



Government of **Western Australia**
Department of **Communities**

Statutory review of the
Children and Community Services Act 2004

November 2017

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Acknowledgement of Country and Peoples

The Department of Communities acknowledges the Aboriginal peoples as the traditional custodians of this land and the waterways in Western Australia. It pays respect to their Elders past, present and future.

It recognises the long history of Aboriginal peoples on this land and acknowledges that the past is not just the past. The past, the present and the future are, as they always are, part of each other - bound together.

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CHAPTER 1 Introduction

The *Children and Community Services Act 2004* (the Act) and *Children and Community Services Regulations 2006* (the Regulations) came into effect on 1 March 2006.¹ The Act provides for the protection and care of children² in certain circumstances, the provision of social services, financial and other assistance and for other matters concerning the wellbeing of children, other individuals, families and communities in Western Australia. The Department of Communities (the Department)³ is the agency principally assisting the Minister for Child Protection (the Minister) in the administration of the Act.

The Minister is required to carry out a five-yearly review of the operation and effectiveness of the Act under section 249. The Department undertook this task on behalf of the Minister with the assistance of a Review Committee and a Legal Working Group comprising key stakeholders. This Report presents the deliberations and recommendations of the second statutory review of the Act (the Review). The first review of the Act was conducted in 2012 (the 2012 Review) and the *Report of the Review of the Children and Community Services Act 2004* was tabled in Parliament on 29 November 2012 [Tabled paper No.5434].

The Review's **terms of reference** were 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 children⁴ in sections 12 to 14 and the consultation requirements 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.

2015 Legislative Consultation

In November 2015, the Department conducted a consultation (the *2015 Consultation*) to explore how the Act might better support the Department's out-of-home care reforms, including those aimed at promoting earlier stability and certainty for children in the care of the Chief Executive Officer (CEO) of the Department.⁵

Some matters responded to in the *2015 Consultation Paper* were deferred for consideration to the current Review.⁶ Others resulted in proposed amendments announced by then Minister for Child Protection, the Hon. Andrea Mitchell MLA, which were referred to in the *Review of the Children and Community Services Act 2004: Consultation Paper* (the *Review Consultation*

¹ Section 102 of the Act, which is the offence of leaving a child unsupervised in a car, was proclaimed earlier than the rest of the Act and became law in WA on 22 January 2005.

² In this Report, the term child is inclusive of children and young people under the age of 18 years.

³ The newly-formed Department of Communities was established on 1 July 2017, amalgamating the previous Department for Child Protection and Family Support; Department of Housing (including the Housing Authority); Disability Services Commission; the communities component of the Department of Local Government and Communities including the Education and Care Regulatory Unit; Regional Services Reform Unit; and the regional coordination and engagement component of the former Department of Aboriginal Affairs. In this report, the Department refers to the Child Protection and Family Support division of the Department of Communities.

⁴ In this Report, a reference to Aboriginal people includes Aboriginal and Torres Strait Islander people.

⁵ The Department received 41 submissions in response to the Department for Child Protection and Family Support, *Out of Home Care Reform: Legislative Amendments Consultation Paper*, Western Australia (November 2015) (*2015 Consultation Paper*).

⁶ These included foster care reforms for a single decision-maker and the naming of protection orders. These issues are addressed in 2.3 and 7.4 of this Report respectively.

Paper).⁷ These proposals did not proceed to drafting prior to the change of Government in March 2017 and consequently were referred to the Review for consideration by incoming Minister, the Hon. Simone McGurk MLA. The most significant of these related to the introduction of permanency planning timeframes in legislation, aimed at achieving earlier decision-making for the long-term future of children in the CEO's care. The Review's recommendations in respect of foster carer reforms are addressed in Chapter 2 of this Report, recommendations related to the Aboriginal child placement principle are addressed in Chapter 3 and the recommendations related to the permanency planning reforms are addressed in Chapter 7.

1.1 List of recommendations

Term of reference 1 – Foster carer standards

Recommendation 1

There should be increased Aboriginal representation on the Cross Sector Foster Carer Panel and it should be a requirement that at least one Aboriginal member of the Panel is involved in the consideration of each foster carer application before the Panel.

Recommendation 2

Subject to the findings of the Royal Commission into Institutional Responses to Child Sexual Abuse, the following non-legislative measures for promoting consistently high cross-sector foster carer standards should be pursued before any further consideration is given to establishing in legislation a single decision-maker for the approval and revocation of foster carers:

- (a) cross-sector development of a carer assessment framework;
- (b) an accreditation and training requirement for foster carer assessors;
- (c) a strengthened Foster Carer Directory following a review of its role and operation.

Recommendation 3

Consideration should be given to the external oversight of compliance with standards of carer assessment, review and revocation by the Department and community sector organisations.

Recommendation 4

The contractual requirements for community sector organisations should be aligned with the requirements of the carer assessment and revocation standards in regulation 4 of the *Children and Community Services Regulations 2006*.

Recommendation 5

Regulation 4 of the *Children and Community Services Regulations 2006* should be amended to introduce an additional assessment criterion which requires that prospective carers must be able to promote children's cultural needs and identity.

Recommendation 6

The Act should be amended to expressly provide that the CEO may make a time-limited emergency placement for a child in accordance with prescribed regulations. Regulations should prescribe the timeframes within which the necessary carer checks, assessment and consultation requirements under section 81 are to be met.

Term of reference 2 – Aboriginal and Torres Strait Islander principles and consultation

Recommendation 7

Section 12 should be amended to provide that:

- (1) In performing a function under the Act about the placement of an Aboriginal child under a placement arrangement, a person, court or tribunal is to observe the principle that any placement for an Aboriginal child must, so far as is consistent with the child's best interests, accord with the following order of priority and all reasonable efforts should be made to comply with the order:

⁷ Department for Child Protection and Family Support, *Review of the Children and Community Services Act 2004: Consultation Paper*, Western Australia (December 2016) 5 ('Review Consultation Paper').

- (a) placement with a member of the child's family;
 - (b) placement with an Aboriginal person in the child's community in accordance with local customary practice;
 - (c) placement with an Aboriginal person in close proximity to the child's community;
 - (d) placement with a non-Aboriginal person in close proximity to the child's community;
 - (e) placement with an Aboriginal person;
 - (f) placement with a non-Aboriginal person.
- (2) Any placement with a non-Aboriginal person should be with a person who is responsive to the cultural support needs of the child and is willing and able to promote the development and maintenance of the child's identity and ongoing connection with the child's family and culture.
- (3) For the purposes of section 12, placement with a member of the child's family has the same meaning as placement with a **relative** of the child, as defined in section 3 of the Act.

Consideration should be given to defining a child's community based on section 176 of the *Children, Youth and Families Act 2005* (Vic).

Recommendation 8

The Act should be amended to require the Department to demonstrate its application of the section 12 placement-hierarchy in the section 61 and section 143 reports it must provide to the Children's Court during protection proceedings, including the consultations under section 81 and other efforts it has made to make placements in accordance with the hierarchy.

Recommendation 9

The consultation requirements in section 81 should be amended to provide for the following:

- (1) Before making a placement arrangement in respect of an Aboriginal child, the CEO must consult with:
- (a) an Aboriginal person who is a member of the child's family;
 - (b) where available, an Aboriginal representative organisation either prescribed in regulations or approved by the CEO that, in the opinion of the CEO, has relevant knowledge of the child, the child's family or the child's community; and
 - (c) an Aboriginal officer of the Department who, in opinion of the CEO, has relevant knowledge of the child, the child's family or the child's community.
- (2) If an emergency placement is required and compliance with the consultation requirements above is not possible, full consultation should be required to occur as soon as practicable after making the emergency placement.
- (3) The term **representative organisation** should be defined to mean an Aboriginal community controlled organisation which provides services to, and is recognised by, the local Aboriginal community.
- (4) In consultation with Aboriginal organisations, work should commence immediately to identify representative organisations to enable consultation under 1(b) above to occur.
- (5) For the purposes of this section the term **family** should have the same meaning as **relative** in section 3 of the Act.

Recommendation 10

It should be a requirement that a plan for maintaining an Aboriginal child's culture and identity – a cultural support plan – is to accompany the reports the Department must provide to the Children's Court pursuant to section 61 when applying for a protection order (special guardianship), and pursuant to section 143 when applying for a protection order (time-limited) or a protection order (until 18).

Recommendation 11

A plan to address an Aboriginal child's cultural support needs – a cultural support plan – should become a specific requirement as part of a care plan under section 89 of the Act, and decisions about cultural support should be reviewable by the Care Plan Review Panel and the State Administrative Tribunal.

Recommendation 12

The Act should be amended to provide that, if available, an Aboriginal representative organisation approved by the CEO or prescribed in regulations which, in the opinion of the CEO, has relevant knowledge of the child, the child's family or community, is to be provided with an opportunity to participate in the development of the child's cultural support plan.

Recommendation 13

The Act should include cultural support planning provisions similar to sections 176(3) and (5) of the *Children, Youth and Families Act 2005* (Vic).

Recommendation 14

Aboriginal membership on the Care Plan Review Panel should be a legislative requirement and at least one Aboriginal member of the Panel should be involved in considering every application to the Care Plan Review Panel in respect of an Aboriginal child in care.

Recommendation 15

Section 13 should be amended to provide that in performing a function under the Act, a person, court or tribunal must observe the principle that Aboriginal people have a right to participate in the protection and care of their children with as much self-determination as possible.

Recommendation 16

Section 14 should be amended to provide that in performing a function under the Act, a person, court or tribunal must observe the principle that an Aboriginal child's family, community or representative organisation is entitled to and should be given opportunities and, where appropriate, assistance to participate in decision-making processes under the Act that are likely to have a significant impact on the life of a child. In observing this principle the views of the child and the child's parent or parents must be considered.

Recommendation 17

Strategies should be implemented, in partnership with Aboriginal community controlled organisations, to support capacity building which enhances the role of Aboriginal community controlled organisations in delivering child protection and family support services to Aboriginal families and communities.

Term of reference 3 - Family violence

Recommendation 18

The Act should be amended to provide that section 101 cannot be used to prosecute a victim of family violence for exposing a child to family violence.

Term of reference 4 – Secure care provisions

Recommendation 19

The maximum timeframes in which a child may be placed in secure care under a secure care arrangement or an extension of a secure care arrangement should remain the same. Any amendments should be informed by an evaluation of secure care.

Recommendation 20

The Department should examine the current barriers to transitioning children effectively and safely from secure care and ways these barriers can be addressed.

Recommendation 21

The target age-range for admission to secure care should continue to be children aged from 12 to 17 years and the admission of younger children should be avoided wherever possible.

Recommendation 22

Work is urgently required to examine alternative means for addressing the complex needs of a small but increasing number of children aged younger than 12 years who, in the absence of suitable alternatives, are being admitted to secure care.

Recommendation 23

Rather than the assessor model in section 125A of the Act, under which the CEO is responsible for the appointment of assessors, oversight of the Department's secure care facility should:

- (a) be undertaken by an independent body with sufficiently broad oversight powers;
- (b) involve a minimum number of annual visits including unannounced visits; and
- (c) include Aboriginal people to assess and determine whether the specific needs of Aboriginal children in secure care are being met.

Recommendation 24

An evaluation of the role and effectiveness of secure care as a protective intervention for children should be undertaken as soon as possible to inform secure care practice and legislative policy into the future, including informing the optimal time frames required for stabilising and assessing the needs of children admitted to secure care.

The evaluation should contribute to the development of an ongoing monitoring and evaluation framework aimed at building evidence-based continual improvement.

Recommendation 25

The Act should be amended to provide that a court must consider the grounds for making a secure care arrangement under section 134A(1) at the first court appearance and, if satisfied they have been met, the Court must make a continuation order or an interim order (secure care).

Recommendation 26

The Act should be amended to enable the CEO to remove a child who is under a secure care arrangement:

- (a) in the event of an emergency, from a secure care facility to another suitable facility for a period of time; and
- (b) from a secure care facility temporarily (for example to attend an appointment or a funeral).

The amendments should also provide that a child under a secure care arrangement is still under the arrangement if the child is removed from a secure care facility for the purposes of an emergency evacuation or otherwise temporarily.

Term of reference 5 – Intersection between child protection and Family Court proceedings

Recommendation 27

In principle, all child protection matters should be heard in a specialist division of the Family Court. This should occur as soon as is practicable after legislative, procedural, resourcing and practical issues have been addressed. Any future specialist division should be responsive to the cultural needs of Aboriginal people.

Recommendation 28

The relevant legislation should be amended to enable the Department to apply for a protection order in the Family Court of Western Australia in respect of a child if the child or the child's siblings have previously been, or are currently, the subject of Family Court proceedings.

Recommendation 29

The relevant legislation should be amended to give the Children's Court the power to transfer protection proceedings to the Family Court by the Court's own motion or on application of a party, if it is in the best interests of the child and:

- (a) it is in the interests of justice; or
- (b) of convenience to the parties.

This transfer should include the entirety of the file and any interim orders.

Recommendation 30

- (1) The relevant legislation should be amended to enable the Children's Court to exercise family law jurisdiction:
 - (a) to make parenting orders in the course of protection proceedings, if all parties consent to the Children's Court hearing and determining the matter; and
 - (b) following a final hearing in which the Department's protection application is dismissed (or no order is made) or a protection order (supervision) is granted, to make any interim parenting orders necessary for the safety and wellbeing of a child until the Family Court can hear the matter.
- (2) If the Children's Court makes a final parenting order, it should be automatically registered in the Family Court.
- (3) If the Children's Court makes an interim parenting order, the matter in its entirety should be transferred to the Family Court.

Recommendation 31

In the event of any inconsistency between the provisions of the Act and the *Family Court Act 1997* or the *Family Law Act 1975*, a court must, to the extent of the inconsistency, comply with the provisions of the Act.

Recommendation 32

A protection order (special guardianship) made by the Children's Court should be automatically registered in the Family Court.

Recommendation 33

The Family Court should be able to hear and determine an application for the variation, addition or substitution of conditions on a protection order (special guardianship).

Recommendation 34

Any person who is entitled to make an application for parenting orders in the Family Court should be able to make an application to vary, add, or substitute conditions on a protection order (special guardianship).

Promoting stability and continuity for children in care through permanency planning

Recommendation 35

Safety, stability, continuity of care and relationships and a sense of identity and belonging for children in the CEO's care should continue to be promoted through implementation of the Department's permanency planning policy, and the policy should continue to be monitored and evaluated on an ongoing basis to determine its effectiveness in contributing to timely decision-making that achieves these outcomes.

Objects and principles in Part 2 of the Act

Recommendation 36

The Act should contain a new principle that, if a child is removed from the child's family, arrangements for the child's long-term stability should be considered in accordance with the following order of preference, as determined to be appropriate and in the best interests of the child:

- (a) reunification with the child's parent(s);
- (b) long-term care with other relatives;
- (c) long-term care with other appropriate persons.

Recommendation 37

Section 9(h) of the Act should be amended to provide that not only should "*decisions about a child ... be made promptly having regard to the age, characteristics, circumstances and needs of the child*", but they should also be made having regard to the possible harmful effect of delay in making a decision or taking an action.

Recommendation 38

Section 145(4) of the Act should be amended to provide that protection proceedings are to be concluded as expeditiously as possible in order to minimise the *possible harmful* effect of the proceedings on the child and the child's family.

Recommendation 39

Section 9(g) of the Act should be amended to provide that, if a child is removed from the child's family then, so far as is consistent with the child's best interests, the child's relationships with his or her parents, siblings and other relatives, and with any other people who are significant in the child's life should be promoted and the child should be given encouragement and support in maintaining contact with the relevant people.

Recommendation 40

The Act should be amended to require that an outline of the proposed arrangements for the wellbeing of the child in the CEO's written reports to the Court under sections 61 and 143 is to include arrangements for promoting the child's relationships with the child's parents, siblings and other relatives and other people who are significant in the child's life, where appropriate. In section 143, this should apply in respect of applications for a protection order (time-limited) or protection order (until 18).

Recommendation 41

Section 9 should be amended to clarify that the principles it contains are to apply to all persons performing a function or exercising a power under the Act, including the CEO, a court or tribunal.

Recommendation 42

The Act should contain a statement which affirms children as valued members of society who are entitled to be treated with respect and dignity.

Recommendation 43

The object under section 6(da) should be amended to align more closely with the underpinning principles of the Act and the aims of the Department's Parent Support service.

Recommendation 44

The principle of child participation in section 10 should be amended to state that children *must* be given the information, assistance and opportunities listed in section 10(1) instead of *should* be given.

Recommendation 45

The Act should include the principle that, if a child is removed from the child's family, then so far as is consistent with the child's best interests and having regard to the child's views and wishes, the child should be placed with his or her siblings.

Recommendation 46

It is recommended the principles in section 9 of the Act include express reference to the use of interpreters when working with children, parents and families who have difficulty communicating in English.

Shared responsibility for children in care**Recommendation 47**

Section 22 of the Act should be amended to require:

- (1) a public authority prescribed in regulations to prioritise and provide services to the following persons in compliance with a request from the CEO for assistance made under section 22 of the Act:
 - (a) children in the CEO's care;
 - (b) children aged under 18 years who are or were under a protection order (special guardianship); and
 - (c) children and young people who are eligible for leaving care services under section 96 of the Act, provided compliance with the request is consistent with the public authority's duties and responsibilities and does not unduly prejudice the performance of its functions; and
(*cont.*)

- (2) the CEO of a public authority, upon request, to provide the CEO with written reasons for non-compliance with a request if the public authority does not intend to comply because doing so would be inconsistent with its duties and responsibility and would unduly prejudice the performance of its functions.

Grounds for protection

Recommendation 48

Section 28(2)(a)(i) of the Act should be amended to apply in circumstances where parents cannot be found or, if found, are unwilling to care for the child.

Recommendation 49

Sections 28(2)(d)(i) and (ii) of the Act should be amended to apply in circumstances where parents are unable or unwilling to provide, or arrange the provision of, adequate care.

Protection orders

Recommendation 50

The Act should be amended to clearly allow protection orders (supervision) to contain a condition as to the parent with whom a child should live.

Recommendation 51

- (1) The Act should be amended to provide that protection order (special guardianship) must include the following conditions:
- (a) the name of a child cannot be changed:
 - (i) without a court order granting permission to do so because exceptional circumstances exist; and
 - (ii) in the case of a child with sufficient maturity and understanding, unless the child consents; and
 - (b) a special guardian must preserve the child's identity and connection to the child's culture of origin, unless the Court otherwise provides in accordance with the child's best interests.
- (2) The Court should have discretion to incorporate specific elements of a child's cultural plan as conditions of a protection order (special guardianship).
- (3) The Court must not make a protection order (special guardianship) for an Aboriginal child solely with a non-Aboriginal carer unless it has considered a report from an Aboriginal agency or Aboriginal person with relevant qualifications in respect of the making of a protection order (special guardianship).

Recommendation 52

The Act should be amended to provide that if the Department becomes aware of the death of a sole special guardian, or both joint special guardians, it is required to notify the Court and once the Court receives the notification the protection order (special guardianship) is taken to be a protection order (until 18).

Children in the CEO's care – advocacy and care planning

Recommendation 53

In collaboration with partner agencies, the Department should strengthen and further develop child-friendly complaints processes for all children in care which:

- (a) are targeted to the needs of different groups, taking into account children's age and type of care arrangement;
- (b) provide children with a range of options to speak out about their concerns;
- (c) link-in with children's existing safety networks;
- (d) are promoted through age-appropriate materials and platforms; and
- (e) are understood, and promoted with children and their safety networks, by child protection workers and residential care workers.

Recommendation 54

The model of independent child advocacy services most appropriate for children in the CEO's care should be explored, taking into account the number of children in care across the State, their type of care arrangement and the high proportion of Aboriginal children in care.

Recommendation 55

The provisional care planning and care planning provisions in sections 39, 88 I and 89 of the Act should be amended to require that children are given opportunities and assistance to:

- (a) participate in the preparation of their care plans; and
- (b) to express their views and wishes,

including in the preparation of cultural support plans and leaving care plans, and their views and wishes should be recorded in the plan.

This should be done giving due regard to the child's age and level of understanding and in a way that is guided by the principle of child participation in section 10 of the Act.

Recommendation 56

Section 89 should be amended to clarify that any change to a care planning decision must result in a modification of the child's care plan as soon as practicable after the decision has been made.

Recommendation 57

It is recommended that:

- (a) a plan to address the cultural support needs of children from culturally and linguistically diverse (CaLD) backgrounds – a cultural support plan – should become a specific requirement as part of a care plan under section 89 of the Act, and decisions about cultural support should be reviewable by the Care Plan Review Panel and the State Administrative Tribunal; and
- (b) it should be a requirement that a plan for maintaining a CaLD child's culture and identity – a cultural support plan – is to accompany the reports the Department must provide to the Court pursuant to section 61 when applying for a protection order (special guardianship) and section 143 when applying for a protection order (time-limited) or protection order (until 18).

Recommendation 58

A plan to address a child's leaving care needs – a leaving care plan – should become a specific requirement as part of a care plan under section 89 of the Act and planning to support a child's transition from care should commence when a child reaches 15 years of age.

Recommendation 59

The *Children and Community Services Regulations 2006* should be amended pursuant to section 97(1)(e) of the Act to prescribe other documents or material that a child is entitled to when leaving the CEO's care.

Recommendation 60

Section 98 should be amended to clarify that the CEO must ensure that a child who has left the care of the CEO is provided with any social services that the CEO considers appropriate having regard to the needs of the child, regardless of whether a matter is expressly identified in the child's leaving care plan.

Recommendation 61

The Act should be amended to require that children are told about their leaving care entitlements and given written information about them.

Recommendation 62

Section 99 of the Act should be amended to ensure that a person who qualifies for assistance is provided with services and other forms of support that may include, but are not limited to, any one or more of the things listed in that section.

Recommendation 63

The State Government should give consideration to providing opt-in, ongoing support to care leavers up to the age of 21 years, including through the continued support of their placement arrangements or alternative accommodation assistance and a dedicated youth worker/mentor to support a person's access to leaving care entitlements in accordance with sections 96 to 100, and ways of achieving this should be explored. The leaving care assistance currently available to young people who qualify under section 96 of the Act should continue to be provided up to the age of 25 years.

Protection proceedings

Recommendation 64

The Act should be amended to preclude the making of interim orders under section 133 where the protection proceedings relate to an application to extend, revoke or replace a protection order (time-limited) or a protection order (until 18).

Recommendation 65

The Act should be amended to include a requirement that written proposals include an outline of arrangements for reunification and the supports that will be provided, where the CEO applies for a protection order (time-limited) or an extension of a protection order (time-limited) and reunification is being contemplated.

Recommendation 66

The Act should be amended to provide that decisions of a Children's Court magistrate under the Act are reviewable at first instance by the President of the Children's Court, with any subsequent appeal to the Court of Appeal of the Supreme Court.

Recommendation 67

The benefits of undertaking a 24-month pilot in the Children's Court of a specialist list for protection matters involving Aboriginal families should be explored, informed by similar approaches in other jurisdictions such as the Koori Family Hearing Day (also known as the Koori List or Marram-Ngala Ganbu) being piloted in Victoria.

Recommendation 68

An Aboriginal Liaison Officer/Consultant should be located at the Children's Court to facilitate the participation and engagement of Aboriginal families in protection proceedings to improve outcomes for Aboriginal children.

Miscellaneous

Recommendation 69

The Department should develop a charter of rights for families who come in contact with the Department as a result of concerns about the wellbeing of their children.

Recommendation 70

The Act should be amended to ensure sections 192(3)(a)(iii) and 115(2)(a) comply with the requirements of the *Sex Discrimination Act 1984* (Cth).

1.2 Committees

A Review Committee was established to address and make recommendations on terms of reference 1 to 4 and other matters put to the Review, and a Legal Working Group was established to address and make recommendations on term of reference 5. The role of the committees was to:

- consider community consultations and written submissions made during the public consultation period;
- contribute relevant expertise to inform deliberations, including relevant policy, practice and research information;
- participate in making findings and recommendations to be included in the Report to the Minister, based on matters raised in submissions to the Review and relevant research materials;

- assist in reviewing interim and final drafts of the relevant sections of the Report, and meet as required to achieve the above.

1.2.1 Review Committee membership

Mandy Gadsdon (Chair to 30 June 2017)	Executive Director, Aboriginal Engagement and Coordination & Policy and Learning
Audrey Lee (Chair from 1 July 2017)	Director Policy – Child Protection and Children in Care
Ross Wortham	CEO, Youth Affairs Council of WA
Glenn Pearson	Telethon Kids Institute, Head Aboriginal Health
Ian Carter	CEO, Anglicare WA
Tara Gupta	General Counsel
Max Lewington	Practice Director, Legal Services Division
Fiona Fischer	District Director West Kimberley
Andrea Nixon	District Director Cannington
Rochelle Binks	General Manager, Strategy and Reform
Deborah Gould	General Manager, Service Delivery Practice Unit
Tracey Ninnette	Program Leader, Cultural Learning
Mark Glasson (Proxy)	Director of Services, Anglicare WA
Dr Mellissa O'Donnell (Proxy)	Telethon Kids Institute

1.2.2 Legal Working Group membership

Julie Jackson	Director Family Law Division, Legal Aid WA
Neil Anderson	Manager, Family Law Unit, Aboriginal Legal Service WA
Corina Martin	CEO, Aboriginal Family Law Services
Carrie Hannington	Managing Solicitor, Women's Law Centre of WA
Lesley McComish	Manager, Legislation and Reform Dept. of the Attorney General
Linda Richardson	Vice President, Family Law Practitioners Association
Max Lewington	Practice Director, Legal Services
Tara Gupta	General Counsel
Victoria Williams (Proxy)	Senior Policy Officer, Aboriginal Legal Service WA
Biddy Brennan (Proxy)	Senior Solicitor, Djinda Services
Kim Farmer (Proxy)	Principal Legal Officer

Executive Team

Rosemary Williamson	Principal Legislation and Policy Officer
Emily Ohayon	Legal Officer

Acknowledgements

The Review would like to acknowledge the substantial commitment and work of the many organisations and individuals who made submissions to the Review and to the previous *2015 Consultation*, and thank them for their valuable contributions. Thanks are also extended to the external members of the Review Committee and the Legal Working Group, who dedicated many hours to share their expertise with the Review.

1.3 Methodology

The Review commenced on 1 December 2016 with the launch of the *Review of the Children and Community Services Act 2004: Consultation Paper* (the *Review Consultation Paper*) in Broome as part of the Kimberley Aboriginal Children in Care Committee (KACCC) Forum hosted by Aarnja Ltd.⁸ In addition to an advertisement in *The West Australian* inviting submissions to the Review, the Director General wrote to over 50 stakeholders informing them of the Review and

⁸ Aarnja Ltd is a Kimberley Aboriginal membership organisation whose mission is to work with all parties to create innovative and sustainable opportunities that empower Kimberley Aboriginal people.

inviting submissions on any of the terms of reference or any other matter related to the operation and effectiveness of the Act.

A Review webpage was established at www.cpfs.wa.gov.au/ccsactreview on the Department's website containing the following information: the Review's terms of reference; the objects of the Act; the Review requirements under section 249 of the Act; a link to the State Law Publisher for a copy of the Act and the Regulations; a link to the *Review of the Children and Community Services Act 2004: Consultation Paper*, November 2016; and email and telephone contacts for enquiries.

The closing date for receipt of written submissions was 31 March 2017. In view of the holiday period this four-month consultation spanned, a number of organisations requested and were granted extensions. The Review received thirty-seven written submissions (see Appendix A). Four agencies made additional submissions during the Review.⁹

As well as inviting written submissions, during this period a series of regional and metropolitan consultations were held with Aboriginal community members, service providers and Aboriginal community controlled organisations (ACCOs). The consultations were conducted to seek feedback from people who may otherwise have been unlikely to make submissions to the Review. The focus on Aboriginal consultations reflected the vision of the Department's *Aboriginal Services and Practice Framework 2016-2018* to improve outcomes for Aboriginal children, families and communities who come into contact with the child protection system, given the continuing over-representation in Western Australia of Aboriginal children in care which, at 30 June 2017, had reached 54 per cent.¹⁰

The Kimberley consultations¹¹ were conducted in partnership with Aarnja and KACCC, and elsewhere¹² were arranged in collaboration with the Department's (then) Aboriginal Engagement and Coordination Unit and district Aboriginal Practice Leaders (APLs). These consultations were well-received. In addition to the valuable contribution made to the Review itself, the consultation process provided participants with an opportunity to raise practice issues with local Department offices which, in a number of districts, initiated valuable conversations that will contribute to building ongoing working relationships between the Department and ACCOs.

1.4 Deliberations

The Reference Committee addressing terms of reference 1 to 4 first met on 26 April 2017 and subsequently on a further seven occasions to consider written submissions, draft proposals and final recommendations. Each member of the Reference Committee was provided with online access to all written submissions to the Review and the *2015 Consultation*.

The Legal Working Group first met on 1 May 2017 and on a further four occasions, and was provided with all written submissions on term of reference 5.

⁹ The CPSU/CSA submitted an Addendum to the Review on sexual exploitation laws, and the Aboriginal Legal Service, the Alliance and CYFAA and MacKillop Family Services made further submissions in response to a further Review consultation question – see Chapter 2.

¹⁰ Department for Child Protection and Family Support, *Final Report 2016-2017* (2017) 14 (*'Final Report 2016/2017'*).

¹¹ Department of Communities, 2017 Legislative Review consultation with Aboriginal community members and local professionals (Broome, 30 November 2016 – 1 December 2016) (*'Broome'*); (Fitzroy Crossing, 29-30 March 2017) (*'Fitzroy Crossing'*); (Halls Creek, 28 March 2017) (*'Halls Creek'*); (Karratha, 2 March 2017) (*'Karratha'*); (Kununurra, 21 March 2017) (*'Kununurra'*); (West Kimberley, 14-15 March 2017) (*'West Kimberley'*); (Wyndham, 22 March 2017) (*'Wyndham'*).

¹² Department of Communities, 2017 Legislative Review consultation with Aboriginal community members and local professionals (Albany, 28 February 2017) (*'Albany'*); (Geraldton, 14 March 2017) (*'Geraldton'*); (Kalgoorlie, 10 March 2017) (*'Kalgoorlie'*); (Perth Metropolitan, 17 February 2017) (*'Metropolitan'*); (Northam, 15 March 2017) (*'Northam'*); Department of Communities, 2017 Legislative Review Consultation with the Alliance and Uniting Care West (Perth, 14 February 2017) (*'Alliance and Uniting Care West'*).

The Review made the distinction between the effectiveness and operation of the provisions of the Act, and their implementation in policy and practice. A number of submissions assisted in identifying legislative issues and suggesting amendments to the legislation, while many raised a range of policy and practice issues beyond the scope of a legislative review. The work undertaken by organisations and individuals in bringing these practice matters to the attention of the Review is acknowledged. Operational matters raised in submissions will be considered and addressed, as necessary, through referral to the relevant work units within the Department.

The following principles guided the Review's deliberations:

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.
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.

Consistent with the 2012 Review, the Review also took the view that overly prescriptive provisions which set out processes or requirements in detail can be counterproductive and should generally be avoided and addressed through policy and practice guidance where possible.

1.5 Recommendations of the 2012 Review

The 2012 *Report of the Legislative Review of Children and Community Services Act 2004*¹³ made 27 recommendations, 23 of which involved amendments to the Act. All but three of these amendments came into effect on 1 January 2016. A report on the implementation of recommendations of the 2012 Review is provided at Appendix B of this Report.

1.6 Background to review

The Review coincides with a period of significant reform in Western Australia's child protection system in response to increased numbers of children entering the out-of-home care system over the past ten years; the continuing and unacceptably high number of Aboriginal children who are brought into the care of the Chief Executive Officer (CEO)¹⁴ of the Department (referred to in this Report as "children in the CEO's care"); and the complex needs of vulnerable children and families in the community.

The number of children living in out-of-home care has increased from 2,630 children in 2007 to 4,795 in 2017; this represents an 82 per cent increase. Over this ten year period, the number of Aboriginal children entering care has grown at a much higher rate than non-Aboriginal children: from 1,107 Aboriginal children in 2007 to 2,603 in 2017. This rate has slowed in the past two years from nine per cent to five per cent. Aboriginal children now represent 54.3 per cent of all children in care in Western Australia.¹⁵

The Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) 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.

¹³ Department for Child Protection, *Report of the Legislative Review of the Children and Community Services Act 2004*, Western Australia (October 2012) ('2012 Review').

¹⁴ In this Report the term "the Department" is used interchangeably with the CEO of the Department.

¹⁵ *Final Report 2016/2017*, above n 10, 13.

The Department's reform process has involved extensive consultation with Western Australia's community services sector and other stakeholders, informed by the Department's Aboriginal Services and Practice Framework (the ASPF) and culminating in the release of:

- *Building a Better Future: Reform of the Out-of-Home Care Sector in Western Australia (OOHC Reform Strategy)* in April 2016, a suite of reform actions 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)* in September 2016, aligning the current service system to meet the needs of those families most vulnerable to their children entering out-of-home care.¹⁶

1.7 Overview of the Act

The Act was passed by Parliament on 23 September 2004 and came into effect on 1 March 2006. The legislation consolidated three statutes previously administered by the Department: the *Child Welfare Act 1947*; the *Welfare and Assistance Act 1961*; and the *Community Services Act 1972*.¹⁷ The impetus for a new legislative framework came from several major reviews including the *Edwards Report (1982)*; the *Welfare and Community Services Review in Western Australia (1984)*; the *Child Sexual Abuse Task Force (1987)*; and *Laws for People: The Report of the Legislative Review (1991)*.

The legislation was developed over a decade through extensive consultation with a broad range of government, non-government and community stakeholders, both prior to and during drafting of the Children and Community Development Bill 2003.¹⁸

Since commencement, the Act has been closely monitored and a number of amendments made to improve its operation and effectiveness and introduce new initiatives:

- Part 8 of the Act, which provided for child care services, was repealed in 2007 and replaced by the *Child Care Services Act 2007*.
- The *Children and Community Services Amendment (Reporting Sexual Abuse of Children) Act 2008* introduced provisions for the mandatory reporting of child sexual abuse by certain professionals and came into effect on 1 January 2009. These provisions can be found in Part 4, Division 9A of the Act.
- The *Children and Community Services Amendment Act 2010* introduced a suite of amendments on 31 January 2011 including: protection orders (special guardianship); body piercing prohibitions; expanded information sharing provisions to public authorities prescribed in the Regulations; and provisions for the making of secure care arrangements for children at extreme risk.
- On 1 January 2016, the *Children and Community Services Legislation Amendments and Repeal Act 2014* came into effect to implement recommendations of the 2012 Review. These included: a further broadening of information sharing provisions; the inclusion of exposure to family violence as a form of emotional abuse; the introduction of responsible parenting agreements into the Act; and new mandatory reporting requirements for boarding supervisors of school boarding facilities.

