ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC)

SUBMISSION IN RESPONSE THE DEPARTMENT FOR CHILD PROTECTION AND FAMILY SUPPORT CONSULTATION PAPER ON OUT-OF-HOME CARE REFORM LEGISLATIVE AMENDMENTS

15 February 2016

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.

OUT-OF-HOME CARE REFORM: LEGISLATIVE AMENDMENTS CONSULTATION PAPER

Background

The Department for Child Protection and Family Support (DCPFS) is in the process of undertaking reforms to the out-of-home care system in Western Australia. In November 2014, a discussion paper was released describing the proposed strategic directions to improve the effectiveness and efficiency of the out-of-home care system. DCPFS recognises that the 'Western Australian out-of-home care

sector is facing a number of ongoing challenges, including significant over-representation of Aboriginal children and it is timely that its operation, funding and regulation are reviewed'.[1]

In November 2015, DCPFS released its Consultation Paper on proposed legislative reforms in relation to out-of-home care in Western Australia. Submissions are due by 16 February 2016. On 21 January 2016 the Manager of ALSWA's Family Law Unit attended the DCPFS briefing session for legal service providers in relation to the proposed reforms. Also on 4 February 2016, the Manager of the Family Law Unit attended a briefing session for Aboriginal service providers.

Data

According to the most recent Productivity Commission *Report on Government Services*, as at 30 June 2015 Aboriginal[2] children comprised 31% of children on care and protection orders in Australia. For Western Australia, the proportion of Aboriginal children who are subject to care and protection orders is far higher – there were 4,808 children subject to orders and 2,472 of these were Aboriginal children (51%).[3] The proportion of Aboriginal children under the care of the CEO of DCPFS is continuing to increase each year. As at 30 June 2011, Aboriginal children comprised 45% of children under the care of the CEO of the DCPFS[4] – by June 2014 this figure had risen to over 50%.[5] In 2014–2015 the rate of growth was far greater for Aboriginal children (9%) compared to non-Aboriginal children (3%).[6] ALSWA is gravely concerned about the alarmingly high disproportionate rate that Aboriginal children are taken into the care of DCPFS as well as the fact that this rate continues to rise each year. Accordingly, ALSWA's response to the proposed legislative reforms is underpinned by the need to significantly reduce this rate while at the same time ensuring the continued safety and wellbeing of Aboriginal children. As recently stated by the Aboriginal and Torres Strait Islander Social Justice Commissioner:

> There are undoubtedly circumstances where children need to be removed from their families. However, greater efforts are required to empower and support Aboriginal and Torres Strait Islander peoples to break free from the cycle that brings them into contact with children protection authorities in the first place.[7]

ALSWA submits that the key priority for any reform to the child protection system is the need to invest in culturally competent, appropriate and effective early intervention strategies to prevent Aboriginal

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1 https://www.dcp.wa.gov.au/ChildrenInCare/Pages/OOHCReform.aspx.

2 ALSWA uses the term 'Aboriginal' to refer to 'Aboriginal and Torres Strait Islander' people throughout this submission unless the term 'Aboriginal and Torres Strait Islander' is used in a direct quote.

3 Productivity Commission, *Report on Government Services* (2016) Chapter 15 Child Protection Services.

4 Department for Child Protection and Family Support, *Annual Report 2010–2011* (2011) 8.

5 Department for Child Protection and Family Support, *Annual Report 2014–2015* (2015) 28.

6 Department for Child Protection and Family Support, *Annual Report 2014–2015* (2015) 28.

7 Australian Human Rights Commission, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2015* (2015) 138.

children from coming into care in the first place. As the Aboriginal and Torres Strait Islander Social Justice Commissioner recommended:

> As a first step, at-risk and vulnerable families must be given support which assists them to stay together. The extent to which our children are currently overrepresented within the system would perhaps suggest that the provision of this type of support is an area that should be prioritised.[8]

A greater investment in prevention and early intervention programs is not only in the best interests of Aboriginal children, their families and the wider community; it is also the most cost effective approach for government in the long-term. **ALSWA recommends that the Western Australian government should provide increased resources for culturally competent, appropriate and effective prevention and early intervention programs for Aboriginal children and families at risk of child protection intervention.**

Permanency Planning

It is apparent from the Consultation Paper (and other supporting material) that the proposed reforms are designed to cement permanency planning as a key priority in child protection decision-making. The Consultation Paper states that all 'OOHC reforms, strategies and realignments are being guided by the aim of affirming and reinforcing the Department's permanency planning policy for all children in care and reducing the overrepresentation of Aboriginal children and families in the child protection system'.[9]

DCPFS's *Policy on Permanency Planning 2014* states that for children who are in provisional protection and care or on a protection order (time limited) 'permanency planning must occur within a parallel process that identifies reunification with one or both parents as the primary permanency plan and long term out-of-home care as the secondary permanency plan'. For children subject to a protection order (until 18) 'long term out-of-home care is the only permanency plan'. The current process requires that decisions about whether reunification should proceed, and is in the child's best interests, must be made within 12 months if the child enters provisional protection and care at less than three years of age and within two years for all other children.

Permanency planning is defined in the policy as the 'case management practice used to provide children in care with safe, continuous and stable living arrangements, lifetime relationships and a sense of belonging'. It is also stated that permanency planning should not be confused with 'permanent care' or 'permanent out-of-home placement'.

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8 Australian Human Rights Commission, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2015* (2015) 150.

9 Department for Child Protection and Family Support, *Out-of-Home Care Reform: Legislative Amendments*, Consultation Paper (November 2015) 1.

The Consultation Paper states that permanency planning policy 'is underpinned by evidence that early permanent decision-making for children is associated with better life outcomes'.[10] The reference for this statement is an attachment to the paper (Attachment One). As this attachment notes, permanency planning has three components: relational, physical and legal. Relational permanence refers to 'children having the opportunity to experience positive, caring and stable relationships with significant others'.[11] Thus, as has been observed:

> A permanent placement is more than a long-term placement; it is a placement that meets a child's social, emotional and physical needs.[12]

ALSWA emphasises that for Aboriginal children who have been removed from their parents/family this aspect of the concept of permanency planning has enormous significance. As discussed further in this submission, an Aboriginal child may obtain relational permanence by maintaining ongoing relationships with a number of different extended family even if their physical and legal arrangements change over time. In this regard it has been stated that:

> Aboriginal and Torres Strait Islander children in care may face particular challenges in the process of cultural identity formation. Children's lack of knowledge or understanding of their Aboriginality as a result of being placed in out-of-home care has been linked to poor emotional well-being and mental health problems in later life, with negative outcomes for individuals and communities. The literature suggests that racial and ethnic identity should be factored into all aspects of permanency planning, necessitating the involving of family members and Indigenous community child protection agencies in planning. There should be particular caution about making permanent arrangements for Indigenous children with non-Indigenous carers, and such plans must include arrangements for the child to retain or regain their cultural connectedness.[13]

Attachment One also notes that permanency planning is informed, at least in part, by 'attachment theory'. This theory focuses on the attachment of an infant with his or her primary caregiver, usually the mother. Bearing in mind that over half of all children in care in Western Australia are Aboriginal, ALSWA urges greater consideration of, and respect for, Aboriginal child-rearing practices. The Law Reform Commission of Western Australia observed:

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10 Department for Child Protection and Family Support, *Out-of-Home Care Reform: Legislative Amendments*, Consultation Paper (November 2015) 1.

