Aboriginal Legal Service of Western Australia Limited
ACN: 617 555 843

Standing Committee on Legislation
Legislative Council
Parliament House
4 Harvest Terrace
West Perth WA 6005 Address

SUBMISSION TO THE INQUIRY INTO THE CHILDREN AND COMMUNITY SERVICES AMENDMENT BILL 2019

BY: ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA LIMITED (ALSWA)

DATED: 28 JULY 2020

The Aboriginal Legal Service of Western Australia wishes to acknowledge the Traditional Custodians of the land on which this ALSWA office stands. We wish to acknowledge and respect the continuing culture and contributions that our First Nations Peoples make to the life of this region.

ALSWA thanks the Standing Committee on Legislation for the opportunity to make a submission into the Inquiry into the Children and Community Services Amendment Bill 2019.

We note that in this submission:

- **'the Act'** refers to the current *Children and Community Services Act 2004*;
- **'the Bill'** refers to the Children and Community Services Amendment Bill 2019 (Bill No 157-2);
- **'CEO'** refers to the CEO of the Department of Communities;
- **'Clause'** refers to a clause within the Bill;
- **'Department'** refers to the Department of Communities; and
- **'Section'** refers to a section in the Act.

ABOUT ALSWA:

The Aboriginal Legal Service of Western Australia Limited (ALSWA) provides legal aid services to Aboriginal and Torres Strait Islander peoples throughout Western Australia in accordance with grant conditions imposed by the Commonwealth Attorney General's Department. ALSWA has a head office in Perth and offices in 11 country locations.

ALSWA lawyers and Court officers appear daily in the Children's Court of Western Australia in Protection and Care matters brought under the Children and Community Services Act 2004, both in Perth and regional locations, representing parents and at times, the children. ALSWA meets daily with parents and children involved in the protection and care system and as well as representing them in court, assists them in meetings, mediation conferences and pre-birth signs of safety meetings with the Department.

ALSWA INVOLVEMENT IN THE STATUTORY REVIEW OF THE ACT

ALSWA has provided a submission to the Review of the Children and Community Services Act 2004 Consultation Paper. We refer the Standing Committee to the submission of ALSWA, which can be found here:

https://www.als.org.au/wp-content/uploads/2015/08/ALSWA-Submission-to-Review-of-CCSA-13-April-2017.pdf

This submission was considered in the Department of Communities' 2017 Statutory Review of the Act. We note a number of ALSWA's recommendations were not included within the Review and likewise, a number of the recommendations made by the Review were not included within the Bill. We further note that the consultation questions which informed the Review were limited and did not lead to addressing all issues of concern to ALSWA.

PROTECTION AND CARE SYSTEM – IN CRISIS FOR ABORIGINAL CHILDREN AND FAMILIES:

The rapid growth of Aboriginal children entering care, and the decline in reunification to family, is a matter of great concern to ALSWA and to all Aboriginal Nations.

As some of our Aboriginal clients, stakeholders and employees have shared with us in our research on a therapeutic child protection model:

> "The Court needs to acknowledge the goal of the Department of Native Welfare was to remove children, a living memory for many people and many still believe this – they're told by grandparents and parents this is the case, for some that is still evidenced in practices today."

> "Many Aboriginal people feel very strongly we are in a second stolen generation - children want to be connected to their families and to where they are from, but there is no one who knows the children or their families who are finding the right place for them – need Aboriginal people who know the family to say which family the child belongs with."

> "People making the decisions don't know what it's like to grow up Aboriginal, there is a lack of understanding of why kids and families do what they do and a lack of care."

ALSWA's experience mirrors the statistics - the jurisdiction derives from historical legislative subjugation and oppression of Aboriginal people that has never been remedied.

The lived experience of many of ALSWA's clients in the protection and care jurisdiction is bleak. Removals of children happen against a background which is well known - the experience of intergenerational trauma from the historical impacts of dispossession, social exclusion, racism, disadvantage and policies sanctioning the involuntary removal of Aboriginal children from their families, leading to the stolen generation.

This trauma is compounded exponentially by the feelings of distress, grief and loss when their own child is taken from their care.

