

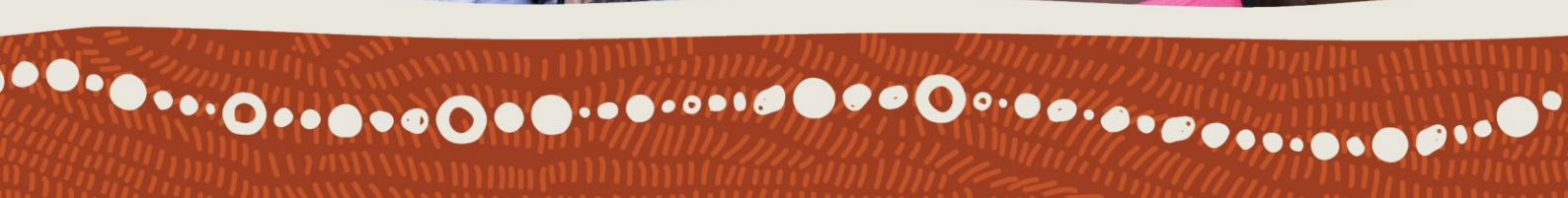


Government of Western Australia
Department for Child Protection
and Family Support

REVIEW OF THE *CHILDREN AND COMMUNITY SERVICES ACT 2004*

Consultation Paper

DECEMBER 2016



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MAKING A SUBMISSION TO THE REVIEW

Interested individuals, service providers and other stakeholders are invited to make submissions to the review of the *Children and Community Services Act 2004*. Submissions may be made in response to the questions in this Consultation Paper, or on any other aspect of the Terms of Reference of the Review or the operation and effectiveness of the *Children and Community Services Act 2004*.

The closing date for written submissions is 31 March 2017.

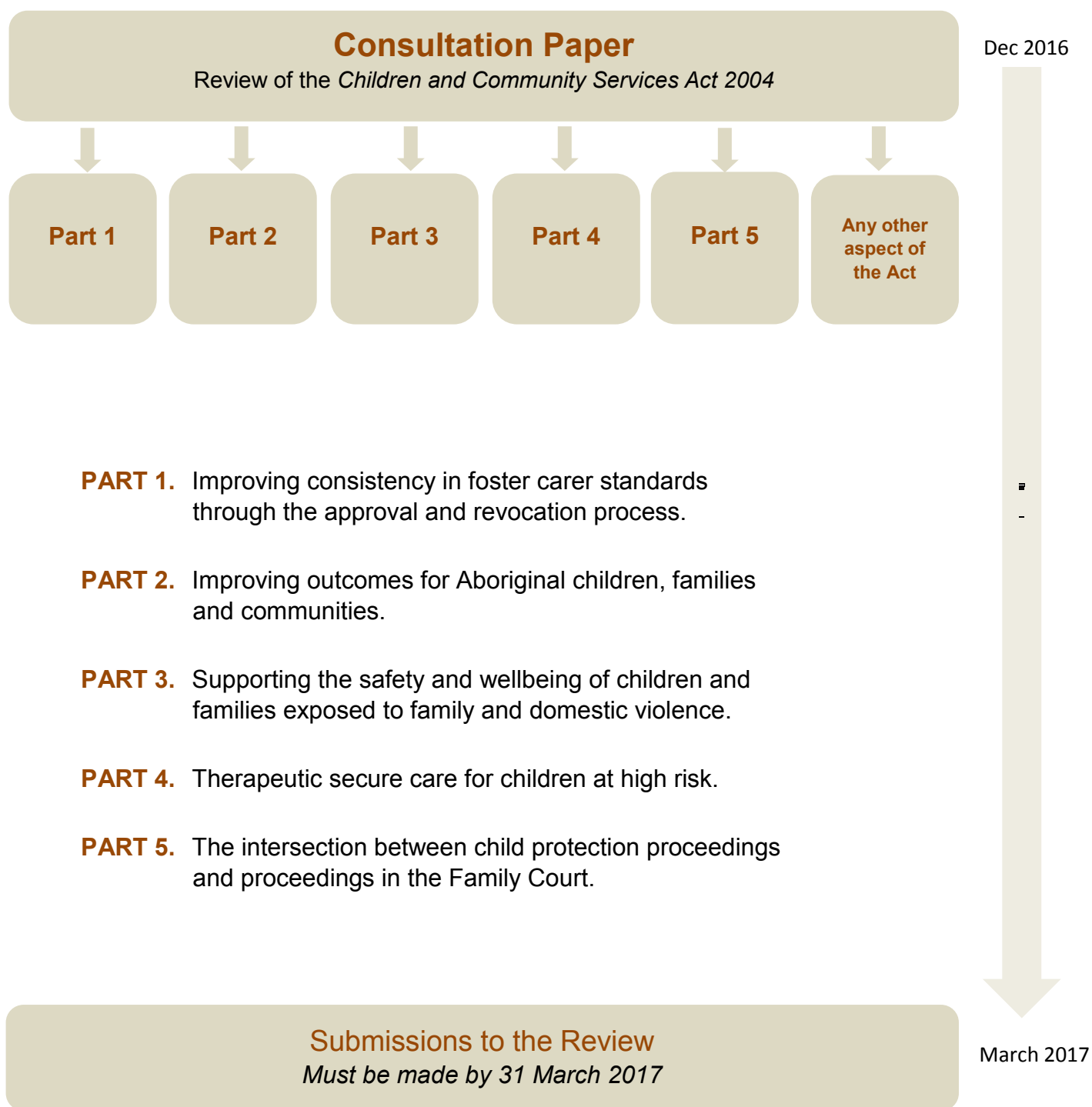
Submissions can be emailed to ccsactreview@cpfs.wa.gov.au (email lodgement is preferred) or sent by post to:

2017 Legislative Review
General Law Unit
Department for Child Protection and Family Support
PO Box 6334
EAST PERTH WA 6892

All submissions must be accompanied by a Cover Sheet. For further information on how to make a submission please refer to www.cpfs.wa.gov.au/ccsactreview



THE CONSULTATION AT A GLANCE



INTRODUCTION

Background to the Review

It is over ten years since the *Children and Community Services Act 2004* (the Act) replaced the *Child Welfare Act 1947* on 1 March 2006. The Act provides the legal framework relating to the protection and care of children and the employment of children;¹ the provision of social services, financial and other assistance; and for other matters concerning the wellbeing of children, other individuals, families and communities. The Department for Child Protection and Family Support (the Department) is the government agency principally responsible for assisting the Minister for Child Protection in the administration of the Act.

Section 249 of the Act requires a review of the operation and effectiveness of the legislation to be conducted every five years. Legislative reviews provide the opportunity to consider whether adjustments in the law are required to effectively achieve the objects of the legislation in response to policy directions or the way in which the legislation operates in legal practice.

The first review of the Act in 2012 (the 2012 Review)² found the legislation to be operating effectively towards achieving its stated objectives, although a number of recommendations were made to improve the operation of the Act and provide increased clarity about existing provisions where necessary. The resulting legislative amendments were introduced in Parliament on 29 November 2014 and came into effect on 1 January 2016.³

This Consultation Paper is released for comment to inform the second statutory review of the Act (the Review). A final report of the Review must be tabled in Parliament by the end of 2017.

Terms of Reference

The *Terms of Reference* for the Review are to examine the operation and effectiveness of the Act and in particular:

1. changes to support the introduction of consistent high-quality foster carer standards through a single decision-maker for approvals and revocations;
2. the principles relating to Aboriginal and Torres Strait Islander children in sections 12 to 14 and the consultation requirement in section 81;
3. any changes necessary to support the safety and wellbeing of adults and children subject to family and domestic violence;
4. the provisions relating to secure care arrangements for children at high-risk; and
5. issues relating to the intersection between child protection proceedings under Part 5 of the Act and proceedings in the Family Court.

The following *principles* will guide the Review:

1. Legislation should be developed or amended only when there is no other appropriate way of responding to an issue after taking all relevant circumstances into account.

¹ Use of the term children throughout this paper refers to both children and young people less than 18 years of age.

² The *Report of the Legislative Review of the Children and Community Services Act 2004* was tabled in Parliament on 29 November 2012 [Tabled Paper No. 5434].

³ A summary of amendments made under the *Children and Community Services Legislation Amendment and Repeal Act 2015* is available on the Department for Child Protection and Family Support website at: www.dcp.wa.gov.au/Organisation/Documents/Summary%20of%20amendments%20as%20at%201%20January%202016.pdf



2. Recommendations for significant legislative change should be evidence-based, with due consideration given to possible flow-on effects including unintended consequences.
3. Regard should be given to the principles of substantive equality in recognition of the differing impact legislation may have on certain groups in the community.
4. Child protection legislation should be sufficiently flexible to enable decisions to be made in the best interests of individual children.
5. Due consideration should be given to submissions from stakeholders recognising their efforts and particular areas of expertise.

Objects and underpinning principles of the *Children and Community Services Act 2004*

The “*objects*” of the Act are:

- (a) *to promote the wellbeing of children, other individuals, families and communities; and*
- (b) *to acknowledge the primary role of parents, families and communities in safeguarding and promoting the wellbeing of children; and*
- (c) *to encourage and support parents, families and communities in carrying out that role; and*
- (d) *to support and reinforce the role and responsibility of parents in exercising appropriate control over the behaviour of their children; and*
- (e) *to provide for the protection and care of children in circumstances where their parents have not given, or are unlikely to be able to give, that protection and care; and*
- (f) *to protect children from exploitation in employment.*⁴

The *principles* contained in sections 7 to 10 are the foundation on which the legislation is based and underpin all the functions and powers exercised under the Act:

- section 7 requires the best interests of the child to be regarded as the paramount consideration when a person, the Court or the State Administrative Tribunal performs a function or exercises a power under the Act;
- section 8 sets out a broad range of matters that must be taken into account when determining what is in an individual child’s best interests;
- section 9 contains 14 guiding principles that must be observed in the administration of the Act; and
- section 10 establishes the principle of children’s participation in the decision-making process when making decisions that are likely to have a significant impact on the child’s life. The operation of this principle should underpin the Department’s case practice, subject to the age and level of understanding of the child concerned.

Additional principles in sections 12 to 14 of the Act are specific to Aboriginal and Torres Strait Islander People⁵ and are addressed in detail in Part 2 of this Paper. A brief summary of the Parts of the Act is provided in Appendix Two of this paper.

Changes to the child protection system in Western Australia

The 2017 Review of the Act coincides with a period of significant reform in Western Australia’s child protection system in response to the increasing numbers of children entering the out-of-

⁴ *Children and Community Services Act 2004*, section 6.

⁵ Use of the term Aboriginal throughout this paper refers to both Aboriginal peoples and Torres Strait Islanders.

home care system over the past ten years; the continuing high number of Aboriginal children who are brought into the care of the Chief Executive Officer (CEO) of the Department (referred to in this Paper as “children in the Department’s care”);⁶ and the complex needs of vulnerable children and families in the community.

The *Royal Commission into Institutional Response to Child Sexual Abuse* has also informed the reform agenda, as shortfalls in out-of-home care systems throughout Australia have been identified through the public hearings, consultations and research conducted by the Royal Commission.

The reform process has involved extensive consultation with Western Australia’s community services sector and stakeholders, culminating in the release this year of:

- *Building a Better Future: Reform of the Out-of-Home Care Sector in Western Australia (OOHC Reform Strategy)*, which commits to a suite of initiatives aimed at achieving high-quality consistent out-of-home care for children unable to remain safely in the care of their own family; and
- *Building Safe and Strong Families: Earlier Intervention and Family Support Strategy (the Earlier Intervention Strategy)* for aligning the current service system to meet the needs of those families most vulnerable to their children entering out-of-home care.⁷

In November 2015, the Department also conducted a consultation to explore how the legislation might better support the OOHC reforms aimed at promoting earlier stability and certainty for children in the Department’s care (the *2015 Legislative Consultation*). The Department received 41 submissions in response to the issues raised in the *Out-of-Home Care Reform: Legislative Amendments Consultation Paper* and takes this opportunity to acknowledge the significant contributions made by stakeholders.

Following the 2015 Legislative Consultation, the Minister for Child Protection, the Hon. Andrea Mitchell MLA, announced on 13 May 2016 the Government’s intention to amend the Act to focus it more effectively towards earlier decision-making for children’s long term care and legal status. It is proposed the amount of time a child may be in out-of-home care without an application by the Department to the Children’s Court for a long term protection order – either a protection order (until 18) or a protection order (special guardianship) - will be two years, unless special circumstances warrant the Children’s Court extending that time limit to three years. A principle is also proposed to provide that the child’s safe reunification with parents is the first priority wherever possible. Related aspects of the already-approved amendments are referred to in Parts 2 and 3 of this Paper.

Within this environment of change, the 2017 legislative review provides the opportunity to consider the operation and effectiveness of the Act as a whole.

⁶ The Act provides the CEO with numerous powers and duties, although in practice many of these are carried out by officers of the Department or other service providers, through the use of the CEO’s delegation powers in the Act and through agreements made under the Act. In this Paper, the term “the Department” is used in place of the CEO.