The **objects** of the Act under section 6 outline the underlying purpose of the legislation:

- (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*

¹⁶ These Strategy documents can be accessed on the Department of Communities, Child Protection and Family Support website at www.dcp.wa.gov.au/Pages/Home.aspx

¹⁷ All Acts referred to in this Report are Western Australian Acts, unless specifically indicated in the citation to the contrary.

¹⁸ The title of the Bill was later changed to the Children and Community Services Bill 2003.

- (da) to support and reinforce the role and responsibility of parents in exercising appropriate control over the behaviour of their children; and*
- (d) 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; and*
- (e) to protect children from exploitation in employment.*

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 that the best interests of the child always be regarded as the paramount consideration when a person, the Court or the State Administrative Tribunal (SAT) performs a function or exercises a power under the Act.
- Section 8 sets out a comprehensive number of matters that must be taken into account in determining what is in a child's best interests for the purposes of the Act.
- Section 9 contains guiding principles which must be observed in the administration of the Act.
- Section 10 establishes the important principle of child participation in the process of making decisions under the Act which 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.

CHAPTER 2 Improving consistency in foster carer standards through the assessment, approval and revocation process

Term of reference 1 – The Review was required to examine changes to support the introduction of consistent high-quality foster carer standards through a single decision-maker for approvals and revocations.

- **Consultation question 1** asked which of the proposed legislative models was preferred for improving sector-wide consistency in the approval of foster carer applications and the revocation of an existing foster carer's approval, when necessary.
- **Consultation question 2** asked whether a community sector organisation, in addition to an individual foster carer, should have a right of review in the event that one of its foster carers had his or her carer-approval revoked by a decision-maker.

As noted in 1.1, in addition to the Review's consultations above, some of the proposed reforms flagged in the *2015 Consultation* were deferred for further consideration by the Review.¹⁹ These included proposals to establish a single decision-maker for the approval and revocation of foster carers and a number of related matters including: the cross sector portability of approved carers; the requirement for carers to report relevant changes in their personal circumstances; and the external review of decisions to revoke a carer's approval. This Chapter addresses the outcome of these consultations and provides background information to the Review's deliberations.

2.1 Background Information

Out-of-home care 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, is provided in Western Australia by the Department and a number of service providers in the community services sector (community sector organisations - CSOs). CSOs are engaged to provide out-of-home care services under section 15(1) of the Act. This section enables the Minister, on behalf of the State, to enter into an agreement with a 'person' for the provision or promotion of social services.²⁰ The vast majority of placement arrangements for children in care in Western Australia are managed by the Department (77 per cent), with 17 per cent being provided by CSOs.²¹

2.1.1 Current legislation

In section 79 of the Act, the CEO of the Department may make arrangements for the placement of children in care. The Act refers to these as 'placement arrangements'²² (although for policy and practice purposes the Department has adopted the term 'care arrangement' in preference). Under section 79(2)(a), the CEO may make an arrangement for the placement of a child in the CEO's care -

- (i) *with an individual approved by the CEO in accordance with the regulations; or*
(These are the Department's volunteer family carers, who are assessed and approved to provide care for a particular child, and general foster carers.)
- (ii) *with a person who has entered into an agreement under section 15(1) for the provision of placement services; or*
(These are the CSOs contracted by the Minister under section 15(1) to engage or employ individuals to care for children under a placement arrangement.)

¹⁹ See Department for Child Protection and Family Support, *Building a Better Future: Out-of-Home Care Reform in Western Australia*, Western Australia (April 2016) 67 ("*Building a Better Future*").

²⁰ Under section 5 of the *Interpretation Act 1984*, '**person**' includes a public body, company, or association or body of persons, corporate or unincorporated.

²¹ *Final Report 2016/2017*, above n 10, 44.

²² *Children and Community Services Act 2004* s 3 ('*CCS Act*').

- (iii) *in a residential facility operated or managed by the Department or another public authority....*

Regulation 4 of the Regulations contains the assessment criteria the CEO must be satisfied of before approving an individual to care for a child under a placement arrangement. These criteria are commonly referred to as 'carer competencies' and are set out below. Before approving an individual as a carer, the CEO must be satisfied 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 protects the child from harm; and*
- (ii) *is able to provide a safe living environment for a child; and*
- (iii) *is able to work cooperatively with officers, a child's family and other people when providing care for a child; and*
- (iv) *is able to take responsibility for the development of his or her competency and skills as a carer; and*
- (v) *is a person of good character and repute – Regulation 4(1).*

Regulation 4 also enables the CEO to revoke a carer's approval in certain circumstances, including if the person no longer meets the carer competencies or is issued with a negative notice or interim negative notice under the *Working with Children (Criminal Record Checking) Act 2004*. Before revoking a carer's approval, the CEO must follow the procedural fairness steps in regulation 4(3), which are to:

- (a) *give a written notice to the individual:*
 - (i) *stating the reasons for the proposed revocation; and*
 - (ii) *informing the individual that the individual is entitled to make representations to the CEO in respect of the proposed revocation within 28 days after receipt of the notice;*

and
- (b) *have regard to any representations made within the period referred to in paragraph (a)(ii).*

2.1.2 Community sector organisations

CSOs providing out-of-home care services under a section 15(1) agreement with the Minister are not legislatively required to comply with regulation 4. Instead, they are required through their service agreements to provide services for children in care in accordance with:

*Better Care, Better Services: Standards for Children and Young People in Protection and Care (Better Care, Better Services).*²³ Standard 8 requires CSOs to:

...ensure carers and staff recruited are appropriate for their role, and have skills consistent with the competencies identified, being the competencies for foster carers defined in regulation 4 of the Children and Community Services Regulations 2006; and

Protocols for the Foster Carer Directory of Western Australia (June 2012). Under these protocols:

*...service providers must have in place procedures to inform carers about the decision to revoke their approval that allow the carer the opportunity to respond. This is similar to the procedural fairness requirements the CEO must follow in regulation 4 before revoking a carer's approval status.*²⁴

²³ Department for Child Protection, *Better Care, Better Services; Standards for children and young people in protection and care*, Western Australia (undated) ('*Better Care, Better Services*') was developed in partnership with CSOs providing out-of-home care.

²⁴ Department for Child Protection, *Protocols for the Foster Carer Directory of Western Australia*, Western Australia (June 2012) ('*Protocols for the Foster Carer Directory*').

2.1.3 Varying assessment and approval processes

Traditionally, children in out-of-home care have been cared for in volunteer family or general foster care settings or in residential care, which is typically provided by paid employees in group home settings. During 2016-17, children in care were in the following types of placement arrangements:

- 43 per cent were with family carers
- 26 per cent were with Department foster carers
- 11 per cent were with CSO foster carers
- 6 per cent were in CSO residential care
- 6 per cent were with a parent or former guardian
- 2 per cent were in Department residential care
- 6 per cent were in unendorsed or other arrangements.²⁵

Models of care have evolved in recent years to include the following variations and combinations of each:

- foster carers looking after children in homes owned or rented by agencies (sibling groups, remote settings, children with complex needs);
- carers providing care on a rotating basis (for example, children have two sets of carers coming into their home several days on and several days off); and
- carers who are engaged by CSOs as employees rather than volunteers.

These developments have blurred the boundaries somewhat between traditional foster care and residential care. In an environment of out-of-home care reform, this focussed attention on the approaches being used in Western Australia to engage people to look after children in the CEO's care. As indicated in the Review's *Consultation Paper*, different service providers use different assessment methods to determine the suitability and capability of individuals to care for children under a placement arrangement:

- foster carer assessments use a 'carer competency' approach; while
- a human resource employment process is used to employ residential care workers and other foster carers engaged by CSOs as employees.

In relation to the assessment, approval or revocation of volunteer or paid foster carers, the Department and CSO foster care providers manage separate processes. In relation to the recruitment of residential care workers, there are no shared standards against which new staff are assessed. In addition, organisations employ residential care workers through varying job descriptions.²⁶

2.1.4 Relevant reform actions

Differing standards may emerge across the out-of-home care sector under these circumstances. To address these issues, the Department's out-of-home care reforms have focussed on achieving greater oversight and cross-sector consistency of carer assessment and approval standards. Reform actions underway to address these issues include:

- | | |
|------------------|---|
| Reform Action 58 | Amend <i>Better Care, Better Services</i> ²⁷ standards to clarify that all foster carers must be assessed and approved against the regulated competencies. |
| Reform Action 59 | Establish a Cross Sector Panel. |
| Reform Action 60 | Evaluate the effectiveness and efficiency of the Foster Carer Panel. |
| Reform Action 64 | Develop and implement cross-sector standards for residential care workers. |
| Reform Action 65 | Review and update <i>Better Care, Better Services</i> standards, creating Part 1 (Safety) and Part 2 (Quality). |

²⁵ *Final Report 2016/2017*, above n 10, 46.

²⁶ *Building a Better Future*, above n 19, 44.

²⁷ From January 2008, all services for children in care have been required to comply with *Better Care, Better Services*, above n 23.

Reform Action 66 Implement independent monitoring role of Ombudsman Western Australia (pending Government approval).²⁸

2.1.5 Other jurisdictions

As observed by the Royal Commission, arrangements for the assessment, approval and revocation of foster carers in jurisdictions vary widely.²⁹ In Queensland, the Chief Executive of the Department of Communities, Child Safety and Disability Services (the QLD Department) holds responsibility under the *Child Protection Act 1999* (Qld) for the approval and licensing of 'foster carers' and 'kinship carers' under a model which delegates authority for the decision to the Department's local child safety services centre managers. Applications must be lodged with the QLD Department, although assessments may be undertaken by department staff, CSO staff or contracted human services professionals. While not required by legislation, the Chief Executive's approval decisions may be informed by the convening of a local assessment panel.³⁰

In Victoria under the *Children, Youth and Families Act 2005* (Vic), out of home care services (OHCS) are responsible for approving a person to act as a foster carer (s.75) or for employing a person as:

- (a) a carer for children placed with the service; or
- (b) a provider of services to children at an out-of-home care residence managed by the service (s.76).

Before doing so, OHCS must have regard to prescribed matters in regulations 9 and 10 of the *Children, Youth and Families Regulations 2017* (Vic). These matters are common to both foster carers and employed persons. The Secretary of the Victorian Department of Human Services (the Secretary) must keep a register of out-of-home carers ('registered foster carers' and 'registered out-of-home carers'), and OHCS must notify the Secretary of a person's approval as a foster carer, or a person's employment or engagement as a carer for children placed with the service (s.78), or the revocation of foster carers or cessation of employment or engagement of a person as a carer. Registered out-of-home care services must also report allegations about carers (s.81), and other reports about carers can also be made (s.82).

2.2 Non-legislative Cross Sector Foster Carer Panel

As background to the Review's consultation on possible legislative models, the Review *Consultation Paper* noted the Department's work with CSOs to establish a Cross Sector Foster Carer Panel (the Panel) under Reform Action 59. The Panel subsequently commenced operation in April 2017 when the Department began submitting its foster carer assessments for Panel consideration. Those CSOs wishing to use the Panel process began submitting assessments for Panel consideration in August 2017.

The Panel's role is to quality assure new foster carer assessments, excluding family carers, through either endorsing or not endorsing Department and CSO recommendations for the approval of volunteer or paid foster carer applicants. However, the Panel is not a single decision-maker model: agencies retain final decision-making authority on whether or not to approve a foster carer applicant, regardless of whether the Panel endorses the applicant's approval as a carer.

²⁸ *Building a Better Future*, above n 19.

²⁹ Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Institutional Responses to Child Sexual Abuse in Out-of-Home Care*, (March 2016) 47 ('*Royal Commission Consultation Paper*').

³⁰ Department of Communities, Child Safety and Disability Services, Queensland, *Child Safety Practice Manual* www.communities.qld.gov.au/childsafety/child-safety-practice-manual/chapters/8-regulation-care/key-steps/3-approval accessed 11 May 2017.

2.2.1 Panel membership

Panel membership currently comprises a Department officer, a Foster Care Association of WA representative, and the following positions selected through a tender process:

- Panel Chair with relevant qualifications and experience, independent of the Department and CSO foster care providers;³¹
- Deputy Chair with relevant qualifications and experience, independent of the Department and CSO foster care providers;
- an additional community service sector member (rotating members); and
- an Aboriginal community representative.

A number of Review submissions commented on the current Panel as part of their feedback on the proposal for a single decision-maker. Consistent feedback was provided on the need for greater Aboriginal representation on the Panel and any future legislative model, given the majority of children in the CEO's care are Aboriginal children. The current inclusion of only one Aboriginal person on the Panel was regarded as tokenistic. The Mental Health Commission, for example, submitted that the process for approving foster carers should have the strong involvement of Aboriginal people under any model that may be adopted, and the Aboriginal Health Council of WA expressed concern:

... that the seven-member cross-sector foster carer panel, and also the care plan review panel, are lacking adequate representation from Aboriginal communities and ACCOs. With recent statistics reinforcing the need for a marked shift in our approach to child protection services, it is critical to ensure adequate representation on consultative and decision-making committees.

A greater involvement of Aboriginal organisations in the assessment and approval of foster carers was also seen as necessary for recruiting more Aboriginal carers, as well as general foster carers who are willing and able to support Aboriginal children's cultural needs.³² The Review noted that steps to increase Aboriginal membership of the Panel are already underway and affirmed the importance of Aboriginal representation and cultural competence in decision-making concerning Aboriginal children.

Recommendation 1

There should be increased Aboriginal representation on the Cross Sector Foster Carer Panel and it should be a requirement that at least one Aboriginal member of the Panel is involved in the consideration of each carer application before the Panel.

2.2.2 Evaluation

The Review discussed the planned evaluation to be carried out in the Panel's first 12 months of operation³³ and noted submissions from CSOs which questioned the timing of considering a legislative single decision-maker model (discussed in 2.3 below) while the Panel was still in its initial implementation.

The extent to which the CSO sector uses the Panel's endorsement process will impact on the effectiveness of the Panel in achieving cross sector consistency in assessment and approval standards. As a matter of good practice, therefore, the Review considered that any evaluation of the Panel's cross-sector effectiveness should be undertaken only after the Panel has operated

³¹ This position requires a social work or psychology qualification with relevant child protection and fostering experience.

³² Aboriginal Legal Service; SNAICC, Family Matters WA and the Noongar Child Protection Council (SNAICC et al).

³³ Reform Action 60, *Building a Better Future*, above n 19.

for at least 12 months with a substantial number of CSO foster carer providers participating in the Panel process through the submission of their foster carer assessments for endorsement.

2.3 Legislative proposals for a single decision-maker

Consultation question 20 of the 2015 Consultation asked: *Do you support legislative amendments which provide for a single decision-maker (such as the CEO of the Department) in respect of the approval and revocation of foster carers?* Thirteen submissions to the 2015 Consultation responded to the question above, seven of which supported establishing a single decision-maker.³⁴ While views varied as to who the decision-maker should be, few supported it being the CEO.

To further explore legislative options for a single foster carer approval decision-maker, the Review Consultation Paper sought feedback on three possible models:

- **Consultation question 1** asked which of the proposed legislative models below was preferred for improving sector-wide consistency in the approval of foster carer applicants and, when necessary, the revocation of existing foster carers' approval.

Under each of the models, the Department and CSOs would retain responsibility for recruiting and assessing their own foster carer applicants against the carer competencies in regulation 4.

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.

Models A and B would 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 the CEO's 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 as single decision-maker

- The Department would retain 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 as single decision-maker

- A cross-sector Foster Carer Review Panel would be 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 would make a final decision based on recommendations of the Foster Carer Review Panel.

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

³⁴ Of the seven submissions supporting a single decision-maker, four were from within the Department itself.

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 would be responsible for the approval and revocation of all Department and CSO foster carers.

2.3.1 Submissions

Submissions to both consultations³⁵ invariably upheld the need for cross-sector consistency in Western Australian foster carer standards. Views on how this should be achieved varied widely and a range of measures, additional to the question of a single decision-maker, were suggested.

Twenty-three submissions to the Review addressed term of reference 1. Nine expressed a preference for one of the proposed models in the event that legislation was proceeded with. Only one of these supported *Model A* - the CEO as the sole decision-maker.³⁶

Model B - a cross-sector foster carer panel which makes recommendations to the CEO - was supported by three of the nine agencies:

Model B seems more collaborative, inviting multiple opinions and perspectives with a single point of accountability (Child and Adolescent Mental Health).

Model B provided the most effective process for reviewing and approving foster care applications. The key component in our consideration were the 'layers', allowing for review, challenge and reflection at each stage; application, assessment, review and final decision making. It was felt that as the Department holds legal responsibility for children in care, they also need to have the overall decision making in terms of competency of who cares for young children and young people in their charge (a metropolitan office of the Department).

WA Police prefers Model B as it is important to have an independent body to be able to examine all the issues and then make their recommendation to the Department. The Department can make its decision based on the independent body's recommendation. Using this Model, the decision making process will be seen as being fair, open and accountable (WA Police).

Five submissions supported *Model C* - the establishment of an independent cross-sector panel as the single decision-maker.³⁷

The need for a consistent decision-making process across the Department and the community sector for the approval and revocation of foster carers is strongly supported. This would seem fundamental to ensuring quality of care and safeguarding of all children in the care of the Director General wherever they are placed... Our preference is for Model C because of the independence of the panel and its inclusive composition that will ensure that decision making is informed by a range of perspectives (Australian Association of Social Workers).

We are broadly supportive of Model C, which would see a cross sector panel make decisions about the appointment and revocation of foster carers; this provided that appropriate persons are included on the panel, and that such panel members are available so as to draw on a range of individual and organisational representatives to suit each individual assessment (Women's Law Centre).

³⁵ 2015 Consultation Paper, above n 5; Review Consultation Paper, above n 7.

³⁶ Community and Public Sector Union / Civil Service Association.

³⁷ Australian Association of Social Workers; Aboriginal Legal Service; Housing; Legal Aid; Women's Law Centre.

The Aboriginal Legal Service also supported the establishment of an independent decision-making body, but with a separate division responsible for the approval of people wanting to care for Aboriginal children. In the model which they envisaged, CSOs would retain “a primary role in the assessment and approval of carers (as they do now) with uniform oversight from the new body, but final endorsement, maintenance and upkeep of a central carer register, and rights of review would be the role and responsibility of the new body.” Legal Aid also supported an independent decision-making body with significant Aboriginal representation, and in their joint submission, SNAICC, Family Matters WA and the Noongar Child Protection Council³⁸ (SNAICC et al) submitted that:

...for decisions in relation to Aboriginal and Torres Strait Islander children, an Aboriginal and Torres Strait Islander organisation must be involved in the decision making process and have final authority to determine the appropriateness of carers for Aboriginal and Torres Strait Islander children. Any cross-sector assessment panel must include Aboriginal community organisation representation.

Without indicating any preference for a particular model, and consistent with his 2015 Consultation submission, the Commissioner for Children and Young People Western Australia (Commissioner for Children and Young People) reiterated support for a legislative single decision-maker in respect of the approval and revocation of foster carers.

Seven Review submissions were opposed to a single decision-maker.³⁹ The majority of these were from CSOs who had expressed their concerns about a single decision-maker model in the previous 2015 Consultation. In summary, these submissions questioned the assumption that the models proposed would be any more effective in promoting cross sector consistency than other non-legislative means and expressed concerns about unintended consequences. These included: possible industrial implications in relation to employee carers; possible duplication, delays and inefficiencies in the carer approval process; a reliance on written assessment reports rather than a more nuanced, contextual approach to foster carer assessments; and committing to the inflexibility of a legislative model before an evaluation of the Cross Sector Foster Carer Panel is undertaken.

Consultation by WACOSS with the sector indicates a high level of concern about the level of inconsistency in standards of foster carers. Reasons cited for this included the lack of measures or agreed indicators to achieve consistency, the difficulty in recruiting foster carers and the lack of resources, support, training and incentives for foster carers who take on the role... There is also a widely held view that a centralised panel would not necessarily improve consistency so the proposal for a centralised panel was not supported (Western Australia Council of Social Service - WACOSS).

It would be advisable to incorporate policy changes within the Department, and contractual changes for Community Sector Organisations, to ensure consistency in foster care acceptance and approval processes rather than legislating these changes. This will ensure the system is able to remain flexible and adaptable to the needs of children and young people, whilst ensuring there is a high standard of care provided by Foster Carers (Centrecare).

The community sector has strongly advocated that Better Care Better Services standards and quality assurance, combined with policy settings, offer a more effective and flexible means of assuring standards across foster carer assessments – for government and non-government services... There is little evidence from around the world that a centralised panel will benefit children in out of home care; rather, evidence suggests it will cause delays in approvals and disrupt carer arrangements, especially for emergency care. ...Employee carers (in Family Group Homes) cannot be treated in the same way as

³⁸ Formerly known as the Western Australian Aboriginal Child Protection Council.

³⁹ Submissions opposing a single decision-maker model were from the Alliance and CYFAA; Centrecare; Key Assets; MacKillop Family Services; Society of Professional Social Workers; Wanslea Family Services; and WACOSS.

volunteer foster carers. There are different risks and industrial and legal issues for employees (the Alliance and CYFAA).

Key Assets, in common with the vast majority of community sector out of home care providers, does not regard the centralised panel as an effective way of achieving the desired outcome of consistent standards in care assessment and approval... The community sector has made numerous representations to the Dept. of Child Protection and Family Support (CPFS) suggesting better ways of working together to achieve consistent, high quality standards in carer assessment and approval. This includes strengthening Better Care Better Services standards; contractual obligations to employ qualified assessors; and quality assurance measures through CPFS monitoring (Key Assets).

MacKillop is of the view that other non-legislative mechanisms will better support the screening, assessment and approval of carers and, ultimately, the safety of children and young people (MacKillop Family Services).

There will be fewer checks and balances in the proposed models that will only rely on a written report without any opportunity to discuss the nuances with either the assessor or the prospective family. So much of an assessment is subjective that this cannot be captured in a report (Wanslea Family Services).

Discussions during the Review's targeted community consultations in regional areas emphasised the importance of regionally-based decision-making on the suitability of carer applicants, and concern was expressed that a metropolitan-based centralised panel would not adequately address regional needs. Local knowledge, along with improved consistency in decision-making, was seen as important in order to align with local expectations and it was thought that a centralised model would not provide the necessary flexibility. One suggestion was to establish regional foster care panels with high Aboriginal membership or to have appropriate regional representation (including Aboriginal representation) on the central panel when applications from regional areas are considered.

2.3.2 Deliberations

In approaching its deliberations, the Review made the important distinction between the carer assessment and approval process and the decision about with whom a child should be placed: responsibility for making a placement arrangement for a child in the CEO's care is vested solely in the CEO.⁴⁰

The Review gave careful consideration to submissions for and against the establishment of a single decision-maker for the approval of carers. This included looking at the alternative measures suggested for promoting consistent carer standards, and the extent to which they had been considered by the Department. In summary these measures included:

- (a) making *Better Care, Better Services* more prescriptive, with service providers assessed against standards,⁴¹ and the external monitoring of foster carer standards;⁴²
- (b) amending *Better Care, Better Services* to include minimum requirements for approval panels for CSOs, including the inclusion of Aboriginal panel members and possible registration by the Department of panel Chairs who must comply with training requirements;⁴³
- (c) developing a consistent carer assessment framework;⁴⁴
- (d) a system of accreditation of foster carer assessors;⁴⁵
- (e) strengthening the WA Foster Carer Directory and improving information sharing protocols;⁴⁶

⁴⁰ Except in certain circumstances in relation to negotiated placement arrangements and placement services under section 32(1)(a) of the Act.

⁴¹ The Alliance and CYFAA; Key Assets.

⁴² WACOSS.

⁴³ MacKillop Family Services.

⁴⁴ Society of Professional Social Workers.

⁴⁵ Wanslea Family Services; MacKillop Family Services.

⁴⁶ MacKillop Family Services.

- (f) improved collaboration between the Department and CSOs;⁴⁷ and
- (g) strengthening the screening, assessment and approval requirements for relative and kinship carers.⁴⁸

Ways of increasing regional input into the current Panel were also discussed and it was suggested the possibility of establishing regional pilots through the Panel should be explored. The Review also agreed that a single-decision maker model may not be necessary if the Panel proves successful in achieving its aims and the reform actions referred to in 2.1.4 are given time to be bedded-down in practice and their effectiveness evaluated.

Having considered community consultations and submissions to the Review, and given that the Panel and other reforms are in their infancy (albeit not a single decision-maker model), there was a shared view that in preference to establishing a single decision-maker legislative scheme for foster carer approvals, a number of non-legislative measures should be pursued at this time. Another factor in the Review's considerations was that the Royal Commission is yet to release a response to its out-of-home care Consultation Paper⁴⁹ in either interim or final report format. The non-legislative measures that should be developed are addressed below.

2.3.3 Cross sector carer assessment framework

As a common sense approach to enhancing consistent carer standards, the Review considered that the development of a cross sector carer assessment framework, consistent with best practice and the foundation standards established through *Better Care, Better Services* and regulation 4, has merit. While maintaining sufficient flexibility for agency-specific practices, this would require cross-sector collaboration in developing a holistic approach to the management of volunteer and paid carers, including carer assessment standards, carer reviews, training and learning, and assessor accreditation and training. The Framework would need to be responsive to Western Australia's need for Aboriginal carers and use evidence based approaches to support the development of a culturally competent out-of-home care system.

This work would build on a number of the out-of-home care reform actions already underway including, for example, the establishment of the Panel, mandatory training for carers and assessors and work to develop consistent carer assessment for use across the sector. It is hoped that as cross sector participation in the Panel increases, so will opportunities for cross sector learning and development, with the aim of continual improvement in delivering high quality out-of-home care for all children in Western Australia.

2.3.4 Accreditation and training for carer assessors

The Review considered suggestions that an accreditation process should be established to ensure those conducting carer assessments are appropriately trained:

...Accrediting assessors to ensure they are trained equipped and supervised in undertaking their assessments. A formal unit of work can be established within Learning and Development that is assessed and monitored to meet the required standards. Only those who have completed and achieved the competencies are then able to undertake assessments. This is a more cost effective and sustainable option (Wanslea Family Services).

Accreditation / registration and training of foster care assessors (including requirements for minimum qualification) is an initiative worthwhile of consideration to strengthen the capability of individuals entrusted with the assessment of prospective foster carers and to better assure the quality of work (MacKillop Family Services).

An accredited training program and a foster care and adoption assessment manual (the Manual) for Department staff (including contract staff) and sector assessors is under

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ *Royal Commission Consultation Paper*, above n 29.

development. A cultural audit of the Manual and the development of a cultural competency, which foster care applicants will be assessed against, are key features of the project.

Under Reform Action 25, the Department is already co-designing a learning strategy and resources, guidance and materials to enhance training modules and programs for staff who conduct family carer assessments (see 2.4.5 for further information). The Review saw merit in the Department developing an accreditation and training program for a broader group of carer assessors, including those assessing general volunteer foster carers and carers who may be employed in different care settings.

2.3.5 Foster carer directory

The Department operates a Foster Carer Directory (the Directory), which is incorporated into its electronic data base known as Assist. The Directory records the personal and residential details of all foster carer applicants and their assessment outcomes from all participating services in Western Australia.⁵⁰ The objectives of the Directory are to:

- *align the requirements of recording of application, approval, non-approvals and revocations details of foster carers by non-government foster care providers, with the Department's requirements;*
- *provide a complete record of foster carers approved to provide foster care for children in the CEO's care;*
- *provide for information exchange between participating service providers regarding persons applying to be foster carers, and current or previous foster carers;*
- *ensure service providers are notified when a foster carer applicant to their agency has been previously assessed as unsuitable to provide foster care;*
- *ensure foster carers are approved with only one service provider at any time;*
- *ensure the Department is able to record the placement of a child with a named carer at a specified address.*

The Directory is often mistakenly referred to as a 'register'; generally, however, registers are very prescriptive and require legislation to regulate their operation. Although the Directory is not accessible by CSOs, the Directory's custodian shares information with CSOs on a case-by-case basis.

In its submission to the Review, MacKillop Family Services suggested that "*enhancements to the existing carer register and information sharing between agencies when carers may be transitioning between one provider and another*" would be one way of better ensuring the quality and suitability of foster carers (than a legislated single decision-maker).

The need for more effective information sharing in respect of carers was raised in a number of submissions to the Review and the *2015 Consultation*. In their Review submission the Aboriginal Legal Service indicated that, in the absence of a shared database accessible by CSOs and the Department, individuals whose foster carer status has been revoked by one CSO may be able to apply to be a carer for another CSO without their previous carer history being known to the recruiting CSO. The CPSU/CSA also referred to gaps in information sharing:

CPSU/CSA members would be welcoming of any scheme which would ensure that carers who have been rejected by the Department are not then accepted for a similar role by a community sector organisation. The current approach is believed to be too ad hoc. Even if the other agencies are doing their own assessments, if the Department can review those assessments this would have a more positive outcome for children in care.

In March 2016, the Royal Commission's *Consultation Paper on Institutional Responses to the Child Sexual Abuse in Out-of-Home Care* invited submissions on whether carer registers should be established in every jurisdiction, and whether registers in individual jurisdictions should include the kind of information held on the NSW Carers Register and be accessible by all

⁵⁰ *Protocols for the Foster Career Directory*, above n 24, 3.

jurisdictions' accredited out-of-home care service providers and appropriate regulatory and oversight bodies.

The *Protocols for the Foster Carer Directory* were last revised in June 2012. Subject to the Royal Commission's final report and recommendations, the Review agreed the operation of the Directory should be strengthened to support more consistent and effective management of carer approvals and revocations, including enhanced information sharing between agencies and the inclusion of all foster carers regardless of the type of care they provide or the manner in which they are engaged to provided care. It was noted that the Department is already examining options for establishing a portal which external agencies can access.

Recommendation 2

Subject to the findings of the Royal Commission into Institutional Responses to Child Sexual Abuse, the following non-legislative measures for promoting consistently high cross-sector foster carer standards should be pursued before any further consideration is given to establishing in legislation a single decision-maker for the approval and revocation of foster carers:

- (a) cross-sector development of a Carer Assessment Framework;
- (b) an accreditation and training requirement for foster carer assessors;
- (c) a strengthened Foster Carer Directory following a review of its role and operation.

2.3.6 External oversight of carer assessment and revocation standards

Oversight of standards in Western Australia's out-of-home care system is currently undertaken by the Department's Standards Monitoring Unit, which regularly monitors organisations' compliance with *Better Care, Better Services*. In 2016-17, monitoring reviews were conducted in eight of the Department's district offices and 16 residential care services and community sector placement services.⁵¹ [In addition, the Act enables the appointment of assessors under section 125A. Assessors have broad powers to visit residential facilities and the Department's secure care facility.]

A number of Review submissions identified the inherent conflict of interest in the Department being the funder, the main provider and the overseer of out-of-home care services. The Royal Commission has also demonstrated the need for greater external oversight of the out-of-home care sector.

To enhance external oversight of out-of-home care services in Western Australia, a system of independent monitoring of Safety Standards by the Ombudsman WA is being established through Reform Action 66. As previously noted, under Reform Action 65 the *Better Care, Better Services* standards have been reviewed and expanded to create Safety and Quality standards.⁵²

This work was completed by a cross-sector working group, guided by the following principles:

1. *The Western Australian community has confidence that there is an objective and unbiased oversight system in place, which supports all children in out-of-home care to be provided with safe and high quality care.*
2. *Systemic oversight is managed externally to the organisation that is the decision-maker for the child.*
3. *Standards of out-of-home care in Western Australia are consistent with the National Standards for Out-of-Home Care and the Charter of Rights for Children and Young People in Care.*
4. *Organisations are accountable for the standard of out-of-home care that they provide.*
5. *The voices of children are sought and considered throughout processes of oversight.*
6. *Mechanisms of oversight meet the principles of substantive equality.*

⁵¹ *Final Report 2016/2017*, above n 10, 52.

⁵² *Building a Better Future*, above n 19, 45 [65].

All CSOs providing out-of-home care will be contractually required to meet the *Better Care, Better Services* standards. Minor amendments to the *Parliamentary Commissioner Act 1971* are required to enable the Ombudsman's cross-sector oversight role and the Department is currently working with the Ombudsman WA to scope the nature and extent of the amendments, including the functions of the Ombudsman WA which will apply to its out-of-home care oversight role.

In the context of these developments, the Review considered there may be scope for this role to include oversight of cross sector standards of carer assessments, approvals and reviews.

Recommendation 3

Consideration should be given to the external oversight of compliance with standards of carer assessment, review and revocation by the Department and community sector organisations.

2.4 Other matters related to foster carer consistency

In addition to the proposal for a single decision-maker, other *2015 Consultation* matters deferred for further consideration during the Review were in response to Consultation questions 21 to 25: the portability of approved carers between foster care service providers; requiring carers to report relevant changes in their personal circumstances to the decision-maker; whether carers should be able to seek external review of a CEO decision to revoke a carer's approval; any suggestions regarding amendments to the carer competencies; and which carers should be subject to a legislative approval process. A number of these matters are addressed below.

2.4.1 Portability of carer approvals and changes in personal circumstances

Consultation question 21 asked whether there was support for the portability of carer approval status for a carer if a single decision-maker were to be introduced, and **Consultation question 22** asked whether a carer should be required to report relevant changes in personal circumstances or history to that decision-maker. In respect of portability, the *2015 Consultation* explained that:

Currently, each time a carer moves to a new CSS organisation, or moves between the Department and the CSS sector, a new carer assessment is undertaken and a revised decision regarding approval follows. If all carers were approved through a consistent process by a single decision-maker, re-approval for each new position a carer pursues may no longer be considered necessary. However, this approach would not mean that an organisation has to engage a carer merely because he/she is approved; that is, an organisation would still decide on a carer's suitability for a particular position.⁵³

There was significant support for the portability of carers' approval status across out-of-home care service providers in 2015 submissions responding to this question. However, given the Review is not recommending amendments to establish a cross sector carer approval mechanism, non-legislative options for supporting the transferability of foster carers across service providers will need to be explored. It is anticipated that the Department's work in conjunction with CSOs to achieve more consistent standards, combined with the Review's recommendations, will support a future system of cross sector foster carer portability by type of carer.

The reporting of relevant changes in certain circumstances was also raised in the context of establishing a single decision-maker. This will be addressed in the work of reviewing and developing the Directory and matching framework within the Department's Child and Carer Connection Hub.⁵⁴

⁵³ *2015 Consultation Paper*, above n 5, 21.

⁵⁴ The Child and Carer Hub is the Department unit responsible for facilitating and managing referrals for children into placement arrangements which best meet their needs, and for managing the Directory and the Cross Sector Foster Carer Panel.

2.4.2 Carer competencies in regulation 4

As part of the 2015 Consultation on the possibility of a single decision-maker, **Consultation question 25** asked which carers should be subject to a legislative carer approval process. Responses indicated there was a widely held view that all adults caring for children in the CEO's care should be subject to any legislative approval process that was established and therefore should be required to meet the carer competencies in regulation 4 of the Regulations.