Added to that, within days of a removal, parents and carers are expected to gather themselves and meet with officials from the Department of Communities - Child Protection ('the Department' or 'DCP'), calmly face the very people who may have been responsible for the decision to remove their child and conduct themselves impassively. Court hearings inevitably follow soon after, with the same expectations as to attitude and behaviour. The bar is set very high and more often than not, unfairly.

Most, if not all, ALSWA clients are profoundly distrustful of the Department. Many perceive that the Department goes to extraordinary steps to ignore, wrong foot or sideline them at every turn. The view is widespread that the Department is part of a racist system to remove Aboriginal children from their families without any meaningful prospect of their return and to assist non-Aboriginal carers to profit from their misery or allow childless couples to raise their children. To an outside observer these views may seem extreme, but these thoughts are very real for many ALSWA clients.

Many ALSWA clients (and other Aboriginal parents with no or limited other representation) experience an overwhelming sense of hopelessness and disengage from a system in which they have no trust. The outcomes then are very predictable; the child remains in care, the family left behind are broken hearted, embittered and even more marginalised and the wellbeing of the extended Aboriginal family network diminishes.

POLICY OF THE BILL - SELF-DETERMINATION IS KEY

With this in mind, we submit that, with the highest number of children in care being Aboriginal children, despite Aboriginal children making up a small proportion of children in Western Australia, to make any difference, the legislation must ensure that responses to the current

crisis are Aboriginal designed, led and implemented. Aboriginal self-determination must be strengthened.

ALSWA's Aboriginal colleagues, clients and stakeholders have recently expressed their pleas:

> "It's our kids, there's nothing more important – it's everything'.
>
> "We are in crisis, we need something different, we need a bottom up approach, it must be Aboriginal designed and led. In the past, things have failed because of this, it hasn't worked. We need to go back to basics and have a paradigm shift. Are we not allowed to try for ourselves?"
>
> "Aboriginal people don't want something that is tokenistic and by having this Aboriginal designed and led - non- Aboriginal people will be able to learn, it can be a two-way thing – walk together."

From first contact to the Statement from the Heart in 2017, back to the Royal Commission into Aboriginal Deaths in Custody report in 1991, the Bringing them Home Report in 1997, countless reports in between and up to the Family is Culture final report (Independent Review into Aboriginal Out of Home Care in NSW) 2019, it has been made abundantly clear that Aboriginal people's wellbeing depends on the recognition of Aboriginal people's inherent right to self-govern. This will in turn bring true self-determination and well-being.

The Bringing them Home Report, 1997 - still not implemented, made clear the ***importance of Aboriginal people's involvement in actual decision-making and leadership roles. We quote:***

> "The rhetoric of self-management, however, has not been matched by practical measures. The administrative, executive and judicial decision making about Indigenous children's welfare are controlled by child welfare authorities. Although Indigenous organisations in some jurisdictions have a right to be consulted, this typically occurs only at the final stages of decision making about a child, when recommendations are being made for a placement in substitute care.
>
> In general, my impression is that the welfare authorities are most willing to encourage Aboriginal people to participate in ways that do not involve a major shift of power and responsibility" (Chisholm 1985 page 8).
>
> "Decision making about Indigenous children's well-being falls well short of accepted notions of self-determination. Moreover, it continues to fall short of government claims of 'partnership' and 'collaboration'. Welfare departments have made changes to their practices in an effort to reduce cultural biases leading to Indigenous over-representation. One common strategy has been to establish an Aboriginal section of the department. This strategy has been criticised on the ground that the section is

'tacked on to the system, without altering its philosophy, structures, practices or processes" (Thomas 1994 page 40).

"Accompanying the establishment of Aboriginal sections have been increased employment of Indigenous staff and an attempt to enhance the cultural sensitivity of existing staff and procedures. Each of these strategies also has its critics.