⁷ These Strategy documents can be accessed on the Department for Child Protection and Family Support website at www.cpfs.wa.gov.au

PART 1. IMPROVING CONSISTENCY IN FOSTER CARER STANDARDS THROUGH THE ASSESSMENT, APPROVAL AND REVOCATION PROCESS

This Term of Reference seeks feedback on legislative options for improving consistency in the assessment and approval of people who wish to be foster carers and the revocation of approval of foster carers who no longer meet the required standards.

1.1. Background

Out-of-home care is provided throughout Western Australia by the Department and a number of service providers in the community services sector⁸ for children who are unable to remain safely in the care of their parents and who require either temporary or permanent care outside the family home. This care is provided through a range of family care, foster care and residential care.

Comprehensive review of the out-of-home care system over the past three years has identified a number of trends and pressures that show new ways of working are required. These include the competing pressures of a growing number of children entering out-of-home care and the continuing difficulty in recruiting foster carers; Aboriginal children entering care at a faster rate than non-Aboriginal children; children entering care younger and remaining longer; and a growing number of children in care with complex, trauma-related needs.

The resulting reform actions presented in the *OOHC Reform Strategy* align with the *National Framework for Protecting Australia's Children 2009-2020* and the priorities outlined in the *National Standards for Out-of-Home Care*.⁹ Overall, they aim to build:

- a system that is driven by the needs of the child
- a coordinated and flexible service system
- a safe system that is accountable to high quality standards
- a legislative framework that supports the best outcomes for children.¹⁰

One of the key reform actions presently under development is the establishment of a cross-sector foster carer panel to improve sector-wide consistency in the assessment, approval and the revocation of approval (the revocation) of foster carers [OOHC reform action 59].¹¹

Existing legislation for the approval of foster carers

Section 79(2)(a) of the Act enables the Department to make an arrangement for the placement of a child in the Department's care with individuals and organisations, including:

⁸ Section 15 of the Act enables the Minister, on behalf of the State, to enter into an agreement with a 'person' (which includes organisations in the community services sector) for the provision or promotion of social services. Section 3 of the Act uses the term "service provider" to define the persons or CSOs that provide or promote social services. In Part 1 of this Paper the term "community sector organisation" refers to those service providers funded to provide out-of-home-care services to children in the Department's care.

⁹ Department of Families, Housing, Community Services and Indigenous Affairs together with the National Framework Implementation Working Group, *An outline of National Standards for Out-of-home Care - A Priority Project under the National Framework for Protecting Australia's Children 2009 – 2020*, July 2011.

¹⁰ Department for Child Protection and Family Support, *Building a Better Future: Out-of-Home Care Reform in Western Australia*, 2016, p.8. (*OOHC Reform Strategy*)

¹¹ *Ibid* p.43.

- (i) *with individuals approved by the CEO in accordance with the regulations* - these are the Department's foster carers, and family members who are able to provide care for a particular child; or
- (ii) *with a person who has entered into an agreement under section 15(1) for the provision of placement services* - these are the community sector organisation (CSO) foster care providers.¹²

Carer competencies

Regulation 4(1) of the *Children and Community Services Regulations 2006*¹³ (the Regulations) requires that, before the CEO approves an individual for the purpose of making an arrangement for the placement of a child under (i) above, the CEO must be satisfied that the person:

- (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 protect 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.*

Currently, the Department and CSO foster care providers manage independent processes for assessing and approving foster carers, and for revoking their approval as foster carers if necessary:

- As indicated above, section 79(2)(a)(i) of the Act requires the Department's foster carers to be assessed against the criteria in regulation 4(1) of the Regulations (commonly referred to as the "carer competencies"). Also, the Department must follow the procedural fairness requirements in regulation 4(2) and (3) for revoking a carer's approval.
- However, CSO foster carers are not legislatively required to meet the carer competencies in regulation 4. Instead, through service agreements, CSO foster care providers are required to provide services in accordance with:
 - *Better Care, Better Services: Standards for Children and Young People in Protection and Care*;¹⁴ Standard 8 requires CSO staff and carers to have skills consistent with the carer competencies in the Regulations; and
 - protocols for the *Foster Carer Directory of Western Australia*. Under these protocols service providers must have in place procedures similar to the revocation requirements the Department must adhere to in regulation 4 of the Regulations.

¹² Above, n 8.

¹³ The *Children and Community Services Regulations 2006* can be accessed at the State Law Publisher website: www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_1221_homepage.htmlhttps://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_1221_homepage.html

¹⁴ *Better Care, Better Services: Standards for Children and Young People in Protection and Care* was developed in partnership with CSOs providing out-of-home care.

All children in out-of-home care should be cared-for by foster carers who have been assessed and approved against a consistently high standard, regardless of location or the foster care service provider. However, while there is anecdotal evidence that standards in foster care in Western Australia are high, there is no systematic oversight of the assessment and approval of CSO foster carers.

Within this environment, differing practices can emerge across the out-of-home care sector in relation to whether a foster carer applicant or an existing foster carer is assessed as meeting, or continuing to meet, the carer competencies. This can lead to situations where people who are not approved to be foster carers by one agency (including the Department) may be approved by another, or one agency's views about the need to revoke a foster carer's approval may not be shared by another.

The intent to explore a foster carer approval panel was first signalled in the Department's 2014 *Out-of-Home Care Strategic Directions in Western Australia 2015-2020 Discussion Paper*. Subsequently, the possibility of improving consistency through legislation was explored in the 2015 Legislative Consultation.¹⁵ Feedback received during the consultation is discussed in section 1.3 below.

The Department is adopting a two-phased approach to improve consistency in approval and revocation standards:

1. A cross-sector foster carer panel is being established under the existing legislation and procurement framework, to introduce greater decision-making consistency now (1.2 below).
2. The Review is further examining legislative measures to support consistent high quality carer standards through a single decision-maker model for foster carer approval (1.3 below).¹⁶

1.2. Cross-sector foster carer panel

A seven-member Cross-Sector Foster Carer Panel (the Panel) is being established early 2017 to create greater consistency in achieving high quality foster carer standards throughout the Western Australian out-of-home care sector. The Panel has been developed by an Implementation Group with representation from the Alliance for Children at Risk, Children's Youth and Family Agencies Association, the Foster Care Association of Western Australia and the Department.

The Panel's role will be to quality assure all new assessments by considering and either endorsing, or not endorsing, recommendations of the Department or CSO foster care providers for the approval of paid or volunteer foster carer applicants. Foster carer assessments will continue to be conducted by the respective agencies against the carer competencies, and final decision-making authority for the approval of a foster carer will continue to lie with the individual agencies.

¹⁵ Department for Child Protection and Family Support, *Out-of-Home Care Reform: Legislative Amendments Consultation Paper*, November 2015, p.17.

¹⁶ *OOHC Reform Strategy*, pp.42, 49.

Membership of the Panel will include two Department officers and a Foster Care Association of WA representative, and the following positions will be selected through an Expression of Interest process:

- a Chair who is independent of the Department and CSO foster care providers, and who possesses relevant qualifications and experience¹⁷
- a Deputy Chair from the community service sector
- a further community service sector member
- an Aboriginal community representative.

The foster carers who will be subject to the Panel approval process will be all Department or CSO foster carer applicants who wish to care for children in a place that is or will be the carer's primary residence.¹⁸

The Department recognises the limitations of the Panel, namely:

- the Department and individual CSOs will retain the right to approve a foster carer applicant, notwithstanding a Panel decision to not endorse the agency's recommendation that the applicant be approved; and
- the current approach to revoking a foster carer's approval status will continue to be managed by the Department and individual CSOs independently, without any coordinating oversight mechanism.

Nevertheless, the Panel will make an appreciable contribution to improving consistency until a suitable legislative model is introduced. The Panel will be under evaluation over its first twelve months of operation, enabling regular feedback and shared learning opportunities for continuous improvement, and will be reviewed after 12 months.

1.3. Legislation to support consistent decision-making

2015 Legislative Consultation

The *2015 Legislative Consultation* sought comment on options for supporting out-of-home care reforms including the following:

- legislating to provide for a single decision-maker in respect of the approval and revocation of foster carers;
- cross-sector portability of foster carers' approval status;
- a requirement for foster carers to report relevant changes in their personal circumstances to the decision-maker;
- a right of external review for foster carers whose approval is revoked; and
- which foster carers should be subject to a legislative approval process, with a proposal that CSO employee foster carers should be included.

Submissions from service providers in the out-of-home care sector gave in-principle support to improving cross-sector consistency in the foster carer assessment and approval process, and there was broad support for:

¹⁷ A social work or psychology qualification with relevant child protection and fostering experience will be required.

¹⁸ Because of the different context in which "family care" is provided, family carers will not be subject to the Panel approval process: while family carers are also legislatively required to meet the carer competencies, all assessments are conducted by the Department and relate to the person's capacity to care for a specific child.

- cross-sector portability of a carer’s approval status;
- a requirement that carers report relevant changes in personal circumstances or history;
- a carer’s right to the external review of a decision to revoke his/her approval as a carer; and
- a requirement that all foster carers caring for a child in the Department’s care meet the carer competencies, including employees in the community service sector.

There was general support for a single decision-maker, although views differed as to whom that should be, with some favouring an independent body and others the Department. Several submissions argued strongly against any change that would compromise the independence of CSOs for managing the approval and revocation of their own foster carers. This was linked to concerns about including employed foster carers within the scope of the proposed carer approval process.

The Department notes concerns raised in those submissions in relation to possible industrial relations implications in respect of foster carers who are employees. Options for addressing these issues will need to be explored including, for example, the use of provisions similar to those in section 41 of the *Working with Children (Criminal Record Checking) Act 2004*, which enable an employer to comply with that Act despite other laws.

Given the substantial contributions already made in relation to the issues above, the Department is now seeking feedback on which of the models below is the preferred legislative approach.

Decision-maker options for approval and revocation

Options for improving cross-sector consistency in foster carer decisions through legislation are outlined below. Under both options, the Department and CSOs would retain responsibility for assessing their own foster carer applicants and reviewing existing foster carers against the carer competencies in regulation 4 of the Regulations.

The model adopted in legislation will include provisions for the revocation of carer approvals; the Review will consider the appropriate avenues for the review of a decision to revoke an existing foster carer’s approval, although it is anticipated that a final right of review would be to the State Administrative Tribunal.

The Department is also seeking feedback on whether a CSO should be able to apply for the review of a decision to revoke the approval of an existing foster carer.

OPTION 1 – The Department (with capacity to delegate the powers externally)

Under this option, new provisions in the Act would vest the Department with responsibility for the approval and revocation of all paid and volunteer foster carers in Western Australia. The new provisions could be implemented adopting either of the two models below.

It should be noted that Model A and B rely on use of the Act’s powers of delegation. The delegation powers provided in section 24 of the Act enable the CEO of the Department to delegate any of his or her powers or duties to an officer of the Department, a service provider or any other person. These powers of delegation are fundamental to the effective operation



of the Act and are used to delegate many of the duties and powers in the Act to the appropriate people to enable them to be carried out in practice.

Model A – *Department single decision-maker*

- The Department retains sole responsibility for all foster carer approvals and revocations. As with many of the powers in the Act, the relevant powers would be delegated to officers within the Department.

Model B – *Foster Carer Review Panel, Department single decision-maker**

- A cross-sector Foster Carer Review Panel is established in legislation. The Panel would review all Department and CSO foster carer assessments and make recommendations to the Department on whether to approve an applicant or to revoke an existing foster carer's approval.
- The Department makes a final decision based on recommendations of the Foster Carer Review Panel.

*This model is similar to the Care Planning Review Panel established in section 92 of the Act.

OPTION 2 - Independent Panel

Under this option, amendments to the Act would provide for the establishment of an independent body vested with decision-making authority for the approval and revocation of foster carers.

Model C – *Independent Panel, single decision-making body*

- A cross-sector panel is responsible for the approval and revocation of all Department and CSO foster care

Consultation question 1

Which of the above legislative models is preferred for improving sector-wide consistency in the approval of foster carer applicants and the revocation of existing foster carers' approval when necessary?

Consultation question 2

Should a community sector organisation, in addition to the individual foster carer, have a right of review in the event that one of their foster carers has his or her carer approval revoked by a decision-maker?

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

This Term of Reference seeks feedback on the operation and effectiveness of the principles relating to Aboriginal children, which are found in sections 12 to 14 of the Act, and the consultation requirement in section 81.

2.1. Background

The Department is committed to improving outcomes for Aboriginal children, families and communities who come into contact with the child protection system in Western Australia. Contact with Aboriginal families and communities now makes up a significant proportion of the Department's work in delivering services to vulnerable and at risk children, and those in need of protection. This has been an increasing trend over the past five years and is a key driver of current reforms. Aboriginal children currently represent 53 per cent of all children in out-of-home-care.¹⁹

Significantly, the Department released the revised *Aboriginal Services and Practice Framework 2016-2018* (ASPF) in June 2016. The ASPF guides the Department's review, development and implementation of services, policies and practices when working with Aboriginal children, their families and communities. The ASPF leads current Department reforms including the *OOHC Reform Strategy* and the *Earlier Intervention Strategy*.

