement Principle should therefore be understood and applied broadly. For example, in addition to guiding decisions about the placement of children, it should also underpin decisions about providing early intervention and support to families at risk, decisions to support parents to prevent and enable reunification, and decisions about the nature and frequency of children's contact with parents, siblings and extended family.

Current Compliance

It was reported in 2014 that across the nation, '68% of Aboriginal and Torres Strait Islander children in out-of-home care were placed with either relatives/kin, other Indigenous caregivers, or in Indigenous residential care (that is, in placements in the first three orders of preference reflected in the placement hierarchy).17

However, as the Productivity Commission has observed:

> *The indicator does not reflect whether the principle's hierarchy of placement options was followed in the consideration of the best placement for the child, nor whether appropriate Aboriginal and Torres Strait Islander individuals or organisations were consulted.*18

In Western Australia in 2014/2015, 66% of Aboriginal children under the care of the CEO were placed in one of the first three options under the Child Placement Principle, and this percentage remained unchanged in the following year. At 30 June 2016, according to the Department's data, 843 Aboriginal children were living in placements with non-Aboriginal foster carers or in residential care homes in Western Australia.19

It is important to also note that overall compliance with the Child Placement Principle has been decreasing (in 2013-2014 the figure was 68%, in 2012-2013 it was 69%, in 2011-2012 it was 71% and in 2010-2011 it was 73%). The Department explains this decrease by reference to the ever-increasing number of Aboriginal children coming into the CEO's care.20 ALSWA notes that the compliance rate was 83% in 2005 and 85% in 1998.21

ALSWA highlights that, in any event, the current measure of compliance with the Child Placement Principle is deficient because it only indicates what proportion of Aboriginal children are placed with a family member, an Aboriginal person in the child's community or another Aboriginal person. It provides no information about the Department's efforts to investigate all possible avenues for placement of a child with a higher placement option in the hierarchy. More specifically, there is no reporting of compliance with the requirement to consult with Aboriginal people under s 81 of the CCSA.

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16 SNAICC, *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements* (June 2013) 3.

17 Arney F et al, *Enhancing the Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Policy and practice considerations* (Australian Institute of Family Studies, Child Family Community Australia, Paper No 34, 2015) 6.

18 Productivity Commission, *Report on Government Services* (2016) [15.23].

19 Department for Child Protection and Family Support, *Annual Report 2015–2016* (2016) 15.

20 Department for Child Protection and Family Support, *Annual Report 2014-2015* (2015) 13 & 51.

21 Western Australia, Parliamentary Debates, Legislative Assembly, 14 September 2006, 6054 (Ms SM McHale).

Current Regime

SNAICC has observed that the principle of participation in decision-making is recognised in the CCSA (ss 14 and 81) but that 'in practice this does not occur. Aboriginal and Torres Strait Islander agency involvement is not required in significant decisions such as placement decisions or judicial decision-making'.[22]

ALSWA notes that guidelines for the application of the Child Placement Principle appear in the Department's Casework Practice Manual. The Manual provides that:

> Child protection workers must consult with an Aboriginal practice leader (APL) or other relevant Aboriginal officer in their district when making a decision to place an Aboriginal child in out of home care.
>
> In some instances, sensitivity and kinship relationships may influence the involvement of the APL. In these situations, it may not be culturally appropriate for the APL to be involved in the placement of the child. In these circumstances, it is advised that child protection workers consult and seek advice from other relevant Aboriginal officers.
>
> In consultation with the APL, an Aboriginal organisation may be identified for consultation and advice.
>
> The consultation process is to provide child protection workers with information related to:
> - the child's family
> - extended family
> - kinship relationships
> - the child's cultural identity and skin group
> - local culturally sensitive supports and services, and
> - other important information.[23]

There are concerns with the vagueness of the above guidelines including the meaning of 'consult with', the extent to which any 'consultation' must actually be incorporated into final care arrangements for a child, and the meaning of 'other relevant Aboriginal officers'.

Further as referred to above, ALSWA's observation is that, in practice, the principal method of consultation is with an APL or another Aboriginal staff member of the Department. The guidelines outlined above actually embed this approach.

ALSWA has rarely seen evidence of meaningful consultation with external Aboriginal people or organisations. In fact, ALSWA lawyers recently became aware of a case where an external Aboriginal consultant provided a written report for the Department in relation to placement of a young Aboriginal child with non-Aboriginal general foster carers. This was the first evidence of genuine external consultation seen by ALSWA in years.

The current system has in effect created an environment in which the Department, in most cases, simply relies on itself to confirm the validity of its own decisions about Aboriginal children, rather than proactively seeking independent input and guidance to incorporate into its decision-making. This is a concern for the quality and independence of and transparency and accountability in the Department's decision-making.

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22 Family Matters, *Western Australia Issues Paper* (2015) 11.
23 Department for Child Protection and Family Support, *Casework Practice Manual.*

ALSWA considers that internal consultation within the Department is not sufficient to ensure that the Child Placement Principle has been properly followed. Wider consultation with external Aboriginal organisations, specialist service providers and community members is essential to ensure that all information about a child's extended family and community is identified and proper consideration of placement options within the child's family and/or community is undertaken. ALSWA's concern is that without this, the cultural identity and security of Aboriginal children cannot hope to be properly addressed and provided for, and the mistakes of the past so starkly illuminated by the *Bringing Them Home* report will continue.

Cases involving the Child Placement Principle

Case Study 4 – Child Placement Principle

ALSWA acts for the father of a two-year-old child, in a case that is currently before the Court. The father and the mother are both under the age of 18 years. The parents' relationship was not stable due to various factors including their age and the fact that they did not consistently live together. The respective families reside in a major regional town some distance from Perth. The mother is a child in care herself.

Due to the relationship breakdown, substance use issues on the part of the mother, and an incident of family violence in which the father was the perpetrator, the Department placed the child into care as an infant. The Department elected to place the child with the mother's carer, who is also the parent of one of the mother's friends. The carer is a non-Aboriginal foster carer. It is not known what steps the Department took, at the time of intervention, to identify and pursue placement options for the child with either the maternal or the paternal family. The evidence indicates that the Department did not engage in any lengthy or detailed investigations in this regard.