Indigenous organisations criticise the incorporation of Indigenous staff into welfare departments on the ground that these talented people cannot simultaneously be community resources. Public service employment inhibits the capacity of Indigenous staff to represent and advocate for their communities. Funding to employ a community member as a community development worker would frequently be preferred. Ideally both should be ensured as State and Territory administrations have a responsibility to provide appropriate and accessible services to all clients." (page 378)

"For evaluation purposes it is necessary to distinguish between different levels of Indigenous participation in decision-making and service delivery. Self-determination requires more than *consultation* because consultation alone does not confer any decision-making authority or control over outcomes. Self-determination also requires more than *participation* in service delivery because in a participation model the nature of the service and the ways in which the service is provided have not been *determined* by Indigenous peoples. Inherent in the right of self-determination is Indigenous *decision-making* carried through into implementation." (page 276)

"Unless provided in accordance with the requirements of self-determination, services to Indigenous people may be effectively inaccessible to them or where accessible are unlikely to secure their objectives.

The exercise of self-determination by Aboriginal and Torres Strait Islander communities most frequently centres on the provision of community services. The aim is not merely to participate in the delivery of those services, but to penetrate their design and inform them with indigenous cultural values. The result is not merely services which are better structured to reflect the needs and identity of particular communities: there can be a resultant improvement in the effectiveness and efficiency of these services (Dodson 1993 page 56)." (page 277)

(Note - above page references from the Bringing them Home report as on the website: https://humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf

The Commissioner for Children and Young People – Western Australia's Aboriginal forum in August 2018 made recommendations, which include:

"• Transfer power and responsibility to Aboriginal people and communities to lead the solutions to improve the wellbeing of Aboriginal children, young people and families.
• Resource Aboriginal community controlled organisations to deliver services and build community capacity.
• Build policies to drive Aboriginal economic participation and development.
• Advocate for an Aboriginal Commissioner for Children and Young People.
• Programs and services working in the Aboriginal community must be:

- Aboriginal-led – the right of self-determination
- Rights-based – rights of the child as well as Aboriginal rights
- Client-centred – place child at the centre
- Place-based – locally identified issues with local solutions
- Evaluated and appropriately resourced (p 1)

Aboriginal leadership and self-determination

- Follow through on the implementation of the Uluru Statement and treaty discussions at a state and federal level to transfer power/control and responsibility to the community
- Aboriginal communities need recognised representative groups working across the state to identify issues and solutions at a local level, and to ensure policies and programs recognise the differences in urban, regional and remote contexts
- In addition to having access to decision makers and decision making power/influence, Aboriginal communities need access to localised data and resources to support the issues being prioritised and the solutions being identified

Roles of Aboriginal community, government and not-for-profits

- Aboriginal community members must collaborate with government and the not-for-profit sector on 'what's next?' Resource Aboriginal people to lead the design, planning, development, funding and implementation and evaluation processes for programs and service in communities.
- Increase opportunities for networking, training and capacity building that bring together non-government organisations, government and Aboriginal community to support better outcomes
- Provide independent monitoring and oversight to ensure organisations are held accountable for performing their roles and work seamlessly with other organisations."

See further: https://www.ccyp.wa.gov.au/media/3635/supporting-aboriginal-led-solutions-aboriginal-forum-23-august-2018.pdf

POLICY OF THE BILL - TRAUMA INFORMED PRACTICE IS NECESSARY

Our Aboriginal colleagues and clients have recently shared the following:

> 'Make sure they are aware of the stigma and trauma of intergenerational DCP stigma, of stolen generation awareness and attached stigma and traumas involved along with the history of DCP involvement.'
>
> 'For Aboriginal people there is a lot of trauma, because of them being removed as children themselves and generations of removal. There is so much trauma in life – from colonisation and intergenerational trauma, that Aboriginal people have been through that led the person to be here – they have been exposed to other people's drug use/ DV/ and to trauma in life – intergenerational/ colonization – it's not just that persons fault they are there. Everyone is like they are because of experiences – for these people it's experiences of pain – but it wasn't their fault.'
>
> 'There is the fact of the effects of inter-generational trauma and colonisation, very few people can break the cycle and we need to do all possible to enable the cycle to be broken.'