The ASPF is built on four foundation elements:

- Cultural respect
- Consultation, collaboration and leadership
- Self-determination and autonomy
- Holistic and strengths based.²⁰

These foundation elements acknowledge and value the diverse cultures of Aboriginal peoples, and recognise and respect the need to work in genuine partnership with Aboriginal children, their families and communities. The ASPF also provides a set of guiding principles. The guiding principles reflect the attitudes and values that shape and influence the way in which the Department works with Aboriginal children and families who come into contact with the child protection system:

- Equity and access
- Accountability
- Cultural safety and cultural security
- Partnership
- Aboriginal community control and engagement.

Capacity building, community engagement, people development and practice development are the four priority areas that provide the overarching strategic direction of the ASPF to 2018:

- **Capacity Building:** Enable and lead sector capacity building including the development of Aboriginal community controlled organisations (ACCOs) through a Department-initiated ACCO

¹⁹Department for Child Protection and Family Support, *2015-2016 Annual Report*.

²⁰Department for Child Protection and Family Support, *Aboriginal Services and Practice Framework 2016-2018*, p.8.



Strategy; the strategic procurement of services that best meet the needs of Aboriginal children, families and communities; and the support of innovative and flexible service design and delivery.

- **Community Engagement:** Strengthen and develop relationships and local partnerships with Aboriginal families, organisations and communities through culturally respectful engagement and communication.
- **Practice Development:** Develop culturally safe and responsive practice when working with Aboriginal children and families. Include Aboriginal peoples' worldviews and values in all service, policy and practice delivery and design.
- **People Development:** Provide development opportunities for both Aboriginal and non-Aboriginal staff together in the spirit of 'two-way' learning. Develop the capacity of the Department to provide culturally safe, competent and secure support to Aboriginal staff, Aboriginal carers and the Aboriginal children, families and communities the Department works with.

Aligning with the ASPF, a major focus of the *Earlier Intervention Strategy* is the development of a culturally competent service system which is responsive to the needs of Aboriginal families. Actions the Department has committed to under this strategy are:

1. To progress and implement the four priority areas outlined in the ASP Framework:
 - Capacity building
 - Community engagement
 - Practice development
 - People development.
2. To support the expansion of the Aboriginal community controlled organisation (ACCO) sector to enable it to deliver significant proportions of family support services. Options for the development of a peak representative body will also be explored.
3. To strengthen the Signs of Safety Child Protection Practice Framework to more effectively meet the needs of Aboriginal families.
4. To develop and implement a five-year Workforce Development Plan to better meet the evolving future needs of the community including:
 - a cultural leadership and a cultural supervision program for both Aboriginal and non-Aboriginal employees;
 - reviewing and setting targets for Aboriginal workforce development, including recruiting and retaining Aboriginal staff; and
 - increasing the cultural competence of all staff to work with Aboriginal children and families.
5. To implement overarching service standards for all Department-funded family support services requiring demonstration of culturally competent services to Aboriginal children and families.
6. To review contractual provisions to strengthen requirements and accountability of all funded services to deliver culturally responsive services and achieve positive outcomes for Aboriginal children and families.²¹

²¹ Department for Child Protection and Family Support, *Building Safe and Strong Families: Earlier Intervention and Family Support Strategy*, 2016, p.9.

2.2. Legislation relating to Aboriginal children

In recognition that the legacy of trauma caused by past welfare practices requires added considerations to be taken into account when intervening in the lives of Aboriginal families, the Act has a number of provisions which relate specifically to Aboriginal people and operate in addition to the other sections in the Act.

Foremost among these are: the principles in sections 12 to 14 which set out, respectively, the [Aboriginal and Torres Strait Islander child placement principle](#) (the child placement principle), the [principle of self-determination](#) and the [principle of community participation](#); and section 81, which requires the Department to consult with Aboriginal people before making a placement arrangement for an Aboriginal child.

The child placement principle had its origins in the 1970s and is now firmly embedded in varying forms in child protection policy and legislation across Australia to help address the devastating impacts of the historical systematic separation of Aboriginal children from their families and communities.^{22/23} In Western Australia, the child placement principle is found in section 12 of the Act.

[Section 12 – Aboriginal and Torres Strait Islander child placement principle](#)

(1) The objective of the principle in subsection (2) is to maintain a connection with family and culture for Aboriginal children and Torres Strait Islander children who are the subject of placement arrangements.

(2) A principle to be observed when making a placement arrangement for an Aboriginal child is that any placement, so far as consistent with the child's best interests and otherwise practical, should accord with following order of priority:

- (a) placement with a member of the child's family*
- (b) placement with a person who is an Aboriginal person in the child's community in accordance with local customary practice*
- (c) placement with a person who is an Aboriginal person*
- (d) placement with a person who is not an Aboriginal person but who, in the opinion of the CEO, is sensitive to the child's needs and capable of promoting the child's ongoing affiliation with the child's culture, and where possible, the child's family*

The consultation requirements contained in section 81 of the Act are critical to implementing the child placement principle.

[Section 81 – Consultation before placement of Aboriginal or Torres Strait Islander child](#)

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;*
- (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.*

²² Arney, F., Iannos, M., Chong, A., McDougall S., and Parkinson, S., *Enhancing the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Policy and practice considerations*, (CFCA Paper No.34) 2015, Australian Institute of Family Studies Melbourne, p.6.



The principles of self-determination and community participation in sections 13 and 14 of the Act are also linked to the intent of the child placement principle in maintaining Aboriginal children's connection to family and culture. These principles are discussed further in 2.5 below.

2.3. Implementation of the child placement principle

Chapter 7.1 of the online Casework Practice Manual guides the Department's implementation of the child placement principle.²⁴ The Department reports on the child placement principle in accordance with the nationally reported indicator: 'Placement in accordance with the Aboriginal Child Placement Principle'. This indicator reports on the number of Aboriginal children placed with the child's extended family, Aboriginal community or other Aboriginal people, rather than compliance with the principle as a whole, such as *"the extent to which the principle's hierarchy of placement options was followed in the consideration of the best placement for the child, nor whether appropriate Aboriginal individuals or organisations were consulted."*²⁵

In 2015/2016, 66 per cent of all Aboriginal children in care were placed in accordance with the first three of the four placement options in section 12(2) of the Act.²⁶ This is comparable with other Australian child protection jurisdictions but falls short of the target of 80 per cent of placements being made in accordance with the first three categories of the child placement principle.

Although mostly conceptualised as a hierarchy of preferred placement options for children who are unable to remain safely with their parents,²⁷ the child placement principle is not simply about where and with whom an Aboriginal child should be placed. Its name as a "placement principle" belies the child placement principle's more fundamental aim of enhancing and preserving Aboriginal children's connection to their family, community, culture and country; the intention is to improve outcomes for Aboriginal children, families and communities, thereby reducing the number of children requiring child protection responses.²⁸

The Secretariat of National Aboriginal and Islander Child Care (SNAICC) describes the child placement principle as having five inter-related elements:

1. **Prevention** - Each Aboriginal child has a right to be brought up within his or her own family and community.
2. **Partnership** - The participation of Aboriginal community representatives, external to the statutory agency, is required in all child protection decision making, including intake, assessment, intervention, placement and care, including judicial decision making processes.
3. **Placement** - Placement of an Aboriginal child in accordance with the child placement principle.

²³ Secretariat of National Aboriginal and Islander Child Care (SNAICC), *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements*, June 2013, p.2.

²⁴ The *Casework Practice Manual* is available on the Department for Child Protection and Family Support website at www.cdfs.wa.gov.au or <http://manuals.cdfs.internal/CPM/SitePages/Procedure.aspx?ProcedureId=246>

²⁵ Steering Committee for the Review of Government Service Provision, *Report on Government Services 2016*, p.1135.

²⁶ Department for Child Protection and Family Support, *2015-16 Annual Report*, p.69.

²⁷ Arney, F. et al (n 22) p.4.

²⁸ Secretariat of National Aboriginal and Islander Child Care (SNAICC), *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements* June 2013, p.6.

4. **Participation** - Aboriginal children, parents and family members are entitled to participate in all child protection decision-making affecting them regarding intervention, placement and care, including judicial decisions.
5. **Connection** - Aboriginal children in out-of-home care are supported to maintain connections to their family, community and culture, especially children who are placed with non-Indigenous carers.²⁹

*The principle is underpinned by a strong evidence base that highlights: the cultural strengths of Aboriginal and Torres Strait Islander child rearing practices; the critical importance of continuity of cultural identity to child wellbeing; that better outcomes can be achieved through Indigenous community-led solutions; and the importance of cultural knowledge to making decisions in children's best interests.*³⁰

With the continuing high number of Aboriginal children in care, there is a concern about the way in which the child placement principle is being implemented and monitored for compliance in Australia. It has been argued that the intent of child placement principle is not fully understood by practitioners or policy makers, nor consistently implemented.^{31/32} There has also been criticism that child protection authorities focus too much on measuring the outcome of children's 'placement type' rather than the extent to which children's safety and connection to family and culture is achieved through implementation of the child placement principle's five elements above.

This has been borne out most recently in a Victorian Inquiry into compliance with the intent of the child placement principle which noted the lack of consistent definition of the intent of the child placement principle, what constitutes compliance and how it should be measured.³³ A number of implementation barriers have also been identified, including the shortage of Aboriginal foster carers and kinship carers given the numbers of Aboriginal children in the care system requiring out-of-home care, poor identification and assessment of potential carers and the subsequent support of carers.³⁴

Improved implementation of the child placement principle is an ongoing action in the *National Framework for Protecting Australia's Children 2009-2020*. Through the earlier mentioned initiatives in the *OOHC Reform Strategy* and the *Earlier Intervention Strategy*, a concerted effort is underway in Western Australia towards a more holistic implementation of the five elements of the child placement principle. Other initiatives include the development of an *Aboriginal Consultation Guide* to support greater staff awareness, understanding and application of the child placement principle.

Approved amendments

As a result of the *2015 Legislation Consultation*, the Government has approved proposals for amendments to the Act aimed at strengthening the Department's implementation of the child

²⁹ Ibid, p.8.

³⁰ Family Matters: Kids safe in culture, not in care, *Discussion Paper An evidence-based approach to address the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care*, February 2016, p.3.

³¹ SNAICC, (n 28) p.18.

³² Arney, (n.26) p.14.

³³ Commissioner for Children and Young People, *In the Child's Best Interests: Inquiry into compliance with the intent of the Aboriginal Child Placement Principle in Victoria*, October 2016, pp.12,16.

³⁴ Arney (n.26) p.32.

placement principle to maintain children’s cultural connections while in out of home care. These include:

- A requirement for the Department to demonstrate its application of the section 12 child placement principle in the reports it is required to provide the Children’s Court during protection proceedings. These are the reports required under section 61 in relation to applications for a special guardianship order, and section 143 of the Act in relation to applications for a protection order (time-limited) or protection order (until 18).
- A requirement that a plan for maintaining a child’s culture and identity must accompany the reports the Department is required to provide to the Children’s Court under the above sections of the Act.

Amendments to the Regulations are also proposed to include a new assessment criterion for the approval of foster carers and family carers. In order to approve a carer under section 79(2)(a)(1), the Department will need to be satisfied the person is able to promote children’s cultural needs and identity (OOHC reform action 63). This will require amendments in 2017 to the carer competencies provided in regulation 4 of the Regulations. Work is underway to develop the guidelines, training and documentation necessary to support this change in the assessment of carers.

2.4. 2011 amendments to sections 12 and 81

In 2009, the Department led an across-agency review of the child placement principle in section 12 and the consultation requirements in section 81 of the Act in fulfilment of a Government pre-election commitment (the 2009 Review). The purpose of this review was to determine whether Aboriginal children in care were being placed in the best possible family environment, whether their best interests were being held as paramount and whether any changes to the Act were needed to make this more likely to occur.

The 2009 Review found that the child placement principle in section 12 was appropriate for ensuring that the cultural identity of Aboriginal children was taken into account in considering the best interests of individual children. Even so, minor amendments to section 12 were made on 1 January 2011 to reinforce that the child placement principle is to be observed “*so far as is consistent with the child’s best interests*”.³⁵

At the time of the 2009 Review, section 81 required the Department to:

- (1) ... ensure that an officer who is an Aboriginal person or a Torres Strait Islander is involved at all relevant times in the making of a placement arrangement in respect of an Aboriginal child or a Torres Strait Islander child.
- (2) ... consult with an Aboriginal or Torres Strait Islander agency, approved by the CEO for the purposes of this section, regarding the prospective placement of an Aboriginal child or a Torres Strait Islander child.

The 2009 Review found that, rather than meaningful consultation, the Department’s compliance with subsection 81(2) was resulting in a ‘tick box’ approach to the consultation process. This was particularly so in relation to children from regional or remote communities where agencies with local knowledge were not readily available, and where the two

³⁵ The amendments to section 12 were made under the *Children and Community Services Amendment Act 2010*.

metropolitan-based approved agencies had limited or no knowledge of the individual children, their families or communities about whom they were being consulted.

Consequently, section 81 was also amended in January 2011 to promote more meaningful consultations and provide greater flexibility in the consultation process. This included providing more flexibility regarding the external consultation options for the Department, and ensuring that such consultations occurred with Aboriginal people who possess relevant knowledge of the child, the child's family and/or the child's community, whether they be private individuals or those working in an approved Aboriginal agency.