Deliberations

The Review considered the operation and effectiveness of section 79 and regulation 4 of the Regulations, and whether all individuals who care for a child in the CEO's care should be legislatively required to be assessed against the carer competencies in regulation 4, regardless of who was responsible for their assessment or approval or how the assessment was carried out.

The policy rationale for legislatively requiring only the CEO to comply with regulation 4 when approving or revoking carers, but not CSOs that engage foster carers (paid or otherwise), was questioned. Similarly, the rationale for not requiring the Department's or CSOs' residential care workers to be assessed against the carer competencies was questioned.

The Review Committee undertook further consultation, including with representatives of the Alliance, to gauge views on legislatively requiring *all* individuals who care for children in the CEO's care, whether volunteer or unpaid, to be assessed, approved and revoked in accordance with the standards in regulation 4 regardless of who is responsible for their assessment and approval.

While it was clear from the response there is wide support for consistent assessment and approvals standards,⁵⁵ MacKillop Family Services and the Alliance and CYFAA again raised industrial relations concerns as the basis of their opposition to including paid carers within scope of a legislative requirement to comply with the carer competencies. As an alternative, they suggested developing standards for employing group or residential home workers that are able to be incorporated into employee recruitment and selection processes.

As referred to in 2.1.2 of this Report, compliance with the carer competencies and the procedural fairness requirements in the revocation process is currently required contractually through CSO service agreements. The Review noted that Reform Action 58 to "*Amend Better Care, Better Services to clarify that all foster carers must be assessed and approved against the regulated competencies*" is currently underway, and recommends that contractual requirements are strengthened in preference to introducing legislative requirements for CSO foster care providers. Proposals for increased external oversight of the out-of-home care sector will contribute to achieving greater assessment consistency, including Recommendation 3 regarding oversight of carer assessments, approvals and reviews.

Recommendation 4

The contractual requirements for community sector organisations should be aligned with the requirements of the carer assessment and revocation standards in regulation 4 of the *Children and Community Services Regulations 2006*.

2.4.3 Additional carer competencies

A number of Review submissions advocated changes to the carer competencies to recognise children with special needs including disability, mental health issues, drug-related problems and

⁵⁵ Agencies supporting this approach included: Legal Aid; UWA Social Policy Practice and Research Consortium; Community and Public Sector Union / Civil Service Association; private individual; Society of Professional Social Workers; Child and Adolescent Mental Health Service; two Department Districts; and WACOSS.

the need for carers to deliver trauma-informed responses. The need for carer competencies to be trauma informed, foetal alcohol spectrum disorder informed and culturally competent was also raised in the Review's metropolitan consultation with ACCOs. Comments in submissions included:

Many children entering OOHC suffer multiple problems and these need to be recognised. Not everyone can look after a child with multiple disabilities, intellectual, physical or psychologically and emotionally damaged/challenged. An option is that the competencies recognise the ranges of needs children have and that foster carers who have these competencies be recognised as having another competency (Carole Kagi).

MacKillop ... suggests the inclusion of a sixth competency – that the carer “is able to support the delivery of trauma-informed care”. The ability to provide care that is based on an understanding of the trauma experienced by children entering out-of-home is an essential requirement. The impact of abuse, neglect and exploitation on children and young people has been well acknowledged in the literature.²⁰ The centrality of providing a care environment with a focus on healing and attachment is a focus of best practice models of out-of-home care²¹. Such a competency would ensure that prospective carers undergo initial training and are provided with ongoing learning and development support to build an understanding of trauma, the impact of trauma on the developing brain and how this can manifest in behaviour and the key elements in the provision of trauma informed care (MacKillop Family Services).

The Aboriginal Legal Service, supported by other legal services' submissions, proposed amendments to regulate foster carers' competency to deliver culturally responsive care for people wanting to care for Aboriginal children, including mandatory training delivered by ACCOs. Legal Aid submitted:

The carer competencies...should be amended to include competencies for those wishing to be general foster carers of Aboriginal children and young people and children and young people with high needs. Special cultural competency standards in relation to caring for Aboriginal children and special competency requirements for children caring for children with high needs need to be set out and then met by carers (Legal Aid).

Deliberations

The Review supported the planned introduction of a new carer competency in regulation 4 of the Regulations to require prospective carers to be able to promote children's cultural needs and identity. Until the necessary regulation amendments occur, work under Reform Action 63 is well-advanced in developing the guidelines and tools necessary to support culturally informed carer assessments and the compulsory training the Department's prospective foster carers must undertake.

In respect of the suggestion that the Act create competencies for specific categories of carer, for example competencies specific to non-Aboriginal carers wishing to care for Aboriginal children, the Review noted the carer competencies are designed to apply to all carers and that all carers should be responsive to a child's culture and identity. The proposed cultural competency in Recommendation 5 below, the Review's recommendations to strengthen the cultural support planning required for Aboriginal children in care⁵⁶ and the significant reforms underway to develop a culturally competent service system aim to improve out-of-home care for Aboriginal children.

In respect of a special needs and trauma-informed competency, the Review considered that the competency in regulation 4(1) encompasses a range of qualities and capabilities a carer may need to possess in order to respond to the diverse needs of children in care. This competency requires the CEO to be satisfied that a prospective foster carer “is able to provide care for a child in a way that promotes the wellbeing of the child, promotes the child's family and interpersonal relationships, and protects the child from harm.”

⁵⁶ Recommendations 11 to 14 of the Review.

Recommendation 5

Regulation 4 of the *Children and Community Services Regulations 2006* should be amended to introduce an additional assessment criterion which requires that prospective carers must be able to promote children's cultural needs and identity.

2.4.4 External review of revocation decisions

- **Consultation question 2** asked whether a community sector organisation, in addition to an individual foster carer, should have a right of review in the event that one of its foster carers had his or her carer-approval revoked by a decision-maker.

The *2015 Consultation* sought feedback on whether an individual who is revoked as a carer should have a right to the external review of the decision.⁵⁷ While this question was posed in the context of a single decision-maker being responsible for carer approvals or revocations, regardless of the differing positions expressed about the prospect of a single decision-maker during that consultation there was a consensus view that carers should have a right to an external review of a decision to revoke their carer approval status.

Given the Review's recommendation to pursue non-legislative means for achieving greater consistency and compliance with foster carer standards,⁵⁸ there is no longer an opportunity to legislatively provide for the external review of revocation decisions. This is because there will be no legislated decision-making process in respect of CSO carers and therefore no way of providing a right of review in the Act. An opportunity does exist to provide the Department's approved foster carers with a right of review of such a decision to SAT. However, the Review considered this would be inconsistent under the circumstances.

2.4.5 Family carers

Submissions⁵⁹ and community consultations raised concerns about the assessment of family carers and some noted that excluding family carers from the remit of the Panel and a possible single decision-maker for foster carer approvals would do nothing to promote across-the-board assessment and approval consistency, and high carer standards for family carers.

The CPSU/CSA submitted that differences in standards in regional WA were more acute:

... with assessments not complete, with the consequence being that many regional carers may be unsuitable or risk being deemed not suitable. With a significant lack of carers in regional areas, Department staff are heavily reliant on them.

SNAICC et al addressed what they saw as some of the real barriers at play in relation to recruiting Aboriginal family carers and called for legislation recognising the role of ACCOs in undertaking "culturally safe and adapted processes of kinship carer identification, assessment, recruitment and support":

Properly resourced Aboriginal and Torres Strait Islander community-controlled organisations (ACCOs) are needed not only to identify kinship care placements, but also to address the reluctance of potential carers to engage with child protection authorities that were centrally involved in creating, and still associated with, the Stolen Generations. Australian research has found that ACCOs and their Aboriginal and Torres Strait Islander staff, rather than Departmental staff, are often most effective at recruiting Aboriginal and Torres Strait Islander kinship carers.¹⁰⁶ Research has also highlighted that kinship carer recruitment is further restricted by a lack of training and guidelines to support it and a lack

⁵⁷ *2015 Consultation Paper*, above n 5,19.

⁵⁸ Recommendation 2 of this Report.

⁵⁹ MacKillop Family Services; WACOSS.

of culturally appropriate carer assessment tools and processes.¹⁰⁷ The Winangay Aboriginal Kinship Assessment Tool has been identified as an example of a promising ACCO-developed strengths based kinship care assessment approach that identifies and addresses perceived risks, such as inadequate support, in a way that could increase the number of safe, culturally strong, and viable kinship carers.^{108 60}

A national comparison of carer screening, assessment, selection and training and support in out-of-home care conducted for the Royal Commission concluded:

... that the assessment of kinship carers (beyond basic probity checks) was generally less rigorous than for foster carers due to a policy-based assumption about the relative safety and wellbeing of children being cared for by kin. In particular, the concerning practice of renewing the 'emergency care' designation of kinship placements in lieu of a full and proper assessment was often seen as a risk factor.⁶¹

Family carers are legislatively required to meet the carer competencies in regulation 4. Because family carer assessments relate to an individual's suitability to care for a specific child, all family carer assessments are conducted by the Department. A number of reform actions are underway to enhance family carer assessments and provide more support and training to family carers. These include:

- | | |
|------------------|---|
| Reform Action 24 | Amend the Family Carer Assessment policies and processes to be more inclusive, understandable and appropriate. |
| Reform Action 25 | Enhance the training modules and programs to staff conducting family carer assessments. |
| Reform Action 26 | Individual learning and development plans for family carers to be reviewed formally as part of annual reviews. |
| Reform Action 27 | An orientation process for family carers to be implemented. The orientation process will include: <ul style="list-style-type: none">• a family carer resource pack;• an induction/orientation process for family carers for each district; and• accessible preparation training to be offered to all family carers. |
| Reform Action 28 | Ongoing and accessible learning opportunities to be provided for family carers. This includes the development of peer support networks. |
| Reform Action 29 | As resources become available, refocus and increase funding expenditure to support family carers. |
| Reform Action 56 | Explore processes for more independence (external to the case management) in the approval process of family carers, to support high quality carer standards. |

As previously mentioned, under Reform Actions 25, 26, 27 and 28, the Department is designing and developing a learning strategy which includes practical resources, training modules and programs for child protection workers conducting family carer assessments and providing ongoing development support to family carers. The resource development has an Aboriginal focus, with a view that the resources can be used in a range of cultural contexts. A pilot of the

⁶⁰ Informed by: [106] Richardson, N., Bromfield, L., and Osborn, A. (2007). Cultural considerations in out-of-home care, National Child Protection Clearinghouse, Research Brief No. 8, 10; Bromfield, L., and Osborn, A. (2007). 'Getting the big picture': A synopsis and critique of Australian out-of-home care research, National Child Protection Clearinghouse Issues Paper No. 26, Melbourne: AIFS, 25; Carmody, T. (2013) Taking Responsibility: A Roadmap for Queensland Child Protection, Brisbane: Queensland Child Protection Commission of Inquiry, 368; [107] Arney et al (2015). Enhancing the Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle. Melbourne: Australian Institute of Family Studies; [108] Carmody, T. (2013) Taking Responsibility: A Roadmap for Queensland Child Protection, Brisbane: Queensland Child Protection Commission of Inquiry, 368; and see <http://winangay.com/wp-content/uploads/2012/10/flyer-8-.pdf>

⁶¹ Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *A national comparison of carer screening, assessment, selection and training and support in foster, kinship and residential care*, Final Report of INCA Consulting Project Team (March 2017).

resources is underway and will be evaluated after six months with an anticipated roll out in June 2018.

2.5 Emergency placements

Currently, the Act does not expressly enable the CEO to place a child in an emergency placement. Rather, section 79(2)(b) enables the CEO to make “*any other arrangement for the placement of a child that the CEO considers appropriate.*” There is a view that a specific provision should be introduced to clarify the CEO’s power to make such placements. Emergency placements are necessary when no other placement option is immediately available, including with approved carers, and most often occur with family or significant others in the child’s life.

The Department’s online Casework Practice Manual⁶² requires initial carer assessments in these circumstances to focus on child safety. The following are the Department’s time-limited practice requirements: a Department record check on the individual and completion of a statutory declaration in relation to criminal history, prior to the placement; a home visit before the placement or, if arranged by Crisis Care, the next working day; possession of a Working with Children Card or the lodging of an application within five days; and a case planning decision within five days of the child’s placement about whether to proceed with a carer assessment for the child’s ongoing care.

The Review considered how long emergency placements should be allowed to continue before the CEO’s approval of the carer is formalised. It was acknowledged that, for emergency placements which may become long term placements for a child, flexibility was needed to enable these placements to be well-considered: sometimes assessments may take several months. It was agreed, however, that emergency placements should be legislatively time-limited. Using regulations to prescribe the timeframes that should apply to particular components of the assessment was seen as appropriate. Timeframes should prioritise the safety assessment requirements already provided for in the Casework Practice Manual, but timeframes in relation to the longer term components of the assessment process will require further consideration.

Recommendation 6

The Act should be amended to expressly provide that the CEO may make a time-limited emergency placement for a child in accordance with prescribed regulations. Regulations should prescribe the timeframes within which the necessary carer checks, assessment and consultation requirements under section 81 are to be met.

⁶² Available on the Department’s website at <https://manuals.dcp.wa.gov.au/CPM/SitePages/HomePage.aspx?Mobile=0>

CHAPTER 3 Improving outcomes for Aboriginal and Torres Strait Islander children, families and communities

Term of reference 2 – The Review was required to consider the operation and effectiveness of the principles relating to Aboriginal children, families and communities found in sections 12 to 14 of the Act, and the consultation requirement in section 81.

- **Consultation question 3** of the Review *Consultation Paper* sought submissions on whether there were 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** asked 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** asked whether any changes were required to increase the effectiveness of the principles set out in sections 13 and 14.

On 30 June 2017, of the 4,795 children living in out-of-home care in Western Australia, 54.3 per cent were Aboriginal despite Aboriginal children comprising only 6.7 per cent of the State’s child population.⁶³

Reducing the over-representation of Aboriginal children in care continues to be a key driver of the Department’s reforms. The Review’s recommendations on this term of reference are intended to build upon the Department’s reform focus on improving outcomes for Aboriginal children, families and communities who come into contact with the child protection system in Western Australia. SNAICC et al noted:

The high-level policy statements in the Western Australian Out-of-Home Care (OOHC) Reform Strategy and the Earlier Intervention Strategy provide a strong basis from which to embark on the process of systemic reform. We are encouraged by the OOHC Reform Strategy’s stated ‘specific focus’ on reducing the rate of Aboriginal and Torres Strait Islander children entering out-of-home care and overall priorities in first, preventing children entering out-of-home care and second, reunifying children with parents.

3.1 Current legislation specific to Aboriginal people

In addition to the generic provisions in the Act, a number of its sections apply specifically to Aboriginal children, families and communities in recognition that the legacy of trauma caused by past child welfare practices requires additional considerations to be taken into account when intervening in the lives of Aboriginal families. Foremost among these are:

- (1) the principles in sections 12 to 14 which set out -
 - the **Aboriginal and Torres Strait Islander child placement principle** – section 12;
 - the **Principle of self-determination** – section 13;
 - the **Principle of community participation** – section 14; and
- (2) section 81, which requires the Department to consult with Aboriginal people before making a placement arrangement for an Aboriginal child.

This Chapter considers a number of issues raised in submissions and Review consultations and makes recommendations in respect of each of these sections and other matters put to the Review.

⁶³ *Final Report 2016/2017*, above n 10, 23.

3.2 Elements of the Aboriginal child placement principle

- **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?

The Aboriginal and Torres Strait Islander child placement principle (the ATSI Principle) originated during the 1970s and is now embedded in various forms in child protection policy and legislation across Australia. In Western Australia, section 12 of the Act is titled ‘Aboriginal and Torres Strait Islander child placement principle’ and sets-out what is commonly referred to as ‘the placement hierarchy’ for Aboriginal children. The placement hierarchy in section 12 is discussed in 3.4 of this Chapter.

Although mostly conceptualised as a hierarchy of preferred placement options for children who are unable to remain safely with their parents,⁶⁴ the ATSI Principle is not simply about where and with whom an Aboriginal child should be placed. In broad terms, the intent of the ATSI Principle is to help address the devastating impacts of the historical systematic separation of Aboriginal children from their families and communities,^{65/66} and to enhance and preserve Aboriginal children’s connections to their family, community, culture and country.⁶⁷ This is the intent of section 12(1) of the Act, which provides that:

- (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.*

The ATSI Principle is underpinned by a strong evidence base which highlights the cultural strengths of Aboriginal child rearing practices and “*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.*”⁶⁸

To provide greater clarity about the purpose of the ATSI Principle and support its full implementation, in 2013 the Secretariat of National Aboriginal and Islander Child Care (SNAICC) described five inter-related elements which underpin the ATSI Principle’s intent:⁶⁹

1. **Prevention** – Each Aboriginal and Torres Strait Islander child has the right to be brought up within their own family and community.
2. **Partnership** – The participation of Aboriginal and Torres Strait Islander community representatives, external to the statutory agency, is required in all child protection decision-making, including intake, assessment, intervention, placement and care, and judicial decision-making process.
3. **Placement** – Placement of an Aboriginal and Torres Strait Islander child in out-of-home care is prioritised in the following way:
 1. with Aboriginal or Torres Strait Islander relatives or extended family members, or other relatives or extended family members; or
 2. with Aboriginal or Torres Strait Islander members of the child’s community; or
 3. with Aboriginal or Torres Strait Islander family-based carers. If the above preferred options are not available, as a last resort the child may be placed with:
 4. a non-Indigenous carer or in a residential setting.

⁶⁴ Arney et al, ‘Enhancing the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Policy and practice considerations’ [2015] *Australian Institute of Family Studies Melbourne* 34, 4.

⁶⁵ Ibid 6.

⁶⁶ Secretariat of National Aboriginal and Islander Child Care, *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements*, Paper (June 2013) 2.

⁶⁷ Ibid 6.

⁶⁸ Family Matters Campaigns National Steering Committee and Secretariat of National Aboriginal and Islander Child Care, *The Family Matters Roadmap*, Paper (August 2016) 7.

⁶⁹ Secretariat of National Aboriginal and Islander Child Care, *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements*, Paper (June 2013) 8.

If the child is not placed with their extended Aboriginal or Torres Strait Islander family, the placement must be within close geographic proximity to the child's family.

4. **Participation** – Aboriginal or Torres Strait Islander children, parents and family members are entitled to participate in all child protection decisions affecting them, including intervention, placement and care, and judicial decisions.
5. **Connection** – Aboriginal or Torres Strait Islander children in out-of-home care are supported to maintain connection to their family, community, culture and country, especially children placed with non-Indigenous carers.⁷⁰

As a party to the National Framework for Protecting Australia's Children 2009-2020 (the National Framework), Western Australia along with the other states and territories has committed to applying the five elements of the ATSI Principle to implementation of the strategies and actions identified in the National Framework's Third three-year action plan 2015–2018.⁷¹ In addition, at a recent meeting of Community Services Ministers there was agreement "to uphold all five domains of the Aboriginal and Torres Strait Islander Child Placement Principle to recognise the rights of Aboriginal and Torres Strait Islander children to be raised in their own culture and the importance and value of their family, extended family, kinship networks, culture and community."⁷²

With the number of Aboriginal children in care growing, concerns have been expressed that the intent and nature of the ATSI Principle was not fully understood or consistently implemented by practitioners or policy makers.⁷³ Child protection authorities have been seen as focusing too much on measuring children's placement type under the hierarchy rather than the extent to which children's safety and connection to family and culture is being achieved through implementation of the five elements of the ATSI Principle. A 2016 Victorian Inquiry into compliance with the intent of the ATSI Principle noted a continuing lack of consistent definition of the Principle's intent, what constitutes compliance and how it should be measured.⁷⁴

As noted in a submission from the Aboriginal Health Council of WA, a focus on the placement hierarchy as a proxy measure of compliance:

*...says little about whether the process of investigating and considering available family and community placement options has been followed, let alone about compliance with other elements of the Principle.*⁷⁵

Implementation of and compliance with the full elements of the ATSI Principle as a whole, and the placement hierarchy itself, was consistently raised as an issue for legislative and practice reform in submissions to the Review. To support full implementation of the Principle, the submission from SNAICC et al recommended:

That the full definition of the Aboriginal and Torres Strait Islander Child Placement Principle, including its five constituent elements – prevention, partnership, participation, placement, and connection – be incorporated into legislation alongside enabling provisions for each element.

⁷⁰ Secretariat of National Aboriginal and Islander Child Care, *Understanding and applying the Aboriginal and Torres Strait Islander Child Placement Principle – A resource for legislation, policy, and program development*, Paper (June 2017) 9 ('SNAICC Resource for Legislation').

⁷¹ Department of Social Services *National Framework for Protecting Australia's Children: Third Three-Year Action Plan 2015–2018 – Driving Change, Intervening Early*, Commonwealth of Australia (2015) 4 and 7.

⁷² Christian Porter MP, Commonwealth Minister for Social Services, Community Services Ministers' Meeting Communique, 25 August 2017, <<https://christianporter.dss.gov.au/media-releases/community-services-ministers-meeting-communiqu-0>> accessed 30 August 2017.

⁷³ Arney, above n 64, 14.

⁷⁴ 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*, Victoria (October 2016) 12 and 16.

⁷⁵ Family Matters, *The Family Matters Report 'Measuring trends to turn the tide on Aboriginal and Torres Strait Islander child safety and removal'* (2016).

Enabling provisions relevant to each of the ATSI Principle's constituent elements are integrated throughout the Act in a combination of generic and Aboriginal-specific sections. Appendix C sets-out which sections of the Act function as enabling provisions for each of the ATSI Principle's elements. The Review considered the submissions made in the context of these existing provisions.

3.3 The current policy and practice reform agenda

Improved implementation of the ATSI Principle is an ongoing action in the National Framework. Through the initiatives in the Department's *OOHC Reform Strategy* and *Earlier Intervention Strategy*, a concerted effort is underway in Western Australia towards a more holistic implementation of the five elements of the Principle. The following overview of the Department's policy and practice reforms currently underway provides important context to the Review's recommendations on this term of reference.

As noted in the *Review Consultation Paper*, the Department's ASPF guides the review, development and implementation of services, policies and practices for working with Aboriginal people, and has led reforms under the *OOHC Reform Strategy* and *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.⁷⁶

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 which reflect the attitudes and values that shape and influence the way in which the Department works with Aboriginal children and families:

- equity and access
- accountability
- cultural safety and cultural security
- partnership
- Aboriginal community control and engagement.

Four priority areas provide the overarching strategic direction of the ASPF:

- **Capacity Building:** Enable and lead sector capacity building including the development of ACCOs through a Department-initiated ACCO 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.

⁷⁶ Department for Child Protection and Family Support, *Aboriginal Services and Practice Framework 2016-2018*, Western Australia (2016) 8 ('ASPF').

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. The Department committed to the following actions under the *Earlier Intervention Strategy*:

1. To progress and implement the four priority areas outlined in the ASPF -
 - Capacity building
 - Community engagement
 - Practice development
 - People development.
2. To support the expansion of the 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.⁷⁷

Considerable progress has been made on each of these actions over the past year. In addition, the Department is taking the following actions to promote a more holistic implementation of the Principle:

- ✓ A review of the permanency planning policy, including strengthening practice guidance and training on the intent and implementation of the ATSI Principle and its five inter-related elements.
- ✓ Use of Family Finding⁷⁸ tools to identify family members of Aboriginal children who come into contact with the Department as early as possible, to find support networks and connections, and possible care arrangement options in the event a child needs to be taken into care.
- ✓ Akin to Taskforce 1000,⁷⁹ a review of current permanency planning and cultural planning for Aboriginal children in out-of-home care such as children who entered care in the last 12 months on time-limited orders, those in a non-Aboriginal care arrangement and those subject to an application for a protection order (until 18).
- ✓ Exploring through the Signs of Safety Reloaded project, the integration of *Aboriginal Family Led Decision Making* or a similar family led process into the Department's *Signs of Safety Child Protection Framework*, to enhance and enable ACCOs, families and children to

⁷⁷ Department for Child Protection and Family Support, *Building Safe and Strong Families: Earlier Intervention and Family Support Strategy*, Western Australia (2016) 9.

⁷⁸ The Family Finding model, developed by Kevin A. Campbell, offers methods and strategies to locate and engage relatives of children currently living in out-of-home care. The goal of Family Finding is to connect each child with a family, so that every child may benefit from the lifelong connections that only a family provides, for more information see www.familyfinding.org

⁷⁹ Commission for Children and Young People, *Always was, always will be Koori children: Systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria*, Melbourne (2016).

participate in all decisions relating to the care of Aboriginal children, particularly decisions about longer-term or permanent care.

3.4 The placement hierarchy in section 12

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) *In making a decision under this Act about the placement under a placement arrangement of an Aboriginal child or a Torres Strait Islander child, a principle to be observed is that any placement must, so far as is consistent with the child's best interests and is otherwise practicable, be in accordance 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 or Torres Strait Islander person in the child's community in accordance with local customary practice;*
 - (c) *placement with a person who is an Aboriginal person or a Torres Strait Islander person;*
 - (d) *placement with a person who is not an Aboriginal person or Torres Strait Islander person but who, in the opinion of the CEO, is sensitive to the child's needs of the child and capable of promoting the child's ongoing affiliation with the child's culture, and where possible, the child's family.*

Chapter 3.4 of the Casework Practice Manual⁸⁰ guides child protection workers' implementation of the placement hierarchy in section 12(2). The Department reports on implementation of the hierarchy using the nationally reported indicator 'Placement in accordance with the Aboriginal Child Placement Principle'. This indicator measures the number of Aboriginal children placed with the child's extended family, Aboriginal community or other Aboriginal people.

In 2016-17, 64 per cent of all Aboriginal children in care in Western Australia were placed in accordance with the first three of the four placement options in section 12(2) of the Act.⁸¹ That is, 36 per cent of Aboriginal children in the CEO's care had non-Aboriginal carers. While comparable with other Australian child protection jurisdictions, this falls well short of the Department's target of 80 per cent of placements being made in accordance with the first three categories of the placement hierarchy, and is a concerning and steady decrease from the 71 per cent achieved in 2011-12.

The Department's implementation of the placement hierarchy is affected by a number of barriers being experienced Australia-wide, including a shortage of Aboriginal foster carers and kinship carers disproportionate to the number of Aboriginal children in the out-of-home care system, and poor identification and assessment of potential carers.⁸²

3.4.1 Submissions

Written submissions addressing the placement hierarchy in section 12 included the following recommendations and comments:

- Removing the reference to the placement of the child in accordance with the hierarchy as being "otherwise practicable". It was thought this would avoid using inadequate resourcing

⁸⁰ Department of Communities Child Protection and Family Support division *Casework Practice Manual* available on the Department's website <https://manuals.dcp.wa.gov.au/CPM/SitePages/HomePage.aspx?Mobile=0> as at 30 September 2017 ('*Casework Practice Manual*').

⁸¹ *Final Report 2016/2017*, above n 10, 18.

⁸² Arney, above n 64, 32.

as a rationale for not pursuing an otherwise appropriate placement in accordance with the hierarchy.⁸³ SNAICC et al submitted, for example, that this terminology:

...permits a broad scope for placement decisions to be made without dedication of the efforts and resources required to identify culturally appropriate family placements or even other prioritised placements.

- It was further suggested the section should require “*all reasonable efforts*” to be undertaken to exhaust each of the options in their order of priority.

This is consistent with the recent guidance provided by SNAICC that “*Proper application of the placement hierarchy requires child protection decision makers to exhaust all possible options at one level of the hierarchy before considering a lower-order placement.*”⁸⁴

This was supported by the Review.

- Removing any ambiguity about the type of arrangement, decision or order that the ATSI Principle applies to so that it is clear the ATSI Principle must be applied at every step of decision-making around the placement of Aboriginal children, both by the Department and the Court.⁸⁵

This was supported by the Review.

- Reinforcing that placement of an Aboriginal child with a non-Aboriginal carer under current section 12(2)(d) is a genuine last resort and, where such placement does proceed, ensuring carers are compliant with suggested revised carer competencies.⁸⁶

As addressed in 3.4.2 below, feedback during the Review’s community consultations challenged what was previously thought to be this widely accepted principle.

- Providing a maximum timeframe in which the placement hierarchy must be applied, to avoid a child being in a placement for a long period of time before this principle is applied.⁸⁷

The placement hierarchy applies to ‘any placement’ of the child and, apart from emergency placements, should be applied as soon as a child enters out-of-home care. The Review considers that imposing a timeframe on the application of section 12 would be unnecessary in light of other recommendations for improved accountability through court reports, expanded consultation requirements in relation to section 81 (see 3.5 below) and the introduction of specific provisions for time-limited emergency placements.

- Requiring the placement hierarchy to be revisited at regular intervals throughout the child’s care period to ‘progress’ up the hierarchy.⁸⁸

The Review considered this proposal in the context of the Department’s permanency planning policy (see Chapter 7 of this Report).

- Providing further requirements in relation to children of mixed heritage or children whose Aboriginal parents are from different cultural groups, similar to provisions in section 13 of the NSW legislation.⁸⁹ To inform its submission to the Review, CREATE Foundation (CREATE) consulted with 27 children and young people aged 10 to 25 years from diverse backgrounds, all of whom had a statutory care experience in Western Australia. CREATE’s submission referred to one young man who identified as both Italian and Aboriginal who had not wanted to identify or connect with his Aboriginal culture while in care:

I was given a choice when I came into care to look into my Aboriginal family and heritage and I chose not to (20 year old, male, Italian-Aboriginal).

⁸³ Aboriginal Legal Service; Legal Aid; Djinda Services; SNAICC et al.

⁸⁴ SNAICC *Resource for Legislation*, above n 70.

⁸⁵ Legal Aid; Aboriginal Legal Service, endorsed by Djinda Services; SNAICC et al.

⁸⁶ Aboriginal Legal Service, endorsed by Djinda Services.

⁸⁷ WACOSS.

⁸⁸ MacKillop Family Services.

⁸⁹ *Children and Young Persons (Care and Protection) Act 1988* No 157 (NSW).

This issue was also raised by the CPSU/CSA:

The Department also needs to be acutely aware that all children have a cultural identity and that having an Aboriginal background should not completely override other cultural identities the child may draw links to. For instance, CPSU/CSA members are aware of children with Italian/Aboriginal, Somalian/Aboriginal and Irish/Aboriginal backgrounds where it would be unwise to assume the child must be surrounded by a single culture.

The Review considered that legislating for mixed culture heritage had potential to weaken the intent of the ATSI Principle and to become overly prescriptive and complex. Section 12(2)(a) prioritises placement with family regardless of cultural considerations, and decisions under the remaining hierarchy options should always be made in accordance with the individual child's best interests. It was considered issues of mixed heritage would be better dealt with in practice guidance.

CREATE noted that "given the diversity of experiences, circumstances, views and each individual child, it is vital that their views and opinions are sought in relation to any decision being made about their lives, including where and with whom they should live". One young person commented on the need for the placement hierarchy to be applied in the best interests of the child saying that not all children would want to be placed with family:

It's not always the best thing to place them with family. My parents weren't good at parenting and my mum's sisters are the same (18 year old, female, Aboriginal).

The principle of child participation in section 10 of the Act is strong. Nevertheless, several of the Review's recommendations are aimed at strengthening children's participation by including participation in some of the substantive provisions in the Act, for example in care planning.

The Youth Affairs Council recommended section 12(2)(d) should require carers commit to maintaining cultural connections.

3.4.2 Proximity to family and country

The Review's community consultations on the placement hierarchy generated considerable interest and discussion (it was noteworthy that a number of participants had no knowledge of the placement hierarchy). The principles inherent in the current hierarchy were strongly endorsed and discussions focused most often on the Department's implementation of the hierarchy, including the way in which the consultation required under section 81 occurred in practice.

However, a consistent theme that emerged across the state-wide community consultations was the importance of proximity to family and country for children in out-of-home care. This was seen as critical to maintaining Aboriginal children's sense of identity and cultural connections - the essential aims of the ATSI Principle - and critical to supporting reunification efforts where reunification is a possibility.

On this point, the diversity of Aboriginal culture and communities across the vast State of Western Australia was frequently emphasised and it was thought the placement hierarchy, as currently expressed in section 12, provided inadequate recognition of this. Many participants considered that, for example, placing an Aboriginal child from a remote Kimberley community, or a central desert community, with non-family Noongar carers in metropolitan Perth or the South West, which may currently occur in compliance with the placement hierarchy, was unlikely to be as effective in maintaining the child's family and cultural connections as placement with a non-Aboriginal carer⁹⁰ living in close proximity to family and country. Nor would such circumstances lend themselves to supporting successful reunification.

A submission from a metropolitan office of the Department with experience in this area suggested the legislation should acknowledge and promote the importance of country for

⁹⁰ Non-Aboriginal carers are to be assessed against a new cultural competency to be introduced in r.4 of the Regulations.

Aboriginal children in care, and also suggested that the geography of a placement should be included as a placement principle:

This promotes the importance of physical connection to land and closeness to family. We found this to be the biggest issue with children and young people from rural and remote areas being placed in the metropolitan area.

Wanslea Family Services suggested “there also needs to be recognition that non-Aboriginal families can be well connected with Aboriginal communities in ensuring children and young are appropriately connected to family and culture”, and another submission questioned the lack of proximity to country in the current hierarchy, and also reminded us of the overriding importance of the best interests of the child:

It is not clear from the consultation and discussion papers whether the Aboriginal placement principle has been developed in this state and with advice from Aboriginal groups here. I wondered whether for some Aboriginal children it would be culturally more appropriate for them to be placed with carers living in the country area with which the child has cultural connections; there may be times when this suits the child’s needs better than being placed for example with extended family in a different town or country area. In addition there may be grounds at times for elders in the child’s community to be consulted about his or her placement. In any case for Aboriginal children as with non-Aboriginal children, the over-riding concern should be the child’s needs including his or her need for safety, and this must be a priority ahead of following the Aboriginal and Torres Strait child placement principle (private individual).

The possibility of non-Aboriginal carers subsequently moving away from proximity to family or country was acknowledged as a reality and one that had no easy answers. The current reform focus on improving the cultural competence and capacity of carers through improved assessment and ongoing learning is intended to improve support of children’s cultural connections regardless of where they live. The legislative proposals recommended in this Report, together with the stronger cultural support planning being developed in practice, are also intended to help maintain children’s identity and culture throughout their care experience.

SNAICC et al also expressed concern that section 12 does not prioritise proximity to family and recommended amendments to require that any placement away from extended family be within close geographical proximity to the child’s family.

3.4.3 Deliberations

An examination of the Aboriginal placement hierarchy provided in the other states and territories reveals the layers of complexity that placement hierarchy legislation is attempting to incorporate. In acknowledgement of the diversity of Aboriginal culture and communities across Western Australia, and to reflect the clear views of the community consultations undertaken, the Review considered that the placement hierarchy in section 12 of the Act should be amended to recognise the importance of proximity to family, community and country. However, the preference was to avoid creating a hierarchy that is overly prescriptive and complicated.