11 Department for Child Protection and Family Support, *Out-of-Home Care Reform: Legislative Amendments*, Consultation Paper (November 2015) Attachment One.

12 Tilbury C & Osmand J, 'Permanency Planning in Foster Care: A research review and guidelines for practitioners (2006) *Australian Social Work* 59, 3.

13 Tilbury C & Osmand J, 'Permanency Planning in Foster Care: A research review and guidelines for practitioners (2006) *Australian Social Work* 59, 3.

> [T]he family unit in Aboriginal societies is extended with many relatives, and often whole communities, having child-rearing responsibilities with the biological parents. As a result, child-rearing practices in Aboriginal Australia are not underwritten by the permanence and stability of a single home that is typical of non-Aboriginal Australian families. 'Indigenous culture', John Dewar says, 'sees movement of children, either geographically or between or within kinships groups, as beneficial.[14]

ALSWA is not opposed to the concept of permanency planning per se because it agrees that plans for the long-term safety and wellbeing of a child who has been taken into the care of DCPFS should commence as early as possible. However, the critical issue is how and when a decision is made to abandon reunification with the child's family as a viable long-term option. The federal Senate Community Affairs References Committee report on out-of-home care, observed that 'particular support was expressed for 'permanency' in out-of-home care placements, particularly for those children *unable* to return to their families.[15] ALSWA highlights that this is a complex question that cannot be answered in a standard single period of time for all cases. For example, in an extreme case where it is proven that a single parent has sexually abused his child over a number of years, the decision that reunification is not possible can be made swiftly and with certainty. In contrast, where a child has been removed because of neglect resulting from parental substance abuse the answer is not so simple. If the parents are willing to address their substance abuse and services can be provided to support the family to achieve this end, all efforts should be made to ensure reunification takes place. If sufficient and appropriate services and programs are not provided or available to the family to enable the ongoing issues to be resolved, a decision to remove the child from the family of origin on a permanent basis may be made prematurely. **For Aboriginal families, it is imperative that culturally secure and appropriate services and programs are available to support reunification goals.**

The Senate Inquiry observed that 'there is little evidence to suggest legally permanent forms of care are effective in reducing the number of children and young people in out-of-home care, and that the focus for child protection authorities should remain on supporting families'.[16] ALSWA strongly supports this view and, as stated above, the priority must be on ensuring children remain safe within their family unit.

In addition, as referred to above, ALSWA observes that a single permanent carer may not necessarily be in the best interests of an Aboriginal child. A number of different kin placements for an Aboriginal child may be the best option. If the parents are clearly unable or unwilling to care for the child, there may be a number of different relatives who are willing to look after the child at different stages until he or she is 18 years. In terms of long-term social, emotional and physical security, this is more likely to

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14 Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Discussion Paper, Project No 94 (2005) 339.

15 Federal Senate Community Affairs References Committee, *Out-of-Home Care* (August 2015) [7.3] (emphasis added).

16 Federal Senate Community Affairs References Committee, *Out-of-Home Care* (August 2015) [7.60].

be the best interests of that child in comparison to being permanently placed with a non-Aboriginal foster carer or a residential home. The Senate Inquiry stated that:

> The committee acknowledges that connection to family is integral to wellbeing of Aboriginal and Torres Strait Islander children and young people. The committee is concerned existing frameworks do not adequately facilitate this connection and more needs to be done to support Aboriginal and Torres Strait Islander children and young people.[17]
>
> The committee is particularly concerned about the lack of culturally appropriate support available to Aboriginal and Torres Strait Islander parents once children are placed into care, including services aimed at supporting family reunification. [18]

ALSWA submits that the importance of a continuing connection to family and culture must not be overlooked and the distinct roles that extended kin play within Aboriginal communities must be at the forefront of decision-making. As the Law Reform Commission of Western Australia observed

> The involvement of Aboriginal people and Aboriginal organisations in cases involving the placement of an Aboriginal child is therefore considered imperative in order to avoid ethnocentric assumptions unnecessarily colouring the decision-making process.[19]

Likewise, the Senate Inquiry concluded that Aboriginal community-controlled agencies should be involved in the 'full range of support services for Aboriginal and Torres Strait Islander families, not just out-of-home care, and must be supported by flexible funding models'. [20]

Finally, ALSWA emphasises that legislative and/or policy reform is not sufficient to ensure the long-term safety, stability and security of children. Without sufficient resources and increased capacity of services on the ground to help children and their families, there will continue to be increasing numbers of Aboriginal children being removed from their families. Furthermore, if there are not enough suitable and properly supported long-term carers for children in care, the problem of 'placement drift' will continue. **ALSWA recommends that the Western Australian government provide sufficient resource to support and utilise the expertise of Aboriginal community controlled organisation in the provision of a broad range of services (including expert advice) in the child protection system.**

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17 Federal Senate Community Affairs References Committee, *Out-of-Home Care* (August 2015) [8.76].

18 Federal Senate Community Affairs References Committee, *Out-of-Home Care* (August 2015) [8.78].

19 Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Discussion Paper, Project No 94 (2005) 342.

20 Federal Senate Community Affairs References Committee, *Out-of-Home Care* (August 2015) [8.109].

Response to Consultation Questions

The Consultation Paper mentions that some proposed legislative amendments may occur as a matter of priority while others may be delayed until the upcoming statutory reviews of the *Children and Community Services Act 2004* (WA) ('the Act') and the *Adoption Act 1994* (WA) in 2017 and 2018 respectively. **ALSWA is of the opinion that any reforms should occur after the next statutory review of the Act.** Unless there is clear evidence that the current legislative provisions are deficient and require *immediate* reform, it is preferable that the whole legislative scheme is reviewed and reformed (if necessary) at the same time. **As discussed above, ALSWA considers that the immediate priority should be the investment of great resources for on-the-ground services.**

Question 1: Should the underpinning principles of the Act give more emphasis to the importance of permanency of care for a child in OOHC?