The Department is seeking feedback on whether section 81 is operating effectively to support implementation of the child placement principle. One likely amendment is to require that the Aboriginal officers of the Department referred to in section 81(a) also have relevant knowledge of the child, the child's family or the child's community.

2.5. Principles of self-determination and community participation

The principles in sections 13 and 14 of the Act are also intended to support the operation and effectiveness of the child placement principle and full implementation in accordance with its objective *"to maintain a connection with family and culture for Aboriginal children and Torres Strait Islander children who are the subject of placement arrangements."* – section 12(1).

Section 13 – Principle of self determination

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

Section 14 – Principle of 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 this Act that are likely to have a significant impact on the life of a child who is a member of, or represented by, the group, community or organisation.

These principles are consistent with, and must be observed in addition to, the general principles in section 9 of the Act which state that:

- 9(i) *decisions about a child should be consistent with cultural, ethnic and religious values and traditions relevant to the child;*
- 9(j) *a child's parents and any other people who are significant in the child's life should be given an opportunity and assistance to participate in decision-making processes under this Act that are likely to have a significant impact on the child's life;*
- 9(k) *a child's parents and any other people who are significant in the child's life should be given adequate information, in a manner and language that they can understand, about –*
 - (i) decision-making processes under this Act that are likely to have a significant impact on the child's life; and*
 - (ii) the outcome of any decision about the child, including an explanation of the reasons for the decision; ...*

Implementation in practice

The principles of self-determination and community participation can be broadly interpreted as applying to Aboriginal participation both in the Department's individual casework with families and, more broadly, the development of the Department's child protection policy and practice.

In practice, implementation of these sections is integrated throughout the Department's policy and strategic frameworks and its online Casework Practice Manual. Examples of the ways in which the Department observes these principles in practice include:

- Cultural Plans – a Cultural Plan must be prepared within 30 working days of an Aboriginal child being placed in out-of-home care. Cultural Plans should address ways to preserve and enhance the child's culture and connection to country.³⁶
- Care planning - the care planning process should be inclusive and provide children, parents, carers and significant others with the opportunity to participate in significant decisions regarding the child's care – section 90(2). Consultation must occur with a Department Aboriginal practice leader or other relevant Aboriginal officer when planning for an Aboriginal child. Information about the child's culture and identity must be included in the care plan and the culture and identity component should outline the connection of the child with his or her cultural origins, and be maintained throughout their period of care.³⁷
- Pre-birth planning pilot - the Department is implementing a 12 month pre-birth planning project with hospitals, the Aboriginal Medical Service and other Aboriginal organisations in six districts across the state, to work with Aboriginal families in pre-birth planning for the safety of a child following the child's birth.
- Community meetings – these meetings are being held between the Director General and senior executive as discussion and consultation forums with Aboriginal people from the community and agencies in the community services sector. This includes an increasing dialogue with Aboriginal organisations such as the Kimberley Aboriginal Children in Care Committee (KACCC). KACCC was formed in 2015 to look at ways of preventing the further removal of Aboriginal children from their families and the care of Aboriginal children already taken into care.³⁸
- Funding of Kinship Connections - a service which helps Aboriginal children transit out of State care by reconnecting them with their extended family systems, and identifying safe family members who will support them through these difficult years.
- Building relationships with local Aboriginal women in the Department's Great Southern and Cannington districts so that family for Aboriginal children in care can be located through creating genograms.
- Working with Aboriginal housing agency Noongar Mia Mia on the *Intensive Family Support Housing Program*, which supports primarily Aboriginal families who have been evicted from public housing due to the Disruptive Behaviour Management Policy. The Department works closely with the family to support them to address the issues which resulted in their initial eviction, and to re-establish themselves in a home. Families who successfully engage with the program over the two-year support period are enabled to take up a long-term tenancy in public housing.

³⁶ Department for Child Protection and Family Support, Casework Practice Manual, *Chapter 7.1- Child Placement Principle*.

³⁷ *Ibid*, *Chapter 10.3 Care Plans – including Review or Modification*.

³⁸ Kimberley Aboriginal Children in Care, *Gaps Report*, November 2015.

- *Safer Families, Safer Communities Kimberley Family Violence Regional Plan 2015-2020* – a whole of community action plan to reduce family and domestic violence in Kimberley communities in collaboration with local Aboriginal agencies and community groups.³⁹

Other examples of the way the Department is observing the principles in sections 13 and 14 include:

- the development of local Department staff inductions involving Elders from the local communities and other Aboriginal people; and
- establishing local Aboriginal reference groups to provide guidance on decisions.

While the Department is not aware of problems in the way the principles in section 13 and 14 operate from a legal perspective, it is suggested that the wording of section 13 should reflect more contemporary relations between the state and Aboriginal communities; namely, Aboriginal people should be enabled or supported to participate in decision-making rather than the paternalistic use of “allowed to”.

Consultation Question 3

Are there any changes to the Act which could help to clarify or strengthen the intended operation of the child placement principle as a way of enhancing and preserving Aboriginal children’s connection with family and culture?

Consultation Question 4

What legislative changes might improve the effectiveness of the consultation required of the Department when making a placement arrangement for an Aboriginal child?

Consultation Question 5

Are any changes required to increase the effectiveness of the principles set out in sections 13 and 14?

³⁹ Department for Child Protection and Family Support, *Safer Families, Safer Communities Kimberley Family Violence Regional Plan, 2015-2020*.



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

This Term of Reference seeks feedback on any changes to the Act necessary to support the safety and wellbeing of adults and children subject to family and domestic violence.

3.1. Background

Family and domestic violence is a significant driver of demand for the Department's services. Increased community awareness and less acceptance of family and domestic violence has led to a significant growth in reports to the Department. Almost 35,000 incidents of family and domestic violence were reported and responded to in 2015-16, an increase of 27 per cent from the previous year, and family and domestic violence accounted for more than 30 per cent of all contacts for the Department.⁴⁰

This situation is reflected Australia wide, with the Australian Institute of Health and Welfare finding that emotional abuse (which includes family and domestic violence) was the most commonly investigated and substantiated type of abuse in Australia in 2014-15: 43 per cent of all child protection substantiations were for emotional abuse, and emotional abuse was also most likely to coincide with other forms of abuse including neglect (32.4%) and physical abuse (21.5%).⁴¹

Children's exposure to family and domestic violence is a significant factor contributing to the removal of children from their parents. A qualitative analysis of 85 children in care in Western Australia during 2015 demonstrated that in 91 per cent of the cases, at least one episode of family and domestic violence had been reported to the Department, and in 55 per cent of the cases five or more episodes had been reported to the Department. The Department's family and domestic violence policy states:

Exposing a child to an act of family and domestic violence is a form of emotional abuse. The person responsible for the abuse is the perpetrator of the violence. The Department is responsible for identifying and responding to cases where a child has suffered significant harm or is likely to suffer significant harm as a result of exposure to family and domestic violence. Significant harm or likelihood of harm may be caused by a single act of family and domestic violence or the cumulative impact of exposure over a period of time.

When responding to cases of emotional abuse - family and domestic violence, the role of the Department is to increase safety for the child and adult victim by reducing or managing the risk posed by the perpetrator. To do this, a priority of all responses is:

- *the safety of the child and the adult victim;*
- *a strong and ongoing working relationship with the adult victim;*
- *rigorous ongoing assessments underpinned by evidence based risk factors; and*
- *coordinated responses involving family, community, government agencies and community sector services that are focused on increasing the safety and wellbeing of*

⁴⁰ Department for Child Protection and Family Support, 2015-2016 Annual Report, p.7.

⁴¹ Australian Institute of Health and Welfare, 2016. <https://aifs.gov.au/cfca/2016/07/28/emotional-abuse-children-growing-problem-australia>



*the child and the adult victim, and reducing or managing the risks posed by the person using violence.*⁴²

3.2. Recent amendments to the Children and Community Services Act 2004

On 1 January 2016, two important amendments to the Act relating to family and domestic violence came into effect following recommendations of the 2012 Review:

1. *A definition of 'emotional abuse'* was introduced into section 28 of the Act, which is the section that sets out the grounds on which a child may be found to be in need of protection. The definition states that: *emotional abuse includes psychological abuse, and being subjected to or exposed to one or more acts of family and domestic violence.* An "act of family and domestic violence" has the meaning given in section 6(1) of the *Restraining Orders Act 1997*, and being 'exposed' to family and domestic violence includes:
 - (a) *to see or hear the act of family and domestic violence; and*
 - (b) *to witness physical injuries resulting from the act of family and domestic violence'*- section 3.

It is noted that under amendments to the *Restraining Orders Act 1997* recently passed by Parliament, changes to broaden the definition of family and domestic violence in section 6(1) of that Act will be made. This follows a review in 2012 of family and domestic violence laws by the Law Reform Commission of Western Australia.⁴³

2. *New information sharing powers* were introduced to improve information exchange in cases of family and domestic violence. The critical importance of timely information exchange within and between the service and court systems has been consistently identified as necessary for supporting safety and protection for victims of family and domestic violence. In addition to information about the wellbeing of a child or class or group of children, "*relevant information*" now includes information that "*is, or is likely to be, relevant to the safety of a person who has been subjected to, or exposed to, one or more acts of family and domestic violence*". This has broadened the type of information sharing that can occur between the Department and a range of individuals or agencies pursuant to section 23 of the Act.

Perhaps of more practice significance are the new information sharing powers in sections 28A to 28C of the Act. These sections do not apply to information sharing with the Department, but rather enable the sharing of *relevant information* between other public authorities (prescribed in the Regulations⁴⁴) and certain agencies in the community services sector in relation to children's wellbeing and the safety of persons subjected or exposed to family and domestic violence. More information on the new information sharing laws is available on the Department's website.⁴⁵

3.3. Responding to family and domestic violence within the child protection system

Responding to family and domestic violence requires a coordinated response involving government agencies and community sector services. This response is shaped by the criminal

⁴² Department for Child Protection and Family Support, *Emotional Abuse – Family and Domestic Violence Policy* www.dcp.wa.gov.au/Resources/Documents/Policies%20and%20Frameworks/Family%20and%20Domestic%20Violence%20Policy.pdf

⁴³ Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, June 2014.

⁴⁴ *Children and Community Services Regulations 2006*, regulation 20A.

⁴⁵ www.dcp.wa.gov.au/Organisation/Pages/Amendments-to-the-Children-and-Community-Services-Act-2004.aspx



and civil legal systems through laws contained in the *Criminal Code of WA*, the *Restraining Orders Act 1997*, the *Family Court Act of Western Australia 1997* and the *Children and Community Services Act 2004*.

In 2015, the Department internally reviewed its family and domestic violence practice and casework practice guidance (the FDV review). The FDV review was informed by:

- the impending changes to the Act at that time (as described in 3.2 above);
- recommendations arising from the Ombudsman Western Australia's Own Motion investigation into violence restraining orders made under the *Restraining Orders Act 1997*;⁴⁶
- recommendations arising from the Ombudsman Western Australia's role in the review of child deaths and family and domestic violence related deaths;⁴⁷ and
- relevant learnings and recommendations arising from the Luke Batty inquest.⁴⁸

The methodology included extensive consultation with the Department's district staff, a review of intake thresholds and the review of safety and wellbeing assessments and safety plans. The majority of the FDV review's findings were implemented through changes to the Department's policy and case practice guidance. However, a small number of findings related to the adequacy of the Act for supporting the safety of child and adult victims.

In particular, the FDV review found that an ongoing challenge for the Department, as with all child protection agencies in Australia, is recognition that the strengths and protective capacity of the adult victim (usually the child's mother) are often not enough for mitigating the risk posed by perpetrators of family and domestic violence. Managing the risk to children that is posed by perpetrators of violence requires coordinated safety planning involving extended family, members of the community and other professionals including the civil and criminal justice systems.

In some cases, however, even with extensive safety planning, the perpetrator's use of violence is unable to be stopped, changed or contained. In these circumstances, a child may be critically injured or removed from a protective parent (whether or not they are separated from or residing with the person using violence), due to an inability of the service system, including the police, courts, the Department and community sector services, to create adequate protections for the child and adult victim and reduce or manage the risk posed by the person using violence. Two examples are provided below.

Excerpt from the Luke Batty inquest

"Luke's death was preceded by years of family violence perpetrated by Mr Anderson to him and his mother. Luke was exposed to emotional harm, conduct engendering fear and anxiety, and he witnesses physical harm inflicted by Mr Anderson on his mother, Ms Batty. (Para 13)

The Department of Human Services based their risk assessment around the following factors:

⁴⁶ Ombudsman Western Australia, *Investigation into issues associated with violence restraining orders and their relationship with family and domestic violence fatalities*, 2015.

⁴⁷ Ombudsman Western Australia, *Annual Report 2014-15*.

⁴⁸ Coroners Court of Victoria, *Finding – Inquest into the Death of Luke Geoffrey Batty*, September 2015.