The Review considered using the term country in the hierarchy, but also reflected that the child’s family, community and country are not interchangeable: family and kin may be located anywhere across the State, either away from a child’s local community and/or country. Further, the Review noted that while country is central to Aboriginal identity and culture, the term is not defined in state or federal legislation, including Native Title legislation. It was therefore decided that its use in the Act, alongside the Act’s reference to local community, would be likely to over-complicate the hierarchy and its implementation in practice.

The Review also noted that the undefined term family is used in section 12 instead of relative, which is a defined term in section 3 of the Act:

relative, in relation to a child, means each of the following people —

- (1) *the child's* —
 - (a) *parent, grandparent or other ancestor;*
 - (b) *step-parent;*
 - (c) *sibling;*
 - (d) *uncle or aunt;*
 - (e) *cousin;*
 - (f) *spouse or de facto partner,*
- (2) *whether the relationship is established by, or traced through, consanguinity, marriage, a de facto relationship, a written law or a natural relationship;*
- (3) *in the case of an Aboriginal child, a person regarded under the customary law or tradition of the child's community as the equivalent of a person mentioned in paragraph (a);*
- (4) *in the case of a Torres Strait Islander child, a person regarded under the customary law or tradition of the Torres Strait Islands as the equivalent of a person mentioned in paragraph (a);*

It was thought use of this definition would bring some clarity as to how the placement hierarchy can be applied. Furthermore, because 'family' is more often used by Aboriginal people than 'relative', this could be achieved by providing that family in section 12 has the same meaning as relative in section 3.

The Review also considered that guidance on the meaning of the child's community could be provided. In relation to cultural support planning for Aboriginal children in care, the Youth Affairs Council drew attention to section 176 of Victoria's *Children, Youth and Families Act 2005* (Vic). This section provides a definition of 'a child's Aboriginal community' and the Review considered it has merit for use in Western Australia.

... a **child's Aboriginal community** is—

- (a) *the Aboriginal community to which the child has a sense of belonging, if this can be ascertained by the Secretary; or*
- (b) *if paragraph (a) does not apply, the Aboriginal community in which the child has primarily lived; or*
- (c) *if paragraphs (a) and (b) do not apply, the Aboriginal community of the child's parent or grandparent.*

Recommendation 7

Section 12 should be amended to provide that:

- (1) In performing a function under the Act about the placement of an Aboriginal child under a placement arrangement, a person, court or tribunal is to observe the principle that any placement for an Aboriginal child must, so far as is consistent with the child's best interests, accord with the following order of priority and all reasonable efforts should be made to comply with the order:
 - (a) placement with a member of the child's family;
 - (b) placement with an Aboriginal person in the child's community in accordance with local customary practice;
 - (c) placement with an Aboriginal person in close proximity to the child's community;
 - (d) placement with a non-Aboriginal person in close proximity to the child's community;
 - (e) placement with an Aboriginal person;
 - (f) placement with a non-Aboriginal person.
- (2) Any placement with a non-Aboriginal person should be with a person who is responsive to the cultural support needs of the child and is willing and able to promote the development and maintenance of the child's identity and ongoing connection with the child's family and culture.
- (3) For the purposes of section 12, placement with a member of the child's family has the same meaning as placement with a **relative** of the child, as defined section 3 of the Act. (cont.)

Consideration should be given to defining a child's community based on section 176 of the *Children, Youth and Families Act 2005* (Vic).

3.4.4 Implementation monitoring

One of the previously approved proposals referred to in the *Review Consultation Paper* was expressly aimed at strengthening implementation of the section 12 placement hierarchy and consultation requirements in order to help maintain children's family and cultural connections while in out of home care.⁹¹

It was proposed the Department be required to demonstrate its application or intended application of the section 12(2) placement hierarchy in the reports it provides the Children's Court of Western Australia (the Children's Court) during protection proceedings. These are the reports required under section 61 of the Act when the Department applies for a protection order (special guardianship), and the written proposals that are required in section 143 of the Act, but only in relation to the Department's applications for a protection order (time-limited) or protection order (until 18) in respect of a child.

The Review endorsed this proposal as part of the Minister's request for review of the *2015 Consultation*. It was also endorsed by a number of submissions to the Review:

Having the Act strengthened to ensure that account has been taken of the Aboriginal placement principle and requiring the Department to demonstrate its application of this principle in reports it provides to the Court would seem appropriate, provided the Department makes it clear that the priority is given to the child's best interests in applying the placement principle (confidential submission).

...there is value in requiring the Department to provide information to the Court and to parents who are parties to court proceedings, as to the assessment of out-of-home carers according to the placement hierarchy. This could be a useful accountability mechanism to ensure that the Department is thoroughly investigating and assessing carers in the order of the hierarchy of placement (SNAICC et al).

The Act needs to be strengthened to measure accountability and quality, to require evidence of consultation with appropriate people, families and communities, and to demonstrate that a genogram has been created, that APLs have adequate and relevant knowledge of family, and that serious attempts have been made to find family (the Alliance and CYFAA).

It is envisaged that, together with the greater practice focus on implementing other elements of the ATSI Principle, this level of increased accountability will drive improved implementation of the placement hierarchy and the consultation required of the Department under section 81 (addressed further in 3.5 below). It will also provide greater transparency about the extent to which the placement hierarchy is being applied.

Recommendation 8

The Act should be amended to require the Department to demonstrate its application of the section 12 placement-hierarchy in the section 61 and section 143 reports it must provide to the Children's Court during protection proceedings, including the consultations under section 81 and other efforts it has made to make placements in accordance with the hierarchy.

⁹¹ *Review Consultation Paper*, above n 7, 17.

3.5 Section 81 – Consultation requirements

- **Consultation question 4** asked what legislative changes might improve the effectiveness of the consultation required of the Department when making a placement arrangement for an Aboriginal child.

The consultation the Department must undertake before making a placement arrangement for an Aboriginal child is fundamental to implementing the placement hierarchy and making culturally informed decisions that are in the best interests of individual children. The Review received considerable feedback on the operation and effectiveness of section 81 through both community consultations and written submissions.

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.*

3.5.1 Previous amendments to sections 12 and 81

By way of background, in 2009 the Department led an across-agency review of section 12 and the consultation requirements in section 81 of the Act (the 2009 Review).⁹² The purpose of the 2009 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 provisions in section 12 were 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 ATSI Principle is to be observed “*so far as is consistent with the child’s best interests.*”⁹³ In relation to the consultation provision, 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 section 81(2) was resulting in a ‘tick box’ approach to the consultation process. This was particularly evident in relation to children from regional or remote communities where agencies with local knowledge were not readily available, and where the two 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 amended on 1 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 providing that any such consultations occurred with Aboriginal people who possessed relevant knowledge of

⁹² This was in fulfilment of a government pre-election commitment.

⁹³ The amendments to section 12 were made under the *Children and Community Services Amendment Act 2010*.

the child, the child's family and/or the child's community, whether they be private individuals or those working in an Aboriginal agency.

3.5.2 Submissions

A review of how section 81 has operated since the 2011 amendments is timely. As anticipated, most submissions and consultations on section 81 called for changes to improve the effectiveness of the consultation required given concerns about how the amended section 81 has been implemented in practice. Section 81 was seen as providing the Department with too much discretion because, in order to comply with the section, consultation need only occur with an Aboriginal person who is an officer of the Department who need not even have relevant knowledge of the child, the child's family or child's community.⁹⁴ The Aboriginal Legal Service observed that:

In practice, the principal method of consultation is with an APL (Aboriginal Practice Leader) or another Aboriginal staff member of the Department... ALSWA considers that internal consultation within the Department is not sufficient to ensure that the Child Placement Principle has been properly followed. Wider consultation with external Aboriginal organisations, specialist service providers and community members is essential to ensure that all information about a child's extended family and community is identified and proper consideration of placement options within the child's family and/or community is undertaken.

SNAICC et al submitted:

To facilitate representative participation of Aboriginal and Torres Strait Islander organisations in decision making, we suggest that a clearer definition of "representative organisation" as referred to in section 14 and "Aboriginal or Torres Strait Islander agency" as referred to in section 81 be set out. The definition of a "recognised entity" in the Queensland context may be useful – a "recognised entity" is an organisation that includes Aboriginal and Torres Strait Islander members, has appropriate knowledge of child protection and provides services to Aboriginal and Torres Strait Islander people.⁶³ An Aboriginal and Torres Strait Islander representative organisation seeking to participate in decision making about a child should be one that is recognised, accepted and respected by local families who would engage with that organisation in child protection and related matters.

During community consultations with Aboriginal people the importance of consulting members of the child's family and kinship network in relation to where children should be placed was emphasised. This was seen as fundamental to supporting self-determination and participation in decision-making and a gap in the current consultation requirements. In the Albany consultation, an elder stressed *"More family consultation is needed. Children shouldn't be taken away from their country. (People) need to realise how important bonding with the extended family is."* This view was shared by the children and young people CREATE consulted:

When asked who should be involved in determining the placements for Aboriginal and Torres Strait Islander children and young people, a number of participants in CREATE's consultation identified that family and those who know the child should be involved.

- *Maybe parents – my mum got me down here [to my current placement]. She knows people here. My mum organised [this placement] through the caseworker (12 year old, female, Aboriginal).*
- *The best person to give advice is someone that knows about the child, and been with them all their lives and knows who they are (19 year old, male, Aboriginal).*

⁹⁴ Submissions on section 81 were received from Aboriginal Legal Service; CREATE; SNAICC et al; WACOSS.

In addition to the above, options proposed in submissions included:

- requiring consultation under at least two of the options, or all three, rather than only one;
- requiring an Aboriginal officer of the Department, paragraph (a), to also have relevant knowledge of the child, the child's family or the child's community;
- removing the option of consulting with an Aboriginal officer of the Department and requiring external consultation only.

The UWA Social Policy Practice and Research Consortium commented on the resource implications of consultation:

Resources are also central to the ability for adequate consultation to be made 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"... Consulting is a time consuming practice, especially for people and agencies with few resources, and this would need to be resourced.

SNAICC et al also observed how important capacity-building and resourcing is to the effective operation of legislation supporting greater Aboriginal participation in child protection decision-making:

As was recognised in the Department's 2009 review, legislation mandating participation in decision making of Aboriginal and Torres Strait Islander organisations will be ineffective unless such organisations are provided with the resources and have the capacity to participate. To this end SNAICC believes the Department's commitment to support capacity development of Aboriginal and Torres Strait Islander community-controlled organisations across Western Australia through the Aboriginal Services and Practice Framework 2016-2018, OOHRC Reform Strategy, and Earlier Intervention Strategy would support the implementation of legislative requirements.

3.5.3 Deliberations

Review discussions agreed it was clear the requirement for consultation with 'at least one' of the options was not operating effectively in support of the participation element of the Principle. The pros and cons of requiring consultation under at least two, or all three, of the options were considered and the following decisions arrived at:

- Consultation with family should become a separate requirement under section 81. This reflects current practice and majority feedback, particularly from community consultations. Linking the meaning of family to the definition of relative in section 3 of the Act will also provide for consultation with a broad range of people within an Aboriginal child's extended family and kinship network.
- Given the cultural lens Aboriginal officers of the Department bring to the Child Protection and Family Support information they are privy to, consultation with an Aboriginal officer should remain in section 81. It was agreed, however, that advice provided on an Aboriginal child's placement should be grounded in relevant knowledge of the child, the child's family or the child's community rather than an officer's Aboriginality per se: Aboriginal officers of the Department should therefore also be required to have such knowledge.
- Consultation with an Aboriginal representative organisation or Aboriginal agency, either prescribed in regulations or approved by the CEO, should be reinstated as a requirement when making a placement arrangement for an Aboriginal child. It was noted the terms 'representative organisation' and 'Aboriginal agency' are referred to in sections 14 and 81 respectively, although it is not clear why different terms are used in these sections. For consistency with section 14, representative organisation should replace Aboriginal agency in section 81.
- The Act should provide for emergency placements to be made in circumstances where full consultation may not be possible before a placement is required (see Recommendation 6 in respect of emergency placements).

The role of representative organisations in section 81 consultations is envisaged as being broader than providing advice about an individual child's placement with a particular individual or family. Information on local relationships and issues of significance to the child's community, or a child's family and kinship connections in the local area or wider in order to help identify all possible placement options, are likely to inform decisions that are more culturally appropriate and best able to meet a child's needs and circumstances.

To avoid repeating the mistakes of the previous provisions in section 81 (see 3.5.1), the Review acknowledged the urgency of the work that would be required in order to be able to commence mandatory consultations with representative organisations state-wide. This would include consideration of whether such organisations should be established through regulations or by some form of CEO approval mechanism under which representative organisations are listed on the Department's website.

The Department is developing its capacity building strategies to support partnerships between ACCOs and other service providers, particularly in the out-of-home care sector, which will help promote the development of more standalone ACCO service providers with specialist child protection knowledge over the longer term. However, it was considered that the cultural knowledge relevant to making an informed decision about a child's placement is not exclusively held by ACCOs working in the community services sector, nor does it depend on particular knowledge of child protection.

Currently there are 788 Aboriginal corporations throughout Western Australia registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), including 39 bodies set up under the *Native Title Act 1993*.⁹⁵ Additional Aboriginal corporations may also be registered with ASIC under the *Corporations Act 2011* (Cth) or established under the *Associations Incorporation Act 2015*. Aboriginal corporations contribute to the social and economic fabric of their local communities by providing a wide range of essential services and contributing to the cultural life of communities.⁹⁶

These corporations vary widely in their role and focus. However, their potential for contributing, directly or indirectly, to culturally informed decisions about placements for Aboriginal children should be further explored and developed. As capacity building of ACCOs continues, supported by government and the community services and private sectors, the real work in developing effective and meaningful consultation may lie in establishing working relationships of trust between the Department and ACCOs.

Recommendation 9

The consultation requirements in section 81 should be amended to provide for the following:

- (1) Before making a placement arrangement in respect of an Aboriginal child, the CEO must consult with:
 - (a) an Aboriginal person who is a member of the child's family;
 - (b) where available, an Aboriginal representative organisation either prescribed in regulations or approved by the CEO that, in the opinion of the CEO, has relevant knowledge of the child, the child's family or the child's community; and
 - (c) an Aboriginal officer of the Department who, in opinion of the CEO, has relevant knowledge of the child, the child's family or the child's community.
- (2) If an emergency placement is required and compliance with the consultation requirements above is not possible, full consultation should be required to occur as soon as practicable after making the emergency placement. (cont.)

⁹⁵ Office of the Registrar of Indigenous Corporations www.oric.gov.au/catsi-act/about-catsi-act accessed 14 September 2017.

⁹⁶ KPMG, *Regulating Indigenous Corporations*, Final Report (15 December 2016), 3.

- (3) The term **representative organisation** should be defined to mean an Aboriginal community controlled organisation which provides services to, and is recognised by, the local Aboriginal community.
- (4) In consultation with Aboriginal organisations, work should commence immediately to identify representative organisations to enable consultation under 1(b) above to occur.
- (5) For the purposes of this section the term **family** should have the same meaning as **relative** in section 3 of the Act.

3.6 Cultural support plans

“One of the most important objectives of the Aboriginal Child Placement Principle is to maintain connection to family, culture and land. The importance of connection to culture is paramount in determining the best outcomes for Aboriginal and Torres Strait Islander children.” (Youth Affairs Council).

The importance of culture and identity is recognised in Standard 10 of the National Standards for Out-of-Home Care: *“Children and young people in care are supported to develop their identity, safely and appropriately, through contact with their families, friends, culture, spiritual sources and communities and have their life history recorded as they grow up.”* Libesman⁹⁷ describes two components to cultural care for Aboriginal children:

- one involves developing children’s personal history of parents, mob, family, ancestors (through genograms) and information about their heritage such as the country their parents come from, the clans they are connected to and stories associated with their country and totem;
- the other component involves helping children to connect or maintain their connection to their families and communities through active and ongoing involvement in family and community. *“Cultural care/support plans need to be living documents, rather than records which are update from time to time, because cultural identity is formed out of ongoing experiences.”*⁹⁸

3.6.1 Current provisions

The Act contains various provisions related to the importance of maintaining children’s culture and identity, including the following:

Section 8(1)(h) – When determining what is in a child’s best interests: the need for the child to maintain contact with the child’s parent, siblings and other relatives and with any other people who are significant in the child’s life must be taken into account.

Section 8(1)(j) – When determining what is in a child’s best interests: the child’s cultural, ethnic or religious identity (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal people).

Section 9(i) – The principle that decisions about a child should be consistent with cultural, ethnic and religious values and traditions relevant to the child must be observed in the administration of the Act.

The Department’s Casework Practice Manual requires child protection workers to develop a cultural plan as part of a care plan, using a prompt list, within 30 working days of an Aboriginal or CaLD child entering care.⁹⁹ Cultural plans for Aboriginal children should address ways to

⁹⁷ Telethon Kids Institute, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Aboriginal and Torres Strait Islander children and child sexual abuse in institutional contexts* (July 2017) 40, citing Libesman, T *Cultural care for Aboriginal and Torres Strait Islander children in Out-of-Home Care*, Fitzroy (2011).

⁹⁸ Telethon Kids Institute, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Aboriginal and Torres Strait Islander children and child sexual abuse in institutional contexts*, July 2017, 40.

⁹⁹ This does not apply to children in provisional protection and care, who have separate requirements for a provisional protection and care plan under section 39 of the Act.

preserve and enhance the child's culture and connection to country, and are to include a variety of information including the child's family's country or ancestry of origin and language.¹⁰⁰ Work is currently underway to further develop the cultural planning practice guidance to include:

- (a) input from the child's parents and family;
- (b) identification of any native title claims;
- (c) annual review of cultural plans and at transition times;
- (d) quality assurance by Aboriginal Practice Leaders or someone known to or connected to the child; and
- (e) best practice examples of cultural planning for children of all ages, demonstrating adherence to the Principle.

3.6.2 Submissions

A number of submissions addressed the need for stronger cultural support planning legislation and practice for children in care, including Aboriginal children and children from CaLD backgrounds.

As flagged in the Review's *Consultation Paper*, the absence of cultural planning requirements in legislation was identified as a significant gap during the *2015 Consultation*. As a result, it was proposed the Act be amended to require that a plan for maintaining the child's culture and identity is to accompany the following reports the Department must submit to the Court when applying for certain protection orders:

Section 61 reports, which are required when the Department is applying for a protection order (special guardianship). These reports must address the suitability of a person to provide long-term care for a child and their willingness and ability to, and must "*outline the proposed arrangements for the care of the child*".

Section 143 written proposals, which must "*outline the proposed arrangements for the wellbeing of the child*" if a protection order (time-limited) or protection order (until 18) is made or extended.¹⁰¹

The Casework Practice Manual provides detailed guidance on care planning requirements, including the need to address a child's 'Identity and Culture' as one of the nine dimensions of care. However, the Review agreed that cultural support planning is a cornerstone element of the ATSI Principle and should become a legislative requirement. As part of its review of the *2015 Consultation*, the Review endorsed the previously approved amendment. This proposal was also supported in written submissions to the Review.¹⁰²

... AHCWA supports YACWA in implementing the approved amendments from the 2015 legislative review.² These include requirements on the Department to provide reports on its adherence of the principle in court proceedings; for a plan maintaining a child's culture and identity to accompany these reports; and, in approving a carer, for the Department to be satisfied the person is able to promote the children's cultural needs and identity.

MacKillop Family Services also noted their support for:

...measures to monitor the compliance with legislative requirements and quality of cultural support plans, with a greater focus on connecting to family and community. For example, in other jurisdictions the monitoring of cultural plans includes a focus on key aspects of the plan development, including:

- *Consultation with immediate family members*
- *Contact with relevant Aboriginal Community Controlled Organisations*
- *Consultation with broader kinship group...*

¹⁰⁰ Casework Practice Manual, above n 80, Chapter 3.4 - Care planning.

¹⁰¹ For further information about s.143 written proposals see 13.3 of this Report.

¹⁰² Aboriginal Legal Service; Legal Aid; Aboriginal Health Council of WA; and Youth Affairs Council.

Recommendation 10

It should be a requirement that a plan for maintaining an Aboriginal child's culture and identity – a cultural support plan – is to accompany the reports the Department must provide to the Children's Court pursuant to section 61 when applying for a protection order (special guardianship), and pursuant to section 143 when applying for a protection order (time-limited) or a protection order (until 18).

In their submission SNAICC et al further recommended:

That the completion, implementation and periodic review of cultural support plans be mandated for all Aboriginal and Torres Strait Islander children in out-of-home care and that the role and provision of resources for Aboriginal and Torres Strait Islander organisations to complete and support implementation of cultural planning be specified in legislation.

Other legislative proposals concerning cultural planning included the following:

- Requiring annual reporting on the number of Aboriginal children who have a cultural plan in place (Youth Affairs Council).
- Requiring a cultural plan for every Aboriginal child to be produced as early as possible in protection proceedings (Aboriginal Legal Service).

This is supported, and consistent with Recommendation 10 that cultural support plans must accompany section 143 written proposals to the Court.

- Requiring cultural support plans to include, as a minimum, how the Department intends to address and action the principles set out in sections 8(1)(j), 12, 13, 14 and 81 of the Act (Legal Aid).

Demonstrating the application or intended application of sections 12 and 81 is addressed in Recommendation 8 of this Report.

- Requiring such plans to include genograms (Society of Professional Social Workers).

While not a legislative proposal, providing opportunities for Aboriginal children to travel to country was regarded as an important element of cultural support planning which should be supported in practice:

In most cases, there is no provision for travel to country for the children to spend extended time with important family, kin and community members. Such arrangements spell death for any opportunity for cultural immersion and meaningful learning of culture, with resulting negative long-term impacts on the child's identity formation in many cases (Aboriginal Legal Service).

A 'return to country' should also be the entitlement of children and young people who are permanently placed in the metro, but whose country is elsewhere. In addition to maintaining a connection to culture via contact with family (immediate), we believe that children and young people should be given every opportunity to continue a relationship with their country. This should include an expectation that resources (funding, local district support) is made available for at least bi-annual visits. This acknowledges that return to country also incorporates contact with extended family (Metropolitan District Office of the Department).

3.6.3 Deliberations

The Review Committee agreed that more was required to strengthen cultural support planning for Aboriginal children. Rather than replicating the existing care planning provisions for the purposes of cultural planning, use of the care planning provisions for this purpose was seen as an effective way of achieving this.

The care planning provisions in section 89 of the Act require that all children have a care plan prepared 'as soon as practicable' after the making of a protection order (time-limited) or a protection order (until 18) and that their care plans are reviewed annually. The care planning provisions are broad: care plans must identify the needs of the child and outline steps or measures to be taken in order to address those needs. Introducing cultural support planning as a component of a care plan would achieve the following:

- cultural support planning in a timely manner;
- the annual review of cultural support plans;
- greater transparency for cultural support planning – section 89(6) requires copies of care plans to be provided to the child; each parent of the child; any carer of the child; and any other person considered to have a direct and significant interest in the wellbeing of the child as soon as practicable after they are prepared or modified; and
- provide parties with a right of review of cultural support decisions, first by the Care Plan Review Panel (on behalf of the CEO), and ultimately by SAT if a party of the care plan is dissatisfied with the review decision.

Recommendation 11

A plan to address an Aboriginal child's cultural support needs – a cultural support plan – should become a specific requirement as part of a care plan under section 89 of the Act, and decisions about cultural support should be reviewable by the Care Plan Review Panel and the State Administrative Tribunal.

Recommendation 12

The Act should be amended to require that, if available, an Aboriginal representative organisation approved by the CEO or prescribed in regulations which, in the opinion of the CEO, has relevant knowledge of the child, the child's family or community, is to be provided with an opportunity to participate in the development of the child's cultural support plan.

To provide further legislative guidance regarding cultural planning, the Youth Affairs Council recommended the cultural support provisions in section 176 of Victoria's *Children, Youth and Families Act 2005* be considered. Section 176 includes the requirement that the child's case plan:

- (c) must reflect and be consistent with the child's cultural support needs, having regard to the child's circumstances, so as to –
- a. maintain and develop the child's Aboriginal identity; and
 - b. encourage the child's connection to the child's Aboriginal community and culture.

The Review considered similar provisions could provide a useful framework for cultural support planning for Aboriginal children in Western Australian.

Recommendation 13

The Act should include cultural support planning provisions similar to sections 176(3) and (5) of the *Children, Youth and Families Act 2005* (Vic).

Finally, the Review shares the view that the connection of children to culture is critical to any child's self-identity and development.¹⁰³ While the recommendations for cultural support provisions are specific to Aboriginal children, the importance of cultural planning for all children, including CaLD children, continues to be reflected in care planning requirements to address the Identity and Culture domain in each child's care plan.

3.7 Membership of the Care Plan Review Panel

The Aboriginal Health Council of WA recommended increased Aboriginal membership on the Care Plan Review Panel.

AHCWA recommends that the Department significantly strengthen Aboriginal community and ACCOs representation both on the cross-sector foster carer panel and also the care plan review panel. This is particularly important given the significant number of Aboriginal children subject to placement orders.

The Care Plan Review Panel is established under section 92 of the Act to carry out reviews of children's care plans on behalf of the CEO if a party to the care plan¹⁰⁴ does not agree with a care planning decision. The decisions the Review Panel may review include those about the child's placement arrangements and contact decisions. The Review Panel comprises three members who are appointed by the CEO who must have "such experience, skills, attributes or qualifications as the CEO considers appropriate to enable them to effectively perform their review functions" (s.92(3)). An officer of the Department is not eligible to be appointed or hold office as a member of the Review Panel.

The Review agreed there is a need for Aboriginal members on the Panel and considered this should become a requirement in section 92(3).

Recommendation 14

Aboriginal membership on the Care Plan Review Panel should be a legislative requirement and at least one Aboriginal member of the Panel should be involved in considering every application to the Care Plan Review Panel in respect of an Aboriginal child in care.

3.8 The principles of self-determination and community participation

→ **Consultation question 5** asked whether any changes were required to increase the effectiveness of the principles set out in sections 13 and 14.

The principles of self-determination and community participation in sections 13 and 14 of the Act are intended to support the operation and effectiveness of the ATSI Principle in accordance the objective stated in section 12(2) "to maintain a connection with family and culture for Aboriginal children and Torres Strait Islander children who are the subject of placement arrangements."

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

¹⁰³ Youth Affairs Council.

¹⁰⁴ The parties to a care plan are the child, a parent of the child, any carer of the child or any other person considered by the CEO to have a direct and significant interest in the wellbeing of the child – section 92(2) of the Act.

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.

The principles of self-determination and community participation can be interpreted as applying to Aboriginal participation at an individual casework level and more broadly in the development of the Department's policies, programs and services. They are consistent with, and must be observed in addition to, the general principles in section 9 of the Act including:

- 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; ...*

Consistent with the above provisions, in carrying out the functions set out in section 21(2)(c) and (d) of the Act, the CEO must have regard to:

- (c) *the need to promote diversity and increased participation in community life, giving particular consideration to the interests and aspirations of —*
 - (i) *children and other young people; and*
 - (ii) *Aboriginal people and Torres Strait Islanders; and*
 - (iii) *people from culturally or linguistically diverse backgrounds; and*
 - (iv) *people with disabilities; and*
 - (v) *women and men of all ages as distinct groups within society;*
- (d) *the need to promote the development and strengthening of families and communities so that they have the capacity to achieve self-reliance and to provide for the care and wellbeing of their members.*

3.8.1 How these principles are observed in practice

In practice, the principles in sections 13 and 14 are observed in a number of ways and implementation is integrated throughout the Department's policy and practice frameworks and its online Casework Practice Manual. In addition to the strategies and initiatives referred to in 3.3, other examples of the many ways in which the Department observes the principles in section 13 and 14 include:

- Signs of Safety Aboriginal Support Project – *Getting Ready* – this 18 month project was undertaken in partnership with the Department and Legal Aid and concluded in June 2015. The project was designed to provide support and a more culturally accessible service for Aboriginal families in Signs of Safety pre-hearing conferences. An evaluation report was finalised early 2016 and this approach is currently being developed and implemented across the Department. Both senior Aboriginal and non-Aboriginal staff have been involved in and trained as pre-hearing conference convenors.
- 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 and participated in coordinating Kimberley community consultations to feed into the Review.¹⁰⁵

¹⁰⁵ Empowered Communities, Kimberley Futures, Aarnja Ltd, *Kimberley Aboriginal Children in Care*, Gaps Report (November 2015).

- 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.
- *Safer Families, Safer Communities Kimberley Family Violence Regional Plan 2015-2020* – a whole of community action plan to reduce family violence in Kimberley communities in collaboration with local Aboriginal agencies and community groups.¹⁰⁶

3.8.2 Submissions on sections 13 and 14

Community consultations and the majority of submissions on Consultation question 5 affirmed the importance of the principles in sections 13 and 14 and called for amendments to strengthen them significantly. There was a general view that the principles should be less equivocal about the self-determination and participation of Aboriginal people in decision-making processes. There were, however, a diversity of views about how this would be best achieved.

The Review's Kimberley community consultations asked Aboriginal participants what 'self-determination' meant to them. These were some of their responses:

- ✓ Stand-up, stay strong, be bold and have a say about your children
- ✓ Being empowered: communities and children
- ✓ Autonomy – families participating in decisions about their lives
- ✓ Controlling yourself instead of others controlling you
- ✓ Being able to make your own decisions and able to put actions into place to reach your goals.

The Review Committee considered what self-determination means in the context of statutory child protection services and legislation in which the CEO, the Court and SAT hold final decision-making authority. Review submissions also acknowledged the tensions in providing a principle of self-determination without corresponding provisions which support Aboriginal participation in decision-making under the Act. For example, SNAICC et al recommended:

That the right of self-determination of Aboriginal and Torres Strait Islander peoples be more strongly recognised as a principle within the Act and reflected in substantive provisions that require the participation of Aboriginal and Torres Strait Islander families and organisations in child protection decision-making affecting them regarding intervention, placement and care, including judicial decisions;

Recommendations for strengthening the principles in sections 13 and 14 included:

- Use of the term "should be allowed to participate" in section 13 is disempowering and should be replaced with more empowering language.
- Remove "with as much self-determination as possible" from section 13 and insert "with self-determination".
- Provide a definition of self-determination.
- The term "should be given" in section 14 needs to be replaced with: "must be given"; "is entitled to be given"; or "has a right to participate".
- Replace "participation" with "engagement".
- Remove "where appropriate" from section 14.
- Replace "a principle to be observed" in each section with "a principle which must be observed".
- The wording of these sections should include children to ensure they are also given opportunities to participate.

In considering the various proposals for amending sections 13 and 14, the Review considered the intent of the principles and their role in the Act. In legal terms, the principles in sections 13 and 14 (and the other principles in the Act) are not of the same nature as specific mandatory

¹⁰⁶ Department for Child Protection and Family Support, *Safer Families, Safer Communities Kimberley Family Violence Regional Plan, 2015-2020*, Western Australia (2015).

requirements, but operate to provide in-principle guidance to those involved in carrying out functions under the Act. For this reason, some of the above suggested amendments were considered to be inconsistent with the way in which principles operate in legislation, whereas others were supported.

Removing the paternalistic reference in section 13 to Aboriginal people 'being allowed' to participate was flagged in the Review *Consultation Paper*. Other amendments, captured in the Review's recommendations below, seek to strike a balance between strengthening the principles and ensuring they continue to operate as principles rather than substantive provisions of the Act. It was considered, however, that by definition an Act which vests decision-making authority in the CEO, judiciary and SAT can only give effect to a right to self-determination 'as much as is possible'. As developments towards achieving true self-determination occur in practice, these principles can be realised in future child protection legislation.

3.8.3 Who is required to observe the principles

At present, the principles in sections 13 and 14 must be observed in the administration of the Act. However, doubt in relation to the application of these sections arises from a 2016 Children's Court decision in which a protection application was dismissed. In that case, the Magistrate stated that he was not applying section 9 in the making of the decision "*as the trial process is not part of the administration of the Act.*" Further, as cited in the Aboriginal Legal Service submission, in *Farnell and Chanbua*,¹⁰⁷ the Honorable Justice Thackray, Chief Judge of the Family Court (Chief Judge of the Family Court), stated that:

*Although it has been assumed in some decisions of single judges of the Supreme Court that s9 has application to judicial proceedings, I would respectfully doubt that courts are concerned with the 'administration' of the legislation, which seems to me to be the responsibility of the relevant Minister and the Chief Executive Officer of her department.*¹⁰⁸

The Department and submissions from the Aboriginal Legal Service and Legal Aid identified the need for amendments to clarify that the principles in these sections must also be observed by courts and SAT. This matter has also been raised in relation to section 9 of the Act, which sets out a number of important principles that operate to guide decision-making under the Act.

Recommendation 15

Section 13 should be amended to provide that in performing a function under the Act, a person, court or tribunal must observe the principle that Aboriginal people have a right to participate in the protection and care of their children with as much self-determination as possible.

Recommendation 16

Section 14 should be amended to provide that in performing a function under the Act, a person, court or tribunal must observe the principle that an Aboriginal child's family, community or representative organisation is entitled to should be given opportunities and, where appropriate, assistance to participate in decision-making processes under the Act that are likely to have a significant impact on the life of a child. In observing this principle the views of the child and the child's parent or parents must be considered.

¹⁰⁷ *Farnell & Anor v Chanbua* [2016] FCWA 17 ('Farnell').

¹⁰⁸ *Ibid* [649].

3.9 Submissions on Aboriginal community controlled organisations

As well as changes to the wording of sections 13 and 14, a number of submissions made recommendations to enable increased participation of ACCOs in child protection decision-making. Some of these have been taken up in recommendations regarding consultation and cultural support planning (see 3.5 and 3.6).

Each state and territory takes a different legislative approach to enabling the participation of Aboriginal organisations in child protection decision-making. The NSW and the Northern Territory Acts refer to ‘representative organisations’ without defining the term or providing a mechanism for their establishment.¹⁰⁹ In South Australia, the *Children’s Protection Act 1993* (SA) enables the Minister to declare, by notice in the Government Gazette, an organisation to be a ‘recognised Aboriginal organisation’ and the Department for Child Protection must, where reasonably practicable, consult with and have regard to any submissions of such an organisation when placing an Aboriginal child. In Queensland, the *Child Protection Act 1999* (Qld) requires the CEO of the Department of Communities, Child Safety and Disability Services to keep a list of recognised entities and a recognised entity must be given an opportunity to participate in the decision-making process when making a significant decision about an Aboriginal child. A recognised entity may be an Aboriginal person with appropriate child protection knowledge or expertise, or an entity with such membership which provides services to Aboriginal people.

To support increased Aboriginal participation, submissions from Djinda Services & SNAICC et al proposed amendments to enable the delegation of statutory functions and powers to Aboriginal agencies. The Review noted that section 24 of the Act already enables the CEO to “*delegate to an officer, a service provider or another person any power or duty of the CEO under any other provision of this Act.*” The CEO exercised this power of delegation to establish a four-year trial, which ended by mutual agreement early 2017, in which the CEO’s case management functions in respect of a number of children were delegated to five CSOs providing out-of-home care services for children in the CEO’s care.