The father, with assistance and advocacy from ALSWA, nominated his mother and aunt as relative carers. The Department considered both these options as being unsuitable due to family violence concerns. By this time the father had dealt with the consequences of the family violence incident and had moved away to live with his grandparents in another town several hours away. This move enabled him to complete school and live in safe and stable home, which was something the Department had requested of him. The mother has failed to engage with the Department over a long period and has absconded from her placement numerous times. The father, while young and inexperienced, is devoted to the child and committed to being a good parent. He is now in full time work.

The father's grandparents are both Aboriginal people who maintain a safe, stable home free of any child protection concerns. In fact, years earlier, the Department had placed a cousin of the subject child with the grandparents. That child, now aged 6, still lives with the grandparents. In or about September 2016, ALSWA wrote to the Department seeking that the grandparents be assessed as relative carers and that they be confirmed as the placement for the child for the duration of any protection order. Seven months later, with the child still in the same placement with a non-Aboriginal general carer – a placement the mother herself has repeatedly absconded from – the Department has yet to make any decision and has only just commenced its carer assessment of the grandparents.

There is no evidence that any external Aboriginal person or agency has been involved at any step of the decision-making around the subject child in this case.

Case Study 5 (CEO DCP v BW[24]) Child Placement Principle & Aboriginal Practice Issues
In this case, ALSWA represented the kinship grandparents of a child who, at the time of trial, was aged 9 years. The kinship grandparents sought the child be returned to their care while the Department pursued continuation of an existing placement of the child with a general foster carer, until the child turned 18. The matter had a lengthy factual history and had been the subject of significant litigation.

The relationship between the grandparents and the Department was dysfunctional and marked by mistrust, hostility and lack of cooperation. The Department accused the grandparents of, among other things, failure to engage and failure to disclose information. The judgment describes the full factual background and course of proceedings.

The Court refused the Department's application for a protection order (until 18); the Court instead ordered that the grandparents be invested with parental responsibility for the child and a protection order (special guardianship) was made.

Relevantly, the Magistrate made a number of remarks in respect of the Department's approach to and management of the cultural issues, notably:

> Mr [W] said that there are no indigenous caseworkers in the Fremantle District Office, a fact that I find almost incredulous. Further, he implied that it would be near impossible to have successfully asked for an indigenous caseworker from another District Office to be allocated to the case. He said that having an indigenous caseworker working with [the grandparents] may or may not have made a difference in this particular case. In my view, all of the evidence ... suggests that it would have made a great difference and that involvement should have been at the very earliest stage of the Department's intervention in this family's life.[25]
>
> In my view ... the extremely limited and extraordinarily peripheral involvement of [Mr C] as an indigenous advisor and at such a late stage of proceedings coupled with [Mr W's] evidence regarding the unavailability of indigenous caseworkers is indicative of the Department's overall inability to see the importance of indigenous inclusion on decision making processes in this case.[26]
>
> I accept that many of the case workers in this case have had experiences in working with indigenous communities but that does not overcome **the need to place indigenous workers, their expertise in engaging with indigenous families, their perspectives and cultural knowledge at the very centre of the decision making process.**[27]
>
> Further, [Mr W's] evidence that there are no indigenous caseworkers in the Fremantle District Office and that there is no capacity within the Department to access indigenous caseworkers from other District Offices suggests **a systemic failing that needs to be addressed on an urgent basis. Alternatively, organizations such as Djooraminda must be given greater capacity to become involved in case management much earlier in proceedings.**[28]

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24 [2011] WACC 10
25 Ibid [68].
26 Ibid [77].
27 Ibid [79].
28 Ibid [241] (emphasis added).

In the almost six years since this decision was handed down, ALSWA has not observed any actions taken by the Department that have significantly addressed the shortcomings identified by the Court around the Department's approach to engagement with Aboriginal families.

RECOMMENDATIONS

ALSWA submits that the legislative provisions designed to give effect to the Child Placement Principle require significant strengthening and that changes should ensure that the present system of largely internal consultation, and of the Department's own Aboriginal Practice Leaders 'signing off' on placement arrangements, is abandoned.

First, s 12, which actually sets out the Child Placement Principle, requires amendment. It should be clear that the principle *must* be applied at every step of decision making around the placement of Aboriginal children, both by the Department and the Court. In Case Study 3 above, one of the issues the Court was required to decide on an interim basis was placement of the child. The Magistrate's view was that the Court was not required to have regard to the Child Placement Principle at the interim hearing stage. ALSWA fundamentally objects to such a situation on the basis that it curtails the Court's ability to evaluate the child's best interests. Accordingly, any ambiguity about the type of arrangement, decision or order that the Principle applies to should be removed.

Further, the reference in existing s 12(2) to a placement being 'otherwise practicable' should also be removed because, in ALSWA's experience, this can be used to suggest that a placement is not practicable because the Department claims it cannot access or mobilise sufficient resources for the arrangement.

Accordingly, the first part of s 12(2) should be amended to read:

> *(2) In the making of any decision or order under this Act about care arrangements for an Aboriginal or Torres Strait Islander child, the principle which must be observed is that any placement of the child must, as far as is consistent with the child's best interests, be in accordance with the following order of priority –*

Curiously, s 61(4), which relates to protection orders (special guardianship), contains mandatory language expressly directing the Court to have regard to the Child Placement Principle in assessing the suitability of a proposed special guardian. This specific wording is not found elsewhere in the CCSA. The recommended change above would ensure that the Child Placement Principle is a central consideration at any stage of decision-making.

Section 12(2)(d) should also be amended to further reinforce the position that placement of an Aboriginal child with a non-Aboriginal carer is a genuine last resort, and where such a placement does proceed, the carer should be compliant with the suggested revised carer competencies proposed above. The subparagraph (d) should be amended to read:

> *(d) where no other option pursuant to subparagraphs (a) to (c) of this section is available, placement with a person who is not an Aboriginal person or a Torres Strait Islander but who fulfills the competencies required by the regulations in respect of the care of Aboriginal and Torres Strait Islander children.*

In conjunction with the recommended amendments to s 12, s 81 must be significantly reformed in order to combat the concerns described above around the Department's system of internal consultation.

It is recommended by ALSWA, that s 81 be redrafted and that the model which should be adopted in Western Australia should be informed by that which is used in Victoria in respect of the placement of an Aboriginal child with a non-Aboriginal carer. In the *Children, Youth and Families Act* 2005 (Vic), an Aboriginal child cannot be placed permanently with a non-Aboriginal carer unless certain conditions – set out in s 323 – are met. The conditions include:

- the provision of a report from the child protection authority certifying that no suitable Aboriginal carer can be found; and

- a requirement for an independent report to be provided from an Aboriginal agency recommending the making of the order.