- a) *an intervention order was in place;*
- b) *Ms Batty was a proactive and 'protective' parent, reporting violence and seeking out supports; and*
- c) *Ms Batty and Mr Anderson were separated.* (Para 499)

DHS relied on Ms Batty's own courage and strength of character in substitution for a proper safety plan for Luke's safety". (Para 502)

Possible Department case scenario

The Department is seeking a protection order (until 18) for a young child. The child's mother is protective and he thrives when in her care. However, his father is extremely violent. The Department has removed the child on two prior occasions due to his exposure to the significant and ongoing violence perpetrated by his father against his mother. On both occasions the child was reunified following the father's incarceration. The Department is now seeking a protection order (until 18) following the father's breach of a violence restraining order (VRO) and an assault on the mother, so severe that she was hospitalised with multiple fractures. District staff are concerned that they are re-victimising the mother and her son by taking this action, but consider they have no other option.

This is an issue that speaks to the overall capacity of the Western Australian service system to stop, change or contain the violent and abusive tactics used by perpetrators of family and domestic violence, and is not an issue unique to child protection. What is unique to child protection is the dilemma facing child protection workers when deciding whether or not to remove a child from an otherwise protective parent, thereby risking further trauma to the child and re-victimizing the parent victim.

3.4. What new measures could be introduced?

The Department has been considering what further options might improve the effectiveness of the Act in keeping children safe with a protective parent by holding perpetrators accountable for failing to protect children from family and domestic violence.

A new offence?

One suggestion has been the introduction of an offence similar to the offence for failing to protect a child from harm under section 101 of the Act. Section 101 provides that:

A person who has the care or control of a child and who engages in conduct –

- (a) *knowing that the conduct may result in the child suffering harm as a result of any one or more of the following –*
 - *physical abuse;*
 - *sexual abuse;*
 - *emotional abuse; or*
 - *neglect as defined in section 28(1); or*
- (b) *reckless as to whether the conduct may have that result, is guilty of a crime and is liable to imprisonment for 10 years.*

Section 101 is used in circumstances where the person charged had *the care or control of a child*. This offence cannot be applied to perpetrators who are, for example, bound against contact with a child and/or child's parent by a VRO because they do not have the 'care or control' of a child.



In these cases, a perpetrator who exposes a child to family and domestic violence through an assault on the child's mother could be charged with breaching the VRO, which carries a maximum penalty of a fine of \$6,000 or two years imprisonment, or both, and also charged with criminal offences carrying varying penalties under the *Criminal Code*, depending on the severity of the assault. Some offences committed in 'circumstances of aggravation' attract higher penalties: committing an offence against a person with whom the offender is in a family and domestic violence relationship and committing an offence in the presence of a child are both circumstances of aggravation.

Even so, in recognition of the factors listed below, it has been suggested that a new offence could be created for perpetrators who no longer have the 'care or control' of a child (for example, due to a VRO or parenting order) but who continue to expose that child to family and domestic violence:

- the seriousness of the impact of family and domestic violence on children;
- that perpetrators often escalate their use of violence after separation;
- that children are often used as objects of perpetrators' abusive and controlling tactics;
- that children can suffer significant harm as a result of their exposure to acts of family and domestic violence.

Such an offence could add to the tool box for promoting perpetrator accountability and child safety, and send a strong message about the impact of family and domestic violence on children. It could be argued, however, that the Act is not the appropriate vehicle for an offence which is not directed at a person who has the care or control of the child.

Protection order options

Another suggestion for increasing child protection workers' options when attempting to manage cases of family and domestic violence is a new type of protection order which could be used to curtail or remove the parental rights of a perpetrator and/or place restrictions or conditions on them, thereby supporting a child to remain safely under the parental responsibility of a protective parent. Such an order could be used for preventing a child from coming into care, or to support a child's reunification with a protective parent.

An order of this kind would not in itself 'solve' the issue of family and domestic violence. It would need to be used in conjunction with safety planning and support for the child and adult victim, and could be used in conjunction with a VRO.

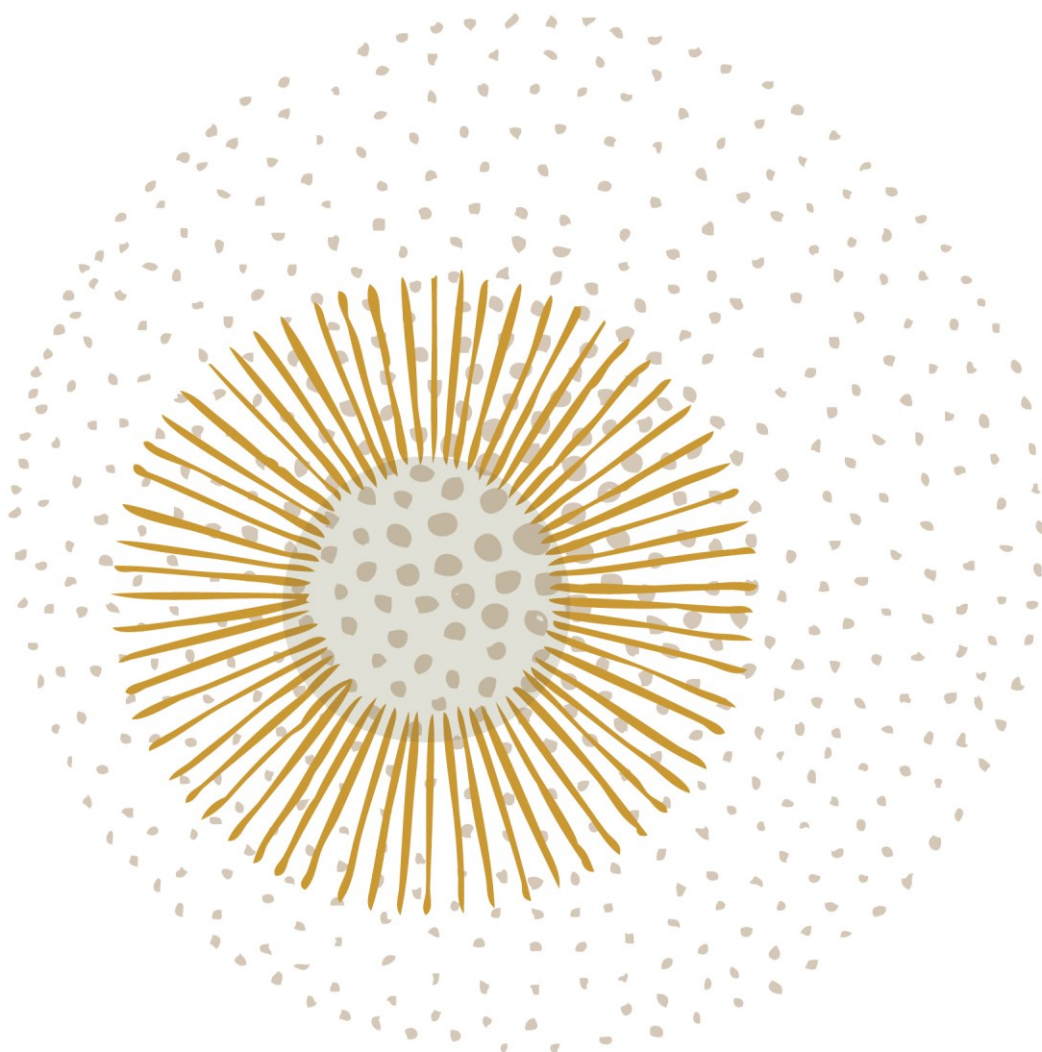
Adapting protection orders (supervision) for this type of purpose has been mooted previously. However, it is arguable this would change the fundamental nature of the order. Supervision orders are provided for in sections 47 to 53 of the Act, and are used when a child is found to be in need of protection, but the child's ongoing safety can be managed through working with the parent/s without the Department assuming parental responsibility for the child. To promote children's safety and avoid their entry into care if possible, supervision orders can place conditions on a child, a parent of the child or an adult with whom the child is living.

Supervision orders cannot be used to make conditions about with whom a child should live, or who is to have responsibility for the day-to-day care of the child. This is because they were never intended to operate as a 'backdoor' means for determining a child's custodial parent. The Family Court is the appropriate jurisdiction for determining custodial arrangements.

However, there may be merit in exploring a new type of protection order for use in circumstances when a child is found to be in need of protection from one parent while the Department works with the other parent to achieve ongoing safety for the child. Careful consideration would need to be given to how this type of protection order might interact with family law. This proposal therefore also falls within scope of the Review's fifth Term of Reference regarding the intersection between protection proceedings under Part 5 of the Act and proceedings in the Family Court of Western Australia (see Part 5 of this Paper).

Consultation Question 6

What further amendments might improve the effectiveness of the Act in protecting children from family and domestic violence while keeping them safe with a protective parent?



PART 4. THERAPEUTIC SECURE CARE FOR CHILDREN AT HIGH RISK

This Term of Reference seeks feedback on the legislation relating to secure care arrangements for children at high risk.

4.1. Background

In May 2011, the Kath French Secure Care Facility (Kath French Centre) in Stoneville commenced operation as Western Australia's first secure care facility established under amendments to the Act which came into effect on 1 January 2011. Since then, 175 children⁴⁹ with complex needs have been admitted to the six-bed secure care facility for planned, short-term intensive intervention to stabilise their emotional state and high risk behaviours. Five years on, it is timely to consider the operation and effectiveness of the legislation under which the secure care facility operates.

The Kath French Centre was established in response to the complex needs of a small but consistent number of children aged 12 to 17 years who are considered to be at immediate and substantial risk of causing significant harm to themselves and/or others, and where there is no other suitable way to manage that risk and ensure they receive the care they need.⁵⁰ This is referred to as the threshold for admission. As noted in the Explanatory Memorandum to the amending legislation:

*These limitations are intended to ensure that children are placed in the secure care facility as a measure of last resort only, once it has been determined that there are no other suitable ways to manage the situation. It is not the intention of this Bill that the secure care facility be used in lieu of a psychiatric facility or for criminal justice purposes such as remand or as a condition of bail. A secure care arrangement is a therapeutic rather than punitive option.*⁵¹

Similar to involuntary admissions to a mental health facility, secure care represents the most extreme form of protective intervention available to the Department in a continuum of care options for promoting the protection of children. The need for a secure care facility in Western Australia was long deliberated following the closure of secure institutional facilities in which "uncontrolled" children under the *Child Welfare Act 1947* were placed for assessment and treatment.⁵²

The Ombudsman Western Australia's 2006 *Report on Allegations Concerning the Treatment of Children and Young People in Residential Care*⁵³ recommended consideration be given to the need for a such a facility and Prudence Ford's 2007 review of the then Department for Community Development recommended the Kath French Centre become an Intensive Therapeutic Unit for young people in care.⁵⁴

⁴⁹ As at 31 August 2016.

⁵⁰ *Children and Community Services Act 2004*, section 88C.

⁵¹ Children and Community Services Amendment Bill 2010 - Explanatory Memorandum, p.4.

⁵² During the 1970s, 80s and early 90s, then Department for Community Welfare operated a number of secure facilities for the assessment, treatment and detention of juveniles, who could be placed through the welfare or juvenile justice arm of the Children's Court under the *Child Welfare Act 1947*; examples include Hillston and Nyandi. See Department for Community Development, *Signposts: A Guide for Children and Young People in Care in WA from 1920*, p.27.

⁵³ Ombudsman Western Australia, *Report on Allegations Concerning the Treatment of Children and Young People in Residential Care*, Parliamentary Commissioner for Administrative Investigations, August 2006, p.155.

⁵⁴ Ford, Prudence. *Review of the Department for Community Development: review report*, Department for Community



Other Australian jurisdictions have established varying models of therapeutic secure care for children including Victoria and New South Wales. Most recently, the 2016 South Australian *Child Protection Systems Royal Commission* (South Australian Royal Commission) has recommended the development of a secure therapeutic care model in that State given “the urgent circumstances a number of children and young people find themselves in”.⁵⁵

4.2. Kath French Centre model of care

The *Sanctuary Model* of therapeutic care⁵⁶ guides the model of care used in the Kath French Centre. The Sanctuary Model uses trauma-informed therapeutic practice to offer children a safe and healing environment to support them when they are at their most vulnerable.⁵⁷ The therapeutic environment aims to provide the physical and psychological safety needed to support healing from trauma, and also to identify ways of transitioning a child back into the community to reduce the likelihood of readmission to secure care.

A multi-disciplinary approach is required to assess the needs of children and stabilise their emotional state and behaviour while in secure care. The team at the Kath French Centre includes a senior child protection worker; full time senior consultant clinical psychologist; part-time general practitioner, nurse practitioner and education officers; five senior secure care officers; 13 secure care officers; and a team of casual secure care officers. All staff have skills and knowledge in providing high quality therapeutic interventions for children in crisis and receive training on:

- the *Impact of trauma* on children (including brain development, attachment and growth and development)
- the *Sanctuary Model* (trauma-informed organizational model to create a community of healing)
- *Therapeutic Crisis Intervention* (strategies to support de-escalation for children who are unable to manage their emotions and behaviours).

4.3. What the legislation requires

The secure care provisions in the Act are outlined below. In general, the Department has identified few problems in the way the provisions operate from a legal perspective, although some gaps of a more technical legal nature have been identified. For example, there is a need for provisions dealing with emergency evacuations if children under a secure care arrangement need to be placed in an alternative facility as a result of an unanticipated event at the Kath French Centre. These will be considered by the Review.