The Review concurs with the views below that an ongoing commitment to, and resourcing of, capacity-building is necessary to enable ACCOs to play a more significant role in the child protection service system.

... legislation mandating participation in decision making of Aboriginal and Torres Strait Islander organisations will be ineffective unless such organisations are provided with the resources and have the capacity to participate. To this end SNAICC believes the Department’s commitment to support capacity development of Aboriginal and Torres Strait Islander community-controlled organisations across Western Australia through the Aboriginal Services and Practice Framework 2016-2018, OOHRC Reform Strategy, and Earlier Intervention Strategy would support the implementation of legislative requirements (SNAICC et al).

There is an important opportunity now to build the capacity of local Aboriginal organisations to deliver services. We support greater investment in Aboriginal community controlled intensive family support services to target and sustain prevention and early interventions services and support families and children. We are concerned to ensure that due consideration is given to the opportunity for emerging Aboriginal service providers to engage with the process, and the mechanism by which collaborative bids with mainstream organisations to build capacity may be encouraged and supported (WACOSS).

The high proportion of Aboriginal children in out-of-home care and the relatively small ACCO sector delivering family support services means that it is not yet feasible for all Aboriginal children in care to be case managed by an Aboriginal agency. Opportunities associated with the recent establishment of the Department may enable a wider range of avenues for procuring services

¹⁰⁹ *Children and Young Persons (Care and Protection) Act 1998* (Vic) s12; *Care and Protection of Children Act 2012* (NT) s12.

from and building capacity within the ACCO sector. The Review is of the view that further consideration should be given to expanding the role of ACCOs under the Act and this should occur as soon as possible.

Recommendation 17

Strategies should be implemented, in partnership with Aboriginal community controlled organisations, to support capacity building which enhances the role of Aboriginal community controlled organisations in delivering child protection and family support services to Aboriginal families and communities.

3.10 Aboriginal Family Led Decision Making

Submissions from the Aboriginal Health Council of WA and SNAICC et al called for a model of Aboriginal Family Led Decision Making to be provided for in legislation and offered to families early in their contact with child protection services at a number of significant decision-making points:

*Research (also) clearly identifies that family decision-making models provide opportunities to bring alternate Indigenous cultural perspectives and worldviews to the fore in decision-making. However this must extend beyond consultation to the genuine inclusion of Aboriginal children, families and community representatives in the decisions that are made about their children at all stages of the child protection process.*¹¹⁰

The Review considered that the current legislative framework already enables the operation of Family Led Decision Making and, that in view of the proposal to examine its integration into Signs of Safety, legislative amendments are considered unnecessary and premature. It is suggested that any need for legislation could be re-examined at a later date following a period of implementation and evaluation.

¹¹⁰ Aboriginal Health Council of WA; SNAICC et al.

CHAPTER 4 Supporting the safety and wellbeing of children and families exposed to family and domestic violence

Term of reference 3 – the Review sought feedback on any changes to the Act necessary to support the safety and well-being of adults and children subject to family and domestic violence.

→ **Consultation question 6** asked what further amendments might improve the effectiveness of the Act in protecting children from family violence while keeping them safe with a protective parent.

The Review *Consultation Paper* flagged two possible measures:

- (a) the creation of an additional offence provision which does not require a perpetrator of family violence¹¹¹ to have the care and control of the child, as required by the offence of “Failing to protect a child from harm” under section 101 of the Act; and/or
- (b) a new type of protection order which could remove the parental rights of the person committing family violence and/or place restrictions or conditions on that person.

4.1 Background

The Australian Bureau of Statistics reported that in 2016 there were 176 victims of family and domestic homicides and related offences, with 145 occurring at a residence Australia wide.¹¹² During 2016-17, WA Police recorded 20,166 domestic assaults.¹¹³ These numbers are indicative of the very real threat family violence poses to the lives and safety of adult and child victims.

The prevalence of family violence is a significant factor contributing to the removal of children from their parents in Western Australia. In 2016-17, the Department responded to 50,755¹¹⁴ incidents of family violence involving children; an increase of 21 per cent since 2014- 15.¹¹⁵ This significant recorded increase is not necessarily related to an increase in incidents of family violence; it may be attributable to a greater level of community awareness and willingness to contact the Department for help.

The term family violence covers a wide range of conduct which presents varying levels of risk to adult and child victims. When a report of family violence is made to the Department it is immediately triaged and responses are prioritised based on factors which indicate whether urgent action is required to protect a child. Priority 1 and 2 reports are immediately referred for a safety and wellbeing assessment (SWA). Other matters require initial inquiries to be made to determine whether the Department has an ongoing role. The outcome of these inquiries can be to conduct a SWA, offer family support services or close the matter. On completing a SWA, child protection workers may substantiate that a child has suffered, or is likely to suffer, significant harm as a result of physical abuse, sexual abuse, emotional abuse or neglect.

In section 28(1) of the Act, emotional abuse is defined to include psychological abuse and being exposed to family violence. During 2016-17, according to the Department’s records child protection workers commenced 12,954 SWAs.¹¹⁶ Of all the cases in which harm to a child was substantiated, 29 per cent included substantiated harm from emotional abuse as a result of exposure to family violence.¹¹⁷

¹¹¹ In this Report, the term family violence includes family and domestic violence.

¹¹² Australian Bureau of Statistics, *4510.0 – Recorded Crime – Victims, Australia, 2016* (6 June 2017) www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4510.0~2016~Main%20Features~Victims%20of%20Family%20and%20Domestic%20Violence%20Related%20Offences~6.

¹¹³ Western Australian Police, *Monthly verified crime statistics 2016-2017* (26 July 2017) www.police.wa.gov.au/Crime/Crime-Statistics-Portal/Crime-Statistics-Portal/Monthly-and-annual-crime-statistics.

¹¹⁴ *Final Report 2016/2017*, above n 10, 15.

¹¹⁵ *Ibid* 16.

¹¹⁶ *Ibid* 13.

¹¹⁷ *Ibid* 35.

During 2017, the Department undertook an analysis of 433 children in care. In 78 per cent of these cases at least one episode of family violence had been reported to the Department, and in 50 per cent there had been five or more episodes reported.

Child protection concerns around family violence rarely occur in isolation. They are often coupled with concerns about neglect, physical abuse, drug and alcohol issues and mental health issues. Wherever possible, the Department works with one or both parents to create safety for a child without the need to bring the child into care.

The Department's family violence policy acknowledges that a child is likely to suffer significant harm as a result of ongoing exposure to family violence, and places responsibility for exposing a child to family violence on the person who is perpetrating the violence. The policy's emphasis on perpetrator accountability in the context of family violence is further reinforced in the Casework Practice Manual¹¹⁸ and in *Perpetrator Accountability in Child Protection Practice: A resource for child protection workers about engaging and responding to men who perpetrate family and domestic violence*.¹¹⁹ The role of the Department in situations of family violence is to increase the safety of the child and adult victim by reducing and managing the risk posed by the person responsible for the violence. It does this by seeking to promote an ongoing working relationship with the adult victim of the violence.¹²⁰

In March 2016, the Royal Commission into Family Violence (the Victorian Royal Commission),¹²¹ ordered by the Victorian Government in the wake of the Luke Batty Inquest,¹²² published its findings. The emerging themes and challenges identified when responding to family violence in the context of child protection included:

- *the invisibility of perpetrators of family violence in the child protection system*
- *the pressures placed on parents (typically mothers) identified as 'protective parents' and a lack of attention to post-separation violence*
- *a lack of support provided to 'protective parents' by Child Protection and the lack of written advice so as to better support parents in court proceedings*
- *victims being reluctant to report family violence because of the fear that Child Protection will remove their children*
- *concerns with the 'failure to protect' offence and how it can affect victims of family violence*
- *the increase in the number of referrals to Child Protection and difficulties with the differential response model in Victoria and the pressure placed on Child Protection*
- *concerns with the current family violence risk assessment within Child Protection.*¹²³

Child protection workers are frequently faced with cases in which they are required to make a decision which balances the risk posed by a violent parent, despite the other parent doing all within their power to provide safety for children, with the need to keep a child safe. In some cases, despite extensive safety planning and a protective parent, the risk posed by a person committing family violence is unable to be contained.

¹¹⁸ *Casework Practice Manual*, above n 80, Chapter 2.3.

¹¹⁹ Department for Child Protection, *Perpetrator Accountability in Child Protection Practice: A resource for child protection workers about engaging and responding to perpetrators of family and domestic violence*, Perth Western Australia (2013).

¹²⁰ Department for Child Protection and Family Support, *Emotional Abuse – Family and Domestic Violence Policy*, Policy Statement, Western Australia available at www.dcp.wa.gov.au/Resources/Documents/Policies%20and%20Frameworks/Family%20and%20Domestic%20Violence%20Policy.pdf.

¹²¹ Victoria, Royal Commission into Family Violence, *Report and Recommendations* (March 2016) ('*Victorian Royal Commission*').

¹²² Coroners Court of Victoria, *Finding – Inquest into the Death of Luke Geoffrey Batty*, Victoria (September 2015).

¹²³ *Victorian Royal Commission*, above n 121, 169.

The challenge for child protection authorities is to manage this risk while avoiding the need to take protective action for a child which results in the child's removal from the care of an otherwise protective parent. This is a difficult systemic issue. Ongoing work is continuing to improve the capacity of the relevant systems in Western Australia to provide a coordinated and effective response to family violence. The Department, WA Police and CSOs work collaboratively through state-wide Family and Domestic Violence Response Teams. These teams aim to provide timely responses to families following a family violence incident.

In 2017, new governance arrangements were introduced to oversee responses to family violence. These arrangements include the establishment of the Community Safety and Family Support Cabinet Sub Committee, the Director's General Implementation Group, Family and Domestic Violence Advisory Council and the Family and Domestic Violence Advisory Network. These new governance arrangements strengthen the Government's response to family violence, also providing a strengthened partnership with the community services sector and CSOs.

4.1.1 Submissions

Consistent with the Department's policies, there was an overwhelming consensus in Review submissions responding to this term of reference that people who commit family violence are solely responsible, and should be held accountable for, their behaviour. However, differing opinions arise when addressing how best to achieve this accountability, whether through additional legislation or through practice and policy.

As noted in a submission from a metropolitan office of the Department, there can be complexities in identifying who the protective parent is in the context of a family dynamic where there are multiple allegations and accusations:

Safety planning is often made more challenging by the protective parent's mental health being impacted/triggered by family and domestic violence or turning to drug and alcohol as a coping strategy... The strengths and evidenced safety provided by a protective parent may be missed in the complicating factors, conflict and other child protection concerns.

The submission of the Women's Council for Domestic and Family Violence Services acknowledged:

...the tension between respecting the protective parents loving and caring bond with the child and the unpredictability of the abusive parent/partner and the risk of ongoing exposure to and experience of violence for both the child and the adult victim.

Providing a legislative framework that enables an effective response to create safety for victims at the same time as promoting perpetrator accountability is only one element of the broader system. A number of Review submissions contended that the existing legislation, combined with recent and proposed amendments to other relevant Acts, provides an effective legal framework capable of responding to family violence, but that work is needed at the service delivery level to continue building responsive practice. Legislation in isolation cannot create or improve safety for adult and child victims.

4.2 Current legislation

Family violence can constitute the basis for legal action under a number of intersecting pieces of legislation including the Act:

- *Restraining Orders Act 1997* (the Restraining Orders Act);
- *Criminal Code (Compilation Act) 1913* (the Criminal Code);
- *Family Court Act 1997* (the Family Court Act); and
- the Family Law Act.

Consequently, responses to family violence are multifaceted and can result in the following:

- the commencement of criminal proceedings;
- an application to restrain contact between the perpetrator and an adult and/or child victim; and
- the altering of parental rights either in the Children’s Court or the Family Court.

The options available under these intersecting pieces of legislation need to be considered together to determine where any gaps exist and whether they are legislative or systemic issues relating to implementation.

4.2.1 Information sharing

Effective information sharing in cases of family violence increases the likelihood that the risk or severity of the risk to an adult or child victim will be identified at the earliest possible stage. It allows for a more comprehensive picture and a more co-ordinated and appropriate response.

The 2012 Review recognised the importance of breaking down information silos between service providers as crucial to creating safety for victims of family violence. On 1 January 2016 new information sharing powers were incorporated into the Act to enable timely information sharing between the Department and agencies and individuals¹²⁴ and, in the absence of the Department’s involvement, between key public authorities prescribed in the Regulations (‘prescribed authorities’) and service providers in the community services sector.¹²⁵

The new information sharing powers aim to improve information exchange in cases of family violence. In addition to information about the wellbeing of a child or class or group of children, the definition of relevant information in the Act 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, family violence*”.¹²⁶

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 Regulations) and certain agencies in the community services sector in relation to children’s wellbeing and the safety of persons subjected or exposed to family violence. Family Court judges, registrars, magistrates and consultants are now prescribed authorities for the purposes of sharing information under section 28B of the Act, in addition to 16 other prescribed authorities, including WA Police.^{127 128}

At a service delivery level, the Department is currently working in partnership with WA Police and CSOs to continue reforms in Family and Domestic Violence Response Teams across the State. This type of co-ordinated response is facilitated by the expanded information sharing provisions in the Act.

The Family Law Council’s *Interim Report on Families with Complex Needs Intersection of Family Law and Child Protection Systems*¹²⁹ (the Interim Report) and *Final Report on Families with Complex Needs Intersection of Family Law and Child Protection Systems*¹³⁰ (the Final Report)

¹²⁴ CCS Act s 23.

¹²⁵ These information sharing powers are contained in section 28B of the Act.

¹²⁶ This definition of *relevant information* is provided in sections 23(1) and 28A of the Act.

¹²⁷ *Children and Community Services Regulations 2006 (WA)* r 20A (‘CCS Regulations’).

¹²⁸ Further information on the new information sharing laws is available on the Department’s website www.cpfs.wa.gov.au.

¹²⁹ Family Law Council Report to the Attorney General on *Family with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Interim Report [Terms 1 & 2]* (June 2015) (‘Family Law Council’s Interim Report’).

¹³⁰ Family Law Council Report to the Attorney General on *Family with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report [Terms 3, 4 & 5]* (June 2016) (‘Family Law Council’s Final Report’).

highlight the critical importance of timely information exchange within and between the service and court systems as necessary for supporting safety and protection for victims of family violence. Both the Interim and Final Reports make recommendations to facilitate increased information sharing in family violence cases. A number of the Interim Report's recommendations already exist in Western Australia including: a memorandum of understanding between the Department, the Family Court and the Children's Court; a co-located child protection worker in the Family Court; and the convening of regular meetings with representatives from relevant stakeholders directed at developing an integrated approach to the management of cases involving families with multiple and complex needs.¹³¹

In addition, upon commencement, the Domestic Violence Orders (National Recognition) Act 2017¹³² will enable Western Australia to participate in the National Domestic Violence Order Scheme. This will provide a further step towards protecting victims of family violence by establishing a system where a state or territory family violence order is effective and recognised in other states and territories. Recommendations for further improving information transfer between the Family Court and the Children's Court are addressed under term of reference 5 in Chapter 6 of this Report.

4.2.2 Family violence and child protection proceedings

As noted in 4.1, a child is considered to be in need of protection if he or she has suffered, or is likely to suffer, harm as a result of physical abuse, sexual abuse, emotional abuse or neglect, and the child's parents have not protected or are unlikely, or unable, to protect that child from harm or further in the future.¹³³ The inclusive definition of emotional abuse provided in section 28(1) was a recommendation of the 2012 Review and was introduced on 1 January 2016 to expressly reference 'harm' caused by being exposed to family violence as a ground for finding a child in need of protection.

The Act links the definitions of family violence and 'exposed' to the definitions provided in the Restraining Orders Act.¹³⁴ These definitions were subsequently broadened under amendments to the Restraining Orders Act which came into effect on 1 July 2017 to align more closely with those provided in family law legislation.¹³⁵ The meaning of these terms in the Act, Restraining Orders Act, Family Court Act and *Family Law Act 1975* (Cth) (the Family Law Act) are now more consistent. Consequently, a broader number of behaviours may now constitute emotional abuse under section 28 of the Act.

Other amendments to the Restraining Orders Act included:

- the creation of a specific category of restraining orders for incidents of family violence separate to personal violence restraining orders, referred to as family violence restraining orders (FVROs);
- a narrowing of the Court's discretion to not make a restraining order¹³⁶ where particular grounds have been satisfied; and
- the introduction of Behaviour Change Orders which allow prescribed Courts to order a perpetrator to attend approved behavioural changed programs.¹³⁷

4.2.3 Restraining contact and behaviour in circumstances of family violence

Section 25(2)(a) of the Restraining Orders Act enables the Department to apply for an FVRO or personal violence restraining order for any child, whether or not the child is in the CEO's care.¹³⁸ Unless there are special circumstances, a court must make an FVRO if satisfied that a child has

¹³¹ *Family Law Council's Interim Report*, above n 129, 106.

¹³² The Domestic Violence Orders (National Recognition) Bill 2017 received Royal Assent on 8 November 2017.

¹³³ *CCS Act* s 28(2)(c).

¹³⁴ *Restraining Orders Act 1997* ss 5A and 6A ('*Restraining Orders Act*').

¹³⁵ *Family Court Act 1997* s 9A(1) ('*Family Court Act*'); *Family Law Act 1975* (Cth) s 4(1) ('*Family Law Act*').

¹³⁶ The term 'restraining order' refers to FRVOs and personal violence restraining orders.

¹³⁷ *Restraining Orders Act* Parts 1B and 1C.

¹³⁸ *Ibid* s 25(2)(a).

been exposed to family violence and is likely to be exposed again, or there are reasonable grounds to believe that a child will be exposed to family violence.¹³⁹ Applications for a restraining order to protect a child may be made in either a magistrates' court or the Children's Court.¹⁴⁰

Restraining orders can be made during protection proceedings in either the Family Court or the Children's Court, provided the person to be restrained is either a party to proceedings or a witness in the proceedings, and that person is present in court.¹⁴¹ The Family Court also has the power to make a protective injunction for a child, a parent of a child or a person with whom a child lives, which restrains the conduct of another person.¹⁴²

FVROs and protective injunctions can be applied for in conjunction with a protection application or in an attempt to prevent the need for a protection application in respect of a child.

4.2.4 Family violence and criminal prosecutions

Legislative provisions criminalising conduct are referred to as offence provisions. While the Criminal Code contains the vast majority of offence provisions in Western Australia, a number of other Acts also contain offence provisions, including the Act.

Family violence can constitute conduct that amounts to criminal offending under the Criminal Code including, but not limited to, assaults, threats, offences endangering life and offences against liberty.¹⁴³ Although the existence of a domestic relationship is not a prerequisite to any of these offences, Part V of the Criminal Code deals with what constitutes 'circumstances of aggravation' for these types of offences. Offences committed in circumstances of aggravation attract higher penalties.

221. **Term used: circumstances of aggravation – Criminal Code**

(1) *In this Part —*

circumstances of aggravation means circumstances in which —

- (a) *the offender is in a family relationship with the victim of the offence; or*
- (b) *a child was present when the offence was committed; or*
- (c) *the conduct of the offender in committing the offence constituted a breach of an order, other than an order under Part 1C, made or registered under the Restraining Orders Act 1997 or to which that Act applies; or*
- (d) *the victim is of or over the age of 60 years.*¹⁴⁴

Under the Criminal Code, a breach of a restraining order is a circumstance of aggravation. The Restraining Orders Act contains offence provisions which criminalise the breach of a restraining order. A single breach of an FVRO attracts a fine of up to \$6000 or imprisonment for up to 2 years, or both.¹⁴⁵ A breach of a police order is also an offence under the Restraining Orders Act and carries the same penalty.¹⁴⁶ Section 61A of the Restraining Orders Act requires a sentence which includes a term of imprisonment for a person who is convicted of a third breach of a restraining order within a two-year period, unless it would be clearly unjust to do so in the circumstances, or that person is unlikely to be a threat to the safety of a person protected or the community generally.

¹³⁹ Ibid s 10E.

¹⁴⁰ *Restraining Orders Act* s 24A(3).

¹⁴¹ Ibid s 63.

¹⁴² *Family Court Act* s 235; *Family Law Act* s 68B.

¹⁴³ *Criminal Code Act (Compilation Act) 1913*, Chapters XXIX, XXX, XXXIII, and XXXIII A ('*Criminal Code*').

¹⁴⁴ Ibid.

¹⁴⁵ *Restraining Orders Act* s 61(1).

¹⁴⁶ Ibid s 61(2A).

In addition, the Commonwealth Exposure draft¹⁴⁷ includes a proposal to substitute police powers of arrest where a protective injunction is breached with criminal sanctions.¹⁴⁸

Section 101 of the Act makes it an offence for a person who has the care or control of a child to engage in conduct knowing that it may result in a child suffering harm as a result of neglect, physical abuse, emotional abuse or sexual abuse, or is reckless as to the result. Conduct includes doing an act or failing to do something.¹⁴⁹ This offence acknowledges the vulnerability of children and the responsibility of care givers to act protectively to safeguard children for whom they have care and control. Section 101 cannot be used against a person who is the subject of an FVRO protecting a child, and who therefore does not have the care and control of the child, yet who continues to expose the child to family violence. Nevertheless, the person would be in breach of the restraining order and could be prosecuted for that offence and for criminal offences such as assaults or threats.

4.3 A possible new offence

The Review *Consultation Paper* flagged the possibility of creating a new offence similar to section 101, but which would not require a person to have the care or control of a child in order for a prosecution to occur.

The only other child protection jurisdictions with this type of offence are NSW,¹⁵⁰ Victoria¹⁵¹ and Tasmania.¹⁵² The failure to protect offences in these jurisdictions are distinguishable from section 101 because: they require the act or failure to act to be intentional, and do not provide the possibility that it could be reckless; the harm suffered by the child as a result of emotional abuse needs to be likely to cause significant damage to a child's emotional or psychological development; and the maximum penalties are significantly less severe.¹⁵³ Further, in Victoria and Tasmania, prosecutions can only be brought after consultation with the Secretary of the Department's equivalent.¹⁵⁴

4.3.1 Submissions and community consultations

Of the 11 submissions commenting on the possibility of creating a new offence (or amending section 101 to broaden its scope), three supported it, three were opposed and five commented on the possibility but did not take a clear position.

Of those supporting the offence: the AASW¹⁵⁵ was in support but expressed reservations about the extent to which its introduction would provide a deterrent; CPSU/CSA supported an offence which captures a non-custodial parent, on the basis that it would likely increase protection for the parent who is the victim; and the Mental Health Commission supported an offence that extended to persons who "previously had care or control of a child" as a way of promoting perpetrator accountability.

The Aboriginal Legal Service, the Department's Child Protection Legal Unit and Legal Aid opposed the introduction of a new offence on the basis that there are currently adequate criminal offences and restraining order regimes to provide protection for children, and an additional offence would be unlikely to create additional safety. Legal Aid expressed concern that further criminalising family violence may deter families from seeking assistance. The Aboriginal Legal

¹⁴⁷ Family Legislation Amendment (Family Violence and Other Measures) Bill 2017: Exposure Draft (Cth) ('Family Violence and Other Measures Exposure Draft').

¹⁴⁸ Ibid. cl 15 referring to s 68C of *Family Law Act*.

¹⁴⁹ *CCS Act* s 101(2).

¹⁵⁰ *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 227 and 228.

¹⁵¹ *Children, Youth and Families Act 2005* (Vic) s 493.

¹⁵² *Children, Young Persons and Their Families Act 1998* (Tas) s 91.

¹⁵³ Ibid; *Children, Youth and Families Act 2005* (Vic) s 493; *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 227.

¹⁵⁴ *Children, Young Persons and Their Families Act 1998* (Tas) s 91; *Children, Youth and Families Act 2005* (Vic) s 493.

¹⁵⁵ Australian Association of Social Workers.

Service considered that the introduction of such an offence may worsen the overrepresentation of Aboriginal people in the criminal justice system without any obvious benefit to the victims in the community. Mackillop Family Services did not take a position on the offence but also questioned the evidence base supporting its creation.

The Review's community consultations were less equivocal and made the following comments:

- creating additional offences or reporting requirements may create more risk for victims because they may be more reluctant to call the police;
- the Act was not the most appropriate place for criminal offences;
- section 101 hadn't to date effectively protected victims;¹⁵⁶
- the highest risk to victims often occurs when the offender is released from prison, and emphasis should be on communication between departments at the time of release and access to men's behaviour change programs;¹⁵⁷
- a new offence would not provide anything additional;¹⁵⁸
- there should be more perpetrator accountability but through a holistic approach;
- creating safety within the family unit is more likely to have a lasting beneficial impact on the children than requiring a parent to leave permanently because in most instances this doesn't last. The focus should be on behaviour change programs for perpetrators and making this a requirement;¹⁵⁹
- perpetrators of family violence were not respecting current laws so the introduction of a new offence would be unlikely to act as a deterrent – again, mandatory counselling and perpetrator programs were emphasised;¹⁶⁰ and
- the gap in regions is the availability of services.¹⁶¹

4.3.2 Deliberations

The Review looked at family violence legislation as a mechanism for supporting the safety and wellbeing of adults and children. Having considered submissions and consultations on the possible creation of a new offence, it was decided the introduction of such an offence would be unlikely to create additional safety for children and adult victims.

The Review further considered the scope of the existing offence in section 101. Some submissions¹⁶² and community consultations¹⁶³ expressed concern that, as it currently stands, the offence in section 101 may have the unintended consequence of resulting in prosecutions against victims of domestic violence for exposing a child to family violence. This is because the offence of failing to protect a child from harm includes harm from emotional abuse, and since the amendments on 1 January 2016 emotional abuse has expressly included being exposed to family violence.

The Family Inclusion Network submission in particular noted:

... the need to exercise caution when using definitions to label victims or behaviours. For example, with the introduction of an amendment to the Children and Community Services Act 2004 to include emotional abuse as a component of family and domestic violence (Section 28 (1), Fin WA has observed that an unintended consequence of this has been the labelling of mothers as 'emotionally abusive' towards their children...

¹⁵⁶ The Alliance and Uniting Care West.

¹⁵⁷ Kalgoorlie.

¹⁵⁸ Karratha.

¹⁵⁹ Kununurra.

¹⁶⁰ West Kimberley.

¹⁶¹ Wyndham.

¹⁶² Women's Law Centre.

¹⁶³ Geraldton.

The Victorian Royal Commission also looked at the potential for victims of family violence to be prosecuted under both their equivalent of the failing to protect offence¹⁶⁴ and under section 327 of the *Crimes Act 1958* (Vic), which is the offence for failing to disclose sexual abuse of a child:

*So far it appears that both section 327 of the Crimes Act or section 493 of the Children, Youth and Families Act serve largely symbolic purposes. We are unaware of any prosecutions under section 327 of the Crimes Act...[yet] It is undesirable to have offences on the statute book that serve little practical purpose, particularly when there are other offences that could be used to prosecute a person who was actively involved in the abuse of a child by their partner.*¹⁶⁵

The Victorian Royal Commission's recommendation in response to this concern was that:

*The Victorian Government amend section 327 of the Crimes Act 1958 (Vic) to require the Director of Public Prosecutions to approve a prosecution for the offence in cases where the alleged offender is a victim of family violence and consider legislative amendments to reconcile section 327 of the Crimes Act and section 493 of the Children, Youth and Families Act 2005 (Vic) [within 12 months].*¹⁶⁶

If introduced, an amendment to Victoria's section 327¹⁶⁷ would work in conjunction with the pre-existing safeguard, which requires that prosecutors consult with the Secretary of Victoria's equivalent to the Department prior to any prosecution.

The Review agreed that section 101 should be amended to remove the possibility that an adult victim of family violence could be prosecuted for exposing a child to that violence.

Recommendation 18

The Act should be amended to provide that section 101 cannot be used to prosecute a victim of family violence for exposing a child to family violence.

4.4 A possible new protection order

The Review *Consultation Paper* also flagged the possibility of a new type of protection order under which parental responsibility could be removed from one parent in favour of the other. The new type of order could potentially prevent the need for a child to come into, or remain in, the CEO's care when there is a safe parent. Such an order would be time-limited, and at the expiration of the order there would likely need to be Family Court orders in place to prevent parental responsibility reverting to both parents.

Current protection orders available under the Act are:

- **protection order (supervision)** - parents maintain parental responsibility but the Department has a supervisory and support role with conditions placed on the parent/s and/or child;
- **protection order (time-limited)** - parental responsibility is transferred to the CEO for a period of up to 2 years;
- **protection order (until 18)** - parental responsibility is transferred to the CEO until the child reaches the age of 18 years; and
- **protection order (special guardianship)** - parental responsibility is transferred to a person, other than a parent, until the child reaches the age of 18 years.

¹⁶⁴ *Children, Youth and Families Act 2005* (Vic) s 493.

¹⁶⁵ *Victorian Royal Commission*, above n 121, 199.

¹⁶⁶ *Ibid* 205.

¹⁶⁷ *Crimes Act 1958* (Vic).

There is no protection order which enables parental responsibility to be allocated between parents or in favour of one parent over the other. Traditionally, the Family Court has jurisdiction over the allocation of parental responsibility between parents. Under the Family Court Act and Family Law Act, the Family Court can make a wide variety of orders in relation to a child.

84. Meaning of parenting order and related terms — Family Law Act s. 64B

...

(2) A parenting order may deal with one or more of the following —

- (a) the person or persons with whom a child is to live;
- (b) the time a child is to spend with another person or other persons;
- (c) the allocation of parental responsibility for a child;
- (d) if 2 or more persons are to share parental responsibility for a child, the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;
- (e) the communication a child is to have with another person or other persons;
- (f) maintenance of a child;
- (g) the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of —
 - (i) a child to whom the order relates; or
 - (ii) the parties to the proceedings in which the order is made;
- (h) the process to be used for resolving disputes about the terms or operation of the order;
- (i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.¹⁶⁸

4.4.1 Submissions

Of the ten submissions which commented on the possibility of introducing a new protection order: six supported the proposed introduction;¹⁶⁹ six suggested consideration of the current options available through a combination of Family Court orders, restraining orders and protection orders (supervision) to achieve what the proposed new order intended to;¹⁷⁰ and one supported more detailed consideration of the new order, but did not take a position.¹⁷¹

There was some support in the community consultations for a possible new protection order on the basis that it could potentially empower women experiencing family violence and support them to keep their children.¹⁷² Other regions' views included that: the suggestions in the Review *Consultation Paper* focused on a crisis response directed at removing a person from the family unit rather than creating perpetrator accountability within a family unit;¹⁷³ restraining orders or police orders are more appropriate mechanisms for restraining a perpetrator;¹⁷⁴ and the onus would still be on the person experiencing the violence, because the likely outcome of not being able to keep the perpetrator away would be that the child comes into care.¹⁷⁵

4.4.2 Deliberations

The Review considered the submissions and consultations on a new protection order in the context of the legislative options currently available to curtail or remove the parental rights of a perpetrator, and/or place restrictions or conditions on them in order to enable children to remain

¹⁶⁸ *Family Law Act*.

¹⁶⁹ The Alliance and CYFAA; Child and Adolescent Mental Health Service; CPSU/CSA; a metropolitan office of the Department; Djinda Services; Women's Law Centre.

¹⁷⁰ Aboriginal Legal Service; Australian Association of Social Workers; Women's Council for Domestic and Family Violence Services; metropolitan office of the Department; Aboriginal Family Law Services; Women's Law Centre.

¹⁷¹ Australian Association of Social Workers.

¹⁷² *Karratha; West Kimberley*.

¹⁷³ *Kununurra; Northam*.

¹⁷⁴ *Kununurra*.

¹⁷⁵ *Karratha*.

safely in the care of a protective parent rather than being placed in out-of-home care. These include the availability of FVROs, Family Court orders and protection orders (supervision).

Protection orders (supervision) in section 47 of the Act provide a mechanism for monitoring a child's safety while working with the parent/s to manage the risks without the Department assuming parental responsibility. As discussed in the 2012 Review and noted in the *Review Consultation Paper*, it was never intended that a protection order (supervision) be used to allocate parental responsibility between parents. However, section 50(3) appears to allow a condition on a protection order (supervision) that a child live with a parent specified in the order. Some submissions requested the Act be amended to provide clarity on whether or not a protection order (supervision) can include a condition about with whom a child should live, which has the effect of altering the pre-existing arrangements in relation to the child's living arrangements.¹⁷⁶

Recommendation 50 of this Report seeks to clarify that a protection order (supervision) may contain a condition concerning the parent with whom a child is to live. The Review considered that a protection order (supervision) could be a useful order, in conjunction with an FVRO, in situations where family violence presents serious protection concerns for children, even if this scenario was not originally envisaged.

The Review also considered the overlap between term of reference 3 and term of reference 5, particularly in relation to the recommended expansion of the Children's Court's powers to make Family Court parenting orders (whether interim or final) in certain circumstances, including:

- if the parties consent to the Children's Court hearing and determining family law proceedings; and
- following a trial which results in either the dismissal of a protection application or the making of a protection order (supervision).

Given it was contemplated that any new protection order would be time-limited and used in circumstances of ongoing family violence, it is likely that a number of cases would require subsequent proceedings in the Family Court. The advantage of enabling the Children's Court to use Family Court parenting orders to allocate parental responsibility between parents in the above circumstances is that this would allow parenting orders to be made more quickly and in a more streamlined way, either by consent or pending a further hearing in the Family Court if required.

In consideration of the Review's recommendations for term of reference 5, Recommendation 50 to clarify that conditions on with whom a child is to live may be placed on a protection order (supervision) and the Department's powers to seek FVROs on behalf of a child, the Review decided there would be no further need to create a new type of protection order.

The current legislative framework in Western Australia for responding to family violence enables: the making of orders restraining the conduct of a perpetrator; intervention action as a measure of last resort to protect a child who is exposed to family violence; and the criminal prosecution of persons who commit family violence.

In recent years a number of legislative amendments have been introduced aimed at removing obstacles to responding effectively to family violence in Western Australia. However, legislation alone cannot create or provide safety for adult and child victims. Significant work has been undertaken, and continues, towards creating an integrated and co-ordinated systems response to family violence. The Review supports this ongoing work to strengthen practice and service delivery responses to family violence within the existing legislative framework.

¹⁷⁶ Women's Law Centre, a metropolitan office of the Department; Aboriginal Family Law Services.

CHAPTER 5 Therapeutic secure care for children at high risk

Term of reference 4 - The Review examined the operation and effectiveness of the provisions relating to secure care arrangements for children at high risk.

- **Consultation question 7** asked whether respondents would 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 arrangement; for, from 21 days to 28 days.
- **Consultation question 8** asked what other amendments to the secure care legislation might improve the effectiveness of secure care as a short-term therapeutic intervention.