A revised version of s 81 should contain similar conditions, to apply to any decision to place a child with a non-Aboriginal carer. Both of the relevant reports would need to be provided to the parents and their advocates. All reports should also be accompanied with the most accurate possible genogram (showing traditional family and kinship relationships) in respect of the child.

Children from regional areas should be further protected with an additional requirement that, where a placement is proposed to be made away from the child's country, the impact of this and how it will be mitigated should also be meaningfully addressed in the relevant reports.

It is further recommended that all of the above requirements should equally apply to any application for the making of a protection order (special guardianship) in favour of a person who is not related to the subject child, irrespective of the propose special guardian's ethnicity and cultural background.

Finally, ss 81(b) and 81(c) – which leave the question of the 'relevant knowledge' possessed by Aboriginal persons or agencies entirely up to the opinion of the CEO – is paternalistic, inappropriate and not consistent with the principles of self-determination and community participation. In the existing section, there is no pathway for review of the CEO's 'opinion' or need to explain how the opinion was formed, nor is there any mechanism to resolve a significant difference between the opinions of the CEO and the Aboriginal person or agency, where this might be critical to the question of a child's best interests. This situation should be corrected as set out above in relation to s 81 of the CCSA.

3. Written Proposals and 'Cultural Plans'

Written Proposals – Section 143

ALSWA has previously made submissions that reform around the content of Written Proposals provided to the Court pursuant to s 143 of the CCSA is sorely needed. ALSWA's position on this issue remains unchanged. No meaningful change in the Department's practice has been observed in recent years.

ALSWA's views about the Department's current approach to Written Proposals is informed by examples taken from many hundreds of cases ALSWA has been involved in since the CCSA commenced operation. Parents are frequently presented with Written Proposals that are brief, lacking in detail, lacking in direction and plans, and which do not explain how the child's best interests are met by the particular arrangements contained in the Proposal.

Specific examples have included:

- Written Proposals which fail to make any mention of one of the parents, where that parent is obviously participating in the protection proceedings and is legally represented.
- A series of Written Proposals in respect of an Aboriginal sibling group that failed to mention that the children were Aboriginal at any point in the document.
- Numerous Written Proposals which failed to include any specific plan for contact between the child and one of the parents, where there was no opposition to contact taking place.
- The majority of Written Proposals containing no plans for children to have contact with extended family members.
- No Written Proposal ever observed by ALSWA has included any content demonstrating how the Department has followed and applied the principles of self-determination and community participation in arriving at a view about children's best interests.
- The majority of Written Proposals failing to include any defined or clear plan for the child to experience, be immersed in, properly learn and remain connected to their culture, country and community of origin.

This approach creates difficulties for parents and families in understanding and accepting why the Department may have taken a certain position. For legal representatives, advising parents about the adequacy and appropriateness of a Written Proposal is much more difficult, which in turn can cause cases to become more protracted and more likely to go to a trial.

However, what is most concerning is that poorly drafted Written Proposals do not enable the Court to be provided with a comprehensive and carefully prepared statement of all of the evidence and information that is relevant to the legislative regime when determining the outcome that is in the best interests of the child.

In this regard, ALSWA notes a recent interim decision by a Magistrate in a regional court who refused to make a protection order, even with the consent of all parties, on the basis that the Department had in effect failed to address the factors and considerations that would have enabled the Court to come to a view about best interests.

RECOMMENDATION

ALSWA therefore submits that the Department must overhaul its approach to Written Proposals. ALSWA recommends that all Written Proposals should:

- explain to the Court how and why the arrangements proposed for the child are in the child's best interests, by reference to each individual 'best interests' consideration set out in ss 8(1)(a) to 8(1)(m);

- in respect of any Aboriginal child, explain to the Court how the principles set out in ss 12, 13 and 14, and the requirements of s 81 (as amended according to ALSWA's recommendations above), have been adhered to and fulfilled;

- in respect of any Aboriginal child proposed to be placed with a non-Aboriginal carer, certify that the carer possesses the competencies (as amended in accordance with ALSWA's recommendations above) in the regulations;

- in respect of any Aboriginal child, contain an extensive and detailed cultural plan and genogram, particularly where it is proposed the child should be placed with a non-relative carer or away from country;

- explain what independent Aboriginal persons or agencies have been involved in planning for the child and detail the role they have played;

- where reunification of children with a parent is specifically not supported by the Department, the Department should in the Proposal provide a comprehensive explanation and analysis of all matters considered by the Department in coming to the view that reunification will never be a possibility; and

- even where the Department seeks a protection order (until 18) and long-term out-of-home placement, the Proposal should still contain a plan for reunification with one or both parents and/or family of origin. This is simply because events happen – for example, the sudden incapacity or death of a carer – and the Department may find itself having to choose between placing a child back with a parent or family member, and moving the child into the care of a stranger.

Cultural Plans

In relation to cultural issues, it is ALSWA's experience that Written Proposals tend to contain brief references to a child's Aboriginality and simply state that the child's Aboriginality has been taken into account. Rarely does the Department set out how a child will actually be immersed in and given meaningful experience of the particular cultural traditions and practices relevant to that child's family and community of origin. The only time ALSWA has observed more detailed cultural plans is when a case reaches the trial phase.

Cultural plans almost never contain any expert or independent evidence addressing an individual child's specific needs in respect of cultural identity, safety and security. The capacity and genuine willingness of individual carers to meet cultural needs is rarely mentioned. The extent to, and the ways in, which the Department has followed the principles of self-determination and community participation are not usually addressed.

ALSWA's experience of cultural plans prepared by the Department for Aboriginal children placed with non-Indigenous carers, is that they are generally brief, vague and lack detail in respect of how culture will be learned and practiced, by whom it will be taught, and how. It is common to see cultural plans containing no reference to the particular cultural groups of the parents and families and no mention of, for example, their specific language(s), dreaming, songs or other specific customs and traditions.

Among the clearest examples of poor or obviously inadequate cultural plans are the following cases:

- In a Written Proposal for an Aboriginal child placed with non-Aboriginal foster carers, the only mention of any plan about the child's 'culture' consisted of a suggestion that the carers could attend a university course to 'study cultural issues'.