Some of the practice-issues which have emerged, however, warrant consideration as to whether amendments might improve the effectiveness of the legislation in enabling protective therapeutic intervention. These issues are discussed in section 4.4 below.

Development, Perth, 2007 - Recommendation 56.

⁵⁵ Child Protection Systems Royal Commission, *The Life They Deserve: Child Protection Systems Royal Commission Report*, Government of South Australia, 2016, p.352. (Child Protection Systems Royal Commission)

⁵⁶ Sandra L Bloom, *The Sanctuary Model of Organisational Change*, 2005.

<http://sanctuaryweb.com/TheSanctuaryModel.aspx> and

www.dcp.wa.gov.au/Resources/Documents/Residential_Care_Sanctuary_Framework.pdf

⁵⁷ Department for Child Protection and Family Support, *Kath French Secure Care Centre Fact Sheet*, Sept 2015.

Admissions to secure care

Children who meet the threshold for admission to secure care may be admitted in two ways:

Administrative admission If the Department has full parental responsibility for a child under a protection order (time limited) or a protection order (until 18), he or she is admitted to secure care ‘administratively’; that is, it is the Department who makes the “secure care arrangement” for the child and who sets the “secure care period”.⁵⁸

Judicial admission Children who are not in the Department’s care under a protection order (time limited) or a protection order (until 18) may be admitted ‘judicially’ by the Children’s Court under an interim order (secure care) applied for by the Department. If necessary, in urgent situations, these children may initially be admitted administratively under a secure care arrangement made by the Department; however, as soon as possible, but no later than two working days after the admission, the Department must lodge an application with the Children’s Court for a ‘continuation order’. If a child is not already the subject of protection proceedings, the Department must also make a protection application for the child at the same time as applying for the continuation order.⁵⁹

The majority of children admitted to secure care are already in the care of the Department under a protection order (approximately 78 per cent of all admissions).

Secure care period - sections 88D, 88F and 134A

A secure care arrangement must not exceed 21 days unless there are exceptional reasons why it should be extended, and in these cases it may be extended only once and for a period not exceeding 21 days. In the case of an administratively admitted child, the Department may extend the secure care arrangement, whereas for children who are judicially admitted and therefore only in the provisional protection and care of the Department, the Department must apply to the Children’s Court for an extension of the order to be granted.

Review of secure care decisions - section 88G

Children who are administratively admitted to secure care, their parents or other relatives may apply to the Department to have a ‘secure care decision’ about any of the following reconsidered:

1. the secure care arrangement itself;
2. the secure care period; or
3. a decision to extend the secure care arrangement.

If unsatisfied with the outcome of the Department’s reconsideration, they can apply to the State Administrative Tribunal for a review of that decision.

There are no specific review provisions for children who are judicially admitted. Judicial admissions by their nature provide judicial oversight of secure care arrangements made for children who are not under the parental responsibility of the Department. In addition to the legal representation children receive during court proceedings relating to secure care

⁵⁸ *Children and Community Services Act 2004*, section 88C.

⁵⁹ *Children and Community Services Act 2004*, section 88F.



arrangements, the *Children's Court of Western Australia Act 1988* provides that parties may appeal to the Supreme Court against a decision made in the Children's Court.

Care planning - section 88I

Within two working days of a child's admission to secure care, a care plan or provisional care must be prepared. The plan must:

- (a) identify the child's needs in transitioning to other living arrangements after leaving secure care; and*
- (b) outline the steps or measures designed to address those needs and to reduce the likelihood of the child being placed in the facility again.*

Oversight - section 125A

To oversee the operations of secure care, the Act provides for the appointment of assessors who are external to the Department to carry out the following functions:

- (a) enter and inspect the facility;*
- (b) inquire into the operation of the facility;*
- (c) inquire into the wellbeing of any child in the facility;*
- (d) see and talk with any child in the facility;*
- (e) inspect any document relating to the facility or to any child in the facility.*

Any child admitted to the Kath French Centre (or a parent or relative of the child) may ask to see and talk with an assessor and the Department must facilitate the meeting.

4.4. The first five years – secure care in practice

It must be acknowledged there is a paucity of research on the effectiveness and practice parameters of secure care settings for children placed in secure facilities for child protection purposes (rather than for youth justice or mental health purposes), including evidence about the most effective length of time that should apply. Despite this, support continues for the judicious use of secure care in the absence of effective options for this small group of children at most extreme risk.⁶⁰

Drawn from literature relating to a combination of promising secure youth programs, the South Australian Royal Commission has suggested that the following key messages should be used to guide that state's development of a secure therapeutic care model:

- Children placed in secure care are likely to have complex needs, including communication disorders, mental health disorders, post-traumatic stress disorder, neuro-disabilities and learning disabilities.
- The effectiveness of secure care will depend on the quality of therapeutic input, skilled interactions with staff and transition planning. The model should include:
 - positive relationships between staff and young people;
 - an ability to match therapeutic input to client needs;
 - significant input from mental health services;

⁶⁰ See University of South Australia, Australian Centre for Child Protection, *Report on Secure Care Models for Young People at Risk of Harm: Report to the SA Child Protection Systems Royal Commission*, Dr Sara McLean, 2016, p.30.

- the capacity to engage children with services for long enough to benefit; and
- appropriate transition planning.”⁶¹

The Department’s experience is consistent with the above messages. Each child admitted to the Kath French Centre has complex needs which can include trauma-related behavioural and mental health issues as a result of past abuse or neglect and experiences of family and domestic violence. At times these co-occur with and are complicated by cognitive impairment and neuro-disabilities such as foetal alcohol spectrum disorder.

Who is being placed in secure care?

- From 1 May 2011 to 31 August 2016, 175 individual children were admitted to secure care.
- Of these, 54 percent (95) were male and 46 per cent (80) were female.
- Fifty-four per cent (95) were Aboriginal.
- The ages of the majority of children at first admission were 13 years (45), 14 years (31) and 15 years (33). Fifteen per cent (27) of the children admitted were under 12 years of age when first admitted, four of whom were nine years old and two of whom were eight years old.
- Sixty-three percent (111) of the children were admitted to secure care once only and of these 48 per cent (53) had their secure care arrangement extended.
- Of the remaining 64 children, 34 had two admissions, 14 had three admissions and 16 had four or more admissions.
- The average number of days this group of children spent under an initial secure care period is 19 and the average number of days children spent under an extension of a secure care period is 15.
- Thirty (17%) of these 175 children were registered with the Disability Services Commission.

The Department notes with concern the unexpected and increasing number of younger children requiring secure care as a last-resort protective measure in the absence of alternative ways to manage the extreme level of risk their behaviour presented – three per cent of the 175 children above were under ten years of age. The intended target age range for secure was 12 to 17 year-olds; however, in anticipation of exceptional circumstances in which a younger child may require secure care, no age-limit was placed on admissions in the legislation. Secure Welfare Services in Victoria are for 10 to 17 year-olds, although children under 10 years of age may be admitted with senior approval.

Practice challenges

Over its first five years, the team at Kath French Centre has grown the skills and knowledge needed to provide high quality therapeutic interventions to this high-needs group of children. As anticipated, there are inherent practice challenges in undertaking this work within the short timeframes of a 21-day or less secure care period, including:

- building therapeutic relationships;
- responding to the complex and diverse nature of children’s needs within in a secure environment and gaining timely access to the specialist services necessary to address them during and post-secure care;
- finding appropriate placement options in a timely manner (in practice, a maximum 21-

⁶¹ Child Protection Systems Royal Commission, (n 55), p.353.



day secure care period is often reduced to 15 working days placing pressure on the out-of-home care system to arrange complex support options for the state's most challenging children); and

- facilitating timely review of secure care decisions if applied for by children who have been administratively admitted.

Relationships - The Sanctuary Framework values relationships in the process of healing from trauma. However, building therapeutic relationships with such high-needs children takes time. The Kath French team has observed that children's secure care experience generally follows the pattern below:

- In the first week they begin to establish trust and relationships with staff and the ability to rest and reduce anxiety, anger, frustration and fear.
- The second week usually involves implementing the therapeutic program's focus on safety (physical, social, psychological and moral), emotion management, loss and future.
- The third week often sees the beginnings of change, but can be disrupted with a child's growing anxiety about leaving secure care.

Services - Children admitted to secure care are supported to build and maintain existing relationships with external services. The Kath French Centre works with the child's case workers to identify support services that will assist the child to remain safe in the community. Direct contact is encouraged in order for positive and supportive relationships to commence while the child is in secure care. On site visits are facilitated and participation in secure care children's meetings is seen as a significant contribution to the development of safety.

Placements - For children requiring new placement arrangements post secure-care, delays in finding suitable options can leave little or no time in which to meet future carers before leaving secure care. This can be particularly difficult for children with disabilities or emerging mental health concerns, who often require more time to adjust to change.

Rather than reducing the likelihood of a readmission to secure care required by transition planning, delays in accessing appropriate services and placement options can contribute to placement breakdown and result in a return to pre-admission levels of risk which may trigger subsequent return to the Kath French Centre.

Reviews

All children administratively admitted are advised of their right to a review of their secure care decision and supported to make an application to the State Administrative Tribunal if they wish to do so. The Department notes that it is establishing procedural improvements to expedite applications to the State Administrative Tribunal to ensure urgent hearing given the compressed timeframes involved.

Administrative admissions - July 2011 to July 2016

- Twenty applications were made to the Department to reconsider a secure care decision, one of which resulted in the cancellation of the child's secure care arrangement.
- Four applications to the State Administrative Tribunal were made, but none proceeded to hearing.



Judicial admissions - July 2011 to July 2016

- The Department made 65 applications to the Children’s Court for an interim order (secure care) or an order for the continuation of a secure care arrangement initially made by the Department. Three of these applications were unsuccessful and resulted in the cancellation of the child’s secure care arrangement and their removal from the facility.
- There have been no appeals to the Supreme Court in respect of an interim order (secure care) or continuation order.

Secure care period

The significance of introducing a secure care facility was recognised in Parliamentary debate, with a particular concern expressed over the need for external oversight (see below) and the cumulative length of time a child may spend in secure care. In relation to timeframes, the 21-day maximum limit for a secure care arrangement and the opportunity for one extension in exceptional circumstances for up to a further 21 days was modelled on the timeframes operating in Victoria’s secure welfare service. The intention was:

...to ensure children are protected from prolonged periods of time kept under a secure care arrangement. The secure period should be based on the shortest period necessary to manage the child’s safety and to identify and plan for their need to be met.⁶²

However, the recent South Australian Royal Commission observed that:

The available length of admission varies across Australia. Longer term programs are often required to respond to such issues as mental health, disability and social needs. Children should be admitted for a sufficient time to address any of these underlying concerns.⁶³

The Department is considering whether amendments should be made to extend the maximum period allowable for a secure care period and an extension of the secure care period from 21 to 28 days. This is in recognition that the current timeframe is challenging in practice given the reality of children’s complex needs and the capacity of the service system to quickly respond.

Consultation Question 7

Would you support a limited increase in the maximum number of days a child may be placed in secure care under an initial secure care arrangement, and an extension of a secure care arrangement; for example, from 21 days to 28 days?

Oversight

The broad powers in section 125A of the Act enable assessors to exercise a high degree of external oversight of secure care and residential facilities operated by the Department and the community service sector. Four assessors are currently appointed under a panel contract with the Department until 30 June 2017, and to date there have been five assessor visits to the Kath French Centre. The Department provides copies of all assessor reports to Western Australia’s Commissioner for Children and Young People. In practice, assessor reports have contributed to improvements as the Kath French Centre has developed, with recommendations for change

⁶² Children and Community Services Amendment Bill 2010, Explanatory Memorandum, p.4.

⁶³ Child Protection Systems Royal Commission, (n 55) p.353.