We refer to the Australian Government, Australian Institute of Health and Welfare – Australian Institute of Family Studies report on 'Trauma-informed services and trauma specific care for Indigenous Australian children' of 2013, which is informative here:

> "Trauma-informed services directly deal with trauma and its effects. They look at all aspects of their operations through a 'trauma lens'. Their primary mission is underpinned by knowledge of trauma and the impact it has on the lives of clients receiving services. Every part of the service, management and program delivery systems are assessed and modified to include an understanding of how trauma affects the life of individuals seeking support and the workers delivering the care." (Page 7)
>
> (see further: https://www.aihw.gov.au/getmedia/e322914f-ac63-44f1-8c2f-4d84938fcd41/ctg-rs21.pdf.aspx?inline=true)

POLICY - CENTRALITY OF A CHILD'S NEED TO LIVE IN CONNECTION WITH FAMILY, COUNTRY AND CULTURE

As Aboriginal families disengage at high rates both leading to the removal of children at the early stage of the Department's intervention and lack of reunification, it is imperative that the central role of family as defined by Aboriginal people and their culture is understood. Without fully supporting and empowering Aboriginal people to fully connect with their family and culture, the child protection system will continue to harm Aboriginal children and their families.

With these in mind, ALSWA considers specific issues within the Bill:

CONSIDERATION OF THE BILL

1. **Bill - Clause 4(2) definition of family** – this recognition of kinship connections is supported by ALSWA.

2. **Bill - Clause 5A** – application of objects and principles to all people, courts and tribunals – this is also a very positive step, it makes clear that principles, including the Aboriginal child placement principle must be followed not only by the CEO but also by all.

3. **Bill – Clause 9 – this amends section 9 of the Act, the principles to be followed**. While these amendments include some positive amendments such as the addition of ss 9(a) and 9(ae), ALSWA has concerns in particular about the following:

    a. The Bill removes current section 9(g) of the Act, which ALSWA is concerned will lead to a decrease in the level of support the Department gives to contact between children and their families.

    Section 9(g) currently reads that 'the child should be given encouragement and support in maintaining contact with the child's parents, siblings and other relatives'. Positively, the Bill escalates the issue of contact into clause 8(h) as well as strengthens proposed sections 9(ga) and (gb) – however, the legislative imperative on the Department to actively encourage and support contact is removed by the Bill and we consider that is likely to be disadvantageous to Aboriginal children.

    The ALSWA experience is that families are often too disempowered or traumatised by past practices to seek contact themselves. We submit that the words in s 9(g) above be returned to the Bill with the Department, who has parental responsibility for the child and must promote their best interests, should retain responsibility for ensuring children have contact and connection with their family.

    b. Clause 9(c) of the Bill inserts subsections 9(g) and 9(ga) which specifically require the consideration, at an early stage, of whether it is appropriate to

work towards the return of children to their parents and the stability of a child's living arrangements.

This appears to suggest consideration of long-term orders – incorrectly assuming that children are able to be stabilised under these orders. ALSWA experience is that children on long-term orders have many placement changes.

The amendment fails to recognise a child's ongoing need for care by their parents and the reality that many children leave their placements and self-select to live with their parents or family members. It further fails to recognise the vulnerability of young people leaving care – when they return to family but with fractured relationships from the years of lack of connection between them. It fails to take into account the Bringing them Home Report – making clear the lifelong harm of keeping children removed from their families and the inter-generational effect of this. We refer here to the ALSWA submission to the Statutory Review, particularly pages 12-14.

ALSWA seeks reconsideration of the proposed subsections 9(g) and (ga) and submits that more effort needs to be put into the culturally appropriate healing of trauma faced by Aboriginal families and increased Aboriginal designed and led early intervention to assist parents and their families to overcome any barriers in place for them to care safely for their children. This will enable better long-term benefits for children and society as a whole.

ALSWA suggests that at the least, the wording be strengthened to assure that this does not assume a need for long-term orders, but rather that family, culturally appropriate care be identified and supported at the earliest opportunity.

4. **Clause 10 – and necessary amendments to Section 148 – Legal Representation of a Child**

Clause 10 ensures greater participation of children – which in turn is likely to mean a higher number of children are represented in court proceedings pursuant to s148. Whilst this is not considered in the Review nor the Bill, it is of great importance to the reality of section 13 – self-determination and proper representation of Aboriginal children.