- Two Aboriginal boys (aged 6 years and 8 years) were placed with their maternal non-Aboriginal grandmother. The Department sought protection orders (until 18) in respect of both children. The Written Proposal submitted to the court contained a section headed '*Cultural*' for each child. For each child ('C') this section contained only the following text: 'C is considered of Aboriginal origin and the Aboriginal Practice Leader is consulted on plans for C'.

ALSWA has seen cases where the contact between children in care and their parents and extended family is extremely limited (once or twice a year). In other cases, Aboriginal children are living in residential care facilities (or 'group homes') with no opportunity to spend time being cared for by extended family. Now, as has already been noted in this submission, ALSWA is observing a disturbing trend towards automatic reduction of contact between children on long-term protection orders and their families of origin, to only once every three months for several hours, supervised by Department workers. Such arrangements have no hope whatsoever of providing children with a real understanding and experience of, and connection to, their culture.

The Department has formulated and put forward the examples referred to above as arrangements that the Department claims will ensure children have a meaningful experience of and connection to their culture of origin. ALSWA rejects this. It has long been known that culture can only be meaningfully imparted in a lasting manner, through the immersion of a child in that culture with the persons who practice and live that culture every day, not through instruction provided by strangers.

In *CEO DCP v BN*,[29] in the course of considering cultural plans for the child, the Magistrate remarked:

> ... none of the evidence presented for [the Department] adequately addressed the concept of a 'cultural plan' for the Child. **Indeed, most witnesses for the Department struggled to really define that concept and it appears that the 'cultural plan' was approached on the basis that it is an addendum to the overall case management rather than having a real sense of centrality.**[30]
>
> The Department should, in future, have greater recourse to the experts in defining and developing a 'cultural plan', those experts being members of the indigenous community themselves.[31]

29 [2011] WACC 10.
30 Ibid [237] (emphasis added).
31 Ibid [238].

In ALSWA's view, these remarks accurately encapsulate the Department's approach to cultural planning for Aboriginal children in the majority of cases. ALSWA has observed no appreciable improvement in this situation since the *BN* decision almost six years ago. ALSWA considers the Department's overall approach to be inadequate and often tokenistic, and the need to protect and promote the cultural identity and security of Aboriginal children demands change.

RECOMMENDATIONS

For all of the above reasons ALSWA recommends that s 143 of the CCSA should be amended. First, s 143(1) should be amended to read as follows:

> *(1) In this section, **proposal** means a document that, to the satisfaction of the Court –*
>
> *(a) outlines the proposed arrangements for the wellbeing of the child if a protection order (supervision) is made or extended in respect of the child;*
>
> *(b) outlines the proposed arrangements for the wellbeing of the child, including a plan for reunification of the child with one or both of the child's parents, if a protection order (time-limited) or protection order (until 18) is made or extended in respect of the child;*
>
> *(c) addresses the matters set out in subsections 8(1)(a) to 8(1)(m) inclusive, to the extent that those matters are relevant to the best interests of the child;*
>
> *(d) where the child is an Aboriginal or Torres Strait Islander child, addresses the CEO's adherence to the principles set out in sections 12, 13 and 14, and to the provisions of section 81;*
>
> *(e) where the child is an Aboriginal or Torres Strait Islander child, explains how the child's connection to culture, and cultural identity, will be supported, promoted and developed.*

The model provision above assumes that ALSWA's proposed amendments to ss 12, 13, 14 and 81 discussed in this submission are in force.

In order to give proper effect to a new regime for Written Proposals, and to ensure that the Department provides comprehensive and detailed proposals to the Court, an amendment to s 144 should also be made. ALSWA recommends that s 144(1) should be amended to read:

> *(1) The Court must not make or extend a protection order unless it is satisfied that the CEO has complied with all relevant provisions of section 143(1).*

4. Changes to Protection Orders by Type

Protection Order (Supervision)

ALSWA considers that the preservation of the family unit – as far as is safely achievable – is in the vast majority of cases vitally important to a child's long-term wellbeing. Generally, the separation of children from their family is highly traumatic, with lifelong ramifications. The entire community should regard separation as the genuine last resort, when no other option exists.

A protection order (supervision) enables children to live with one or both parents and have access to various forms of support provided by the Department or allied service providers. In ALSWA's view, this type of protection order is well suited to many child protection cases and it is currently under utilised.

A significant concern, however, is that pursuant to s 49(4) of the CCSA the Court cannot extend a protection order (supervision) more than once. ALSWA submits that this restriction is inappropriate and may be contrary to the best interests of children in some cases. ALSWA's view is that there should not be an artificial time limit imposed upon a child being able to live in his or her family home with ongoing supports.

Whether or not the Court should extend protection order (supervision), and for what period, should be at the discretion of the Court based on a child's best interests alone. That is to say, if it is in the child's best interests to remain living at home, but with supports in place, then that is the appropriate outcome. Section 53 of the CCSA provides that while 'a protection order (supervision) is in force in respect of a child the CEO must ensure that the child and the child's parents are provided with any social services that the CEO considers appropriate.' The Department should provide the social services (or 'family support) that the family needs and this function should continue for as long as the family requires support.

RECOMMENDATIONS

Accordingly, ALSWA recommends that s 49(4) of the CCSA (which provides that a protection order (supervision) can only be extended once) should be repealed.

Furthermore, there is constant pressure on the social services that are commonly required for parents in the child protection jurisdiction. Such services include in-home support services, counselling and therapy, addiction treatment services and family violence services. In addition, housing services and access to housing is an area of much need. In many cases, funding for these types of services has been reduced or redirected. These pressures have resulted in much longer waiting times for access to services and, hence, delays in successful completion of programs which may be required of parents by the Department. This directly affects the ability of parents to meet outcomes within prescribed timeframes, and the situation is worsening.

In recognition of the difficulties faced by parents in accessing appropriate support services, ALSWA is firmly of the view that the current two year limit on protection orders (supervision) prescribed by s 48(2) should be increased to at least three years. This is a more realistic period and it will ensure that fewer parents reach the end of an order being unable to satisfy the Department's requirements because of scarce, delayed or overburdened services and supports. It is clearly not in the best interests of

children that their opportunity to live at home with their parent(s) is lost solely because of the expiry of an unreasonably short time limit.

Further, ALSWA considers that the expanded definition of 'parent' proposed earlier in this submission would expand the options available to the Department to place Aboriginal children with other persons from their family networks, thereby increasing the utility of the protection order (supervision).