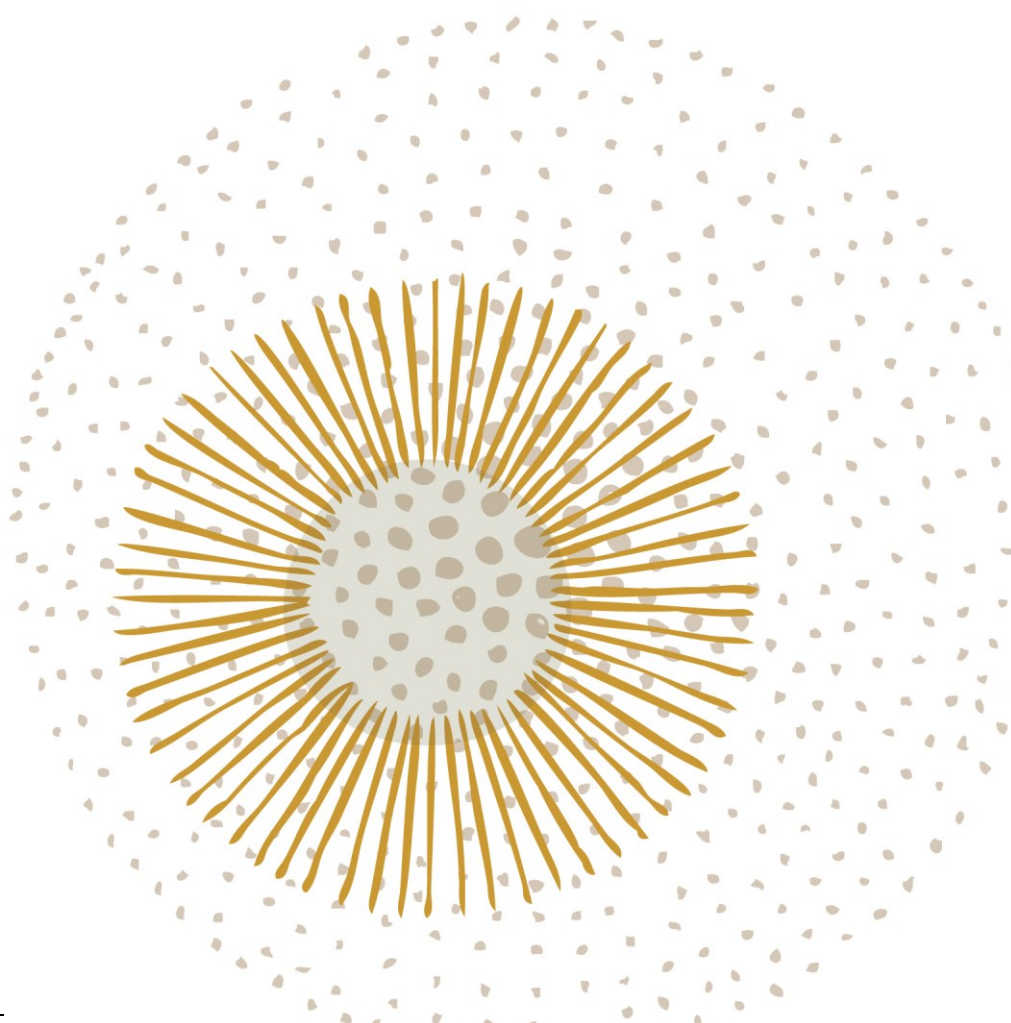


relating to administrative, communication and internal building configuration relating to safety concerns.

Lessons from the *Royal Commission into Institutional Responses to Child Sexual Abuse* highlight the critical importance of independent oversight of the out-of-home care system for children who are unable to remain safely in the care of their own families.⁶⁴ To strengthen the independent oversight of standards in the out-of-home care sector, OOHC reform action 66 of *The OOHC Reform Strategy* proposes a new Ombudsman Western Australia role in monitoring all organisations against new Safety Standards in *Better Care, Better Services Standards*. The Kath French Centre will be included in these oversight reforms and consideration will need to be given to the future of role of assessors in the context of these reform proposals.

Consultation Question 8

What other amendments to the secure care legislation might improve the effectiveness of secure care as a short-term therapeutic intervention?



⁶⁴ Royal commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Institutional Responses to Child Sexual Abuse in Out-of-Home Care*, March 2016, pp.54-59.



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

This Term of Reference is intended to identify any legislative changes that could streamline and enhance the operation of the child protection and family law jurisdictions for children and families when the jurisdictions intersect.

5.1. Background

The Children's Court of Western Australia (the Children's Court) has exclusive jurisdiction to hear and determine all applications made with respect to a child under the Act,⁶⁵ and Part 5 of the Act contains provisions relating to the conduct of protection proceedings in the Children's Court. This includes provisions for interim orders, orders for determining parentage, pre-hearing conferences, reports to the court, proposals about arrangements for children and procedural matters including legal representation of children.

In Western Australia there are a number of children and families who become involved in protection proceedings in the Children's Court at the same time as proceedings are underway in the Family Court of Western Australia (the Family Court). Increasingly, families presenting to the family law and child protection systems in Australia have multiple and complex needs, including those affected by family and domestic violence, mental health concerns and drug and alcohol dependency.⁶⁶ This has contributed to concerns about the risks and issues that can arise when child protection and family law proceedings involving the same children and families are dealt with in separate courts.

Confusion and delays are commonly experienced by children and families, as well as practice and resource challenges for courts, legal practitioners and service providers. A particular concern is the potential risk to children's safety in the absence of fully informed and timely decision making. Children and families who are involved in both jurisdictions may experience:

- confusion about which court has responsibility for decisions regarding parental responsibility, the child's care arrangements and the child's safety;
- delays resulting from multiple adjournments in both courts until appropriate care arrangements for the child are determined;
- confusion over differences in court documentation, terminology and case management approaches; and
- unintended consequences of decisions about a child being made by one court in the absence of information about, or evidence associated with, proceedings being conducted in relation to the child in the other court.

Issues for courts, legal services and other practitioners may include:

- funding challenges (the same party may require legal representation in two separate courts);

⁶⁵ This is provided in section 20(1)(a) of the *Children's Court of Western Australia Act 1988*.

⁶⁶ Commonwealth Attorney-General's Department, Family Law Council, *Interim Report to the Attorney-General In response to the first two terms of reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*, June 2015, p.1. (Family Law Council Interim Report)

- duplication of resources and documentation associated with having proceedings relating to the same child or family underway in two courts; and
- sharing of expert reports and other relevant documents across two jurisdictions.

A number of measures have assisted to alleviate some of these problems by supporting better coordination and collaboration between the two jurisdictions in Western Australia. These include:

- a memorandum of understanding (MOU) between the Family Court, the Department and Legal Aid WA, which has operated since 2008 with the aim of achieving the best possible outcomes for children by facilitating the sharing of information and resources;⁶⁷
- the co-location of a child protection worker from the Department with the Family Court Counselling and Consultancy Service since 2009, to manage information sharing between the Department, Legal Aid WA and the Family Court and between the Department and Independent Children’s Lawyers, and to liaise between the three sectors. This includes assisting with urgent applications of varying kinds; Family Court orders seeking information from Department; collaborative case discussions between the Department and the Court and/or Legal Aid; notices of child abuse or family violence; and staff development regarding all aspects of the Department’s work with the Family Court; and
- Practice Directions issued by the Courts to streamline the admission of particular evidence and documents in each jurisdiction to facilitate more timely decisions.

The new information sharing powers in section 28B of the Act, introduced on 1 January 2016, have also enhanced information sharing between the relevant courts. Officers of the Family Court are now ‘prescribed authorities’ under the *Children and Community Services Regulations 2006*⁶⁸ and are able to exchange information relevant to the wellbeing of a child or children, or to the safety of a person who has been subjected to or exposed to family and domestic violence.

While these measures have increased collaborative case management between the jurisdictions, in recognition that a more integrated response was needed, an Integrated Services Reference Committee (the WA Committee) was established. Membership of the WA Committee includes the Family Court, the Children’s Court, Legal Aid WA, the Department and the State and Commonwealth Attorney-General Departments. The work of this committee has also been informed by a 2011 Churchill Fellowship report⁶⁹ and a subsequent consultation in Western Australia during 2012 which examined options for greater integration between the Family Court and Children’s Court jurisdictions in Western Australia. These options could include the Children’s Court:

- having the power to make parenting orders where protection order proceedings are on foot, provided all parties agree;

⁶⁷ The MOU is available on the Department for Child Protection and Family Support website at www.cpfs.wa.gov.au or at http://dcpworkspace/DCP_Agreements/MOU%20-%20DCP,%20the%20Family%20Court%20and%20LAWA.pdf

⁶⁸ *Children and Community Regulations 2006*, regulation 20A.

⁶⁹ J Jackson, *Bridging the Gaps between Family Law and Child Protection: Is a unified family court the key to improving services in the family law system?*, Churchill Fellowship, 2011.



- being invested with the statutory power to grant injunctions for the safety of children and victims of family violence.

5.2. Legislation and current practice in Western Australia

Western Australia is the only Australian state with its own family court. The Family Court operates under the *Family Court Act 1997* (WA) (the Family Court Act) and can exercise both federal family law jurisdiction and jurisdiction in state law matters including the *Adoption Act 1994*, the *Surrogacy Act 2008* and the *Children and Community Services Act 2004*. (In other states, family law proceedings are heard in the Family Court of Australia and the Federal Court of Australia, pursuant to the *Family Law Act 1975*.)

Section 36(6) of the Family Court Act gives the Family Court all the powers of the Children’s Court in the following circumstances:

“Where a child the subject of proceedings appears to be a child in need of protection within the meaning of the Children and Community Services Act 2004 the Court has, in relation to the child, in addition to the powers conferred by this Act, all the powers of the Children’s Court.”

In practice, these powers take effect in the following circumstances:

- when the Department agrees to intervene in family court proceedings at the request of the Family Court (or Magistrates Court in country regions) - section 207(1)
“In any proceedings under this Act that affect, or may affect, the welfare of a child, the court hearing the proceedings may request the CEO to intervene in the proceedings and the CEO may intervene in those proceedings on that request”; or
- if the Department makes a decision to intervene in Family Court proceedings - section 207(2)
“If a child the subject of proceedings under this Act appears to be a child in need of protection within the meaning of the Children and Community Services Act 2004 the CEO may intervene in any proceedings with respect to the child.”

Despite provisions enabling child protection proceedings to be heard in the Family Court in the above circumstances, until recently this has rarely occurred.

Pilot project

The legislative framework in Western Australia provides a unique opportunity to develop a more integrated approach to managing family law cases involving child protection concerns.⁷⁰ As a result of ongoing work by the WA Committee, a Pilot Project was initiated in the second half of 2014 with the aim of improving streamlined proceedings for children and families and informing future legislative reform. This has involved identifying individual cases in which it is considered to be in the best interests of the child or children involved for the Department to intervene directly in Family Court proceedings and seek protection orders.

The Pilot Project is managed by a Working Group chaired by the Principal Registrar of the Family Court. Members include representatives from the Family Court, the Department and Legal Aid WA and meetings with the Children’s Court occur as needed. It is anticipated the Pilot Project will conclude in 2017. During this period the Department will have formally intervened

⁷⁰ Family Law Council Interim Report, (n 66) p.24.



using section 207 of the Family Court Act in between ten to 20 Family Court cases to obtain protection orders.

The Pilot is, in part, intended to assist the Department, working with the Court and other relevant stakeholders, to analyse the outcomes and benefits of action being taken in the Family Court as opposed to the more usual conduct of proceedings in the Children’s Court, including developing clear guidelines for Department staff in relation to intervention proceedings in the future.

To date, approximately 80 Family Court cases involving almost 150 children have been identified as falling into “intersection categories” including:

- A request under section 207(1) of the Family Court Act, by either the Family Court or an Independent Children’s Lawyer, for Department intervention to become a formal party to Family Court proceedings due to concerns about a child.
- Department-initiated intervention under section 207(2) of the Family Court Act in Family Court proceedings in order to seek a protection order under the Act.
- Attendance at the Family Court by a Department case manager and/or lawyer as “friend” of the Court.

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

Consultation Question 9

What legislative changes could be made to further enhance the integration of child protection proceedings with proceedings in the Family Court of Western Australia?

GLOSSARY OF TERMS

Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) – section 12

The principle in section 12 of the *Children and Community Services Act 2004* (the Act) which describes the order of priority the Department must consider when placing an Aboriginal child in a care arrangement. The aims of the ATSICPP are to:

- recognise and protect the rights of Aboriginal children, families and communities.
- increase the level of self-determination for Aboriginal people in child protection matters
- reduce the disproportionate representation of Aboriginal children in the child protection system.

The ATSICPP is not simply about where or with whom the child is placed in out-of-home care. The history and intent of the ATSICPP is about keeping Aboriginal children connected to their family, community, culture and country.

Aboriginal community controlled organisation (ACCO)

An incorporated Aboriginal organisation, initiated, based and governed by local Aboriginal community to deliver holistic and culturally appropriate services to the Aboriginal community that controls it.

Care Plan – section 89

A legislatively required plan, developed by the Department, which identifies the needs of the child under the nine dimensions of care, outlines the steps or measures required to meet those needs and sets out decisions about the care of the child. This plan is developed in a collaborative process with all significant people and with the child's participation.

Casework Practice Manual

Central repository of information and procedures for all aspects of casework and case practice within the Department.

Child in the CEO's care – section 30

Section 30 of the Act provides that a child is in the CEO's care when he/she is in provisional protection and care of the CEO, on a protection order (time limited) or protection order (until 18), on a negotiated placement agreement, or provided with a placement service under section 32(1)(a) of the Act. In this Paper, the term "child in the Department's care" has the same meaning as child in the CEO's care.

Child in the Department's care

As above.

Community sector organisation (CSO)

May be a not-for-profit or a for-profit organisation, a Local Government Authority or a religious or charitable organisation that provides the community with services to meet a broad range of needs, including out-of-home care. Part 1 of this Paper refers only to those community sector organisations which are funded under section 15(1) of the Act to provide out-of-home-care services to children in the Department's care.

Community services sector

The collection of community sector organisations that provide the community with services to meet a broad range of needs, including out-of-home care.

Family Carer

A relative of a child in the Department's care who cares for the child in a setting that is considered to be the family carer's primary residence. The term family carer is not used in the Act, but a definition of *relative* is provided in section 3.