5.1 Background

The Kath French Secure Care Centre in Stoneville (the Centre) commenced operation as a secure care facility on 31 May 2011.¹⁷⁷ The Centre was established under amendments to the Act¹⁷⁸ in 2011 to address the needs of a small but increasing proportion of children aged 12 to 17 years in the CEO's care who present as a risk to themselves and/or others from time to time, and require immediate stabilisation, assessment and support.¹⁷⁹

From commencement in May 2011 to 30 June 2017, 198 children with complex needs have been admitted to the six-bed secure care facility for planned, short-term intensive intervention in a therapeutic environment in order to contain, stabilise, assess and support their wellbeing. The Department's *Policy on Children Entering Secure Care* describes secure care as:

*... a time-limited 'circuit breaker' to stabilise the child's behaviours. This is achieved through a therapeutic model of care that is individually tailored to the child's needs, culturally responsive and takes into account their views. The goals are to work with the child to prevent repeating a pattern of high risk behaviours, develop life skills, establish a network of proactive supports with the child's family and other agencies, and transition the child's return to the community.*¹⁸⁰

Only the CEO can initiate a child's admission to secure care, either through direct admission to the facility or by making an application to the Children's Court. In order to do so the CEO must be satisfied that:

- (a) *there is an immediate and substantial risk of the child causing significant harm to the child or another person; and*
- (b) *there is no other suitable way to manage that risk and to ensure the child receives the care the child needs* - section 88C.

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.*¹⁸¹

¹⁷⁷ Under section 88B of the Act, the Minister declared the Centre to be a secure care facility by the publication of a declaration order in the Government Gazette.

¹⁷⁸ The amendments were made under the *Children and Community Services Amendment Act 2011* and came into effect on 31 January 2011.

¹⁷⁹ Department for Child Protection, *Secure Care*, Background Paper, Western Australia (June 2011).

¹⁸⁰ Available on the Department of Communities website at

www.dcp.wa.gov.au/Resources/Documents/Policies%20and%20Frameworks/Policy%20on%20Children%20Entering%20Secure%20Care.pdf.

¹⁸¹ Explanatory Memorandum, Children and Community Services Amendment Bill 2010, 4.

The Act includes provisions regarding the length of time a child may spend in secure care – the child’s ‘secure care period’ (s.88D); the care planning required following admission (s.88 I); and the capacity for the relevant parties, including the child, to apply for a CEO ‘reconsideration’ of a secure care decision or subsequently an external review by SAT, in respect of children who are administratively admitted (ss.88G and 88H). There is also provision for external monitoring of a secure care facility (and other residential facilities operated by the Department or its funded agencies) through the appointment of an assessor under section 125A.

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.¹⁸² The Ombudsman WA’s 2006 *Report on Allegations Concerning the Treatment of Children and Young People in Residential Care*¹⁸³ recommended consideration be given to the need for such a facility, and Prudence Ford’s 2007 review of the then Department for Community Development recommended the Centre become an Intensive Therapeutic Unit for young people in care.¹⁸⁴

As indicated in the *Review Consultation Paper*, other Australian jurisdictions with models of therapeutic secure care for children include Victoria and NSW. In 2016, the South Australian *Child Protection Systems Royal Commission* (the South Australian Royal Commission) 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.*”¹⁸⁵

5.1.1 Admissions to secure care

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

Administrative admission - If the CEO has full parental responsibility for a child under a protection order (time limited) or a protection order (until 18), the child is admitted to secure care administratively; that is, it is the CEO who makes the ‘secure care arrangement’ for the child and who sets the secure care period.¹⁸⁶ Approximately 78 per cent of the children are administratively admitted to secure care.

Judicial admission - Children who are not in the CEO’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, the CEO may initially admit a child administratively under a secure care arrangement; however, as soon as possible, but no later than two working days after the child’s admission, the CEO must lodge an application with the Children’s Court for a ‘continuation order’. If the child is not already the subject of protection proceedings, the CEO must also apply for a protection order at the same time as applying for the continuation order.¹⁸⁷

Depending on whether the child is under a protection order or in provisional protection and care, the CEO and/or the Children’s Court must be satisfied a child meets the admission threshold

¹⁸² 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*, Western Australia, 27.

¹⁸³ Ombudsman Western Australia, *Report on Allegations Concerning the Treatment of Children and Young People in Residential Care*, Parliamentary Commissioner for Administrative Investigations, Western Australia (August 2006), 155.

¹⁸⁴ Prudence Ford, *Review of the Department for Community Development*, Review Report, Western Australia (2001) Recommendation 56 (*‘Ford Review’*).

¹⁸⁵ South Australia, *Child Protection Systems Royal Commission, The Life They Deserve: Child Protection Systems Royal Commission Report (2016)* 352 (*‘South Australian Royal Commission’*).

¹⁸⁶ CCS Act s 88C.

¹⁸⁷ Ibid s 88F.

before making (the CEO) or ordering (the Children's Court) a secure care arrangement for a child.

Admission of individual children from 1 May 2011 to 30 June 2017

- 198 individual children were admitted to secure care.
- Of these children, 53 per cent (105) were male and 47 per cent (93) were female.
- Fifty-five per cent (109) were Aboriginal.
- The ages of the majority of children at first admission were 13 years (50), 14 years (38) and 15 years (33). Seventeen per cent (33) of the children admitted were under 12 years of age when first admitted: six were nine years old; two were eight years old; and one was seven years old.
- Sixty-one per cent (121) of the children were admitted to secure care once only.
- Of the remaining 77 children: 39 had two admissions; 17 had three admissions; and 21 had four or more admissions.
- The average number of days this group of children spent under an initial secure care period was 18 and the average number of days children spent under an extension of a secure care period was 14.
- Thirty-five (18 per cent) of these 198 children were registered with the Disability Services Commission.
- The total number of admissions for these 198 children was 372: in 24 per cent (91) of these admissions were the subject of an extension.

5.1.2 The first five years – secure care in practice

The Review and submissions acknowledged the critical work of the Centre in protecting children at extreme harm. Every child admitted to the Centre has complex needs which can include trauma-related behavioural and mental health problems as a result of past abuse or neglect and experiences of family violence. These frequently co-occur with and are complicated by cognitive impairment and neuro-disabilities such as foetal alcohol spectrum disorder.

The Review *Consultation Paper* referred to the practice challenges the secure care team has faced over its first years of operation and the specialist skills and knowledge developed over this time to provide high quality therapeutic interventions to this high-needs group of children. Particular challenges lie in undertaking this work within the short timeframe 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-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 the timely reconsideration or SAT review of secure care decisions if applied for by children who have been administratively admitted.

The *Sanctuary Model* of therapeutic care¹⁸⁸ guides the trauma-informed therapeutic practice used to offer children a safe and healing environment to support them when they are at their most vulnerable.¹⁸⁹ This environment aims to provide the physical and psychological safety needed to support healing from trauma and identify ways of transitioning a child back into the community to reduce the likelihood of readmission to secure care. The Review noted the

¹⁸⁸ Sandra L Bloom, *The Sanctuary Model of Organisational Change* (2005)

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

¹⁸⁹ Department for Child Protection and Family Support, *Kath French Secure Care Centre*, Fact Sheet, Western Australia (Sept 2015).

acknowledgement of the Department's work in adopting trauma-informed approaches to working with children in care:

MacKillop acknowledges the leadership the Department of Child Protection and Family Services (DCPFS) has provided in embedding trauma informed approaches to child protection and out-of-home care. For example, the DCPFS is unique in its certification in the Sanctuary Model. The application of this model in the secure care setting is a further example of where Western Australia leads other state jurisdictions.

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 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).

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

- **Consultation question 7** of the Review *Consultation Paper* asked whether there was support for a limited increase in the maximum number of days for which a child may be placed under an initial secure care period, and under an extension of a secure care period, from up to 21 days to up to 28 days.

The secure care period is the period for which a child is to be kept in a secure care facility under a secure care arrangement.¹⁹⁰ A secure care period 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. The maximum period of time a child may spend in the secure care facility is therefore 42 days. In the case of administratively admitted children, it is the CEO who 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 CEO must apply to the Children's Court for an extension of the child's secure care arrangement to be granted.

5.2.1 Background

As explained in the Review *Consultation Paper*, the secure care 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.

Children admitted to secure care are supported to build and maintain existing relationships with external services. The Centre works with case managers to identify support services that will assist children to remain safe in the community once they leave secure care. Direct contact with service providers 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 children's secure care meetings is seen as a significant contribution to the development of safety.

¹⁹⁰ CCS Act s 88F(1).

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 disability or emerging mental health concerns, who often require more time to transition and adjust to change.

Rather than reducing the likelihood of a readmission to secure care required, 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 Centre.

5.2.2 Submissions

Views on the possibility of increasing the maximum allowable period for an initial secure care admission and an extension varied widely among the 23 written submissions received:

- six¹⁹¹ supported an increase from 21 to 28 days in the maximum allowable initial secure care period *and* the maximum time for which a secure care arrangement may be extended;
- two¹⁹² supported the proposed increases in the maximum allowable periods, but only with accompanying judicial oversight;
- two¹⁹³ provided variations; and
- twelve¹⁹⁴ did not support any increase to the maximum secure care period available.

In considering this question, a number of submissions questioned the intended role of secure care:

In reference to the aim of the program being therapeutic and to 'heal from trauma' it is difficult to understand how 21 days is sufficient and wonder if this is more in keeping with the aim to provide a safe environment to undertake assessment. We need to ensure how this environment can be therapeutic and how the elements of attachment theory, trauma theory and supporting children to make sense of their trauma and be able to create some form of narrative around their trauma can be achieved, it would seem these children are in survival mode and therefore some thought needs to be given to what the secure unit is aiming to achieve, safety and assessment or therapeutic outcome (Child and Adolescent Mental Health Services).

The primary reluctance among submissions not supporting an increase in the maximum allowable timeframes was based on the lack of available evidence on the impact of protective secure care on children, its effectiveness in achieving desired outcomes and the optimal timeframes for doing so.

There is a lack of research evidence to support the proposed change; more research is required before informed decisions can be made. At present, it is not clear whether secure care achieves the outcomes intended, and research evidence is required to establish optimal admission periods (the Alliance and CYFAA).

There is a lack of evidence to support the proposed changes to secure care, and the Department should measure the outcomes for children and young people accessing secure care before legislative changes are made. This research should also track the child's journey into secure care to identify opportunities for systemic changes to be made to prevent children and young people from entering, and returning to, secure care, especially with the increase of younger children being placed in the Kath French Centre.

¹⁹¹ Submissions supporting the timeframe increases included: Department's Child Protection Legal Unit; Community and Public Sector Union / Civil Service Association; a metropolitan office of the Department; Mental Health Commission; Society of Professional Social Workers WA.

¹⁹² These were the Australian Association of Social Workers and Legal Aid.

¹⁹³ CREATE; WA Police.

¹⁹⁴ Those opposed to an increase in the maximum allowable timeframes were: the Alliance and CYFAA; Aboriginal Health Council; Aboriginal Legal Service; Child and Adolescent Mental Health Service; Commissioner for Children and Young People; Centrecare; Key Assets; UWA Social Policy Practice Consortium; Wanslea Family Services; WACOSS; Women's Law Centre; Youth Affairs Council.

This can also provide an evidence base to the most appropriate placement periods for children and young people in secure care (Centrecare).

5.2.3 Deliberations

In addition to submissions, the Review gave careful consideration to the anecdotal evidence and experience presented through the Centre's five years of operation, and to Parliament's intentions and concerns presented through Parliamentary debate. During the Bill's passage through Parliament, particular concern was expressed over the need for external oversight (see 5.3.2) and the cumulative length of time a child may spend in secure care. 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 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.¹⁹⁵

The Review agreed that any amendments to the maximum allowable secure care period should be informed by an evaluation of the operation and effectiveness of secure care as a model of protective intervention, and that such evaluation should occur as soon as possible (see 5.3.3 of this Report).

Recommendation 19

The maximum timeframes in which a child may be placed in secure care under a secure care arrangement or an extension of a secure care arrangement should remain the same. Any amendments should be informed by an evaluation of secure care.

5.2.4 Transitioning from secure care

Planning for transitioning from secure care is required under section 88 I of the Act. A care plan or provisional care plan must be developed or modified as soon as practicable, but not more than two working days after a child's admission to secure care, and plans are to include strategies to reduce the likelihood of a child's readmission to secure care. Under section 88 I, the requirements for a plan are that it:

- (a) *identifies the needs of the child in his or her transition to other living arrangements after leaving the secure care facility; and*
- (b) *outlines the steps or measures designed to address those needs and to reduce the likelihood of the child being placed in a secure care facility again.*

The Casework Practice Manual requires transition planning from secure care to commence upon admission and remain part of the ongoing assessment, planning and reviews during the child's time in secure care. District child protection workers retain responsibility for developing and implementing transition plans to support the child's return to the community. Transition arrangements are most effective when developed collaboratively with all stakeholders and with the ongoing participation and cooperation of service providers. The challenges in transitioning children out of the Centre were referred to in the Review's *Consultation Paper*:

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.¹⁹⁶

¹⁹⁵ Explanatory Memorandum, Children and Community Services Amendment Bill 2010, 4.

¹⁹⁶ Review *Consultation Paper*, above n 7, 32.

5.2.5 Submissions

A number of submissions¹⁹⁷ addressed the importance of the transition from secure care. Some of the young people in CREATE's consultation said the transition out of secure care can be overwhelming:

They believed that there needed to be better planning and transition options for re-integrating back into the community after being in secure care.

→ *We need to be prepared to be around lots of people again. When I left, you go from being with only one or two people at a time and all of a sudden you're surrounded by heaps of people at school and stuff. They need like re-integration – let them go out for lunch or something (18 year old, female).*

→ *This [way of leaving secure care without a transition] can cause more trauma (18 year old, male).*

CREATE recommended exploring a tiered approach to secure care to better support children's transition out of the facility. MacKillop Family Services also suggested there should be:

...further investment in 'step down' model of care for children and young people transitioning from the secure setting. Too often there is a lack of an appropriate care option to meet the needs of children and young people exiting secure care. This should include investment in regional and remote service options to facilitate the delivery of robust specialist services options closer to families and communities.

5.2.6 Deliberations

The problems associated with children transitioning from secure care are not legislative. Effective transitioning from secure care relies upon the availability of suitable placements, and accessible services for addressing the complex needs of the children exiting from secure care. In 2016 the Department undertook community consultations to develop the new out-of-home care service system, including a model of complex care for high needs children. Within the requirements of this service model are provisions that require CSOs to participate in the transition planning process for children as they enter secure care and work with the Department case manager to reduce the duplication of clinical assessment. During consultations, a step down, or tiered approach to service delivery was considered; however, the feedback indicated concern that this type of model would result in multiple care arrangements for children leaving secure care which would not be in their best interests. The new service system will provide an increased number of complex care arrangements which are appropriately resourced to reduce the likelihood of readmissions to secure care and provide quality, effective community based options.

The out-of-home care system reforms are intended to address some of the systemic issues that currently beset practice in transitioning children from secure care by:

- building-in greater contractual requirements for CSOs to work with secure care from the point of a child's admission, in order to facilitate the transition of children back into community placements; and
- the funding of individual children according to their NAT assessment to create greater flexibility, efficiency and capacity to meet children's needs, regardless of their care arrangement.

Additionally, if implemented, Recommendation 47 for the prioritisation and provision of government services to children in care aims to facilitate more timely access to the services necessary for more effectively transitioning children out of secure care, and reducing the likelihood of their re-admission.

¹⁹⁷ These included submissions from the Community and Public Sector Union / Civil Service Association; CREATE; MacKillop Family Services; and Wanslea Family Services.

Recommendation 20

The Department should examine the current barriers to transitioning children effectively and safely from secure care and ways these barriers can be addressed.

5.3 Other matters considered

- **Consultation question 8** of the *Review Consultation Paper* asked what other amendments to the secure care legislation might improve the effectiveness of secure care as a short-term therapeutic intervention.

5.3.1 Age of admission to secure care

The *Review Consultation Paper* noted 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. At that time, the youngest child admitted was 8 years old: however, updated figures to 30 June 2017 reveal that a total of nine children under 10 years of age had been admitted to secure care: six 9 year-olds; two 8 year-olds; and one 7 year-old.

The Department's policy provides that secure care is intended for children aged 12 to 17 years. This limit was adopted because of the substantial developmental differences that already span the 12 to 17 year age group. However, in anticipation of exceptional circumstances in which a younger child may require secure care, no minimum age-limit was placed on admissions in the legislation. This was to preserve a degree of flexibility in the few cases where younger children met the high threshold for admission. It was not anticipated, however, that children as young as 7 and 8 years of age would be admitted.

Deliberations

The Review Committee, along with a number of submissions, expressed deep concern about the use of secure care for such young children, particularly in relation to their exposure to and interaction with older children with complex needs. In attempting to understand the situation, a closer examination of the seven children less than 10 years of age who were admitted to secure care revealed the highly challenging and complex needs of these children and an appreciation of the lack of options available to keep them safe. MacKillop Family Services suggested there was a need for flexible, more intensive home-based care options for younger children with multiple and complex needs.

In considering the complexity of issues surrounding the use of secure care for young children, the Review gave consideration to establishing a minimum age limit for a secure care admission in the Act, for example 10 years. No minimum age is provided in Victoria's Secure Welfare Service legislation although, under policy, children under 10 years of age may be admitted with senior approval only. In practice, the Department already exercises a high degree of caution when assessing secure care referrals for young children. For this reason, the majority of the Review Committee was reluctant to impose an age-limit in legislation because of the extreme risk facing those children who meet the threshold for admission. The lack of alternative options to meet the needs of this small group of younger children was considered to be an issue that requires urgent attention.

Recommendation 21

The target age-range for admission to secure care should continue to be children aged from 12 to 17 years and the admission of younger children should be avoided wherever possible.

Recommendation 22

Work is urgently required to examine alternative means for addressing the complex needs of a small but increasing number of children aged younger than 12 years who, in the absence of suitable alternatives, are being admitted to secure care.

5.3.2 Oversight

The Review *Consultation Paper* noted that lessons from the Royal Commission highlight the 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. The Review *Consultation Paper* also referred to the role the Ombudsman WA will play in monitoring organisations against new Safety Standards in *Better Care, Better Services* occurring under Reform Action 66 of the *OOHC Reform Strategy*.

The Review made the distinction between systems oversight of the secure care facility, and oversight of the individual secure care arrangements through which children are admitted to the facility, their secure care period is extended or they seek the reconsideration or SAT review of a secure care decision.

Systems oversight – assessors

To oversee the operation of the Centre¹⁹⁸, section 125A of the Act enables the CEO to appoint assessors who are external to the Department who may, at any time, do one or more of the following:

- (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 – section 125A(3).

Assessors are required to provide the CEO with a written report about each visit to the Centre.¹⁹⁹ The Department provides copies of all assessor reports to the Commissioner for Children and Young People as matter of practice rather than legislative requirement. Assessor reports have contributed to improvements as the Centre has developed, with recommendations for change relating to administrative, communication and internal building configuration regarding safety concerns. Six assessors are currently appointed under a panel contract with the Department, and there have been six initial assessor visits to Centre since its commencement in 2011.²⁰⁰

Submissions

Submissions to the Review emphasised the need for heightened independent oversight of the secure care facility:

AASW supports the proposed role for the Ombudsman in terms of standards monitoring and suggest that there needs to be a specific requirement for cultural competence of the Ombudsman's staff employed to undertake this monitoring.

Given the restricted nature of the secure care facility, and the vulnerability of children and young people placed there, legislation should change to incorporate additional oversight mechanisms to protect children and young people. This could be a similar model to the Independent Visitors who regularly attend secure mental health facilities and correctional facilities. This could also be an extended version of the current Independent Assessor process utilised across residential care facilities. This would ensure secure care is

¹⁹⁸ And residential facilities operated by the Department and CSOs.

¹⁹⁹ CCS Act s 125A(4).

²⁰⁰ In 2013, the approach changed so assessors make a follow-up visit to an initial visit in order to monitor progress with any recommendations they made have made resulting from the first visit.

providing a safe, accountable facility for some of the state's most vulnerable children and young people (Centrecare).

It is unclear how children and young people are made aware of the ability to request an Independent Assessor, how they are supported to access this, or whether children and young people actually utilise this as an option. The Independent Assessors should play a more active role in providing oversight to the facility and ensuring that children and young people are receiving the appropriate care that they require (CREATE).

Evidence of the efficacy of current and proposed oversight mechanisms is required. An independent visitor or guardian arrangement with open access is desirable; the South Australian guardian model should be investigated (the Alliance and CYFAA).

The assessor role outlined in section 125A of the CCS Act (should) be reviewed to provide for a more robust mechanism that provides the high degree of independent, external oversight of secure care and residential facilities that is needed (Commissioner for Children and Young People).

The Commissioner for Children and Young People also highlighted the importance of transparency, noting that:

Reporting on results can lead to integrity, trust and confidence in the quality of care provided to children and young and the identification of ways to improve the services they receive.

Deliberations

The powers provided in section 125A enable assessors to exercise a high degree of external oversight of secure care.²⁰¹ However, in considering the operation and effectiveness of the provisions as a whole, the Review noted that the CEO's appointment and management of assessors under a panel contract effectively removes a significant degree of independence. In addition, the discretion the legislation provided to assessors to visit the facility unannounced has not been exercised to date, and visits to the Centre have been scheduled by the Department.

The role of assessors was intended as a systems oversight role rather than an individual advocacy role. However, during passage of the Bill through Parliament, a new provision (s.125(4A)) was inserted to enable a child, or a parent or relative of a child, to request that an assessor visit the Centre and see and talk with the child. As noted in the Commissioner for Children and Young People's submission,²⁰² there have been no requests for an assessor visit since the commencement of the Centre.

The Review is aware of the Centre's protocols that require all children to be provided with written and verbal information about their rights upon admission to the Centre, including the right to ask to see and talk with the Department's Advocate for Children in Care and to request a visit from an assessor. Nevertheless, the provision in section 125(4A) of the Act is evidently ineffective in providing children with a direct avenue of independent oversight. This may be due to a lack of clarity about the role of assessors in the eyes of children themselves, or to children's unsurprising reluctance to want to speak and meet with a stranger. The Review's discussion also reflected on the fact that the very title 'assessor' may be off-putting to children, and suggested consideration be given to the use of an alternative title in practice.

The Review considered that while the assessor role has made a valuable contribution to oversight of the Centre, the locked nature of the facility requires a higher degree of independent oversight than the current section 125A model allows. This work should be vested in a body which is completely independent of the Department. The Review also noted the high proportion of Aboriginal children in secure care (50%) and the specific needs of these children. In

²⁰¹ Assessor powers extend to residential facilities operated by the Department and the community service sector.

²⁰² Commissioner for Children and Young People.

conclusion, the Review noted the need for secure care oversight informed by Aboriginal people with knowledge of the particular cultural security and safety needs of Aboriginal children in the Centre.

Recommendation 23

Rather than the assessor model in section 125A of the Act, under which the CEO is responsible for the appointment of assessors, oversight of the Department's secure care facility should:

- (a) be undertaken by an independent body with sufficiently broad oversight powers;
- (b) involve a minimum number of annual visits including unannounced visits; and
- (c) include Aboriginal people to assess and determine whether the specific needs of Aboriginal children in secure care are being met.

Admissions oversight

Section 88G enables children who are **administratively admitted** to secure care, their parents or other relatives to apply to the CEO to have a 'secure care decision' about any of the following reconsidered (a CEO reconsideration):

- the secure care arrangement itself;
- the secure care period; or
- a decision to extend the secure care arrangement.

If unsatisfied with the outcome, the relevant parties can apply to SAT for the CEO's decision to be reviewed. As noted previously, 78 per cent of admissions are administrative.

Children administratively admitted are advised of their right to a CEO reconsideration of their secure care decision, and to make an application to SAT if they wish the CEO's decision to be externally reviewed.

Administrative admissions - July 2011 to August 2017

- Thirty-three "reconsideration" applications were made to the CEO, one of which resulted in the cancellation of the child's secure care arrangement.
- Four subsequent applications to SAT were made, but none proceeded to hearing.

Judicial admissions by their nature provide judicial oversight of secure care arrangements made for children who are only in the provisional protection and care of the CEO. In addition to the legal representation children receive during court proceedings relating to secure care arrangements, the *Children's Court of Western Australia Act 1988* (the Children's Court Act) provides that parties may appeal to the Supreme Court against a decision made in the Children's Court.

Judicial admissions - July 2011 to August 2017

- The Department made 79 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. Four 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.

Submissions

Several submissions considered that all admissions to secure care should be made by the Court. One person in CREATE's consultation thought the Court should be involved in assessing all admissions to secure care:

It's fine for it to be increased but it should go to court at the outset- there should be a plan signed off by a justice and the courts will put a maximum on it. It should be decided by the court not DCP. If the child is over 8 they should be appointed an advocate.....I think every case should go to court. If a young person is under 8 or incapacitated they should [also] have a lawyer (24 year old, male, Australian-Dutch).

Legal Aid suggested that Children's Court magistrates should be given the power to review the secure arrangements of children administratively admitted rather than SAT, given the Court's experience in dealing with children at risk.

Deliberations

The Review's attention in respect of administrative admissions focused on the operation and effectiveness of the provisions enabling children to seek an urgent external review of their secure care arrangement or secure care period. As acknowledged in the *Review Consultation Paper*, given the compressed timeframes involved, procedural improvements were needed to expedite the reconsideration and SAT review process in the event that a child applies for a SAT review. The Department now immediately advises Legal Aid and the State Solicitor's Office²⁰³ every time a child applies for a CEO reconsideration. These notifications are intended to enable the agencies to allocate lawyers to the matters in preparation for any SAT application that may follow. The improved arrangements require monitoring to ensure the review processes operate urgently in every case where a child applies for a CEO reconsideration or SAT review. The Review noted that in September 2017, a child's SAT application was successful in being heard expeditiously. In this instance SAT upheld the CEO's decision that the child's secure care arrangement should continue.

5.3.3 Research and evaluation – building an evidence base

The *Review Consultation Paper* acknowledged the need for research on the effectiveness and practice parameters of secure care as a child protection intervention. Nevertheless, as noted in a report to the South Australian Royal Commission, 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.²⁰⁴ Submissions to the Review also emphasised the need for research and evaluation to inform secure care practice and legislation. Centrecare submitted that:

Research should ... track the child's journey into secure care to identify opportunities for systemic changes to be made to prevent children and young people from entering, and returning to, secure care, especially with the increase of younger children being placed in the Kath French Centre. This can also provide an evidence base to the most appropriate placement periods for children and young people in secure care. ...The legislation should not be changed to address the systemic issue of a lack of placements for children and young people exiting secure care, nor should secure care be used instead of appropriate mental health services.

CREATE Foundation acknowledges the role that the Secure Care Facility plays in supporting some of the State's most vulnerable and at-risk children and young people in care, however notes that there have been no formal evaluations or evidence of the facility in relation to supporting positive outcomes for children and young people. Given the high risks and vulnerability facing many of the children and young people in secure care, this information is vital, and CREATE recommends that formal evaluations are conducted to develop a strong evidence base for the use and operations of the Secure Care Facility.

The Review agreed that an evaluation of secure care should be undertaken as soon as possible to consider its effectiveness as a protective intervention and to establish an evidence base to inform future legislative policy and practice decisions. A specific outcomes framework for secure

²⁰³ The State Solicitor's Office represents the CEO in SAT proceedings.

²⁰⁴ See Sara McLean, Report to the South Australian Child Protection Systems Royal Commission, *Report on Secure Care Models for Young People at Risk of Harm*, 20 January 2016, 30.

care, based on a clear statement of purpose/intent, should be developed to inform the evaluation. Key focus points for an evaluation of secure care include:

- tracking the child's journey into, during and out of secure care, including looking at post-exit outcomes for children at shorter and longer term time intervals;
- speaking with the children and young people who have had a secure care experience, their families, carers and caseworkers; and
- examining the role the current model of secure care plays in stabilising, assessing and planning for the ongoing treatment and service needs of children who are in need of high levels of care and supervision.

In considering the need for an evaluation of secure care, the Review acknowledged the valuable work secure care already undertakes to monitor activities and incidents, and measure child related changes, in order to inform practice improvements.

Recommendation 24

An evaluation of the role and effectiveness of secure care as a protective intervention for children should be undertaken as soon as possible to inform secure care practice and legislative policy into the future, including informing the optimal time frames required for stabilising and assessing the needs of children admitted to secure care.

The evaluation should contribute to the development of an ongoing monitoring and evaluation framework aimed at building evidence-based continual improvement.

5.3.4 Adjournments

The Review is aware that on at least once occasion the Court has adjourned a secure care continuation application. The secure care provisions did not envisage that a court might adjourn an application for either an order to continue a secure care arrangement that has been made by the CEO or an interim order (secure care). As secure care involves removing the liberty of a child for a limited period of time, it was intended that a determination on the validity of a child's admission to secure care should be made at the earliest possible instance.

The Review discussion agreed that if the Court is satisfied of the threshold, a secure care arrangement must be made. There were not thought to be any circumstances in which an order should not be made if the Court is satisfied "*there is no other suitable way to manage that risk and to ensure that the child receives the care the child needs.*"

Recommendation 25

The Act should be amended to provide that a court must consider the grounds for making a secure care arrangement under section 134A(1) at the first court appearance and, if satisfied they have been met, the Court must make a continuation order or an interim order (secure care).

5.3.5 Emergency evacuation and transportation

The Centre's location in the foothills of Perth requires well-established fire evacuation procedures, and a variety of other circumstances may require evacuation of the facility for unknown periods of time. Currently, the secure care provisions do not contemplate a child's temporary removal from the Centre during the period of his or her secure care arrangement. This presents difficulties and legal risks when such circumstances do arise, given the expectation (of the Court, the child's parents and significant others and the community) that children will be in the facility throughout the period of their secure care arrangement.

Amendments are therefore necessary to provide for children who leave the facility under emergency circumstances or to temporarily attend an appointment or funeral, for example.

Another issue is that there are no like-facilities in Perth or elsewhere in the event that an alternative facility is needed for a period of time, either during an emergency itself or while damage to the secure care facility is underway. The Department's use of alternative facilities such as the Keith Maine Centre in Whiteman Park must be accompanied by additional emergency on-call staffing, given the heightened security needs of children under secure care arrangements.

The Review noted that, if the use of an alternative facility is required for a longer period of time, under section 88B(1) of the Act the Minister may declare the place to be a secure care facility.

Recommendation 26

The Act should be amended to enable the CEO to remove a child who is under a secure care arrangement:

- (a) in the event of an emergency, from a secure care facility to another suitable facility for a period of time; and
- (b) from a secure care facility temporarily (for example to attend an appointment or a funeral).

The amendments should also provide that a child under a secure care arrangement is still under the arrangement if the child is removed from a secure care facility for the purposes of an emergency evacuation or otherwise temporarily.

CHAPTER 6 The intersection between child protection proceedings and proceedings in the Family Court of Western Australia

Term of reference 5 – 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.

→ **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?

6.1 Background

Family law proceedings and child protection proceedings are not always discrete and severable. Legal matters which overlap the two jurisdictions are commonly referred to as ‘intersection cases’. In Western Australia there are a number of children who may already be the subject of Family Court proceedings when the Department initiates protection proceedings in the Children’s Court. However, the Department may or may not have been aware of these proceedings. As a consequence of protection proceedings in the Children’s Court, Family Court proceedings will be “generally adjourned” pending the outcome of the protection proceedings.

Equally, on occasions protection proceedings may be initiated in the Children’s Court but end up in the Family Court. For example, a safe and willing family member may be identified during protection proceedings, or one of the parents may have done sufficient work towards addressing his or her issues while the other parent remains a risk to the child. This involves Children’s Court proceedings being adjourned pending the initiation of family law proceedings by the protective parent or family members.

Currently, matters cannot be transferred from the Children’s Court to the Family Court, the Children’s Court cannot make parenting orders, and the Family Court can only make protection orders when existing Family Court proceedings are on foot and the Department has lodged a protection application in the Family Court.

These “intersection cases” involve duplication of resources, processes and documentation and often result in delays, confusion and frustration for families. The best interests of the children concerned may also be affected. This term of reference is intended to identify potential legislative amendments which could remove barriers and enable more effective processes to operate.

6.1.1 The unique position of Western Australia

Western Australia is in a unique position to address the challenges for parties involved in both the family law and child protection systems. Western Australia has the only state Family Court in Australia. This came about as a consequence of Western Australia’s decision not to refer powers to the Commonwealth at the time the Family Law Act commenced.

In other Australian states, family law matters are dealt with in federal courts and child protection matters in state courts, creating a jurisdictional divide that does not exist in Western Australia. Although historically it has not often occurred, theoretically, in Western Australia all family law and child protection matters can be dealt with by a single court. The Family Court currently operates alongside regional magistrates’ courts, which have been vested with limited family law jurisdiction.

The Family Court was vested with federal jurisdiction for matrimonial matters under the Family Law Act²⁰⁵ and state jurisdiction for non-matrimonial matters under the Family

²⁰⁵ *Family Law Act* s 69H.

Court Act.²⁰⁶ The provisions of the Family Court Act largely mirror the provisions of the Family Law Act. However, there are some modest differences and different avenues for appeal. In addition to being able to exercise both federal and state family law jurisdiction, the Family Court is vested with jurisdiction in respect of other state matters including adoption and surrogacy.

The Review's Legal Working Group acknowledged that a number of the recommendations made under this term of reference cannot be achieved through amendments to the Act alone. It is likely they would also require amendments to the Family Court Act and Children's Court Act, and the cooperation of the Federal Government in amending the Family Law Act and/or proclamations made under that Act.

6.1.2 The work so far - research, reports, committees and projects

The intersection of the child protection and family law jurisdictions has been the subject of significant consideration over a number of years. In 2010, Western Australia's then Attorney General authorised the establishment of an Integrated Services Reference Committee (the Reference Committee) with membership from the Family Court, Legal Aid, the Children's Court, the Department and state and commonwealth Attorney General Departments.

The Committee conducted a literature review, extra-judicial consultations, direct consultations with stakeholders and the preparation of a report containing recommendations to present to the two Attorneys General and Western Australia's Minister for Child Protection.

This work led to the Family Court commissioning a report in 2011 to:

*Examine and report on issues associated with integration of the care and protection jurisdiction of the Children's Court of WA and the parenting orders jurisdiction of the Family Court of WA.*²⁰⁷

The *Report on the Intersection of the Family Law and Child Protection Jurisdictions in Western Australia* was finalised by Tatum Hands & Victoria Williams in July 2012 (the Hands and Williams Report) and forms part of the Family Court's submission to the Review.²⁰⁸

Hands and Williams Report

The Hands and Williams Report examined potential models for reform to address issues related to the intersection of the child protection and family law jurisdictions. It also made various recommendations for policy and procedural reforms to improve the interaction of the jurisdictions.²⁰⁹ The models considered in the Hands and Williams Report were:

Integration: The report considered different options for a fully integrated one-court model dealing with family law child-related matters and child protection proceedings. It concluded that the most appropriate court for this option is the Family Court. The report suggested that a dedicated child protection division should be established in the Family Court for 'new' child protection applications, but in the event of existing parenting order proceedings, the allocated Family Court judicial officer would invariably retain carriage of the matter.