Protection Order (Time-Limited)

In ALSWA's view, the major issues with protection orders (time-limited) are:

- that in many cases the Department's caseworkers appears to perceive a protection order (time-limited) as a barrier to children living with their parents; and
- the protection order (time-limited) regime is now afflicted with the same problems around scarce and delayed services and supports, as are described immediately above in the discussion regarding protection orders (supervision).

In relation to the first issue, ALSWA has observed numerous cases where children could reasonably remain with their family with appropriate support to address child protections concerns; however, these children are taken into care and an application is made for a protection order (time-limited).

One category of such a case is where some members of a sibling group are in care while others from the same sibling group remain living in the home with one or both of the parents. There are numerous examples of this and several are current cases in which ALSWA is involved. In these types of cases, the Department's position is confusing because it insists that the children who are in care are in need of protection while allowing other children to live in the home relatively free of monitoring.

RECOMMENDATIONS

In order to correct this aberration, ALSWA recommends that s 54 of the CCSA should be amended by adding to it an additional subsection as follows:

> *(3) Subject to this Act, a protection order (time-limited) does not prevent the CEO from placing a child into the care of a parent of that child.*

In relation to the second issue, in accordance with the submissions above regarding amending the maximum duration of a protection order (supervision), it is recommended that the maximum duration of a protection order (time-limited) be amended to three years (s 56(4)(a)).

Protection Order (Special Guardianship)

ALSWA refers to the submissions above with respect to adherence to the Aboriginal Child Placement Principle and proposed legislative amendments designed to improve processes and transparency around

the application of the principle. The proposed amendments to ss 12 and 81 should apply to the making of any protection order (special guardianship) for an Aboriginal child where the proposed special guardian is not a biological or kinship relative of that child (regardless of the person's ethnicity and cultural identity).

RECOMMENDATIONS

In order to ensure the position is clear in the legislation, firstly, s 61(3) should be amended by adding to the beginning of the provision the words, 'Except where the child is an Aboriginal or Torres Strait Islander child…'

The above amendment would necessitate amendments to s 61(4), and the suggested replacement subsection is as follows:

> *(4) If the child is an Aboriginal or Torres Strait Islander child, the Court must, in assessing the suitability of the proposed special guardian for the purposes of subsection (2)(b), be satisfied that the Department has adhered to the principle set out in section 12 and has complied with the provisions of section 81.*

Under this model, the Department would already have been required to consult as widely as possible with independent Aboriginal persons or agencies, and obtain reports from those persons or agencies, with respect to the suitability of the Department's proposed arrangements for the child. Accordingly, the Court would have independent material before it upon which to make a finding that the making of a protection order (special guardianship) is in the best interests of the child.

In respect of protection orders (special guardianship), ALSWA is also concerned that there is no restriction in the CCSA on a special guardian removing a child from the jurisdiction. Although they are rare, ALSWA is aware of cases where children in the care of special guardians have been removed permanently from Western Australia, with the direct result that thereafter no contact occurs between the children and their families of origin, unless the special guardian brings the children to Western Australia for that purpose.

Such conduct is very concerning as it threatens a child's ongoing connection to their family of origin and may affect healthy identity formation and their sense of place and belonging in the world. This is particularly so for Aboriginal children who are not living with close family. In ALSWA's view, the CCSA should provide that that a special guardian may not remove children from the jurisdiction to live elsewhere without an order from the Court permitting this to happen.

ALSWA recommends a straightforward amendment to s 63 and it should take the following form (with existing s 63(2) to be renumbered as s 63(3)):

> *(2) A protection order (special guardianship) must include the condition that the child may not be permanently removed from Western Australia by or on behalf of the special guardian without an order of the Court expressly permitting such removal.*

Protection Order (until 18)

From its extensive and ongoing work with Aboriginal parents and families, ALSWA holds significant concerns in respect of protection orders (until 18) (or, 'long-term order'), including:

- a protection order (until 18) is the primary means by which a child can be kept in out-of-home care by the State – and therefore divest the parents of parental responsibility – for the duration of that child's entire childhood;

- there is an almost universal view within the Department that, once a protection (until 18) is made, this should in and of itself spell the end of any reunification plans and prevent a child from ever being returned to live in his or her family home;

- the Department's increasing propensity for seeking protection orders (until 18) in respect of extremely young children, many of whom have come to the attention of the Department for the first time;

- that, as discussed earlier in this submission, long-term or 'permanent' out-of-home care arrangements are frequently inconsistent with the communal child-rearing practices and complex family and kinship systems of Aboriginal people.

ALSWA submits that the view which must be engendered among all relevant stakeholders and the Court is that the protection order (until 18) is the instrument of *genuine last resort* and only to be considered when it is obvious from convincing and independent evidence that parents should be divested of responsibility for their own children.

In ALSWA's view, there are very few, if any, interventions in the private lives of individuals that can be said to be more grave or serious. The protection order (until 18) should be treated accordingly and the CCSA should be urgently amended to reflect this approach.

RECOMMENDATIONS

First, in line with the submissions above regarding protection orders (time-limited), ALSWA recommends that a new subsection (3) should be added to s 57, as follows:

> *(3) Subject to this Act, a protection order (until 18) does not prevent the CEO from placing a child into the care of a parent of that child.*

Secondly, ALSWA recommends the introduction of additional restrictions on the Department applying for protection orders (until 18), and on the Court granting them. The 'bar', so to speak, should be set at an appropriately high level. The increasing practice of long-term orders being sought for very young children should be addressed, with the Department only permitted to pursue a long-term order in respect of a young child where leave of the Court is first obtained.

ALSWA recommends that s 58 of the CCSA should be amended to including the following proposed restrictions:

- an application for a protection order (until 18) may not be made in respect of any child under the age of five years without leave of the Court first being obtained by the Department ("application for leave");

- an application for leave must be supported by evidence demonstrating that special circumstances exist justifying the Department seeking a long-term order in respect of the child;

- an application for a long-term order must not be made in respect of any child unless reunification has previously been genuinely attempted, and not been successful, at least once;

- where the child is an Aboriginal child, the Court must not make a protection order (until 18) unless it is satisfied that the Department has adhered to the principles set out in ss 12, 13 and 14 and has complied with the provisions of section 81 (as amended in accordance with ALSWA's proposals above).