As set out in the Consultation Paper, the Act currently includes a number of principles to be applied by decision-makers in the child protection system. The overriding principle is that the 'best interests of the child' is the paramount consideration. Section 8 of the Act provides a non-exhaustive list of the matters that must be taken into account when determining what is in the best interests of a child. Relevantly for the proposed reforms, s 8(1)(g) states that one of the matters is:

> The importance of ***continuity*** and ***stability*** in the child's living arrangements and the likely effect on the child of disruption of those living arrangements, including separation from:
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> (i) The child's parents; or
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> (ii) A sibling or relative of the child; or
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> (iii) A carer or any other person (including a child with whom the child is, or has recently been living; or
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> (iv) Any other person who is significant in the child's life.

Section 9 of the Act sets out principles to be observed and includes:

> (ha) the principle that if a child is removed from the child's family then, so far as is consistent with the child's best interests, ***planning for the child's care should occur as soon as possible*** in order to ***ensure long-term stability*** for the child; and
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> (h) the principle that ***decisions about a child should be made promptly*** having regard to the age, characteristics, circumstances and needs of the child.

The Consultation Paper canvasses two options for providing greater legislative emphasis on the principle of permanency of care. The first is a proposal to amend s 8(1)(g) to replace the phrase 'the importance of continuity and stability' with 'the importance of continuity and permanency' and to

amend s 9(ha) to amend the phrase 'ensure long-term stability' to read 'to ensure long-term stability and permanency'. It is argued that similar amendments were made in Victoria because 'permanency was considered to convey 'long term intentions more effectively than 'stability' which was often interpreted as being more immediate in nature'.[21] The Victoria legislation also included a principle with the phrase 'continuity and stability' and a number of provisions relating to 'stability planning'.

ALSWA is strongly opposed to the removal of the term 'stability' from the guiding principles in the Act. Stability and permanency are not interchangeable in the context of considering the best interests of a child in the child protection system. 'Permanency' emphasises long-term fixed arrangements whereas 'stability' encompasses broader considerations such as the safety, strength and security of the arrangement. In other words, one placement might be both permanent and stable but another might be permanent and unstable. Likewise, a placement might be stable but temporary. ALSWA submits that both concepts are required to ensure that permanency does not become an end in itself. ALSWA does not consider that there is sufficient evidence to justify any changes to the Act in regard to the current principles. However, if reform is to occur ALSWA would prefer the term 'permanency' to replace the term 'continuity' so that s 8(1)(g) would include the phrase 'the importance of permanency and stability'. In regard to s 9(ha), ALSWA is of the view that the phrase 'long-term stability' already captures the essence of both permanency and stability.

The second option put forward in the Consultation Paper is to include a permanency planning principle setting out an order of priority to guide decision-making for permanent care. ALSWA's response to this is discussed below under Question 13.

In summary, **ALSWA is of the opinion that the current principles and overriding requirement that the best interests of the child is the paramount consideration are appropriate and do not require reform.** While ALSWA does not have any objection per se to DCPFS's permanency planning policy it does not believe that this policy needs to be enshrined in legislation. It is important to highlight that the guiding principles of the Act bind both decision-makers within DCPFS as well as the court. If the legislative focus is on achieving permanency, this may preclude a thorough and holistic assessment of the individual circumstances in each case and preclude the court from objectively assessing what is in the best interest of the particular child at any particular time. ALSWA cautions that over-emphasising permanency may cause decision-makers to opt for poor or risky placements just to ensure that long-term arrangements are made.

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21 Department for Child Protection and Family Support, *Out-of-Home Care Reform: Legislative Amendments*, Consultation Paper (November 2015) 1.

Question 2: Should the maximum period for a supervision order be reduced from 24 months to 12 months, with the possibility of up to a further 12 month extension?

The Consultation Paper categorises the current orders: the non-permanent orders are supervision orders and time-limited orders; and the permanent orders are until-18 orders, special guardianship orders and adoption orders. Currently, a protection order (supervision) can be made for up to two years with one further extension for up to two years. It is proposed to reduce both those periods to 12 months in order to 'better align with permanency planning by emphasising the importance of timely decision-making in relation to parental capacity, and therefore the need for focussed interventions'.[22]

ALSWA understands the importance of timely decision-making in relation to parental capacity but it is important to highlight that a protection order (supervision) will be made in circumstances where the court has determined that although the child is in need of care and protection, the provision of social services to the child and the family coupled with supervision by DCPFS will properly provide for the child's safety and wellbeing. The intended outcome of a supervision order is family preservation. Whether and when that outcome can be achieved is dependent not only on the actions of the parents/family but also on the actions of DCPFS and other service providers. If necessary services and supports are not readily available to the parents, a longer time period may be required. ALSWA would support a default period of 12 months (with one further extension of up to 12 months) on the proviso that the legislation enables the court to impose a period of up to two years (for both the initial order and any extended order) if it considers that a longer supervision order is in the best interests of the child. This would adequately accommodate the need for timely-decision making as well as ensuring that family preservation is not compromised because of a lack of availability of services or the need for flexibility in special circumstances.

Question 3: Should the maximum allowable period of a time-limited order be changed from two years to 12 months?

Currently, a protection order (time-limited) may be made for up to two years and, on an application by the CEO of DCPFS, the court can extend the order for a further period of up to two years. A protection order (time-limited) may be extended more than once. As observed in the Consultation Paper, the 'length of time a child may cumulatively spend on a time-limited order is currently unconstrained by the legislation.[23] However, it is stated that under DCPFS's permanency planning policy the aim is for the child's permanency of care to be determined under only one time-limited order. ALSWA notes that DCPFS's Policy on Permanency Planning states that:

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22 Department for Child Protection and Family Support, *Out-of-Home Care Reform: Legislative Amendments*, Consultation Paper (November 2015) 8.

23 Department for Child Protection and Family Support, *Out-of-Home Care Reform: Legislative Amendments*, Consultation Paper (November 2015) 8.

> Decisions about whether reunification should proceed and is in the child's best interests must be made within 12 months for children who enter provisional protection and care at less than three years of age and two years for all other children.

In other words, the maximum time allowable under the policy to determine whether reunification should proceed is two years. The policy does not stipulate that reunification must actually occur within this two-year period. Once a determination is made that reunification should proceed, it is still necessary for there to be a period of transition towards reunification and possibly ongoing support while reunification takes place. For those reasons, there will be cases where a protection order (time limited) is required for longer than two years.

ALSWA also observes that there are a variety of practical considerations that may necessitate a time limited order extending beyond the initial two-year period (and would also make any restriction of time limited orders to a maximum of 12 months unworkable). Waiting periods for urgent housing are currently in excess of two years and entry into rehabilitation services can be delayed for a number of months (up to six months in some cases) followed by rehabilitation/therapy for between three and six months. Reunification services such as Wanslea and Uniting Care West usually have a three-month waiting period following by a period of reunification work for at least three months. Culturally appropriate and sensitive services (eg, Djooraminda, Yorganup, Milliya Rumura) often have lengthier wait times due to high demand, lower capacity and less funding. **ALSWA is of the view that any proposal to cut the current duration of time limited orders in half is unrealistic given current levels of service capacity in the community.**

Additionally, shorter time limited orders are more likely to result in applications for protection orders (until 18) because of the difficulty in moving towards reunification within a period of 12 months (bearing in mind the service capacity issues discussed above). This will only increase the number of Aboriginal children in out-of-home care. Alternatively, DCPFS will apply for extensions to accommodate these situations resulting in an unnecessary use of resources for the court, DCPFS and legal service providers.