Foster carer

A suitably qualified and experienced person, who provides care to children who are unable to live with their own parents and who are in the care of the Department. Foster carers provide foster care in a setting that is considered their primary residence. Foster carer applicants are assessed and approved against the foster carer competencies in regulation 4 of the *Children and Community Services Regulations 2006* (the Regulations) and the revocation of existing foster carers' approval must occur in compliance with regulation 4(2) and (3). The term foster carer is not used in the Act.

Out-of-home care

The provision of care arrangements outside the family home to children who are, or who may be found to be, in need of protection under the Act.

Out-of-home care sector

The government and community services sector organisations that provide care arrangements for children living in out-of-home care.

Placement arrangement – section 3

The term placement arrangement is used in the Act and defined in section 3 as an arrangement for the placement of a child made under section 79(2) of the Act. These arrangements include placements for children in the Department's care with individuals who have been approved by the Department in accordance with regulation 4 of the Regulations, and with community sector organisations which are funded under section 15(1) of the Act to provide out-of-home-care services to children in the Department's care.

Residential care

Refers to care that is provided to a child in a place that is not the carer's primary residence. Residential care typically operates on a rostered basis and provides care for children with complex and intense needs.

Reunification

The process by which a child in out-of-home care is returned to the care of his or her parents.

Secure care arrangement – section 88C

An arrangement under section 88C of the Act which allows the CEO (or delegate) to make an arrangement for the placement of a provisionally protected child or a protected child in a secure care facility

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CONSULTATION QUESTIONS

Consultation question 1

Which of the legislative models outlined in Part 1 of this Paper is preferred for improving sector-wide consistency in the approval of foster carer applicants and the revocation of existing foster carers' approval when necessary?

Consultation question 2

Should a community sector organisation, in addition to the individual foster carer, have a right of review in the event that one of their foster carers has his or her carer approval revoked by a decision-maker?

Consultation Question 3

Are there any changes to the Act which could help to clarify or strengthen the intended operation of the child placement principle as a way of enhancing and preserving Aboriginal children's connection with family and culture?

Consultation Question 4

What legislative changes might improve the effectiveness of the consultation required of the Department when making a placement arrangement for an Aboriginal child?

Consultation Question 5

Are any changes required to increase the effectiveness of the principles set out in sections 13 and 14?

Consultation Question 6

What further amendments might improve the effectiveness of the Act in protecting children from family and domestic violence while keeping them safe with a protective parent?

Consultation Question 7

Would you support a limited increase in the maximum number of days a child may be placed in secure care under an initial secure care arrangement and an extension of a secure care arrangement; for example, from 21 days to 28 days?

Consultation Question 8

What other amendments to the secure care legislation might improve the effectiveness of secure care as a short-term therapeutic intervention?

Consultation Question 9

What legislative changes could be made to further enhance the integration of child protection proceedings with proceedings in the Family Court of Western Australia?



SUMMARY OF KEY PROVISIONS

Children and Community Services Act 2004

Part 1 - Preliminary

Part 1 includes the title of the Act and definitions of many of the terms it uses.

Part 2 – Objects and principles

This Part sets out the “objects” of the Act under section 6, and the principles which must be observed in its administration. The principles under sections 7 to 14 are the foundation on which the legislation is based - they underpin all the functions and powers which are exercised under the Act. The best interests of the child must always be regarded as the paramount consideration.

Part 3 – Administrative matters

Part 3 contains some of the key provisions intended to achieve the objects of:

- promoting the wellbeing of children, other individuals, families and communities;
- acknowledging the primary role of parents, families and communities in safeguarding and promoting the wellbeing of children; and
- encouraging and supporting parents, families and communities in carrying out that role.

Part 3 establishes the administrative structure and processes which enable the CEO to carry out the functions listed under section 21(1). In carrying out these functions, the CEO must have regard to certain things including:

- the need to promote the wellbeing of children, other individuals families and communities;
- the need to encourage a collaborative approach between public authorities, non-government agencies and families in providing social services and responding to child abuse and neglect;
- the need to promote diversity and participation in community life, giving particular consideration to certain groups identified in section 21(2)(c); and
- the need to promote development and strengthening of families and communities to achieve self-reliance and provide for the care and wellbeing of their members (section 21(2)).

Powers under this Part include:

- the setting-up of a Ministerial Body, which is a body corporate;
- power for the Minister to enter into agreements on behalf of the State for the provision of social services - the Department provides substantial funding to CSOs (service providers) under these provisions; and
- powers of delegation by the Minister (section 16) and the CEO (section 24).

Part 3 also contains the principle of cooperation and assistance which requires the Department to endeavour to work in cooperation with public authorities, non-government agencies and service providers in performing functions under the Act (section 22). To this end, the Department has developed a number of memoranda of understanding with key partners which help in establishing cooperative working relationships.

Important sharing of information provisions are included in Part 3 and provide the foundation for much of the collaborative work carried out by the Department and partner agencies in the government and community services sector. The provisions enable sharing of relevant information:

- between the Department and individuals and agencies (section 23); and,
- between prescribed public authorities and certain non-government providers (section 28B). Section 28B was introduced under the *Children and Community Services Legislation Amendment and Repeal Act 2014* and came into effect on 1 January 2016. A number of public authorities have been prescribed under regulation 20A of the *Children and Community Services Regulations 2006* for the purposes of section 28B and have delegated authority under this section within their agencies to enhance information sharing in the best interest of children.

In addition to information that is or is likely to be relevant to the wellbeing of a child or class or group of children, the meaning of “relevant information” in each of these sections was broadened on 1 January 2016 to include information that is relevant to the safety of a person subjected to or exposed to family and domestic violence.

The Act provides protection from liability for information shared in good faith under these sections, and also from breaches of any duty of confidentiality imposed by law or any professional ethics or standards.

Part 4 – Protection and care of children

Part 4 gives the CEO powers to provide for the protection and care of children in circumstances where their parents have not given, or are unlikely or unable to give, that protection and care. The powers include those needed to safeguard or promote children’s wellbeing; investigate suspected child abuse; apply to the Children’s Court for protection orders; make placement arrangements for children in the CEO’s care; and provide assistance for those who are leaving care.

If the Department believes a child to be in need of protection based on the criteria listed under section 28 of this Part, it may take the child into provisional protection and care⁷¹ and make an application to the Children’s Court for a protection order. A protection order is an order made by the Children’s Court if it finds that a child is in need of protection following an application by the Department. There are four types of protection orders in the Act (see Division 3):

- protection order (supervision)
- protection order (time-limited)
- protection order (until 18)
- protection order (special guardianship).

Protection orders (special guardianship) were introduced on 31 January 2011,⁷² replacing provisions for protection orders (enduring parental responsibility). An application for a protection order (special guardianship) can be initiated either by the CEO or a carer who has had the continuous care of a child under a placement arrangement for two years or more. If granted, the order transfers parental responsibility for the child to the carer until the child reaches 18 years of age, giving the carer all the duties, powers, responsibilities and authority that, by law, birth parents have for their own children. At 30 June 2016 there were 563 protection orders (special guardianship) in place. No carer applications have been made to date.

At 30 June 2016, there were 4,658 children in the care of the CEO under a range of placement arrangements. Divisions 5 and 6 of Part 4 contain provisions to support children in the CEO’s care including:

⁷¹ This may occur with a warrant or, if a child is at immediate and substantial risk, without warrant.

⁷² Under the *Children and Community Services Amendment Act 2010*.

- requirements for a Charter of Rights for children in care (section 78);
- guidelines for the placement of children from culturally and linguistically diverse backgrounds, and Aboriginal and Torres Strait Islander children (sections 80 and 81);
- planning processes for children at all stages of their care experience from initial entry into care to leaving care (sections 88 to 95);
- review of care planning decisions by a case review panel and the State Administrative Tribunal (sections 91 to 95); and
- leaving care provisions – where a young person meets certain criteria, assistance may be given to those who are leaving the care of the CEO (sections 96 to 100).

A number of offences are found under Division 7 of this Part including failure to protect a child from harm (section 101), leaving a child unsupervised in a vehicle (section 102), tattooing or branding (section 103), and offences against body piercing (section 104A).

Part 4 also includes two significant initiatives introduced by amendments in 2009 and 2011: the mandatory reporting requirements under Division 9A for certain professionals to report child sexual abuse to the Department; and provisions enabling a secure care arrangements to made for children who are at extreme risk.

Mandatory reporting

The mandatory reporting provisions in Division 9A of this Part require doctors, nurses, midwives, teachers, police officers and boarding supervisors of school boarding facilities to report to the Department a belief on reasonable grounds, formed in the course of their paid or unpaid work, that a child has been or continues to be the subject of sexual abuse. The confidentiality of a mandatory reporter's identity is protected except under certain circumstances set out in section 124F. People who make reports in good faith are protected from liability for breaches of any employment related duty of confidentiality, professional ethics or standards, as provided for in section 129 of the Act.

From 1 January 2009 to 30 June 2016, the Department's Mandatory Reporting Service received 14,815 mandatory reports. On completion of a safety and wellbeing assessment by the Department, 2,521 (17%) of these reports were substantiated.⁷³

Secure care arrangements

In accordance with amendments introduced under the *Children and Community Services Amendment Act 2010*, the Kath French Centre in Stoneville became operational as a secure care facility in May 2011. The Kath French Centre began receiving children placed under a secure care arrangement for up to 21 days (or a further period up to 21 in exceptional circumstances). Since commencement, 175 children have been placed in secure care under a secure care arrangement (figures reported as at 31 August 2016).

A facility of this type was recommended by the 2007 Ford Review⁷⁴ to meet the needs of a small group of young people who present a substantial and immediate risk of causing significant harm to themselves or others, where there is no other way to manage that risk and ensure that they receive the care that they need. The majority of the secure care provisions can be found in sections 88A to 88J of the Act. They provide a high threshold for admission to secure care. The Act provides safeguards which:

- require court orders for children under the provisional protection and care of the CEO;
- enable applications to be made to the State Administrative Tribunal for a review of the secure care arrangements of children who are in the CEO's care under a protection order (time limited) or protection order (until 18); and

⁷³ Figures reported with a snapshot date of 11 November 2016.

⁷⁴ Ford, Prudence., *Review of the Department for Community Development*, 2007.



- allow for the appointment of an assessor with powers which include being able to enter and inspect the facility and talk to children in the facility (see section 125A).

Part 5 – Protection proceedings

Part 5 deals with requirements and procedures in relation to protection proceedings in the Children’s Court of Western Australia. It includes provisions for interim orders, orders for determining parentage, pre-hearing conferences, reports to court, proposals about arrangements for children and procedural matters including legal representation of children.

Part 6 – Transfer of child protection orders and proceedings

This part implements a national agreement between the governments of Western Australia, other Australian States and Territories and New Zealand for the efficient transfer of child protection orders and proceedings for children who move between these jurisdictions.

Part 7 – Employment of children

This Part contains provisions aimed at ensuring that children are protected from exploitation in employment. It is intended to provide a balance between the benefits of children participating in the work force and the imperative that their education not be compromised or that they not be harmed in any way. Restrictions are placed on the employment of children under the age of 15 years except in relation to a family business, entertainment, or in the making of an advertisement. In addition, the CEO is given broad powers to ensure that no child is employed in a situation that is likely to be harmful to the wellbeing of the child. A provision is also included to prohibit the employment of a child to perform in an indecent manner.

These powers were extended in 2011⁷⁵ to allow the CEO to prohibit or impose limitations on the current or future employment of children in a particular business or place, rather than just in relation to a particular child. Under the new powers, a notice may be issued to an employer if the CEO is of the opinion that the wellbeing of child employees is likely to be jeopardised because of the nature of the business or place or the nature of the work carried out there.

Part 8 – Child Care Services

Part 8 was repealed in 2007 by the *Child Care Services Act 2007*. The Department for Local Government and Communities is now the agency with responsibility for assisting the Minister for Community Services in the administration of child care services in Western Australia.

Part 9 – Provision of financial or other assistance

This part enables the Department to provide financial and other assistance to individuals and families, including assistance to families for funeral costs.

Part 10 – Confidentiality provisions

Part 10 provides for the protection of an individual’s privacy while at the same time balancing the need to share information to ensure the wellbeing of children. A person who in good faith provides information to Department regarding concerns for a child is referred to as a “notifier”. Notifiers’ details must not be disclosed except in specified circumstances such as by a departmental officer for the purposes of protection proceedings in relation to a child (see section 240).

This Part also includes restrictions on the publication of certain identifying information or material to protect the identity of children who are or have been the subject of an investigation, protection application or protection order.

⁷⁵ Section 194A, inserted by the *Children and Community Services Amendment Bill 2010*, came into effect on 31 January 2011.



Part 11 – Other matters

Since 30 June 2009,⁷⁶ section 242A of this Part has required the Department to notify the State Ombudsman of investigable child deaths and provide information in relation to the death. Under this Part the Minister must review the operation and effectiveness of the Act, and there are offences for obstructing or hindering a person from performing a function of the Act, for impersonating an officer and for giving false information.

⁷⁶ Resulting from amendments to the Act made by section 32 of the *Parliamentary Commissioner Amendment Act 2009*.







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