In addition to the above orders, the Department is vigorously encouraged to consider, in every case, whether and to what extent parenting orders made under the *Family Law Act* 1975 (Cth) ('FLA') or the *Family Court Act* 1997 (WA) ('FCA') could provide an appropriate solution to its child protection concerns. ALSWA recommends that the Department review all cases periodically to determine whether circumstances have changed such that parenting orders may in fact be a more appropriate solution than a protection order. All relevant Department workers should be fully educated in the parenting orders regime and the types of orders available pursuant to the FLA or the FCA.

ALSWA endorses Legal Aid WA's submissions and proposals in respect of this issue.

5. Final Orders and Enforcement

Conditions included in Final Orders

Pursuant to s 133(2), the Court has discretion to make interim orders with respect to a range of matters relevant to or affecting the wellbeing of a child the subject of protection proceedings. Importantly, these matters include placement of the child and contact the child may have with parents, siblings and other significant persons.

However, in making final orders at the conclusion of the trial phase of proceedings the Court is not able to make orders in respect of the same range of significant matters. The Court is limited by the legislation to determining whether or not a child is in need of protection (s 28) and, if so, whether to make a protection order and what type of protection order to make (s 45).

In ALSWA's view, this is not compatible with a true 'best interests' jurisdiction. A comprehensive evaluation of all matters relevant to and necessary to determine what overall outcome is in the best interests of a child includes such vital considerations as ongoing contact and placement, supports for the child, and other conditions the Court may seek to impose (for example, a parent to complete certain therapy or attend for drug screening). All of these considerations are fundamentally important to any

care arrangements as a whole and, therefore, should be not only taken into account in determining best interests but should also be capable of being the subject of an order.

RECOMMENDATIONS

ALSWA therefore recommends the position in respect of final orders be reformed and it is suggested this be achieved by making amendments to the CCSA to allow the Court, when making a protection order, to impose conditions with respect to matters such as placement and contact.

The reform could be effected by adding further provisions to s 45 enabling the Court to include in any final protection order, conditions relating to the matters set out existing paragraphs (a), (c), (d), (f) and (g) of s 133(2), and add that the Court may make a condition for reunification to occur. The legislation should also provide that any condition in a protection order takes effect as an order of the Court.

Enforcement of Orders and Case Plans

One of the primary grounds for ALSWA's position above relates to the enforceability of contact and other arrangements after a protection order has been made and the protection proceedings are no longer on foot.

The current system for review and enforcement of arrangements in the period after a protection order has been made is severely deficient from the perspective of parents or other individuals who may have been parties to the proceedings.

Individual parties' rights of review in respect of placement and contact arrangements are restricted to the following options:

- A care plan review pursuant to s 90, which is an internal process managed solely by the Department, with no requirement for any independent person to be involved. In such a case, often the caseworkers and team leaders with longstanding involvement in a case will be informing the review process and so, in effect, are simply reviewing their own decisions.

- An application to the Case Review Panel (ss 92 and 93). The Case Review Panel is not an independent decision making body but rather a body established and funded by the Department itself, whose members can be removed and replaced by the CEO of the Department. The Case Review Panel only has the power to make recommendations in respect of a care planning decision. The CEO is then at liberty to confirm, vary or reverse the care planning decision or substitute another care planning decision (s 93(6)). Given the lack of independence, it is difficult to see how this model offers parents and other applicants seeking review, any genuinely objective review at all. ALSWA has recently seen this lack of independence at work first hand. The Case Review Panel refused to make any change to a care planning decision following an application by a kinship carer. In its reasons for decision, the Panel referred to documents it had considered in respect of the child including school records and evidence from psychologists. The Panel suggested that it had considered this material in reaching its conclusions. When the material was requested from the Department – to enable ALSWA to advise the carer on the merits of

seeking further review of the decision – the Department refused to release any of the material on the basis that s 241 prohibited its release.

- A final right of review lies to the State Administrative Tribunal ('SAT') pursuant to s 94. While this pathway at least offers independence from the Department, there are concerns that the SAT does not have specialised knowledge in child protection and child welfare work, does not have any Aboriginal members to decide matters relating to Aboriginal children, and is restricted to dealing with matters contained within care plans.

Perhaps most worrying is that there is no automatic or clear right to review the operation of, and the Department's compliance with, plans and other matters set out in a Written Proposal provided pursuant to s 143. Under the current regime, the Written Proposal is a key document because it contains particulars of plans and decisions made by the Department including placement and contact arrangements.

The ability to enforce proposals for contact is problematic. If the proposal provides for contact to occur but does not specify the frequency and duration of contact, it may be impossible to enforce due to the absence of these details. This is a significant concern as contact after an order is made may be reduced or substantially varied by the Department without reference to the parent or person exercising that contact. There is also no consequence for the Department if it fails to comply with an obligation to facilitate contact, or to provide compensatory contact where a visit does not proceed, even when the Department is at fault.

RECOMMENDATIONS

The adoption of the model proposed in the preceding section – pursuant to which the Court would effectively make final orders ('conditions') in respect of contact, placement and other matters – should be accompanied by the inclusion in the CCSA of a right for all parties to apply to the Court to enforce a condition in a protection order (whether it relates to placement, contact, reunification or another matter). It would be just and expedient for such applications to be listed before the trial Magistrate, where possible. The right should apply to any condition that is included in any form of protection order. ALSWA strongly recommends the CCSA be amended to this effect.

ALSWA otherwise recommends:

- In any review of a care plan pursuant to s 90 in respect of an Aboriginal child, an independent Aboriginal person or agency (identified in accordance with the 'recognised entity' model outlined earlier in this submission) appropriate to the case must provide input into the review.

- If the recommendations above are implemented, the Case Review Panel should be abolished and consideration should be given to redirecting any savings to increase the resources of the Court to deal with enforcement applications.

- Where an applicant for a care plan review is aggrieved by the CEO's decision, a right to review that decision lie directly to the SAT.

6. Additional Matters

Reports to the Court under s 133(2)(c)

Pursuant to s 133(2)(c), the Court has power to make an interim order 'that the child is to be placed with a person approved by the Court following a report, whether oral or written, from the CEO as to the person's suitability'.

ALSWA has represented parents or caregivers in numerous cases where a party to the proceedings requests that the Court consider making an order for such an arrangement. In most matters, the Department will provide a report in some form; however, in some cases the Department will refuse to provide any report. This can have the effect of preventing the Court from endorsing an interim placement arrangement where, on objective evidence, the arrangement appears appropriate even though the Department does not support it.