The Bill (amending sections 14 and 81) provides for the Department to consult more widely with the child's family, community and Aboriginal or Torres Strait Islander

representative organisations in decision making. The Bill does not extend this to the legal practitioner who represents the child as their separate representative.

ALSWA has had experience of child representatives who appear to lack knowledge of the child's culture but are expected to make submissions on the best interests of children which are crucial to the proceedings and the child's future. We submit that elements of consultation in section 14 and 81 (as amended as sought below) should also extend to the Child's legal representative.

As we are at crisis point for the over-representation of Aboriginal children in care, the most appropriate action would be the establishment of a specialist Aboriginal representative organisation to be tasked with legal representation of Aboriginal children in both Family Court of WA and Protection and Care matters, this being set up in a similar way to ALSWA or AFLS.

5. **Bill – clause 11 – this amends Section 12, the Aboriginal placement principle**, ALSWA welcomes the amendment to ensure that this principle must be followed in courts and tribunals – as well as by the CEO. ALSWA submits that children do need to remain close to their community and country and this amendment is welcomed.

6. **Bill – clause 12 – this amends section 13**. ALSWA welcomes the amendment that sees self-determination elevated to being a right.

   We note that to ensure real self-determination, there are other amendments that are necessary that have not been included in the review, nor in the Bill including:

   a. amending the Act so that when a child is in the protection and care of the CEO – those who had parental responsibility prior to the child coming into care continue to hold a level of parental responsibility – albeit that the CEO may override that where needed to protect the child (discussed below at items 8 and 21);

   b. amending the Act to extend the family members who are able to apply to the court to:

      i. become parties to court proceedings; and
      ii. apply to the court to revoke any protection order;
      (Discussed below – at items 11 and 19)

   c. amending the Act to enable parents and family members to apply to the court, after final orders are made, for implementation of the section 143 written

proposal and for placement, contact and counselling orders for the child (see below at item 22;

d. amending the Act to provide a right to legal advice and representation to all parents or if a parent isn't taking part, a representative family member. This is provided in other parts of the world and nation and is a necessity in a jurisdiction with such grave imbalance in power and such grave consequences to a child, family, community and Nation; and

e. Amending section 148 to ensure children's legal separate representatives must consult with families and Aboriginal representative organisations and/ or Aboriginal liaison officers and Aboriginal Practice Leaders (discussed further above at item 4).

7. **Bill – clause 13 – amending section 14 – principle of community participation** - ALSWA considers community participation fundamental if there is to be self-determination. ALSWA considers the amendments contained within the Bill to be an improvement on the current Act, but to make the Bill effective in achieving the aim of the statutory review it must include the following:

   a. The child's family, community and Aboriginal or Torres Strait Islander representative organisations must be given an opportunity and where appropriate, assistance to participate in decision making processes.

   b. To avoid doubt, this section must not be excluded from applying to decisions about placement arrangements or cultural plans. While it is acknowledged that the Bill has other provisions about participation in these two decisions, there is no reason to exclude this section from applying to those decisions.

   c. ALSWA have been informed that the Department feels that it cannot speak with family about children being placed with their family members where parents do not permit the Department to have those conversations. This provision should ensure that the Department, while considering parent's views, must nevertheless give family, community and Aboriginal or Torres Strait Islander representative organisations the opportunity to participate in decisions about the child – especially about where a child may be placed if not able to remain with parents. See below at discussion of section 81 for further on this.

8. **Bill – clause 17 – amending section 29(3)** – under section 29, the CEO has parental responsibility for a child when the child is in the provisional protection and care of the Department (i.e. after the child has been removed but before a final order is made – basically 'interim' protection and care). By s29 (3) the CEO will no longer have parental responsibility where the child is placed with parents or with another person by the Court. By law, the parental responsibility would revert to the parents or anyone who had parental responsibility for the child under a court order.