Question 4: Should there be a limit placed on the number of times the Department is able to apply for extension of a time-limited order?

For the reasons discussed above **ALSWA does not support a limit on the number of times the Department is able to apply for an extension of a time-limited order**. Further, the Act already provides that the court may extend a time limited order if it is in the best interests of the child to do so.

Question 5: Should criteria for an extension be linked to circumstances where the Court is satisfied that reunification is viable and progressing?

Bearing in mind the overriding requirement that an extension of a time limited order must be in the best interests of the child, ALSWA does not consider any legislative reform is required. If the Act specified that a time limited order could only be extended where the court is satisfied that reunification is viable and progressing, the likely outcome will be more children subject to long term out-of-home care. There will be cases where further actions are required by either the parents/family or DCPFS before an assessment can be made in relation to reunification. In other words, the circumstances may be such that the court cannot be satisfied that reunification is viable but equally cannot be satisfied that reunification is not viable. Currently, where it is clear that reunification is not possible the court would not extend a time limited order in any event.

Question 6: Should the total cumulative time a child can be in OOHC without a permanent order be limited to 24 months?

ALSWA queries whether the Consultation Paper in fact means 'consecutive' rather than 'cumulative' because some children may spend periods in out-of-home care at different times and for different reasons. In any event, **ALSWA does not support on cap on the maximum duration that a child can be in out-of-home care without a permanent order being made. Flexibility and discretion is always required.**

Question 7: If so, upon an application by the Department, should the Court also have discretion to make a time-limited order that goes beyond the 24 months total cumulative time if considered to be in the best interests of the child?

See response to Question 6 above. However, if a cap of two years is implemented requiring DCPFS to apply for a permanent order at the expiration of the two-year period, ALSWA agrees that the court must retain discretion to make a time-limited order that extends beyond the 24 months if it is considered to be in the best interests of the child.

Question 8: Do the names of the current protection orders adequately reflect the status and purpose of the orders?

The Consultation Paper questions whether the current names of the protection orders accurately reflect their purpose in the permanency planning continuum.[24] **ALSWA does not consider that re-branding the current protection orders will result in improved outcomes for children and families and**

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24 Department for Child Protection and Family Support, *Out-of-Home Care Reform: Legislative Amendments*, Consultation Paper (November 2015) 10.

notes that the current names are well understood and reflect their nature and purpose. Any changes may cause a degree of unnecessary confusion.

In addition, **ALSWA is of the view that some of the proposed new names are not appropriate**. The use of the term 'protection order (long term) in place of protection order (until 18) is somewhat misleading because it does not clearly define the end term of the order. The suggested name to replace special guardianship orders (Home for Life) is not appropriate because it will only apply until the child reaches the age of 18 years. The term 'protection order (transitional care)' is also not supported because it may be interpreted as transition *into* long term out-of-home care and, therefore, removes a necessary focus on reunification. In this regard, it is noted that transitional care is often used to refer to children who are transitioning out of long-term out-of-home care. . Finally, if the names of the orders were altered, ALSWA suggests that the only proposed change with any merit is 'parenting order (family support)'. The current name–protection order (supervision)–arguably focuses the attention on the family being supervised and monitored rather than the provision of necessary family support to enable effective reunification. For ALSWA clients, it may have negative connotations due to historical undue control of Aboriginal families by past welfare agencies.

Question 9: Should any of the names change and, if so, what should they become and why?

See response to Question 8 above.

Question 10: Should the Act be strengthened to ensure that, before the Court makes a permanent order, it must be satisfied that the Aboriginal child placement principle has been applied in the child's best interests?

Before discussing the application of the Aboriginal child placement principle (ACPP) in practice in Western Australia, ALSWA draws attention to the requirement under international human rights standards to ensure that an Aboriginal child is not denied his or her right to enjoy his culture. Article 30 of the Convention on the Rights of the Child states that:

> In those states in which ethnic, religious or linguistic minorities or persons of Indigenous origin exist, a child belonging to such a minority or who is Indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her culture, to profess and practise his or her own religion, or to use his or her own language.

The Aboriginal and Torres Strait Islander Social Justice Commissioner has commented that:

> Maintaining links to culture and identity are especially important within the Indigenous child protection context. This is particularly the case given the impact of past policies of removal that resulted in the destruction of Aboriginal and Torres Strait Islander family, culture and identity.[25]

The Consultation Paper observes that some concern exists about the placement of Aboriginal children in out-of-home care, in particular, that some Aboriginal children are placed permanently outside of family and community. [26] It has been observed that nationally 67% of Aboriginal children were placed with Indigenous carers including relatives and non-relatives in 2013-2014. However, this outcome does not "capture 'whether the process of achieving children's safety and familial and cultural connection outlined by the Principle has been followed'.[27]

The Aboriginal child placement principle (ACPP) is set out in s 12 of the Act. In addition to the principle, s 81 of the Act provides that:

> Before making a placement arrangement in respect of an Aboriginal child or a Torres Strait Islander child the CEO must consult with at least one of the following —
>
> (a) an officer who is an Aboriginal person or a Torres Strait Islander;
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> (b) an Aboriginal person or a Torres Strait Islander who, in the opinion of the CEO, has relevant knowledge of the child, the child's family or the child's community;
>
> (c) an Aboriginal or Torres Strait Islander agency that, in the opinion of the CEO, has relevant knowledge of the child, the child's family or the child's community.

In addition, s 13 of the Act provides that 'in the administration of the 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'. Also, s 14 provides for Aboriginal community participation:

> 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 the 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.

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25 Australian Human Rights Commission, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2015* (2015) 139.

26 Department for Child Protection and Family Support, *Out-of-Home Care Reform: Legislative Amendments*, Consultation Paper (November 2015) 10.

27 Australian Human Rights Commission, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2015* (2015) 157.

The relevant policies for the application of the principle are set out in the DCPFS Casework Practice Manual which 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.
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> 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.

ALSWA has serious concerns about the application of the ACPP and the principle of self-determination and community participation in practice. It does not consider that internal consultation within DCPFS is sufficient to ensure that these principles have been properly applied. Wider consultation with external Aboriginal organisations, service providers and community members is essential to ensure that all information about the child's Aboriginal extended family and community is identified and proper consideration of placement options within the child's family and/or community is undertaken.