The current wording of the provision is to the effect that the Department, through the CEO, should control the flow of information to the Court in respect of the suitability of an individual as a placement option. In ALSWA's view this a fundamentally unfair and unjust position and creates a needless inequality between parties to protection proceedings.

The Court should be at liberty to receive under s 133(2)(c) any relevant report, or reports, from independent persons or agencies having expertise or understanding of matters relevant to the child's welfare, for example arrangements that would best promote a child's cultural identity and security. Such persons or agencies could have valuable insights into the suitability of a particular individual to care for a child, particularly with respect to cultural issues.

Evidence can be presented to the Court by way of Affidavit. If the Department has information it wishes to provide to the Court regarding a potential placement option, it can do so. The Court can receive, consider and attach weight to that information as it sees fit. The Court, having considered all evidence presented by or on behalf of the parties, can then rule on the issue. There is no need to have a restrictive provision in the terms of s 133(2)(c).

RECOMMENDATION

ALSWA therefore recommends that s 133(2)(c) should provide that the an interim order may be made 'that the child be placed with a person approved by the Court'.

Provisional Protection and Care and the Return of Children

ALSWA seeks to address an irregularity relating to provisional protection and care.

Where a child is taken into provisional protection and care without a warrant pursuant to s 37, and that child is already the subject of protection proceedings, the CEO must apply for an interim order under s 133(2)(b) within not more than two working days (s 38(3)). If the CEO does not make an application, the child must be returned to their caregiver (s 38(3)(b)).

Where a child is taken into provisional protection and care with a warrant pursuant to s 35, the CEO must make a protection application within not more than two working days (s 36(2)). In this situation, however, there is no requirement for the Department to return the child to their caregiver. Therefore, where the CEO does not make a protection application, the CEO is not required by the legislation to return the child to the parent or caregiver from which they were apprehended.

RECOMMENDATION

ALSWA considers that this is a defect in the legislation, which should be corrected by an appropriate amendment. Further, both ss 36 and 38 should be amended by adding a provision that where the CEO does not make the prescribed application as the case requires, within the two day period, the parent or relevant caregiver is at liberty to apply to the Court for the child to be returned to them.

Negotiated Placement Agreements

ALSWA has encountered problems with the operation of negotiated placement agreements ('agreement') under s 75 of the CCSA.

The major concern relates to uncertainty around parental responsibility. Section 75 is silent with respect to the issue of parental responsibility. While the position in ALSWA's view is that, where an agreement is in place, parental responsibility remains vested in the parents, there can be disagreement about the position.

The concern is most starkly illustrated where a child the subject of an agreement is charged with criminal offences and applies for bail. In numerous cases, the Court in seeking to grant bail will require an individual invested with parental responsibility for the child to undertake to adhere to various conditions attached to the grant of bail. There can be uncertainty in this situation on the part of the Court, the Department, the parents and others involved with the child, regarding whether it is the parent(s) or the Department who have parental responsibility, in this respect. This can result in children languishing in custody – and suffering negative impacts – for much longer than is necessary because the position is unclear as to who should comply with such conditions.

RECOMMENDATION

ALSWA recommends that s 75 should be amended to add a subsection expressly providing that a negotiated placement agreement does not vest parental responsibility for a child in the Department. The section already provides for the parties to an agreement to 'act together' in entering into and extending an agreement. It is submitted that the expectation would be, because of the nature of such an agreement, that the Department and the parent(s) would also be working together to resolve issues affecting the child's wellbeing. This is important because many young Aboriginal people find themselves in the juvenile justice system and it is in their interests to achieve certainty.

The above submissions commencing under the heading Part 2 constitute ALSWA's responses to Questions 3, 4 and 5 of the Consultation Paper.

PART 3: SUPPORTING THE SAFETY AND WELLBEING OF CHILDREN AND FAMILIES EXPOSED TO FAMILY AND DOMESTIC VIOLENCE

In ALSWA's view, the CCSA does not require specific amendments at this time to support the safety of victims of family violence. Family violence issues in the child protection sphere can be effectively tackled through appropriate policy and strategy supported by investment and action at the service delivery level.

In the Consultation Paper, the Department raises the idea of introducing an additional criminal offence for perpetrators who no longer have care or control of a child but continue to expose the child to family violence.

While ALSWA agrees with the message that family violence in all forms is totally unacceptable and repugnant, ALSWA does not support the creation of a further criminal offence.

Aboriginal people are by far the most criminalised section of the population of Australia and, as a result, are vastly and dramatically overrepresented in the criminal justice and prison systems. ALSWA would not support a measure that would potentially worsen this situation without an obvious and significant benefit to victims and the community. The long-term costs to the community of continuing to criminalise, punish and incarcerate people are enormous and unsustainable.

The existing criminal law and violence restraining order (VRO) regimes – including the capacity of a parent or other person to seek directly from the Children's Court a VRO in respect of a child – provide protections. The recent introduction of Family Violence Restraining Orders and the associated information sharing is expected to enhance these protections.

ALSWA disagrees with the commentary in the Consultation Paper regarding the use of the protection order (supervision) in a situation where one parent is the victim, and is able to care for the child, and the other parent is the perpetrator. ALSWA's view is that the protection order (supervision) can already be used to assist and achieve certainty for a victim parent. Relevantly, an order can impose conditions on a parent of the child (s 50(2)) and require that a child live with a specific parent (s 50(3)(a)).

The Department should follow a consistent practice that, in every relevant case where victim parent is being supported to have their child live with them under a protection order (supervision), the Department will support and assist that parent to apply for and secure an appropriate family violence restraining order. ALSWA is aware that some Department workers do this, even appearing alongside parents in Court to support them; however, it is not consistent practice. The Department could also work more closely with Western Australia Police family violence units to provide this type of assistance.

Further protection may be available to victims under the FLA or the FCA, for example, the Family Court of Western Australia can make injunctions for the personal protection of a parent or child. In line with ALSWA's earlier submissions, the Department should incorporate into all of its casework procedures, a requirement to consider the appropriateness of a matter being dealt with by the Family Court and resolved through the making of appropriate parenting orders with related protective orders if necessary.

In order to achieve real change; however, ALSWA encourages the Department to focus on achieving perpetrator accountability by engaging directly with perpetrators and attempting to work therapeutically with them, so that they confront their behaviours, attain insight into the effects of their violence and develop genuine willingness and ability to change.