   This is not always appropriate; for example, if the Court considers the children to be at risk of harm in the care of their parents and places them in the care of another person (generally a family member – the 'carer') then by law, parental responsibility will revert to the parents. The carer with whom the Court has chosen to place the child will not have parental responsibility for the child and will be unable to make decisions – such as medical or educational or other decisions leaving children at risk of having unmet needs.

   ALSWA submits that section 29(3) needs further amendment to enable parental responsibility to be either shared with the carer or exercised by the carer.

   We note here that the legislation in New South Wales enables the Children's Court to determine parental responsibility – ALSWA submits this would be appropriate in this clause – and that in fact it should further apply to all interim and long-term decisions made by the court. To assist, the provision in New South Wales is as follows:

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

   79 Order (other than guardianship order) allocating parental responsibility

   (1) The Children's Court may make an order under this section allocating all aspects of parental responsibility, or one or more specific aspects of parental responsibility, for a child or young person who it finds is in need of care and protection for a period specified in the order—

   (a) to one parent to the exclusion of the other, or to both parents jointly, or

   (b) solely to the Minister, or

   (c) to one or both parents and to the Minister jointly, or

   (d) to one or both parents and to another person or persons jointly, or

   (e) to the Minister and another suitable person or persons jointly, or

   (f) to a suitable person or persons jointly.

   .....

(6) If an order allocates all aspects of parental responsibility for a child or young person to the Minister, the Minister must, so far as is reasonably practicable, have regard to the views of the persons who had parental responsibility for the child or young person before the order was made while still recognising that the safety, welfare and well-being of the child or young person remains the paramount consideration.

9. **Bill Clause 27 – amending section 61 – Special Guardians** – ALSWA is pleased to see that the provisions concerning Special Guardianship Orders are strengthened in the requirement to follow the Aboriginal child placement principle and the need for a cultural support plan.

   However – the Bill - clause 27(5) inserts a proposed section 61(4) to say that the cultural support plan need not be given where it is the child's carer who is seeking a Special Guardianship Order.

   ALSWA seeks that this exemption be removed – ALSWA has experience of children going into the special guardianship of a person who is not culturally connected with the child. This can be for many reasons, including concern that the child no longer has the stigma and associated trauma of being a 'child in care'. Nevertheless, a cultural support plan remains crucial as connection to culture is key to an Aboriginal child's long and short-term well-being.

10. **Bill Clause 28 – amending section 63 – Conditions for Special Guardians** - ALSWA also welcomes the strengthening of conditions for Special Guardians to encourage and promote the child's culture.

    However, a further amendment is required – that is to impose a condition that prevents the Special Guardian from removing the child from being within close proximity of the child's Aboriginal community, from the State or from the Commonwealth of Australia without the permission of the Court. It is imperative that an Aboriginal child should not be removed from Australia or from close proximity to their family and community, at least without the matter returning to Court and the Court having the opportunity to consider the child's best interests.

11. **Bill Clause 30 – inserting section 69B** – this provides that if a child's Special Guardians both die, that child shall become subject to a protection order (time limited). ALSWA thanks the Legislative Assembly for adopting the Government amendments to the Bill to the initial clause which would have subjected the child to an immediate until 18 order. ALSWA would prefer that the child should instead be subject to a provisional protection order – but at least seeks a further amendment that ensures:

a. All family and community members significant to a child (to at least include parents, grandparents, aunts and uncles and those who for an Aboriginal or Torres Strait Islander child are traditionally recognised as such), are notified of the fact the Special Guardians have died, the child is subject to a protection order and that they are able to seek the review of this order;

b. To give a right to the people in (a) to apply to the Court for the revocation of the protection order.

12. **Bill Clause 32 – amending section 81 – Consultation before placement** of an Aboriginal or Torres Strait Islander Child. ALSWA recognises this is an improvement to the current provisions, however, we seek further amendment. ALSWA is aware that other Aboriginal people and Aboriginal controlled organisations will make submissions about this section and wants to ensure these voices are heard, considered and the views implemented.