ALSWA is of the view that DCPFS's policies need to be reformed as a matter of priority to ensure that DCPFS proactively engages with external Aboriginal organisations, agencies and communities in relation to placement options for Aboriginal children. The Aboriginal Practice Leader should be the conduit for this consultation rather than the person providing the sole advice about cultural considerations and compliance with the ACPP. Furthermore, while the current policy arguably complies with the legislation (because s 81 of the Act provides that the CEO must consult with at least one of the listed persons and this includes an Aboriginal officer within DCPFS) **ALSWA submits that s 81 of the Act should be amended to ensure that solely consulting with an officer of DCPFS is the last resort.**

In response to the specific question above, ALSWA highlights that if a protection order (until 18) is made DCPFS has parental responsibility for the child and may change the child's placement at any

time throughout the order. The ACPP directly relates to placement rather than whether a protection order should be made in the first place. Nevertheless, the proper application of the ACPP may be relevant to the decision about whether a protection order should be made and more specifically to what type of order should be made. The position is different for a protection order (special guardianship). The nature of this order is that parental responsibility is vested in a third party. Section 61 of the Act currently provides that if the child is an Aboriginal child, the court must, in assessing the suitability of the proposed special guardian have regard to the ACPP. The court is already required to take into account the best interests of the child as the paramount consideration.

ALSWA is of the view that apart from the requirement to consult with relevant Aboriginal community members (as discussed above) the critical issue is how the court is to determine whether the ACCP has been applied in any particular case. ALSWA's response in this regard is set out below under Question 11.

Question 11: Should the Department be required to demonstrate its application of the Aboriginal child placement principle in the reports it provides to the Court?

ALSWA submits that DCPFS should be required to demonstrate its application of the ACPP in its reports provided to the court. If DCPFS make an application for a protection order and the court is satisfied that the child is in need of protection the court may make the protection order sought or a different protection order. However, under s 46 the court must not make a protection order 'unless the court is satisfied that making the order would be better for the child than making no order at all'. In order for the court to assess this criterion and to determine what type of order is the most appropriate in the circumstances, it is essential for the court to take into account the ACPP and what measures DCPFS have undertaken to comply with the principle. If, for example, the court is not satisfied that the proposed arrangements for the child comply with the ACPP but the child nevertheless should not be returned to his or her family of origin, the court may decide to make a time-limited order to enable DCPFS to investigate alternative options for the long-term care arrangements for the child.

Pursuant to s 143 of the Act, DCPFS is required to submit a report to the court about the proposed arrangements for wellbeing of the child. This report is required to be provided to the other parties in the protection proceedings. ALSWA has experienced multiple examples of insufficient s 143 written proposals. These written proposals are often brief, lacking in detail, lacking in direction and plans and lacking in detailed cultural plans for Aboriginal children. Frequently, these proposals acknowledge the child's Aboriginality and state that it has been taken into account but there is no discussion about how the child will actually be instructed in and given experience of the particular cultural traditions and practices relevant to that child's family of origin. ALSWA submits that s 143 written proposals should be prepared with reference to the key principles under ss 6–9 of the Act. Where reunification with the child's parents/family is not supported by DCPFS, the written proposal should also provide a comprehensive explanation and analysis of all matters considered by DCPFS in reaching that

conclusion. With particular reference to Question 11, the written proposal should address what measures have been undertaken to comply with the ACCP.

It is noted that under s 13 of the *Children, Youth and Families Act 2005* (Vic) there is a requirement to consult with a declared Aboriginal agency in relation to the ACPP. Further, pursuant to s 323 of that Act, an Aboriginal child cannot be placed solely with a non-Aboriginal person without an independent report from an Aboriginal agency recommending the placement. **ALSWA submits that s 12(2)(d) of the Act should be amended to require the CEO to consult with an external Aboriginal agency (and if necessary specific agencies can be prescribed for that purpose) about whether a non-Aboriginal proposed carer is capable to promoting the child's ongoing affiliation with the child's culture and the child's family.**

Question 12: Are there other options that should be explored?

As a means of enhancing the proper application of the ACPP ALSWA suggests that consideration should be given to the New South Wales model of Aboriginal Care Circles. The Aboriginal Care Circles are designed to 'encourage culturally appropriate decision making and care plans to Aboriginal children and young people'. The Care Circles include participation of respected Elders and community members and are chaired by the Magistrate and are convened in appropriate cases after a determination has been made that the child is in need of protection but before a final order is made. The types of matters considered by the Care Circles include appropriate interim arrangements for the child including where the child will live; the services and supports that are need for the parents; contact arrangements; and alterative family placements.[28]

ALSWA is also of the view that measures to provide greater support to Aboriginal kinship carers should be investigated for Western Australia. In its submission to the Federal Senate Inquiry into Out-of-Home Care, ALSWA noted that as far as it is aware there are no specific Aboriginal kinship carer assessment tools in Western Australia.[29] In this regard, ALSWA highlights the specific Aboriginal kinship carer assessment tool which has been developed by Winangay Resources. Its website states that:

> The tools are culturally appropriate, strength based and rest on a strong foundation of Australian and international research. It has been developed to assess and support existing

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28 New South Wales Department of the Attorney General and Justice, *New South Wales Care Circles Procedure Guide* (2011).

29 A literature review in 2010 found that Western Australia 'had no policies or procedures specific to kinship care': Boetto H, 'Kinship Care: A review of issues' (2010) 85 *Australian Institute of Family Studies Family Matters* 60, 66. The DCPFS Casework Practice Manual has a section dealing with 'Supporting Foster Carers'. Chapter Nine of the manual deals with Foster Carer Assessment and Review and includes relative carers.

> kinship carers. Through a series of interviews it identifies carer strengths, concerns and unmet needs.[30]

ALSWA understands that this tool is used in New South Wales and is being trialled in Queensland. The Queensland Child Protection Commission of Inquiry referred to this tool in its final report:

> The Commission would encourage the department to investigate the use of the simplified carer assessment tools as a way of making the process less confronting for families. Tools such as the Winangay Kinship Care Assessment Tools, developed by the not-for-profit organisation Winangay Resources, might be used as an alternative or component of the assessment process. This tool uses a conversational 'yarning' style to assess key areas of carer competency, and visual cards to identify competency in each of the core areas. The tool is designed to reduce power imbalances between carers and workers, enabling potential kinship carers to participate fully in the assessment process.[31]

In its submission to the Senate Standing Committee on Community Affairs inquiry into grandparents raising grandchildren, Winangay Resources highlighted that generic assessment tools 'fail to capture the complexities of Aboriginal kinship care, are culturally insensitive and are predicated on an erroneous assumption that the child is not known to the carer and is a stranger to the potential carer'.[32]

It is also important for child welfare policies to accommodate the specific needs of many kinship carers. For example, it has been observed that kinship carers 'often feel torn between the child's parents (usually their own child) and the needs of their grandchildren...as well as the relationship they have with their own grandchildren who do not live with them'.[33] It has also been found that generally kinship carers are likely to experience greater socio-economic disadvantage than foster carers and that kinship carers may experience harassment and pressure from families because of their involvement with child protection agencies.[34] Winangay Resources have commented that generally kinship care 'receives less monitoring, training and support' than general foster carers.[35]

ALSWA is of the view that there should be specific policies and processes for Aboriginal kinship carers (including but not limited to culturally appropriate assessment tools and policies in relation to providing support to kinship carers). If an Aboriginal child must be removed from his or her family, the

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30 http://winangay.com/.