Concurrency: The consultants envisaged that this model would operate so that the Children's Court would be empowered to deal with parenting order applications if all parties agreed to the Children's Court exercising jurisdiction in relation to parenting orders. Likewise, the Family Court would hear protection applications if existing parenting orders proceedings were on foot.

²⁰⁶ *Family Court Act* s 35.

²⁰⁷ Hands TL & Williams VM, *Report on the Intersection of the Family Law and Child Protection Jurisdiction in Western Australia* (Perth, Family Court of Western Australia, 2012) 11.

²⁰⁸ The initial publication of this report was limited to members of the Integrated Services Reference Committee but there has been limited further publication e.g. to the Family Law Council.

²⁰⁹ For a full list of recommendations, see Appendix D.

Co-location: The report considered the option of co-location whereby the Children’s Court would retain the child protection jurisdiction in its entirety but a dedicated Children’s Court magistrate would be co-located with the Family Court. While this model would not require legislative reform, the report noted it would not address intersection issues as successfully as the integration or concurrency models.²¹⁰

Having considered the legislative, procedural, resourcing and infrastructure requirements of each model, the Hands and Williams Report concluded that the joint partial concurrency model should be adopted because “it overcomes most of the jurisdictional issues..., but also because it can be implemented without the need for significant legislative and process reform and because it has negligible infrastructural and human resources requirements.”²¹¹

The Report identified two key legislative reforms to implement the joint partial concurrency model. The first was to include the Family Court within the definition of ‘Court’ under the Act. This would avoid any doubt that the Family Court has power to make a protection order. Subsequently, in *Farnell & Anor and Chanbua* [2016], the Chief Judge of the Family Court held that the power of the Family Court to make orders under the Act is “beyond doubt” by virtue of section 36(6) of the Family Court Act.²¹² Hence, this issue appears to be resolved.

The second proposed legislative reform involved amending the *Jurisdiction of Courts of Summary Jurisdiction (Children) Proclamation 2006* (Cth) to ensure the Children’s Court has the same power as regional magistrates to make parenting orders if all parties consent to the Children’s Court exercising jurisdiction. The Commonwealth recently proposed similar amendments by virtue of the Family Law Amendment (Family Violence and Other Measures) Bill 2017 (the Exposure Draft).

A number of developments have occurred following finalisation of the Hands and Williams report. These include:

- the partial implementation of Hands and Williams Report Recommendation 2 through the creation of a Pilot Project (see 6.1.3 for further detail);
- ongoing consideration of the recommendations by the Family Court Protocols Committee (which includes representatives of the Family Court, the Department and Legal Aid) to work towards the integration and stream lining of processes;
- certain officers of the Family Court²¹³ becoming prescribed authorities for the purposes of new information sharing powers in section 28B of the Act,²¹⁴ which enable enhanced information sharing between the relevant courts;
- the development and implementation of practice directions of the Family Court and Children’s Court in respect of information sharing,²¹⁵ and
- the development by the Family Court of a process for child protection applications, including the identification of designated judicial officers who will be allocated the cases, and information exchange processes.

²¹⁰ Hands and Williams, above n 207, ch 4.

²¹¹ Ibid 158.

²¹² *Farnell* [2016] FCWA 17 [662]–[671].

²¹³ *CCS Regulations*, r 20A.

²¹⁴ Introduced on 1 January 2016 under the *Child Protection Legislation Amendment and Repeal Act 2015*.

²¹⁵ To manage the significant quantity of information requests being sent to the Department, the Chief Judge of the Family Court issued a practice direction which limited the scenarios in which a subpoena seeking protection of documents by the Department would be granted, see Family Court of Western Australia, *Practice Direction No 1 of 2014 – Documents from the Department for Child Protection and Family Support*, 13 March 2014. Children’s Court of Western Australia, *Practice Direction No 1 of 2015 – Use of Children’s Court Documents in the Family Court of Western Australia*, 11 February 2015.

Family Law Council reports on families with complex needs and the Intersection of family law and child protection systems

As noted in submissions and in Chapter 4, two significant reports were produced by the Family Law Council in 2015 and 2016. These reports were published in response to the Commonwealth Attorney General's request that the Family Law Council report on five terms of reference relating to issues facing families with complex needs seeking to resolve their parenting disputes.²¹⁶ The Family Law Council delivered its response in two stages: an Interim Report in June 2015 made recommendations in relation to the first two terms of reference:

- 1) *The possibility for transferring proceedings between the Family and State and Territory courts exercising care and protection jurisdiction within current jurisdictional frameworks (including any legal or practical obstacles to greater inter-jurisdictional co-operations).*
- 2) *The possible benefits of enabling the family courts to exercise the powers of the relevant state and territory courts including the children's courts and vice versa, and any changes that would be required to implement this approach, including jurisdictional and legislative changes.*²¹⁷

The Final Report released in June 2016 related to terms of reference 3 to 5:

- 3) *The opportunities for enhancing collaboration and information sharing within the family law system, such as between the family courts and family relationship services.*
- 4) *The opportunities for enhancing collaboration and information sharing between the family law system and other relevant support services such as child protection, mental health, family violence, drug and alcohol, Aboriginal and Torres Strait Islander and migrant settlement services.*
- 5) *Any limitations in the data currently available to inform these terms of reference.*²¹⁸

Terms of reference 3 to 5 relate to opportunities for enhanced collaboration and information sharing and identifying any data limitations. Western Australia had already introduced measures to support better collaboration and information sharing which informed the Family Law Council's recommendations, including:

- a memorandum of understanding between the Family Court, the Department and Legal Aid, which has operated since 2008;²¹⁹
- since 2009, the co-location of a child protection worker at the Family Court Counselling and Consultancy Service who manages information sharing between, and liaises with, the Department, Legal Aid, the Family Court and Independent Children's Lawyers;
- significantly broadened information sharing provisions in section 28B of the Act, as recommended in the 2012 Review;
- the ongoing work of the Family Court Protocols Committee to improve practices and protocols between the two jurisdictions;
- practice directions issued by the Family Court and the Children's Court to streamline the admission of particular evidence and documents in each jurisdiction to facilitate more timely decisions; and
- The Family Court's processes for protection applications.

The benefits experienced by children and families, the stakeholders providing them with support, and the Courts as a result of these innovations, were a catalyst to the inclusion of this term of reference in the Review. Consequently, the Legal Working Group's deliberations and

²¹⁶ *Family Law Council's Final Report*, above n 130, 1.

²¹⁷ *Family Law Council's Interim Report*, above n 129, 1.

²¹⁸ *Family Law Council's Final Report*, above n 130, 1.

²¹⁹ Department for Child Protection, Family Court of Western Australia and Legal Aid Western Australia, *Memorandum of Understanding between the Family Court of Western Australia, the Department for Child Protection and Legal Aid Western Australia*, revised 2008 ('2008 Memorandum of Understanding').

recommendations focus on legislative amendments to streamline processes and alleviate issues in intersection cases, and align more closely with the Family Law Council's Interim Report.

6.1.3 Pilot project

Scope

The Pilot Project (the Pilot) was a joint initiative overseen by the Reference Committee to collect more detailed data on intersection cases. The Pilot has built momentum since commencing in 2014. It is anticipated it will conclude in 2017.

As part of the Pilot, the Department's Legal Division sought to identify cases in which it was appropriate, possible and in the best interests of the child for the Department to intervene in pre-existing Family Court proceedings to seek protection orders. It was understood the Pilot would not be able to capture all relevant cases; however, it was anticipated that the learnings from the cases included would inform future legislative reform to streamline and enhance the management of intersection cases.

There are a number of other circumstances in which the Department may become involved in Family Court proceedings without formal intervention. These include attending the Family Court to provide information either orally in Court or by provision of documents as requested. To complement the case studies compiled by the Department, the Family Court provided additional information on requests to attend court and/or provide information.

Information and data collected

In considering the Pilot data, the Review looked only at cases which were both active in the Family Court in 2016 and involved a protection application or a current protection order. These cases were included whether or not the protection application was maintained. A case was considered active in 2016 even if it commenced prior to 2016, or was finalised or ongoing post-2016.

Thirty cases were part of the Pilot and active in 2016. These cases can be categorised as follows:

1. In six cases the Department intervened directly in pre-existing Family Court proceedings without commencing proceedings in the Children's Court;
2. In three cases the Department commenced proceedings in the Children's Court, but subsequently intervened in pre-existing Family Court proceedings and withdrew its application in the Children's Court;
3. In seven cases the Department referred a party to Children's Court proceedings to the Family Court and withdrew in the Children's Court, but did not intervene in the Family Court proceedings;
4. In three cases the Department consented to the commencement of Family Court proceedings where there was a protection order currently in place;
5. In one case the Department made an application in the Family Court on behalf of a child currently on a protection order (until 18) to have sibling contact; and
6. In ten cases the Department was aware of pre-existing proceedings in the Family Court but chose to proceed with a protection application in the Children's Court.

To provide context for the number of cases in the Pilot, in 2015-2016 the Department filed 207 protection applications following the execution of a warrant under section 35 of the Act, and 523 protection applications following action taken without a warrant under section 37 of the Act.

There are a number of Family Court matters in which a protection application is not filed but the Department is still involved in the proceedings. For example, the Department may attend the Family Court as 'amicus' (friend of the Court) at the request of a judicial officer. Alternatively, the

Department may provide information in response to a Form 4 *Notice of Child Abuse or Risk of Child Abuse* (a Form 4) filed by a party to proceedings, or in response to a formal order²²⁰ by a judicial officer requesting information.

The Review requested Family Court data to supplement the information extracted from the Pilot. Data from its casetrack management system was extracted as at 2 February 2017 and provided to the Review on 31 May 2017. This data was supplemented by the Family Court's manual register, which is maintained to track pre-202K Family Court Act or pre-69ZW Family Law Act orders requesting information. Of the 2,002 final order parenting applications lodged in 2016:

- 775 had at least one Form 4 filed; and
- there were 602 orders requesting information from the Department under either section 202K Family Court Act or 69ZW Family Law Act, or in the form of pre-202K Family Court Act or pre-69ZW Family Law Act orders.

According to Legal Aid records, there were 717 Independent Children's Lawyers appointed in 2016/2017. This is an increase of 23 per cent from the previous year. In a majority of these cases a 69ZW/202K order or a pre 69ZW/202K was made.

Limitations on the data

There are a number of limitations regarding the data the Review examined and it should therefore be used as a guide only:

- At times the Department commences protection proceedings in the Children's Court and is unaware of pre-existing Family Court proceedings. This may occur due to the very short legislative timeframes (two working days) in which the Department must file a protection application following bringing a child into provisional protection and care with or without a warrant.²²¹ In addition to drafting documents for court, child protection workers undertake a number of tasks to ensure children's safe placement and have limited knowledge of how to access this information from the Family Court.
- There is no automatic mechanism which alerts the Department to Family Court proceedings, and obtaining information about current Family Court orders is not a standard part of the Department's intake process.²²² By the time the Department becomes aware of Family Court proceedings the matter may have significantly progressed in the Children's Court. System limitations mean it is difficult to retrospectively quantify these cases accurately.
- The data and tracking of cases occurred manually following a review of the Department's electronic, and where necessary physical, files. Systems are not setup to collect Family Court information, including existing Family Court orders or proceedings. Data collection was further complicated by the Department's introduction of new legal software mid-2016, resulting in the information on a number of relevant cases being split between two electronic systems.

Nevertheless, a number of the individual cases provide useful illustrations of the current legislative obstacles that exist between the two jurisdictions. Pilot cases are used as case studies throughout this chapter.

6.1.4 Legal Working Group

This term of reference required detailed consideration of the interaction of multiple state and Commonwealth Acts. In acknowledgment of the complex legal nature of the issues, a separate working group of government and non-government stakeholders with legal expertise was tasked

²²⁰ A request made under section 202K *Family Court Act* /69ZW *Family Law Act* or Pre 202K *Family Court Act* /69ZW *Family Law Act*.

²²¹ CCS Act ss 38 and 36.

²²² The Family Court has set up an email and phone number that could be used by the Department to check the existence of Family Court matters; however, this is not currently common practice. Requiring the Department to contact the Family Court prior to filing a protection application in the Children's Court, and any necessary amendments to the *2008 Memorandum of Understanding*, should be considered.

with responding to this term of reference. Two submissions expressly supported the establishment of this group.²²³

Deliberations

In considering this term of reference the Legal Working Group considered:

- extracts from submissions to the Review which addressed this term of reference;
- data and case studies from the Pilot and information provided by the Family Court;
- recommendations of the Hands and Williams Report in light of subsequent developments and the Family Court's submission to the Review; and
- the extensive expertise and legal experience of the Legal Working Group's members in working with families across the two jurisdictions.

In addition to the Interim Report and Final Report of the Family Law Council, a number of other relevant reports, cases and publications were also considered, including but not limited to:

- the 2008 Memorandum of Understanding between the Family Court, the Department and Legal Aid (revised June 2008);²²⁴
- the Family Law Council Report, *Improving the Family law system of Aboriginal and Torres Strait Islander clients* (February 2012) (Cth);
- a report by Professor Richard Chisholm AM, *Information-Sharing in Family Law & Child Protection; Enhancing Collaboration*, (March 2013);
- *Drake & Drake & Anor* [2014] FCCA 2950;
- *Farnell & Anor and Chanbua* [2016] FCWA 17; and
- the Commonwealth Exposure Draft: Family Law (Family Violence and Other Measures) Bill 2017.

Of the 37 submissions to the Review, 16 addressed term of reference 5. None opposed legislatively streamlining processes for cases that crossed the two jurisdictions. The Alliance and CYFAA, the Commissioner for Children and Young People and Mackillop Family Services made specific reference to the need to consider the findings and recommendations of the Family Law Council reports. SNAICC et al, Legal Aid, the Department's Child Protection Legal Unit, the Women's Law Centre and the Family Court made a number of substantive legislative recommendations, which will be referred to throughout this Chapter.

6.2 Long-term proposal

Examination of the issues in intersection cases has revealed the ideal solution to be the establishment of a one-court model, whereby all child protection and family law matters involving the same child/family are heard in one court. This approach lends itself to the establishment of a specialist division of the Family Court which deals with all child protection matters. A number of submissions addressing this term of reference considered the benefits of transferring the protection jurisdiction in its entirety to the Family Court.

Significant research and work has already been carried out canvassing the advantages and disadvantages of a single court hearing all child welfare related matters. This has been of great assistance to the Review. In *Bridging the Gaps between Family Law and Child Protection; Is a unified family court the key to improving services for children and their families in the family law system?*,²²⁵ Ms Jackson collated research from jurisdictions in the United Kingdom, Canada, the United States and New Zealand on the benefits and challenges associated with 'unified Family Court' models used in those jurisdictions to inform and recommend improvements to the Western

²²³ WACOSS; Australian Association of Social Workers.

²²⁴ 2008 Memorandum of Understanding, above n 219.

²²⁵ Julie Jackson, 'Bridging the Gaps between Family Law and Child Protection: Is a unified family court the key to improving services for children and their families in the family law system,' *Churchill Fellowship Paper*, the Department for Child Protection (2010).

Australian system. The paper outlined the benefits and challenges of this type of approach, including the following:

Benefits:

- *The family only has to go to the one place and all the information travels together*
- *Intake and triage processes that identify risk issues at an early stage...*
- *When individual case management (including problem solving courts) and the “one judge –one family” option is available.*
- *Judges have a broad skill set which enhances their ability to deal with all types of family matters...*
- *The use of private family law orders as the long term placement arrangement for children in care proceedings...*
- *Judges understand the criteria for the best interests of the child in all jurisdictions and the thresholds for the intervention of child protection authorities...*
- *The duplication of time, resources, information analysis and family assessments is minimised.*²²⁶

Challenges:

- *...limited resources and the need for improved triage processes at an early stage, to identify those cases which should be prioritised for individual case management...*
- *in some locations the jurisdictional arrangements of the courts managing family law and child protection matters are complex...*
- *where judicial officers are not appointed or elected to specialise in family law areas...*
- *where the protocols and processes for information sharing between the Courts, child protection agencies and other service providers are not timely and streamlined...*²²⁷

The concept of ‘one family one court’ underpins the submissions which proposed that the protection jurisdiction be transferred to the Family Court. As noted by Legal Aid, it was also the view expressed by the Australian Law Reform Commission and the NSW Law Reform Commission Report *Family Violence – A National Legal Response* (2010) that:

*...wherever possible matters involving children should be dealt with in one court – or as seamlessly as the legal and support frameworks can achieve in any given case...[to] ensure the child’s best interests and welfare are addressed.*²²⁸

Stakeholders consulted for the Family Law Council Interim and Final reports, cited the following concerns associated with the separation of systems:

*...cost and delay, confusion and uncertainty, duplication and inconsistency... concerns about anti-therapeutic effects, decisions being made without knowledge of previous orders, and disruption to the children’s attachment relationships and cultural connections.*²²⁹

Having concluded that, ideally, a single court should deal with all child-related matters, the Legal Working Group considered the appropriateness and benefits of this court being the Family Court.

6.2.1 Historical Context of the Children’s Court

Historically, the department responsible for child welfare was also responsible for youth justice and the administration of the Children’s Court.²³⁰ In 1982, *The Treatment of Juvenile Offenders*

²²⁶ Ibid 7-8.

²²⁷ Ibid 7-9. See also for a complete summary of the benefits and challenges for children, families, judges, courts and the system generally.

²²⁸ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, Final Report, No ALRC 114, (2010), 60.

²²⁹ *Family Law Council’s Interim Report*, above n 129, 29.

²³⁰ Department for Community Services, *Report of the Legislative Review: Laws for People*, Western Australia (1991), 2.

in the Justice System, commonly known as the Edwards Review,²³¹ recommended the transfer of the administration of the Children's Court from the then Department of Community Services to the then Crown Law Department. This occurred in 1988 through the introduction of the Children's Court Act. The possibility of the Family Court assuming child protection jurisdiction does not appear to have been considered in any great detail at the time.

Although children are involved in both child protection and juvenile justice, conceptually the two jurisdictions are very different. Juvenile justice is directed at addressing the criminal culpability of children, while child protection is focused on children's safety and wellbeing. A child may be both in need of protection and involved in the juvenile justice system, but the two matters are and should be dealt with separately in the Children's Court.

The vast majority of cases heard in the Children's Court are criminal prosecutions. Comparatively, a substantial number of Family Court cases involve applications for parenting orders in which the primary consideration is the best interests of the children, as is the case in protection proceedings. The Legal Working Group considered this distinction and the associated cultural differences, and agreed that conceptually the Family Court is a more appropriate jurisdiction for child protection matters.

6.2.2 Overlap of jurisdictions

Legal Aid's submission, citing the Hands and Williams Report, identified ten categories where the work of the Department and the Family Court intersect:

- (1) *CPFS has child welfare concerns and refers parents, grandparents or extended family members to FCWA to seek parenting orders;*
- (2) *Protection proceedings have commenced in the Children's Court and CPFS consent to parenting order proceedings being commenced or continued in FCWA;*
- (3) *A protection order is due to expire and CPFS consent to parenting order proceedings being commenced or continued in FCWA;*
- (4) *FCWA cases where child welfare concerns are identified and FCWA seeks information from CPFS;*
- (5) *There are parenting order proceedings on foot in FCWA, CPFS has concerns about the welfare of the child and works collaboratively with the Family Court Counselling and Consultancy Service, and the Independent Children's Lawyer but does not intervene or participate in proceedings;*
- (6) *CPFS commence protection proceedings in the Children's Court when there are parenting order proceedings already before FCWA;*
- (7) *FCWA proceedings are instituted to enforce conditions of a Children's Court protection order;*
- (8) *FCWA parenting order proceedings are on foot, CPFS have concerns about the welfare of the children and intervenes in the Family Court proceedings;*
- (9) *FCWA parenting order proceedings are on foot, FCWA has concerns about the welfare of the children and requests CPFS intervention but CPFS declines to intervene;*
- (10) *There are concurrent proceedings in FCWA and the Children's Court involving different children in the same family.*

The Legal Working Group also considered these intersection categories in combination with the Family Law Council's Interim and Final Reports, which sought to address the complex legal needs of families "*stemming from the separation of family law, family violence and child protection in Australia.*"²³² Transferring protection proceedings to the Family Court would address the separation of family law and child protection, but would only partially address issues associated with the management of FVRO matters.

²³¹ Eric Edwards, *The Treatment of Juvenile Offenders*, Department of Community Welfare Western Australia (1982).

²³² *Family Law Council's Interim Report*, above n 129, 1; *Family Law Council's Final Report*, above n 130, 1.

As the major rationale for transferring protection proceedings to the Family Court would be to reduce duplication of resources and confusion for the children and families who currently move between the Family Court, Children's Court and magistrate's courts in relation to FVRO issues, the civil jurisdiction of the Children's Court to make restraining orders protecting children also requires consideration.

The Department occasionally applies for FVROs to protect children in either the Children's Court or magistrates' courts. The Department's ability to apply for FVROs for children is not dependent on the child being in the care of the CEO (however described). No data is available on the number of cases where this occurs; however, anecdotally it is more common for the Department to encourage a protective parent to make an application for an FVRO for his or her child. The intention in these cases is to prevent the need for a child becoming the subject of protection proceedings.

Currently, the Family Court has the ability during proceedings to make protective injunctions²³³ and FVROs with some restrictions. Section 63 of the Restraining Orders Act allows a court hearing protection proceedings under the Act, or family law proceedings under the Family Court Act or the Family Law Act, to make an FVRO or personal violence restraining order against a party to proceedings or any person giving evidence in proceedings.²³⁴ If protection applications were made in the Family Court, this section of the Restraining Orders Act would be enlivened. However, the power conferred by this section does not extend to restraining persons who are not giving evidence, or who are not parties to the proceedings (that is, not to a step-parent), and requires the person to be present when the order is made. The latter restriction removes the possibility of obtaining an interim FVRO on an *ex parte* basis in this context.

Section 63 of the Restraining Orders Act applies equally in the Children's Court if an FVRO is sought during protection proceedings. Given the restrictions referred to above, FVROs are generally conducted separately to protection proceedings (i.e. not pursuant to section 63), even if they are both applied for in the Children's Court.

Despite the current limitations on the Family Court's ability to make FVROs, the Legal Working Group agreed that, on balance, these were not sufficient to outweigh the advantages of reducing the duplication of resources and challenges for families experiencing complex issues in the intersection cases.

In addition to the jurisdiction conferred by the Family Court Act and the Family Law Act, the Family Court also exercises child welfare related jurisdiction under a number of other Acts and conventions including the:

- *Adoption Act 1994*;
- *Surrogacy Act 2008*;
- *Hague Convention on the Civil Aspects of International Child Abduction*,²³⁵
- *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*,²³⁶ and
- *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*.²³⁷

²³³ *Family Court Act* s 235 and *Family Law Act* s 68B.

²³⁴ *Restraining Orders Act* s 63.

²³⁵ *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signature 25 October 1980, Hague Conference on Private International Law (entered into force 1 December 1983).

²³⁶ *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, opened for signature 29 May 1993, Hague Conference on Private International Law (entered into force 1 May 1995).

²³⁷ *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, Hague Conference on Private International Law (entered into force 19 October 1996).

Where a jurisdiction's primary focus is in child welfare related matters, this focus is reflected in the professional development and experience of the judicial officers, family consultants and support staff.

6.2.3 A specialist child protection division

The Legal Working Group also reflected on the specialist nature and requirements of protection proceedings and considered it would not be appropriate to simply incorporate child protection into the general lists of the Family Court. There is a level of immediacy in child protection cases that often requires legal applications to be heard urgently and processes to be streamlined. It was therefore considered that a specialist division of the Family Court should be created to deal with child protection applications. If protection proceedings are commenced during the course of current parenting order proceedings, the same Family Court magistrate or judge could continue to hear and determine the protection application.

6.2.4 Timeframe for the recommendation

The Legal Working group reached a consensus that, in-principle, the Family Court was a more appropriate jurisdiction for protection proceedings than the Children's Court, but acknowledged that significant resource, infrastructure and legislative issues would need to be addressed to enable this to happen.

The Hands and Williams Report did extensive work in articulating the resourcing, legislative and infrastructure requirements of a one court model. They would include at least one of each of the following dedicated solely to the child protection division: a courtroom with video conferencing; chambers; a conferencing room; a full-time judicial officer; a part-time judge to hear appeals; a family law secretary; and a court officer.

It was acknowledged there would need to be extensive consideration of the resources required to ensure regional Western Australia was adequately serviced under the new system. A number of submissions, including those supporting a transfer of jurisdiction to the Family Court,²³⁸ acknowledged these issues would have to be addressed during a transitional period and that in the current resource environment a complete integration might need to be considered as the long-term aim.

The Hands and Williams Report highlighted the advantages of fully integrating the protection jurisdiction into the Family Court, but noted the significant legislative and process reforms, as well as infrastructure, human resource and funding issues, that would need to be overcome before this could occur.²³⁹ In 2016, the median time to trial for parenting matters in the Family Court was 91 weeks.²⁴⁰ Comparatively, the Children's Court has reduced the time between the listing date and final hearing for protection proceedings to three to four months. This has occurred through the introduction of Review Hearings.²⁴¹ In addition, the Children's Court has adopted a number of procedural approaches which have been successful in assisting protection proceedings to be concluded expeditiously in order to minimise the effect of proceedings on children and families. These streamlined procedures should be considered in the context of work to establish any future specialist division of the Family Court. However, a specialist child protection division, separate from other matters in the Family Court, might in itself help to address this issue.

Additionally, anecdotally the Family Court is not the preferred jurisdiction of Aboriginal people, as indicated in the community consultations,²⁴² submissions to the Review²⁴³ and recent reports.²⁴⁴

²³⁸ Legal Aid; Family Court; Department's Child Protection Legal Unit.

²³⁹ Hands and Williams, above n 207, 125 – 134.

²⁴⁰ Family Court of Western Australia, *Annual Review 2016* (2016), 5.

²⁴¹ Review Hearings are an initiative introduced by the President of the Children's Court akin to readiness hearings. All matters set for trial in the Children's Court are listed before the President of the Children's Court, for a Review Hearing to determine whether settlement can be achieved or the matter should proceed to trial.

²⁴² Geraldton; Kununurra; West Kimberley.

The Family Court has been working to address this through steps to implement the recommendations of the Family Law Council report, *“Improving the Family Law System for Aboriginal and Torres Strait Islander Clients”*.²⁴⁵ See 13.5 for further consideration of this issue.

As noted in the Family Court’s submission, the *“legislative, financial and administrative implications”* would need to be considered alongside the practical and cultural concerns in implementing a recommendation that incorporates protection proceedings into the Family Court. The Legal Working Group agreed this should be a long-term recommendation, and that interim recommendations aimed at reducing the impact of separate family law and child protection jurisdictions for children and families involved in both, should also be considered.

Recommendation 27

In principle, all child protection matters should be heard in a specialist division of the Family Court. This should occur as soon as is practicable after legislative, procedural, resourcing and practical issues have been addressed. Any future specialist division should be responsive to the cultural needs of Aboriginal people.

6.3 Interim streamlining measures

Until the necessary infrastructure, amendments and resource implications are resolved to enable all protection proceedings to be heard by a specialist division of the Family Court, or if Recommendation 27 is not implemented, the following recommendations aim to streamline the management of child protection and family law intersection cases in the interim. As far as possible, the recommendations aim to enable all child-related matters in respect of a family to one be heard in one court, whether that be the Children’s Court or the Family Court.

6.3.1 Protection applications in the Family Court

Many of the submissions noted the unique position of the Family Court in Western Australia. However, a lack of clarity about the current powers of the Family Court to make protection orders was apparent. The case of *Farnell* has provided important guidance in relation to this issue. However, legislative amendment to ensure clarity is recommended.

The Children’s Court Act provides the Children’s Court with exclusive jurisdiction to hear and determine all applications made with respect to a child under the Act. In reality, while the vast majority of protection applications are made in the Children’s Court, the Family Court does have some jurisdiction to hear protection applications when the CEO intervenes in existing proceedings and files a protection application. Historically, the Department has chosen to file protection applications in the Children’s Court, but in accordance with the Pilot (see 6.1.3) a small number of protection applications are now being made in the Family Court.

The Family Court has jurisdiction to make protection orders following intervention and application by the Department. Section 36(6) of the Family Court Act states:

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.

²⁴³ Mackillop Family Services; Department’s Child Protection Legal Unit.

²⁴⁴ *Family Law Council’s Interim Report*, above n 129, 34; see generally Family Law Council, Report to the Attorney-General on *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*, Final Report (February 2012).

²⁴⁵ Family Law Council, Report to the Attorney-General on *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*, Final Report (February 2012).

Section 45 of the Act sets out the circumstances in which the Children's Court has the power to make a protection order.

Section 45 – Court may make a protection order

If, on a protection application, the Court finds that the child's is in need of protection the Court may, subject to this Part –

(a) make the protection order sought in respect of the child; or

(b) make another protection order in respect of the child.

The Children's Court power to make protection orders relies on the Department or another person entitled to do so making an application under the Act.

The Department may intervene in Family Court proceedings either at the request of the Family Court, if the proceedings "*may affect the welfare of a child*", or if the child subject to proceedings is in need of protection as defined in the Act.²⁴⁶ There are no provisions expressly allowing the Department to make a protection application in the Family Court in the absence of existing proceedings. It can, however, apply for Family Court orders under family law legislation if appropriate. Although not entirely clear under the current legislative regime, one interpretation is that the Department's capacity to make an application for a protection order in the Family Court is linked to its intervention in pre-existing proceedings. Legislative amendments are required to ensure clarity on this issue.

The Legal Working Group considered the benefits of legislation enabling the Department to file a protection application in the Family Court in certain circumstances where no current proceedings are underway. The Department's Child Protection Legal Unit submitted that the Department should be able to initiate protection proceedings in the Family Court when there are pre-existing proceedings relating to the child's siblings. The case study below demonstrates the relevant issues.

Case Study 1

The Department brought three children into provisional protection and care under section 37 of the Act because the children were in immediate and substantial risk of harm as a consequence of physical abuse, emotional abuse and neglect. The children were living with Ms A and her current partner, Mr B, the father of one of the children. Mr C, the father of the other two children, was a former partner of Ms A.

Ms A and Mr C had ongoing proceedings and an extensive history in the Family Court. After bringing all three children into provisional protection and care, but before applying for protection orders in the Children's Court, the Department became aware of the pre-existing Family Court proceedings between Ms A and Mr C.

The Department could have intervened in the Family Court proceedings and filed protection applications for two of the children, but there were no pre-existing proceedings in the Family Court in respect of the third child. Therefore, in light of the two working-day timeframe for filing protection applications, the decision was made to file all three applications in the Children's Court. Subsequently, the Department encouraged Mr C to resume proceedings in the Family Court and the siblings matters became separate, with two proceeding in the Family Court and one continuing in the Children's Court.

Had the Department been able to file a protection application for the third child on the basis that the siblings were the subject of active Family Court proceedings, all three protection applications could have proceeded in the one court. This would have prevented the separation of cases and the existence of concurrent proceedings in both courts with three of the same parties.

²⁴⁶ *Family Court Act s 207; Family Law Act s 91B.*

The Legal Working Group agreed the Department should be able to file a protection application in the Family Court despite there being no current proceedings, provided there have been previous proceedings in respect of a child or sibling of a child. This would be more efficient.

Recommendation 28

The relevant legislation should be amended to enable the Department to apply for a protection order in the Family Court of Western Australia in respect of a child if the child or the child's siblings have previously been, or are currently the subject of, Family Court proceedings.

6.3.2 Transfer of proceedings to the Family Court

The Family Court can make parenting orders dealing with all aspects of the care of a child, including orders setting out the person(s) with whom the child is to live or spend time with, the allocation of parental responsibility (shared or otherwise) and the communication a child is to have with particular persons.

Section 202 of the Family Court Act deals with the limitations on the Family Court to make parenting orders in respect of a child who is in the 'care or control (however described)' of the CEO.

202. Child welfare laws not affected — Family Law Act s. 69ZK

- (1) A court must not make an order under this Act (other than an order under Division 7) in relation to a child who is under the control or in the care (however described), of a person under a child welfare law unless —
- (a) the order is expressed to come into effect when the child ceases to be under that control or in that care; or
 - (b) the order is made in proceedings relating to the child in respect of the institution or continuation of which the written consent has been obtained from a person who, under the relevant child welfare law, has responsibility for the control or care (however described) of the child.

This includes a child who is on a protection order or in provisional protection and care while proceedings in the Children's Court are underway. In *Farnell & Anor v Chanbua*,²⁴⁷ the Chief Judge of the Family Court found that section 202 of the Family Court Act did not prevent the Family Court from making orders in respect of a child who is the subject of a protection order (supervision).²⁴⁸

In practice, if a protective parent or relative is identified during protection proceedings, the Department often encourages that person to apply for parenting orders in the Family Court. The Department provides a letter of support to satisfy the requirements of section 202 of the Family Court Act. The letter indicates the Department's unconditional consent to proceedings in the Family Court, and its intention to withdraw the protection proceedings in the Children's Court. The Department may or may not subsequently seek to intervene in the Family Court proceedings.

Alternatively, if a protection order (time-limited) is in place, the Family Court may make a parenting order which comes into effect following the expiry of the protection order. In practice, however, to ensure the Family Court has jurisdiction to deal with the matter, it usually requires confirmation the Department is not intending to revoke and replace the protection order. The current inability to transfer proceedings from the Children's Court to the Family Court creates

²⁴⁷ *Farnell* [2016] FCWA 17, [332].

²⁴⁸ In drawing this conclusion His Honour considered sections 30 and 50 of the Act, which provide when a child is in the CEO's care and conditions of a protection order (supervision), respectively. See *Ibid*.

delay and uncertainty because of the need for the preferred carer to initiate Family Court parenting order proceedings and obtain interim parenting orders.

In the Children's Court, a child may be under the provisional protection and care of the CEO as a result of an application for a protection order within the legislative timeframes, or a Children's Court interim order that the child is brought into/or remains in provisional protection and care.²⁴⁹ In either situation, if the Department withdraws its protection application before any interim orders are made in the Family Court, the child would no longer be protected from risk of harm by their provisional protection and care status.

The relevant family law provisions²⁵⁰ require the Department to unconditionally submit to the jurisdiction of the Family Court when consenting to the institution of proceedings (that is, the Department should not make its consent conditional on the making of an interim parenting order which meets the approval of the Department in respect of the care arrangements for the child/ren). Traditionally, the Department's approach has been to agree to withdraw the protection application in the Children's Court following the making of any interim orders in the Family Court.

This problem could be resolved by enabling the Children's Court to transfer proceedings to the Family Court, including the entirety of the file, the original application and any interim orders. This would ensure timely and efficient case management and prevent unnecessary duplication of court documentation and associated resources. It would also ensure the Family Court has the evidence required to make timely informed decisions in the best interests of children in relation to their care arrangements. The case study below illustrates how this issue can arise.