ALSWA seeks as a minimum amendment to this clause the following:

a. That the provision makes clear to all readers that the child's family and community and Aboriginal or Torres Strait Islander organisation representing the child are all consulted. We note here that the Bill does not insert the word 'and' between the clauses and instead relies on the Interpretation Act to support a conjunctive reading of the sub-sections. We consider it would avoid confusion and be of benefit to those affected by the Act if the section was very clearly conjunctive on its face. The Act as a whole has different approaches to showing conjunction between sub-sections (for example amended section 39(2B) which links each sub section with 'and', as does amended sections 61(3) and 89(3A) and current section 6 and 10(1)) and ALSWA believes this will bring greater certainty.

b. We seek that there be more than one family member to be consulted and note that each parent and one each of their family members must be a minimum. We note further that if this cannot be done immediately, subsection (2) will allow for this at a later time. This is particularly important because we at ALSWA have seen matters where initial one (1) or two (2) year time limited protection orders are ending and until 18 orders are being sought but one side of the family has not yet been considered for placement or contact arrangements with the child.

c. We seek that the section make clear that the consultation with family must take place when the CEO considers that a child is likely to require a placement arrangement, despite not having yet sought or obtained a provisional protection and care order for the child. This is because there can be a long delay between when a child is brought into the care of the CEO and when family members are considered for placement – leaving a traumatised child without the benefit of living with family simply because the Department felt that it could not talk with family or community about the likely need of placing the child out of home.

d. That the family be given opportunity and support to participate in an Aboriginal led family decision making meeting.

In relation to both this clause and the amendment to section 14, ALSWA points out that Aboriginal Led Decision Making has an important role in the right to self-determination and should be encouraged, supported and resourced. Due to policies to remove children from their families and the resulting trauma, there are families and communities who are not known or closely connected with one another and support is needed to heal this. ALSWA refers to SNAICC research:

https://www.snaicc.org.au/snaicc-report-aboriginal-torres-strait-islander-family-led-decision-making-trials-queensland-jan-2016-jun-2017/

13. **Clause 38 – Section 89A – Cultural Support plan** – ALSWA endorses this step and confirms the centrality of culture to an Aboriginal child, family, community and Nation.

ALSWA seeks the further amendment of section 89(A)(2) to include a requirement to:

(a) Provide the child's genogram to the Court and parties so everyone is clear on who the Department is considering to be the child's family; and

(b) Consult the child's family as well as the Aboriginal or Torres Strait Islander representative organisation. ALSWA believes this to be absolutely necessary.

14. **Clause 38 – Section 89B – leaving care plan** – ALSWA regularly works with children and young people who come to the end of their time in care and are not connected in any meaningful way to family, culture or their community. We submit that as in our response to section 89A above – the child's family and where the child is an Aboriginal child, an Aboriginal or Torres Strait Islander representative organisation must be supported to participate in developing the plan.

15. **Clause 41 – Section 92** – ALSWA considers it to be an improvement to the current legislation that at least one member of the Care Plan review panel be an Aboriginal person or a Torres Strait Islander person.

16. **Clause 59 – Section 133** – ALSWA acknowledges the Legislative Assembly has accepted the Government amendment to the original Bill to remove any limitation on the circumstances of when an application may be made for an interim order; it is crucial that the Court's powers not be fettered.

    ALSWA considers that children in care (including provisional care) are some of the most vulnerable children in the state and yet they are the only children for whom a court cannot make placement, contact or other orders in their best interests.

    ALSWA supports extending the powers in section 133((2) to all children in care, regardless of whether there is a final protection order made, this will be the only way that children in care can begin to have the same rights as other children to have contact with their family members.

17. **Clauses 60-62 – relating to written proposals** – ALSWA seeks strengthening of the Court's power in section 144 of the Act to require the Court to consider whether the proposal is in the best interests of the child, including the cultural security of the child and to adjourn the matter for the Department to amend the proposal in light of the Court's recommendations. Section 144 should further make clear that the Court can adjourn or make a different order (or no order) if the Court finds that the proposal does not meet the best interests of the child, including again the child's cultural security.