31 Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Roadmap for Queensland Child Protection* (June 2013) 368.

32 Winangay Resources, *Submission to the Senate Standing Committee on Community Affairs Grandparents raising Grandchildren,* Submission 107, 3.

33 Boetto H, 'Kinship Care: A review of issues' (2010) 85 *Australian Institute of Family Studies Family Matters* 60, 62.

34 Ibid, 62.

35 Winangay Resources, *Submission to the Senate Standing Committee on Community Affairs Grandparents raising Grandchildren,* Submission 107, 3.

ideal is for the child to be placed with kin. If this occurs and there is no realistic possibility of reunification, there must be sufficient support to the carer to ensure that the new placement is sustainable and successful.

Where an Aboriginal child cannot be placed with kin, in accordance with the ACPP, it is vital that efforts are made to place the child with an Aboriginal general foster carer. DCPFS has acknowledged that there are challenges in recruiting Aboriginal foster carers.[36] In September 2014, Wanslea indicated, through its networks with other agencies, the pressing need to recruit more Aboriginal foster carers. According to Wanslea, it had 110 carers and only two of those carers were Aboriginal; however, 49% of their referrals were for Aboriginal children.

One likely reason for the reluctance of some Aboriginal people to undertake the role of a general foster carer is the distrust of and resentment towards child welfare agencies as a result of past removal policies. The ALSWA is of the view that if Aboriginal-controlled agencies were supported and encouraged to provide support services directly to children in OOHC and their families, the number of Aboriginal foster carers would rise. As recommended above, ALSWA submits that the Western Australian government should provide greater support (including financial) to Aboriginal community-controlled organisations to provide out-of-home care services, reunification services and to undertake the role of providing advice and consultation in relation to the placement of Aboriginal children in care.

ALSWA is also of the view that consideration should be given to promoting the utilisation of Family Court orders as an option for resolving cases with child protection concerns. Family Court orders enable alternative family members to obtain parenting orders without the need for the child to be under the care of DCPFS. ALSWA notes that DCPFS does not take an active role in the vast majority of relevant matters before the Family Court and greater support from DCPFS in such cases would be beneficial for all parties.

Question 13: Should the legislation set out an order of priority for orders which the Department and/or the Court must consider?

The Consultation Paper suggests the inclusion of a hierarchy of preferred placement care options in the legislation with safe care within the child's family as the first permanency objective; reunification as the second preference; adoption of Aboriginal children as the last preference.[37] ALSWA submits that although permanency *planning* is important the **legislation should expressly provide that long term out-of-home care orders (ie, until 18 orders and special guardianship orders) should be the last resort and that, subject to the overriding requirement in regard to the best interests of the child, all other options allowing children to remain with their parents/family must take precedence**.

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36 Department for Child Protection and Family Support, *Annual Report 2012-2013* (2013) 45.

37 Department for Child Protection and Family Support, *Out-of-Home Care Reform: Legislative Amendments*, Consultation Paper (November 2015) 14.

Question 14: If so, what should the order of priority be?

See response to Question 13 above.

Question 15: Should the Act be amended to strengthen provisions for expeditiously dealing with protection proceedings? If so how?

In order to focus on timely decision-making it is proposed that the Act should be amended to direct the court to proceed expeditiously. Currently, s 145(3) provides that 'protection proceedings are to be concluded as expeditiously *as possible* in order to minimise the effect of the proceedings on the child and the child's family' (emphasis added). Reference is made to the provision in New South Wales which provides that the court 'should avoid granting adjournments to the maximum extent possible and must not grant an adjournment unless it is of the opinion that it is in the best interests of the child or young person to do so or there is some other cogent or substantial reason to do so'.

ALSWA highlights that there are various factors that will impact on the time taken to resolve child protection proceedings (eg, increased demand on and capacity of magistrates; requirements for expert reports; involvement of child representatives; referrals to Signs of Safety conferences; and adjournments to enable parents to undergo rehabilitation programs). For this reason, **the current legislation which requires proceedings to be concluded as expeditiously as possible is appropriate**. ALSWA does not support the New South Wales model because the court must have the discretion to consider the merits of any adjournment application and is already required to regard the best interests of the child as paramount.

Having said that, **ALSWA submits that DCPFS, the Children's Court and legal service providers should consult in relation to investigating alternative processes and procedures that may increase case resolution times** (such as docketing cases to one judicial officer; case assessment conferences and call over days as used in Family Court proceedings).

Question 16: Should the legislation be amended to indicate that the level of contact a child is to have with his or her birth family should reflect the priority of meeting permanency objectives?

ALSWA is of the opinion that there should be no legislated connection between permanency and contact arrangements between a child and his or her family. Simply, the nature and frequency of contact between the child and family should be determined on a case-by-case basis and accordingly to what is in the best interests of the child. The Consultation Paper states that:

> While family contact plays a significant role in a child's sense of belonging and identity, it is important to differentiate between contact which supports permanency through reunification and contact that it important for the child's sense of identity but is not part of a reunification process. [38]

ALSWA submits that this is the wrong approach. For some children in permanent out-of-home care, regular and significant contact with family members will be appropriate and necessary to ensure the long-term wellbeing of the child. In other cases, limited or no contact may be appropriate. **There should be no presumption (implied or otherwise) against significant ongoing contact in cases where the child is in permanent out-of-home care.**

Question 17: If so, should amendments require that SGO contact conditions be demonstrably in line with the permanency objective for the child?

Again as explained above, ALSWA does not support any legislative direction that contact conditions should be demonstrably in line with the permanency objective for the child. The Consultation Paper itself states that each case should be determined on an individual basis in the best interests of the child and taking into account the child's need for belonging, identity and culture with his or her family of origin and with the special guardianship family. **ALSWA submits that this is the correct approach, that is, the best interests of the child should be the paramount consideration when determining contact arrangements with full discretion to balance all relevant considerations. It is also important that in determining what is in the best interests of the child that the views of the child are considered where appropriate.**

As a related issue, ALSWA notes that contact conditions attached to a special guardianship order are unable to be enforced. Section 64 of the Act enables a party to the initial proceedings to apply to the court for a variation, addition or substitution of a condition. However, there is no mechanism to enforce compliance by a special guardian to ensure contact conditions are met. **ALSWA submits that specific contact conditions should be made at the time the protection order (special guardianship) is made and a party to the initial proceedings should be entitled to apply to the court for the orders to be enforced.**

Question 18: Should special guardians continue to be able to receive regular carer payments for the duration of their SGO or should payments be limited in some way?