Many Aboriginal perpetrators would require and benefit from intensive, expert therapeutic interventions delivered in culturally secure environments. ALSWA would envisage the Department creating and staffing specialist teams of clinical family violence specialists, who are Aboriginal or suitably experienced with and respected by Aboriginal people, to carry out this difficult work. The Department should take extensive independent and external advice with respect to such specialist teams.

PART 4 – THERAPEUTIC SECURE CARE FOR CHILDREN AT HIGH RISK

The Consultation Paper discusses the secure care arrangements under the CCSA and suggests that the current 21-day limit on the time a young person can remain in the Kath French Centre may not be long enough to enable appropriate therapeutic interventions. The current 21-day limit applies to the first period of secure care as well as to any extension. Therefore, a young person may be placed in the Kath French Centre for a maximum period of 42 days.

In response to Consultation Question 7, ALSWA does not support an increase in the secure care period to 28 days, or to any other period. As the Consultation Paper observes, 'secure care represents the most extreme form of protective intervention available to the Department in a continuum of care options for promoting the protection of children'.[32] ALSWA considers that if the period is extended, traumatised young people may be kept in secure care for unnecessarily long periods; every effort must be made to provide effective therapeutic intervention for the young person in the shortest time possible.

For a number of years, ALSWA has been concerned about the Department's response to alleged 'misbehaviour' by young people while they are residing at the Kath French Centre. ALSWA recognises that the residents of the Kath French Centre are likely to be some of the most traumatised children under the care of the Department and that they have extremely complex needs. Bearing this in mind, ALSWA considers that it is imperative that interventions that involve the police and/or the justice system are only used as a last resort. Such interventions are unlikely to compliment the therapeutic model of care adopted at the centre. The following case study evidences these concerns.

> *Case Study 6*
> M was 15 years old and was under the care of DCPFS. It appears that M's mother found him difficult to manage and was unwilling to care for him. At one stage, M contacted Crisis Care and requested help in relation to his substance abuse. M believed that if he addressed his substance abuse his mother would be willing to have him return home. ALSWA was instructed by M that his caseworker advised him that he could attend DAYS (a substance abuse rehabilitation centre) but he was, in fact, taken to the Kath French Secure Care Centre (it seems that this miscommunication was inadvertent). M was extremely angry about being taken to the centre.
>
> Following his admission, there was an incident at the centre. The witness statement of a centre worker prepared for the purposes of the criminal proceedings against M indicated that she saw M talking on the phone to his caseworker and it appeared that the call did not go well because he became agitated as soon as the call ended. M became verbally abusive to staff and began throwing items around the room. When M approached the TV cabinet, police were called. M damaged the TV cabinet and assaulted a worker by pushing him in the chest with both hands. The worker suffered a graze when M was being restrained. M was charged with damage and assault public officer. M also had other charges in court relating to similar behaviour at a DCPFS hostel.

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32 Department for Child Protection and Family Support, *Review of the Children and Community Services Act 2004*, Consultation Paper (December 2016) 27.

When M appeared in court for the charges relating to the Kath French Centre, he was remanded in custody because DCPFS indicated that it would not sign his bail. M had significant behavioural and mental health issues and significant criminal record. M pleaded guilty to the charges. M was sentenced to a term of four months detention. However, as M was placed in secure care as a result of being traumatised and highly troubled, and the conduct giving rise to the charges was engaged in when M was extremely angry about his placement at the centre, ALSWA is of the opinion that the recourse to criminal proceedings in these circumstances was a punitive and excessive response to a complex situation.

ALSWA continues to represent young people in the Children's Court who are charged with criminal offences arising out of behavioural issues while the young person is at the Kath French Centre. A similar observation applies to young people in the care of the Department who are living in residential care facilities. It is ALSWA's view that criminal prosecution should only occur for children in the care of the Department for behaviour such as damage and assault that allegedly occurs against Departmental staff or property in the most extreme cases. Where the behaviour is minor, the Department should consider other options. As an analogy, parents do not tend to involve the police every time their child misbehaves in a way that might theoretically constitute a criminal offence. Families respond to bad behaviour by their children by using other sanctions and behaviour management techniques and ALSWA urges the Department to revise its approach to minor offending by children under its care.

PART 5 – THE INTERSECTION BETWEEN CHILD PROTECTION PROCEEDINGS AND PROCEEDINGS IN THE FAMILY COURT OF WESTERN AUSTRALIA

This Part of the Consultation Paper discusses the intersection of child protection and family law proceedings and the resulting problems for families and others where proceedings are on foot in both jurisdictions. The Consultation Paper refers to a 2012 Consultation that examined options for greater integration between the Family Court of Western Australia and the Children's Court.

The Department's Consultation Paper states that:

> Given the specialist legal knowledge associated with these matters, and the depth of legal research that has already been carried out, a specialist working group of government and non-government stakeholders with legal expertise will address this Term of Reference for the Review. [33]

ALSWA is aware of the various options for reform. Bearing in mind that ALSWA is a member of this Working Group it will provide its views about appropriate reforms to address the intersection of the child protection and family law jurisdictions as part of the Working Group process. This will enable ALSWA to consider the views expressed by stakeholders in response to the Consultation Paper as well as the views expressed by other members of the Working Group. ALSWA considers that it would be premature to express a final view at this stage.

33 Department for Child Protection and Family Support, *Review of the Children and Community Services Act 2004*, Consultation Paper (December 2016) 38.

CONCLUSION: FURTHER MANAGEMENT OF THE LEGISLATIVE REVIEW PROCESS

The potential reforms canvassed by the Department's Consultation Paper and by ALSWA in this submission are comprehensive and critically important to the community. In order to ensure that the best options for reform are progressed, ALSWA requests that a committee of representatives drawn from stakeholders in the child protection, family law and family violence spaces be established to consider the submissions to the review from all contributors, in respect of Parts 1 to 4 (inclusive) of the Consultation Paper. ALSWA believes that such a committee would assist the Department in formulating recommendations for appropriate amendments to the CCSA. ALSWA recommends that the government should provide any proposed draft legislation to the committee, and provide the committee with the opportunity to comment upon it.

RECOMMENDATION

ALSWA recommends that the Department initiate the establishment of a committee of representatives from stakeholders in the child protection, family law and family violence spaces to consider the submissions to this review in respect of Parts 1 to 4 (inclusive) of the Consultation Paper and this committee continue to provide feedback in relation to any proposed legislative reforms.

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