18. **Clause 63 – Section 145** – ALSWA supports this amendment to enable proceedings to be adjourned for the trial of particular arrangements or other appropriate reasons. This recognises that some families can be best supported to attend to their healing journey while proceedings are ongoing with the support of the Court and that different arrangements can be properly trialled under the supervision of the Court, keeping the best interests of the child as paramount.

19. **Clause 64 – amendment to section 147 – parties to proceedings** – ALSWA regularly finds that sadly, there are a number of children who have parents who do not engage in the court process – for many reasons, often involving trauma and feelings of disempowerment or loss of hope. This leaves children without a member of that parent's family involved in the proceedings or making representations for that parent's family. ALSWA submits that the legislation is too strict in deciding who a party can be

and should be more enabling of family members to become parties. This should be the case particularly where one parent is not engaging or a child or parent is in greater need of more support by a family member standing by them.

ALSWA suggests an amendment to bring this in line with the Family Court Act 1997 (WA) section 88, which provides who may make applications in child related proceedings in the Family Court along with a further amendment that the Court must consider sections 13 and 14 in determining who can be a party (see further pages 19-21 of the ALSWA submission to the Statutory Review).

20. **Clause 74 – Replaces Section 249 - Review of Act**, the Act was to be reviewed in 2012 and each 5 years after that. The Act was reviewed in 2017 and now in 2020 the Act may be amended incorporating many issues raised by the review, however, there are a number of issues that need serious consideration that were not included in the review and a further number of serious matters that were included in the review – but not in the Bill.

    As we are at such a crisis point for numbers of Aboriginal children in care and these numbers are rising each year, this Act will need further review with parliament to again consider the Act much sooner than proposed in the Bill. The Standing Committee should consider this being reconsidered earlier than in 5 years from now (which would otherwise effectively be 8 years from the review).

21. **Self Determination and Parental Responsibility - Amendment to Sections 29, 54 and 57** - In ALSWA's experience, many clients are denied access to information about their children's health, education and extra-curricular activities and are excluded from participating in important decisions about their children's lives – including placement in a different part of the state or country. This further disempowers parents and families. This also leads to parents disengaging from the Department and their own children.

    This is especially problematic as children reach their teens and leaving care – where they find themselves vulnerable and disconnected from their families, culture and community.

    Under the Act, once a child is in provisional protection and care or subject to a protection order - until 18 or time-limited, the CEO has parental responsibility for the child – to the exclusion of parents or anyone else (ss 29(2), 54(2) & 57(2)).

    This is not the position in other jurisdictions around the world, including the UK and in other States and Territories, including NSW, where the relevant legislation enables

the CEO to share parental responsibility, which can be overridden by the CEO where necessary to ensure the safety of the child.

Shared parental responsibility fosters collaboration in the care of children, empowers parents and carers and minimises the risks of mistrust and disengagement. In this respect, we ask that consideration be given to implementing legislation, possibly with the section in the NSW act as set out in paragraph 7 above.

22. **Self Determination and Court ongoing consideration of children's best interests**

Currently, children in care are the only children in WA for whom a specialist family or children's court does not have jurisdiction to consider whether it is in their best interests to have contact with family members.

Further, protection orders are made in reliance on section 143 written proposals but ALSWA regularly finds that counselling for children, contact and other terms of the proposals are not complied with.

Children in care are some of the most vulnerable in the state and it is of concern to ALSWA that these children and their families cannot have these issues reviewed by a specialist children's or family court – they are left to Departmental decisions and review by the State Administrative Tribunal which has little expertise in making best interests decisions for children.

ALSWA seeks amendments to enable the Court to make orders as set out in s133(2) of the Act for all children subject to proceedings, to a provisional protection order or to a final protection order.

ALSWA is available to speak to these submissions.

ALSWA is supportive of submissions made to this Inquiry by the Aboriginal Family Law Services and Djinda –Legal Services as well as Legal Aid Western Australia – all of whom represent Aboriginal families in Protection proceedings under the Act.

Should the Inquiry find material differences within submissions that require clarification, ALSWA is willing to meet and consider with them the most effective way forward.

Signed:

Adjunct Professor Dennis Eggington, MHumRights, BSc, DipTeach
Chief Executive Officer