ALSWA does not have any comment to make in regard to payments to special guardians other than to mention that in order to encourage more Aboriginal foster carers it is important to ensure that they are provided with sufficient resources to care for the child.

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38 Department for Child Protection and Family Support, *Out-of-Home Care Reform: Legislative Amendments*, Consultation Paper (November 2015) 15.

Question 19: Should carer payments cease if a child under the SGO is not residing with the special guardian or receives a Commonwealth Youth Allowance or fulltime income?

ALSWA has no comment in regard to Question 19.

Question 20: Do you support legislative amendments which provide for a single decision-maker (such as the CEO of the Department) in respect of the approval and revocation of foster carers?

As described in the Consultation Paper, in order to be approved as a foster carer for DCPFS the person must comply with the requirements under s 4(1)(a) of the *Children and Community Services Regulations 2006* (WA). The CEO may approve a foster carer (either relative carer or general foster carer) if satisfied that the person has the specified competencies. DCPFS plays no direct role in the assessment of community service sector carers; however, community service sector foster care providers are required to demonstrate that their carers have skills consistent with those competencies.[39]

ALSWA supports consistency in the assessment and approval process for relative and foster carers but is of the view that DCPFS should not be solely responsible for this process. A degree of independence coupled with an appropriate level of cultural competency is suggested as the best way forward. **ALSWA submits that a panel comprising of representatives from DCPFS and the community is a worthy model for consideration. In the case of assessments and approvals for Aboriginal carers, ALSWA submits the panel must include at least equal representation from the Aboriginal community.** Community members should be drawn from agencies, providers, communities (eg elders) and private practice and be comprised of representatives from different regional areas to accommodate the diversity in and between Aboriginal communities.

Question 21: If yes, do you support 'portability' of carer approval status for a carer?

ALSWA understands that this question relates to the approving authority/organisation. For instance, if a foster carer is approved by a community services provider, the foster carer is required to undergo a separate approval process to become a departmentally approved carer. **ALSWA considers that if there is a panel responsible for approving all carers then there should be 'portability' as between different agencies. However, if approval is restricted to a particular type of carer status** (eg, respite carers, pre-adoptive foster carers, and general foster carers) **the approval should not necessarily be transferred to a different carer category.** A person may well have the capacity to care for newborn

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39 Department for Child Protection and Family Support, *Out-of-Home Care Reform: Legislative Amendments*, Consultation Paper (November 2015) 17.

babies for short periods of time but not have the capacity to provide long-term or permanent care for an older child. Prospective carers should be able to indicate in their application the different types of care for which they are seeking approval.

Question 22: Should a carer be required to report relevant changes in personal circumstances or history to the decision-maker?

ALSWA submits that a carer should be required to report relevant changes in personal circumstances or history to the decision-maker.

Question 23: If the CEO is the decision-maker, should a person revoked as a carer be able to seek external review of the CEO's decision?

Irrespective of whoever the decision-maker is, the carer should be able to seek an external review of the decision to revoke carer status. ALSWA has represented clients who were informed that their carer status had been revoked when in fact what had occurred was miscommunication between DCPFS officers and the clients. The carers had requested respite care for the children after one of them had suffered a stroke and the family home had been destroyed by a fire; however, the officer recorded them as withdrawing as carers. **Decisions in regard to carer status (approval, revocation etc) must be open and transparent with reasons for decision provided.** Further, there must be an independent review process for carers to seek a review of decisions made in regard to their carer status.

Question 24: Do you have any suggestions regarding possible changes to the existing regulated competencies?

The current competencies are that the prospective carer:

(i) is able to provide care for a child in a way that promotes the wellbeing of the child, promotes the child's family and interpersonal relationships, and protects the child from harm; and
(ii) is able to provide a safe living environment for a child; and
(iii) is able to work cooperatively with officers, a child's family and other people when providing care for a child; and
(iv) is able to take responsibility for the development of his or her competency and skills as a carer; and
(v) is a person of good character and repute; and
(vi) a negative notice or an interim negative notice has not been issued to the individual under the *Working with Children (Criminal Record Checking) Act 2004* .

ALSWA highlights that the placement of an Aboriginal child must be undertaken in accordance with the ACPP. This principle requires, at an absolute minimum, that an Aboriginal child is placed with a

non-Aboriginal person who, in the opinion of the CEO, is sensitive to the needs of the child and capable of promoting the child's ongoing affiliation with the child's culture, and where possible, the child's family. **ALSWA is of the view that if the ACPP is properly applied there is no need to include an additional competency for carer approval.** However, as explained above, **the decision about whether a non-Aboriginal person meets the requirements in the ACPP should not be made solely by DCPFS. Advice from an Aboriginal person or agency is essential.**

Question 25: Which carers should be subject to a legislative carer approval process?

ALSWA submits that all persons who care for children who are under the care of the CEO of DCPFS should be subject to an approval process.

Question 25: Should the responsibility of government agencies to provide services to children in care be legislated?

The Consultation Paper observes that children in out-of-home care have experienced trauma and that it is 'essential that children in out-of-home care receive accessible and responsive services to meet their health, education and disability and other needs'.[40] The paper refers to the concept of 'corporate parenting' which is explained as the

> concept that children are in government care, and should receive priority access to other government services as a result of the government being the child's 'parent'. Corporate Parenting broadens responsibility for children in care beyond the statutory child protection body and holds other service providers accountable for their actions to provide for the safety and wellbeing of children in the community.[41]

The Consultation Paper notes that the concept of corporate parenting has been legislated in some jurisdictions. In New Zealand, the *Vulnerable Children Act 2014* (NZ) is underpinned by the view that no single agency alone can protect vulnerable children and the chief executives from the Ministries of Education, Health, Justice, Social Development and the New Zealand Police 'must jointly develop and report against a vulnerable children's plan to collectively achieve the Government's priorities for vulnerable children'.[42] It has also been stated that 'frontline staff in health, education, social development, justice and police have to ensure that children identified as vulnerable get the services

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40 Department for Child Protection and Family Support, *Out-of-Home Care Reform: Legislative Amendments*, Consultation Paper (November 2015) 20.

41 Department for Child Protection and Family Support, *Out-of-Home Care Reform: Legislative Amendments*, Consultation Paper (November 2015) 20.

42 New Zealand Government, *Children's Action Plan: About the Vulnerable Children Act 2014* (undated).

and support they need.[43] The New Zealand scheme extends beyond children in care to all vulnerable children.

As observed in the Consultation Paper, the primary way that the Western Australian government agencies 'acknowledge and exercise responsibility towards children in care is via the delivery of services under the banner of the Cabinet-endorsed *Rapid Response Strategy*'. [44] It is further noted that apart from this strategy and various MOUs there is 'no statutory requirement specifically relating to the provision of government services to children in care, other than those regarding the Department's service obligations' and that a legislative requirement would ensure the prioritisation of services for children in care rather than solely relying on the goodwill of agencies and effective working relationships between various agencies.[45]

Section 21(1) of the Act outlines the functions of the CEO of DCPFS. These functions include considering and initiating, or assisting in, the provision of social services to children, other individuals, families and communities. Further s 21(2) states that in performing functions under the Act the CEO must have regard to:

> (a) the need to promote the wellbeing of children, other individuals, families and communities;
>
> (b) the need to encourage a collaborative approach between public authorities, non-government agencies and families —
>
> > (i) in the provision of social services directed towards strengthening families and communities and maximising the wellbeing of children and other individuals; and
> >
> > (ii) in responding to child abuse and neglect.

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43 http://ngo.health.govt.nz/what-we-do/priorities-and-issues/vulnerable-children.

44 Department for Child Protection and Family Support, *Out-of-Home Care Reform: Legislative Amendments*, Consultation Paper (November 2015) 20-21.

45 Department for Child Protection and Family Support, *Out-of-Home Care Reform: Legislative Amendments*, Consultation Paper (November 2015) 21.

Section 22 of the Act requires the CEO to endeavour to work in cooperation with public authorities, non-government agencies and services providers in performing his or her functions under the Act. The CEO may request the assistance of a public authority or service provider (ie, request the provision of advice, facilities and services). The public authority or service provider must endeavour to comply with such a request promptly if compliance is consistent with its duties and responsibilities and does not unduly prejudice the performance of its functions.

The Consultation Paper suggests that one option is to amend s 22 so that it includes express reference to children in care and that their needs will be addressed as a priority by relevant agencies. Another option put forward is to legislate for certain agencies to undertake specific actions.

ALSWA has reservations about legislating to recognise the concept of corporate parenting in an attempt to ensure that generally government agencies provide access to services to children under care. First, there are many vulnerable and disadvantaged children that are not under the formal care of the state. Is it intended that these children would have less priority to government services? Second, **the concept of 'corporate parenting' may inadvertently result in no one taking direct responsibility for the welfare of the child.** While a whole-of-government approach to ensuring the safety and welfare of children is necessary, ALSWA believes that a single government agency must remain responsible for the welfare of a child in care. The current legislation specifies that the CEO of DCPFS has parental responsibility for a child who is subject to a protection order (time limited or until 18 years). Just as any parent is required to ensure the safety and wellbeing of their children, the CEO of DCPFS must remain primarily responsible for ensuring the safety and wellbeing of children under his or her care. Simply because a foster carer, residential carer or relative is caring for the child on a day-to-day basis, does not absolve DCPFS of this obligation. Of course, **appropriate MOUs with all relevant agencies to enable effective access to services for children in care is necessary bearing in mind that DCPFS has parental responsibility for such a vast number of children in care**. It is also highlighted that special considerations may apply for children who are simultaneously within the remit of DCPFS and the Disability Services Commissions or DCPFS and the Department of Corrective Services. For example, a child who under the care of DCPFS and who is also detained in Banksia Hill detention centre is under the direct responsibility of the Department of Corrective Services and in such as case the responsibility for the wellbeing of a juvenile detainee should be shared between DCPFS and the Department of Corrective Services. These special cases of shared responsibility may benefit from specific legislative provisions.

Practical and effective procedures and policies must be adopted to deal with actual barriers within the system to enable effective access to services. Children in care should not be viewed as having a greater right to services. Instead, the reality is that children in care will frequently, but not always, have greater and more complex needs than many other children. This complexity means that **DCPFS workers on the ground need policies and procedures (including MOUs) that enable them to easily navigate the bureaucratic processes of a multitude of government agencies. Furthermore, where**

policies or rules within a particular government agency are disadvantaging a child in care, those policies or rules must be reviewed and modified. One example is housing. ALSWA has seen numerous instances where public housing tenants who have had their child taken into provisional protection and care are evicted on the basis that they no longer have children living in the premises and therefore they no longer require a house of that particular size. The parents are then homeless and from DCPFS's perspective homelessness becomes an additional factor against reunification. A far better approach would be for DCPFS and Homeswest to enter into a MOU that specifically enables parents in this predicament to remain in the premises for a specified period of time (eg, between three and six months) to enable the required reunification support to be provided. A simple process whereby DCPFS requests in writing that Homeswest does not commence eviction proceedings for a set period of time in order to enable reunification to occur should suffice. In those cases where there is absolutely no possibility of reunification such a request would not need to be sent. Provision for DCPFS to seek an extension in appropriate cases should also be included in such a policy. ALSWA considers that these types of practical arrangements will be more effective at protecting children and families than broad legislative obligations or principles that cannot, in reality, ever be effectively enforced.

Question 26: Could and should a broader approach be taken? For instance, could the provision of services under a legislated framework be expanded to target children at risk of entering care?

See response to Question 25 above. However, if a legislated framework is to be introduced ALSWA would support its application to all vulnerable children including children who are at risk of entering care.

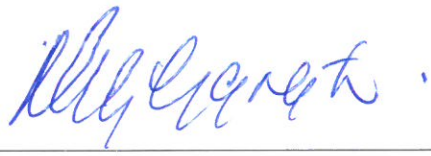
Question 27: How else could the concept of 'Corporate Parenting' be expanded upon in the Western Australian context?

ALSWA highlights that the Commissioner for Children and Young People's statutory functions include promoting and monitoring the wellbeing of children and young people and monitoring and reviewing written laws, draft laws, policies, practices and services affecting the wellbeing of children and young people. In performing these functions, the Commissioner is required to give priority to, and have special regard to, the interests and needs of Aboriginal children and young people and children and young people who are vulnerable and disadvantaged for any reason.[46] Relevantly, the Commissioner 'monitors the implementation of Rapid Response as the framework by which government agencies prioritise access to services for children and young people in care, or who have been in care, and develop specific programs to meet their unique needs'.[47] The Commissioner is well equipped to

46 *Commissioner for Children and Young People Act 2006* (WA) ss 19 & 20.

47 http://www.ccyp.wa.gov.au/content/Child-protection.aspx.

investigate how government agencies are working together to ensure that children in care and other vulnerable children receive the services and support required to ensure their wellbeing and safety. **ALSWA suggests that DCPFS should encourage the Commissioner to examine and publicly report on this issue on a regular basis in order to identify ongoing gaps in service delivery and barriers to effective outcomes.**



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