Case study 2

The Department took a young child into provisional protection and care under section 37 of the Act due to the significant risk posed to the child as a consequence of the father's extreme and repeated violence towards the child's mother putting her and the child at risk. The mother received legal aid for advice and representation in the Children's Court proceedings. The Department wanted to assist the mother to create sufficient safety to allow the child to return to her care. It also took out an FVRO protecting the child from the father. The matter progressed for several months until the Children's Court magistrate determined the Family Court was the appropriate jurisdiction, following the making of an interim placement order in favour of the mother.

The Department withdrew its protection application in the Children's Court. Subsequently, the father filed an application in the Family Court and the Department intervened following an invitation from the Family Court. The Magistrate in the Family Court made interim holding orders that the child live with the mother and have no contact with the father; to maintain the status quo until the case could be further considered. The matter is now proceeding in the Family Court with the same parties to the original protection proceedings, comparable interim orders to those made by the Children's Court and the re-filing of substantively the same evidence.

In this case study, there was substantial delay and resource duplication in order to get to parties to a position in the Family Court proceedings which mirrored the position arrived at in the Children's Court several months earlier. This could have been avoided if the Children's Court had been able to transfer the matter directly to the Family Court.

Although it was the father who initiated proceedings in the above case study, as identified in the Women's Law Centre submission to the Review, it is often very challenging for women experiencing family violence to have to navigate multiple courts. Requiring a person to initiate Family Court proceedings in circumstances where they are experiencing family violence places an additional burden on the victim. This could be avoided if Recommendation 29 below is implemented.

²⁴⁹ CCS Act ss 29, 35, 37, 133(2)(b).

²⁵⁰ Family Court Act s 202; Family Law Act s 69ZK.

Recommendation 29

The relevant legislation should be amended to give the Children's Court the power to transfer protection proceedings to the Family Court by the Court's own motion or on application of a party, if it is in the best interests of the child and:

- (a) it is in the interests of justice; or
- (b) of convenience to the parties.

This transfer should include the entirety of the file and any interim orders.

6.3.3 Powers of the Children's Court

The Children's Court has no power to make parenting orders or transfer proceedings to the Family Court. The Act enables the Court to make a protection order removing parental responsibility from both parents in favour of either the Department or a third party,²⁵¹ or a protection order (supervision), which does not alter parental responsibility.²⁵² Under the Act, a court cannot make a protection order which allocates parental responsibility between parents or creates a situation of shared parental responsibility between parents and non-parents. In the absence of any court order to the contrary, parents have shared parental responsibility for a child.

The Family Law Act does confer some federal family law jurisdiction to make parenting orders on state and territory courts of summary jurisdiction.²⁵³ The Governor-General can place limits on this conferred jurisdiction by proclamation.²⁵⁴ Magistrates' courts in Western Australia are courts of summary jurisdiction. The powers of these courts to make parenting orders under the Family Law Act is limited if they are not 'family law magistrates'.²⁵⁵

In addition, since 1 July 2006 the jurisdiction of metropolitan magistrates' courts has been further limited by Proclamation. The *Jurisdiction of Courts of Summary Jurisdiction (Matrimonial Causes) Proclamation 2006* (Cth) (the 2006 Proclamation) states:

On and after 1 July 2006, the proceedings set out in subsection 39(6) of the Act may not be instituted in, or transferred to, a court of summary jurisdiction in the Perth metropolitan region, other than the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia.

The Children's Court is based in the Perth metropolitan region, and is not a magistrates' court of Western Australia constituted by family law magistrates. However, for completion, a court of summary jurisdiction is defined by the Commonwealth as "any justice of the peace, or magistrate of a State or Territory, sitting as a court of summary jurisdiction."²⁵⁶ Whether or not a court is sitting as a court of summary jurisdiction is dictated by the statute under which it is created. It is clear from the Children's Court Act that Perth Children's Court sits as a court of summary jurisdiction for the purposes of criminal proceedings²⁵⁷ but the same is not true for protection matters.²⁵⁸

²⁵¹ CCS Act ss 43, 54, 57, 60.

²⁵² Ibid s 47.

²⁵³ Family Law Act s 69J.

²⁵⁴ Ibid s 69J(3).

²⁵⁵ A family law magistrate is a person who concurrently holds office as a magistrate under the *Magistrates Court Act 2004* (WA) and as a registrar of the Family Court of Western Australia; *Family Law Act* s 4.

²⁵⁶ *Acts Interpretation Act 1901* (Cth) s 2B.

²⁵⁷ *Children's Court of Western Australia Act 1998* s19(3) ('*Children's Court Act*').

²⁵⁸ Section 42 of the *Children's Court of Act* implies that the Children's Court hearing matters under the Act is not sitting as a court of summary jurisdiction, by stating that decisions made by the Children's Court under the Act will be appealed in accordance with the *Criminal Appeals Act 2004* "as if it were a decision by a court of summary jurisdiction."

The Commonwealth Attorney General's Department recently disseminated draft legislation and a discussion paper for feedback from stakeholders. Pursuant to the provisions of the draft Family Law (Family Violence and Other Measures) Bill 2017, the Commonwealth proposes to enable a state or territory court to be prescribed in regulations and conferred the same powers as courts of summary jurisdiction under Family Law Act.²⁵⁹ This is in line with Recommendation (1)(i) of the Interim Report:

*That section 69J and section 69N of the Family Law Act be amended to remove any doubt that the children's courts, no matter how constituted, are able to make family law orders under Part VII of the Family Law Act in the same circumstances that are currently applicable to courts of summary jurisdiction.*²⁶⁰

The Children's Court could be prescribed if this section comes into effect. However, the 2006 Proclamation would still require amendments to implement some of the Review's recommendations below.

Legal Aid, the Department's Child Protection Legal Unit and the Family Court all submitted that the Children's Court should be able to make final parenting orders in circumstances in which the parties consent to the Children's Court hearing and determining the family law matters. This would be equivalent to the powers of regional magistrates in relation to family law matters. However, even where parties consent to regional magistrates hearing a matter they still have discretion to transfer the proceedings to the Family Court. Therefore, in reality, regional magistrates rarely deal with family law matters beyond the interim stage unless the parties consent to proposed orders, possibly because the regional magistrates lack the resources, capacity and infrastructure to hear a family law trial. This may also become the reality for the exercise of any equivalent power by the Children's Court. Additionally, there is good reason to enable the Children's Court to make interim parenting orders following a contested final hearing which results in the Department's protection application being dismissed or no order being made by virtue of section 46 of the Act.

Enabling the Children's Court to make parenting orders by consent would enable it to expeditiously resolve child protection cases in which: there is a protective parent or family member; all parties consent; and the Court determines the proposed arrangements are in the best interests of the child. This would prevent duplication and delay, and reduce the resource demands associated with the current jurisdictional arrangements.

Equally, if the Children's Court has the benefit of all the evidence presented during a trial and determines the protection application should be dismissed or no protection order made, it should have discretion to make interim parenting orders which ensure that stable and safe arrangements are in place for the child/ren pending consideration by the Family Court of the appropriate long term care arrangements.

The Legal Working Group considered whether the Children's Court should also be able to make parenting orders in conjunction with a protection order (supervision), following a contested final hearing. It is clear from the Chief Judge of the Family Court's judgment in *Farnell* that the existence of a protection order (supervision) does not preclude the making of parenting orders by the Family Court: the parenting orders could continue beyond the expiration of the protection order (supervision).²⁶¹ Although the case study below is a Family Court case, it illustrates some of the benefits of making parenting orders in conjunction with a protection order (supervision).

The Review considered it beneficial to enable the Children Court to make interim parenting orders in conjunction with protection orders (supervision) where there is a serious risk posed by one of the parents. With sufficient supports and supervision for a period, the other parent could safely care for the child. In this situation, the long-term safety of a child, beyond the duration of

²⁵⁹ Family Legislation Amendment (Family Violence and Other Measures) Bill 2017: Exposure Draft (Cth), 2.

²⁶⁰ *Family Law Council's Interim Report*, above n 129

²⁶¹ *Farnell* [2016] FCWA 17, [332].

the protection order (supervision), would likely require interim parenting order and proceedings to be transferred to the Family Court to enable the safe parent to seek a long-term parenting order. Any interim parenting orders made in the Children's Court and transferred to the Family Court would not be affected by the expiration of a protection order (supervision).

Recommendation 30

- (1) The relevant legislation should be amended to enable the Children's Court to exercise family law jurisdiction:
 - (a) to make parenting orders in the course of protection proceedings, if all parties consent to the Children's Court hearing and determining the matter; and
 - (b) following a final hearing in which the Department's protection application is dismissed (or no order is made) or a protection order (supervision) is granted, to make any interim parenting orders necessary for the safety and wellbeing of a child until the Family Court can hear the matter.
- (2) If the Children's Court makes a final parenting order, it should be automatically registered in the Family Court.
- (3) If the Children's Court makes an interim parenting order, the matter in its entirety should be transferred to the Family Court.

By way of summary, the case study below illustrates several of the jurisdictional barriers that currently impact on intersection cases and how the above recommendations could overcome them.

Case study 3

Two children were taken into provisional protection and care and protection applications were filed in the Children's Court early 2016. Both children have the same mother (Ms X) but different fathers Mr Y and Mr Z). There were pending parenting order proceedings Family Court in relation to the child of Ms X and Mr Y, but no proceedings in relation to the child of Mr Z.

Early in the Children's Court proceedings, the Department placed both children with Mr Y and encouraged him to re-initiate proceedings in the Family Court in relation to his biological child. Mr Y did initiate Family Court proceedings and the Department intervened. With the support of the Independent Children's Lawyer, the mother and the Department, Mr Y obtained parenting orders that his biological child live with him and spend time the mother. Meanwhile, the Department preceded with the protection applications for the child of Ms X and Mr Z in the Children's Court.

This case illustrates a number of the current obstacles the proposed amendments aim to overcome: there were concurrent proceedings in the Family Court and the Children's Court for the same sibling group; the respondent mother, child representative/independent children's lawyer, and the Department were all parties to both proceedings; and there was duplication of documentation between the two courts.

Under Review Recommendations 30 and 31, the following options would have been available:

- the Department could have made protection applications for the children directly in the Family Court; or
- if heard in the Children's Court, the Children's Court could have made parenting orders by consent, preventing the need for Mr Y to re-initiate proceedings in the Family Court and the subsequent intervention by the Department, or it could have transferred the matters to the Family Court.

The case study below illustrates the benefits of making parenting orders and protection orders within the one jurisdiction.

Case study 4

Legal Aid was appointed as an Independent Children's Lawyer in proceedings before the Family Court. The child (an infant) was living with the father and spending supervised time with the mother. Those care arrangements were supported by the Department given the mother had a history of unmanaged mental health and older children who were in care. Part way through the proceedings, the parents reconciled. The Department continued to be concerned about the mother's mental health and intervened in the proceedings seeking a protection order (supervision) in the Family Court.

The Family Court proceedings were adjourned to a Signs of Safety Pre-Hearing Conference, and as a result a safety plan was developed in relation to the mother's time with the child. The parties also agreed the mother should undergo an integrated parenting capacity assessment. As a result, the Department was reassured there were no longer any protection concerns and withdrew its application for a protection order (supervision). The parents had separated again at that stage, and Family Court parenting orders were finally made.

6.3.4 Interim orders

A number of legislative principles and procedural requirements under the Act differ to those set out in the Family Court Act and the Family Law Act. For example:

- While the Family Court Act²⁶² and Family Law Act²⁶³ contain provisions creating the right of an Aboriginal child to enjoy his or her culture, they do not contain the placement hierarchy in section 12 of the Act.
- Under family law legislation an Independent Children's Lawyer may be appointed in family law proceedings, but this lawyer is required to act in the best interests of the child and is not obliged to act on the child's instructions.²⁶⁴ It is possible for an application to be made for a child to be represented on instructions but such applications are rare. Under the Act a child's legal representative is required to act on the instructions of a child who has sufficient maturity and understanding to give them and wishes to do so.²⁶⁵ The *Guidelines for Child Representatives in Child Protection Proceedings* endorsed by the Children's Court address some of the child representation issues in intersection cases.²⁶⁶
- Under the Act, if a child is to be placed with a person other than a parent on an interim basis, the Department provides a report on that person's suitability before the Court is able to make an order.²⁶⁷ There is no equivalent requirement under the Family Court Act or the Family Law Act, although the Family Court would not make such an order unless there was evidence before it supporting the making of that order.

Additionally, if implemented, a number of the Review's recommendations will strengthen child participation and the importance of maintaining connection to family and culture for Aboriginal children.

It is important that children who are the subject of protection proceedings are treated consistently under the law, whether the application is made in the Children's Court or the Family Court. Currently, all interim orders made under the Act are made on the basis of the child's best interests, pending a final determination as to whether or not a child is in need of protection.²⁶⁸

²⁶² Family Court Act s 66C.

²⁶³ Family Law Act s 60CC.

²⁶⁴ Family Court Act s 165(4); Family Law Act s 68LA.

²⁶⁵ CCS Act s 149.

²⁶⁶ Legal Aid Western Australia, *Guidelines for the Child Representatives in Protection Proceedings*, Western Australia endorsed by the Children's Court of Western Australia and Family Court of Western Australia (11 April 2017) para 5.3 ('*Guidelines for the Child Representatives in Protection Proceedings*')

www.childrenscourt.wa.gov.au/G/guidelines_child_representatives.aspx?uid=3196-5862-1946-8.

²⁶⁷ CCS Act s 133(2)(c).

²⁶⁸ It is not a requirement that a child be found to be in need of protection at a final hearing if the application is to revoke, revoke and replace, or extend a pre-existing protection order. These applications are decided on a best interests basis at a final stage, see *Ibid* ss 56, 67, 68.

The Legal Working Group considered that until a court concludes the protection proceedings, all interim orders should be made in accordance with the Act to the extent of any inconsistency.

Recommendation 31

In the event of any inconsistency between the provisions of the Act and the *Family Court Act 1997* or the *Family Law Act 1975*, a court must, to the extent of the inconsistency, comply with the provisions of the Act.

6.3.5 Special Guardianship Orders – registration and enforcement of conditions

SGOs vest parental responsibility for a child with a special guardian/s.²⁶⁹ Unlike other types of protection orders, the Department usually has no ongoing involvement with a child who is the subject of an SGO other than the payment of a fortnightly subsidy to the special guardian (as prescribed in Regulations) if ordered by the Children’s Court. Also unique to an SGO is provision for the order to contain conditions for contact with family and significant others.²⁷⁰ Parties to initial SGO proceedings may apply to the Children’s Court for the variation, addition or substitution of conditions on SGOs, but in effect there is no ability to enforce an SGO contact condition in the Children’s Court.²⁷¹

Registration

It was intended SGOs be registerable and enforceable in the Family Court. This is because it may be necessary for a party to seek the enforcement of an SGO if a contact condition was breached, or if a recovery order or injunction is required. To be enforceable in the Family Court, an SGO must be registerable as a ‘state child order’ pursuant to the terms of the Family Law Act and the Family Court Act.

Section 5(1) – Terms Used - Family Law Act 4(1)

State child order means an order made under the law of a State that —

- (a) however it is expressed, has the effect of determining the person or persons with whom a child who is under 18 is to live, or that provides for a person or persons to have custody of a child who is under 18; or
- (b) however it is expressed, has the effect of providing for a person or persons to spend time with a child who is under 18; or
- (c) however it is expressed, has the effect of providing for contact between a child who is under 18 and another person or persons, or that provides for a person or persons to have access to a child who is under 18...

It was anticipated all SGOs would be considered to be state child orders within the definitions of the Family Law Act and the Family Court Act. However, this has not been the experience of the operation of the relevant provisions of these Acts.

The Department recently requested registration of an SGO in the Family Court and the request was declined. The Family Court informed the Department that SGO was not registerable under section 204 of the Family Court Act and Rule 33 of the Family Court Rules²⁷² because it related solely to the allocation of parental responsibility and therefore did not fall within the definition of state child order. The SGO in question did not contain any contact conditions, and was not considered by the Family Court to constitute an order which determines with whom the child should live, who had custody of the child or who was to spend time with the child.

²⁶⁹ CCS Act s 60.

²⁷⁰ CCS Act s 63.

²⁷¹ CCS Act s 64.

²⁷² *Family Court Rules 1998*.

However, it is likely that an SGO which included a contact condition would fall within subsection (c) of this definition. As such orders can only be registered for the purpose of enforcement, the terms of the contact condition would need to be specific enough to be enforceable in order to be registerable. The Legal Working Group considered the relevant legislation should be amended to ensure all SGOs can be automatically registered in the Family Court.

Recommendation 32

A protection order (special guardianship) made by the Children's Court should be automatically registered in the Family Court.

Variation of conditions on protection orders (special guardianship)

As there are no enforcement provisions in the Act, there is potential for proceedings to be required in both Courts: an application for the enforcement of contact conditions on SGOs would need to be made in the Family Court, but application for a variation of the same contact condition must be made in the Children's Court. The Legal Working Group agreed this disconnect should be remedied and that a person should be able to apply to vary and/or to seek enforcement of contact conditions on an SGO in the Family Court. However, consensus was not reached as to whether the Family Court should be given the power to alter conditions on SGOs in addition to, or to the exclusion of, the Children's Court.

Legal Aid considered that once an SGO was made, any child protection concerns were resolved and there would be no further role for the Children's Court. This would mean the Family Court should have exclusive jurisdiction over any addition, variation or substitution of contact conditions on SGOs.

The Aboriginal Legal Service and Aboriginal Family Law Services agreed the Family Court was the most appropriate jurisdiction, but considered parties should not be limited to the Family Court if they wished to make an application in the Children's Court. The Department considered it also appropriate to have the option to apply in the Children's Court. An example would be a variation by consent shortly after an SGO is made.

If Recommendation 51 to enable additional conditions on an SGO is implemented, the Legal Working Group considered that enforcement and variation of all conditions allowable on SGOs should occur by the same mechanisms.

Recommendation 33

The Family Court should be able to hear and determine an application for the variation, addition or substitution of conditions on a protection order (special guardianship).

Who should be able to apply for variation, addition or substitution of contact conditions on an SGO?

Under section 64(4) of the Act, the Children's Court may only vary, add or substitute a condition on a SGO following an application of a party to the initial proceedings if:

- (a) new facts or circumstances have arisen since the condition was imposed or last varied; or
- (b) with consent of all parties to the initial proceedings including the child, if the child was represented or has sufficient maturity and understanding to consent.

The definition of 'party to initial proceedings' in relation to a protection order means a person who is a party to the protection proceedings in which the order was made. Therefore, for the purposes

of section 64, even if the application was an application to revoke a pre-existing protection order and replace it with an SGO, a special guardian would still be considered a party to the initial proceedings. However, a contact condition may be made in favour of a person who was not a party to the initial proceedings or following the making of an SGO a relative or person who is significant to the child may wish to seek a new contact condition. It was agreed that in both cases, applications in relation to contact conditions on an SGO should be possible.

Recommendation 34

Any person who is entitled to make an application for parenting orders in the Family Court should be able to make an application to vary, add, or substitute conditions on a protection order (special guardianship).

Legal Aid, the Aboriginal Legal Service, Aboriginal Family Law Services and Women's Legal Centre shared the view that, in the event the recommendations in this Report are implemented, it would no longer be necessary for the Children's Court and the Family Court to make SGOs. This is because the Courts would be able to make orders under the Family Law Act and Family Court Act in respect of parental responsibility, live with and spend time with arrangements, either on a final basis by consent or on an interim basis pending the transfer of proceedings to the Family Court.

CHAPTER 7 Promoting stability and continuity for children in care through permanency planning

7.1 Background

7.1.1 The 2015 Consultation

The *2015 Consultation* explored how the Act might better support the Department's out-of-home care reforms, including permanency planning timeframes for reunification with parents, while maintaining sufficient flexibility in the statutory child protection system to enable the best outcome to be achieved for every child.²⁷³ Options mooted for aligning the legislation more directly with the Department's permanency planning policy included:

- amending or introducing legislative principles underpinning the Act to provide a greater focus on permanency planning;
- re-focusing the purpose, timeframes and use of some protection orders; and
- re-naming of protection orders to better reflect their purpose.

Proposed permanency planning amendments were subsequently prepared for drafting and feedback on the consultation and resulting proposals was appended to the Department's *OOHC Reform Strategy* April 2016.²⁷⁴ Given this, the *Review Consultation Paper* did not further consult on permanency planning. Nevertheless, the Review received nine submissions on permanency planning.²⁷⁵ All but two of the organisations and one individual had made submissions to the *2015 Consultation*.

As the proposed permanency planning amendments were not drafted before the change of Government in March 2017, they were referred to the Review by the incoming Minister for consideration in the context of a review of the Act as a whole.

7.1.2 Permanency planning

While there is no universally accepted definition, permanency planning is described as a systematic, goal directed and timely approach to case planning²⁷⁶ in order to achieve safe, continuous and stable living arrangements, quality relationships, identity and a sense of belonging for children in care.

*Given the knowledge that children in care who experience multiple care arrangements are more likely to demonstrate poor outcomes in adulthood, the primary focus of permanency planning is to prevent children 'drifting' in care from one care arrangement to another, or through multiple attempts at reunification.*²⁷⁷

*Permanency planning is not only about placement. The three aspects of permanency are: relational, physical and legal. Relational permanence refers to children having the opportunity to experience positive, caring and stable relationships with significant others – this is very important to children; physical permanence denotes stable living arrangements; and the legal dimension pertains to court endorsed arrangements that facilitates stability in the child's best interest (Sanchez, 2004; Stott & Gustavsson, 2010 cited in Tilbury and Osmond 2012).*²⁷⁸

²⁷³ *2015 Consultation Paper*, above n 5.

²⁷⁴ *Building a Better Future*, above n 19, 67.

²⁷⁵ Aboriginal Family Law Services; Aboriginal Legal Service; the Alliance and CYFFA; Commissioner for Children and Young People; Department's Child Protection Legal Unit; SNAICC et al; WACOSS; Women's Law Centre; private individual.

²⁷⁶ Clare Tilbury and Jennifer Osmond, 'Permanency Planning in Foster Care: A Research Review and Guidelines for Practitioners' (2006) 59(3) *Australian Social Work* 265, 265-280.

²⁷⁷ Department for Child Protection and Family Support, *Permanency Planning Policy* (2016) ('*Permanency Planning Policy*')

²⁷⁸ Clare Tilbury and Jennifer Osmond, 'Permanency Planning Concepts' (2012) 37(3) *Children Australia*, 100.

The concept of permanency planning first emerged during the 1970s in the United States in response to concerns about the effects on children of experiencing multiple unstable placements for extended periods of time in state care.²⁷⁹ Interest followed in the United Kingdom where legislation enabling easier adoption from care has been in place for a number of years, including a renewed focus which resulted in legislation in 2002 enabling an adoption to occur within a short time frame of a child entering care and introducing a new type of order: protection orders (special guardianship).^{280 281}

In Western Australia, the 2007 Ford Review²⁸² of the then Department for Community Development recommended the development of a permanency planning policy in response to the issue of multiple placements for children in care. The Department's first permanency planning policy was introduced in 2010, informed by research and responses to a December 2008 consultation paper titled "Permanency Planning in Western Australia". Despite attempts to embed the policy in practice, in 2014 the policy was reviewed and in January 2015 a renewed approach to drive organisational change was adopted to promote a greater understanding of, and focus on, the importance of permanency planning and stability for children who enter the CEO's care.

Under the Department's policy, a case planning decision "*on whether reunification with parents is in a child's best interests must be made within:*

- *12 months of entering care for children who enter provisional protection and care at less than three years of age; and*
- *two years of entering care for all other children.*

For sibling groups the youngest child's age should direct the timeframe for decision making. For children on a protection order (until 18) permanent care is the only permanency plan."

However, while policy guides the Department's actions, it is the Children's Court which makes final decisions about children's permanency of care.

If reunification with a child's parents is not possible, a long-term care arrangement with extended family is always considered as the first option. When family care is not possible, alternative care arrangements which best suit the child's needs are explored. The long-term out-of-home care options available under the Act are:

- protection order (until 18) and stable placement with a family carer, significant other or a foster carer;
- protection order (special guardianship) with family, a significant other or foster carer.

Alternative long-term care arrangements for children can also be formalised through a parenting order under the Family Court Act or adoption by a relative, significant other or foster carer under the *Adoption Act 1994*.

The Department currently refers to the above orders as 'permanent orders' and the children under such orders as being in 'permanent care'.²⁸³ Legislatively, however, it is important to note that although these orders may be referred to as permanent orders in this Report and elsewhere, on application by a party to the order, a protection order (until 18) and protection order (special guardianship) can be revoked, or revoked and replaced with a different order, if the Court determines it is in the best interests of a child. With regard to adoption, in rare circumstances an adoption order may be discharged.

²⁷⁹ Australian Institute of Health and Welfare, 'Permanency planning in child protection' (2016) 64 *Child Welfare Services*, Canberra, 2 ('*Permanency Planning in Child Protection*').

²⁸⁰ Department for Child Protection, *Permanency Planning in Western Australia*, Consultation Paper, Western Australia (December 2008).

²⁸¹ Lenny Roth, *Permanency planning and adoption of children in out-of-home care*, Briefing Paper No 3 of 2012, Parliament of NSW (2012), 10.

²⁸² *Ford Review*, above n 184, Recommendation 39.

²⁸³ Department for Child Protection and Family Support, *Phases of care for children*, Fact Sheet, Western Australia (2016).

In 2015, the Department established a Permanency Planning Monitoring Framework to monitor the impact of its renewed implementation efforts, and in 2016 an Outcomes Framework for Children in Out-of-Home Care in Western Australia across six outcomes areas was also implemented:

1. Safe and stable – children living safely in stable care arrangements
2. Healthy – children have strong physical, social and mental health
3. Achieve – children attend, participate and achieve in quality education
4. Belong – children develop and retain a deep knowledge and understanding of their life history and identity
5. Included – children are included by the systems that support them
6. Future life outcomes – children leave care equipped with the resources to live productive lives.²⁸⁴

The Department's permanency planning policy, practice guidance and training are currently under a scheduled review. The policy review is being guided by: a national reform agenda; the need to review the impact of the policy in achieving children's stability and sense of belonging; and work to align the policy with the five elements of the ATSI Principle (discussed in Chapter Two of this Report). An advisory group has been established to contribute to the policy review comprising Aboriginal and advocacy representatives (Family Matters WA Working Group; Noongar Child Protection Council; Aarnja; Foster Care Association of WA; Family Inclusion Network; and CREATE).

7.1.3 National agenda

The National Standards of Out-of-Home Care establish that children should be provided with stability and security during their time in care: this means they are to experience security, stability, continuity of relationships and social support.²⁸⁵ Currently, one of the measures is stability [of placement]. As at 30 June 2016, 91 per cent of children in out-of-home care had one or two placements during the year.²⁸⁶

Permanency reform has become a national priority of the Community Services Ministers resulting from a 2015 Senate Community Services References Committee (the Senate Committee) report on Out-of-Home Care.²⁸⁷ The Senate Committee noted the varied approaches of states and territories to permanency planning, and the existing data gaps regarding the role of permanency planning. The Community Services Ministers have committed to developing a nationally consistent approach to permanency planning through a recent communique, which includes:

- *action to secure timeframes for permanent care decisions for children at all levels including child protection legislation and/or policy and practice, and national public reporting on permanency timeframes that are achieved.*
- *(developing) Guiding Principles for Best Practice in achieving permanency to guide these actions and ensure children's best interests are protected. Ministers also agreed to a shared Outcomes Statement for all governments to achieve timely and more consistent permanency decisions for children and young people.*

²⁸⁴ Department for Child Protection and Family Support, *Outcomes Framework for Children in Out-of-Home Care in Western Australia, 2015-2016 Baseline Indicator Report*, Western Australia (December 2016).

²⁸⁵ 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).

²⁸⁶ Australian Institute of Health and Welfare, *Indicator reporting for the National Framework for Protecting Australia's Children*, Web report (29 June 2017) www.aihw.gov.au/reports/child-protection/nfpac/data, National indicator 1.4.

²⁸⁷ Senate Community Affairs Committee Secretariat, *The Senate Community Affairs References Committee: Out of home care*, Canberra (August 2015) ('Senate of Community Affairs Reference Committee').

- *(investing) in the recruitment, training and support of more permanent carers, including kinship carers, and to work together to achieve a consistent national process for reunification of children with their families where it is safe to do so.*²⁸⁸

The Australian Institute of Health and Welfare (AIHW) has commenced addressing existing data gaps.²⁸⁹ In its comprehensive paper reviewing current concepts and available data, the AIHW notes the distinction between legal permanency achieved through orders and actual stability experienced by the child. Given the importance of promoting stability and permanency for children, the Community Services Ministers agreed to measure the progress of this work through a national data and evaluation framework.

7.2 Current legislation

The Act recognises the importance of maintaining relationship continuity, stability and timely planning and decision-making for a child's long-term care in a number of ways. In combination, the existing provisions (below) are intended to focus decision-makers' attention on every child's need for timely decision-making which supports stability and continuity in relationships, culture and identity and living arrangements.

Section 8 requires the following matters to be taken into account when determining what is in a child's best interests (among others):

- (g) *the importance of continuity and stability in the child's living arrangements and the likely effect on the child of disruption of those living arrangements, including separation from –*
 - (i) *the child's parents; or*
 - (ii) *a sibling or other relative of the child; or*
 - (iii) *a carer or any other person (including a child) with whom the child is, or has recently been, living; or*
 - (iv) *any other person who is significant in the child's life;*
- (h) *the need for the child to maintain contact with the child's parents, siblings and other relatives and with any other people who are significant in the child's life.*

Relevant principles that must be observed under **section 9** are:

- (e) *the principle that every child should have stable, secure and safe relationships and living arrangements;*
- (f) *the principle that intervention action (as defined in section 32(2)) should be taken only in circumstances where there is no other reasonable way to safeguard and promote the child's wellbeing;*
- (g) *the principle that if a child is removed from the child's family then, so far as is consistent with the child's best interests, the child should be given encouragement and support in maintaining contact with the child's parents, siblings and other relatives and with any other people who are significant in the child's life;*
- (ha) *the principle that if a child is removed from the child's family then, so far as is consistent with the child's best interests, planning for the child's care should occur as soon as possible in order to ensure long-term stability for the child (This principle was introduced in 2011²⁹⁰ to align with the Department's permanency planning policy and promote such planning as early as possible into a child's care experience.); and*
- (h) *the principle that decisions about a child should be made promptly having regard to the age, characteristics, circumstances and needs of the child.*

²⁸⁸ Christian Porter MP, Commonwealth Minister for Social Services, Community Services Ministers' Meeting Communique, 25 August 2017, <<https://christianporter.dss.gov.au/media-releases/community-services-ministers-meeting-communiqu-0>>.

²⁸⁹ *Permanency planning in child protection*, above n 279, 2.

²⁹⁰ Under the *Children and Community Services Amendment Act 2010*.

In addition to the principles above:

- Under **section 12(1)** the objective of the ATSI Principle is “*to maintain a connection with family and culture for Aboriginal children and Torres Strait Islander children who are the subject of placement arrangements.*”
- **Section 80(2)** requires guidelines to be observed when making a placement arrangement for children from CALD backgrounds “*to address the need to preserve and enhance a child’s cultural, ethnic and religious identity.*”
- Under **section 143(4)**, when applying for an extension of a child’s protection order (time limited), the Department must include in its written proposal to the Court “*...plans for securing long-term stability, security and safety in the child’s relationships and living arrangements.*”
- Under **section 145(3)**, protection proceedings are to be concluded as expeditiously as possible in order to minimise the effect of the proceedings on the child and the child’s family.

7.3 Other jurisdictions

Developments in NSW and Victoria have seen the introduction of permanency planning timeframes into child protection legislation in 2014 and 2016 respectively.²⁹¹ Legislated timeframes were also recently considered in South Australia following recommendations of the South Australian Royal Commission. While NSW and Victoria have adopted timeframes, the approaches differ significantly from one another and are unique to the particular framework of orders available under their respective child protection legislation. These schemes are not easily comparable or transferrable into the context of other child protection jurisdictions.

7.3.1 New South Wales

On 29 October 2014, amendments to the *Children and Young Persons (Care and Protection) Act 1998* (the CYP Act) came into effect as part of NSW’s *Safe Home for Life* reforms. The reforms aim to provide clear alternatives for children who cannot live safely at home. There are five pathways for achieving a child’s permanency of care: family preservation; restoration; guardianship; parental responsibility to suitable person(s); open adoption (for non-Aboriginal children); and parental responsibility to the Minister. The CYP Act’s ‘permanent placement principles’ provide an order of preference for the permanent placement of a child:

- (a) *if practicable and in the best interests of the child, the first preference is restoring the child into the care of parents;*
- (b) *if (a) is not practicable or in the child’s best interests, the second preference for permanent placement of the child is guardianship by a relative, kin or other suitable person;*
- (c) *if (a) or (b) are not practicable or in the child’s best interests, the next preference (except for an Aboriginal child) is for the child’s adoption;*
- (d) *if not practicable or in the child’s best interests to be placed under (a), (b) or (c), the last preference is for the child to be placed under the parental responsibility of the Minister under the CYPA or any other law; and*
- (e) *if not practicable or in the best interests of an Aboriginal child to be placed in accordance with (a), (b) or (d), the last preference is for the child to be adopted.*²⁹²

If the Department of Family and Community Services (FACS) applies to the Children’s Court for a care order for a child, it must assess whether or not there is a realistic possibility of the child being restored to parental care and a permanency plan must be prepared for the child accordingly.²⁹³ In preparing a plan for a child’s permanent placement if restoration is not a realistic possibility, FACS must consider whether adoption is the preferred option. The Children’s

²⁹¹ *Children and Young Persons (Care and Protection) Act 1998* (NSW); *Children, Youth and Families Act 2005* (Vic).

²⁹² *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 10A.

²⁹³ *Ibid* ss 82(1) - (3).

Court must decide within set timeframes whether to accept FACS' assessment of whether restoration with parents is realistic: this decision must be made within six months of an interim order being made for a child under two years-old; and within 12 months of an interim order being made for a child over two years.²⁹⁴ However, having regard to the circumstances of the case, and if considered appropriate and in the best interests of the child, the Court has discretion to decide whether or not there is a realistic possibility of restoration after these timeframes end.²⁹⁵ That is, the Court retains discretion over the making of permanent orders at all times.

7.3.2 Victoria

On 1 March 2016, amendments to the *Children, Youth and Families Act 2005* (the CYF Act) came into effect to address key recommendations of the 2012 *Report of the Protecting Victoria's Vulnerable Children's Inquiry* (the Inquiry), particularly those modifying the types of protection orders available and removing barriers to the permanent placement of children in out-of-home care.²⁹⁶ In the context of Victoria's child protection legislation prior to the amendments, the Inquiry found:

For those children for whom reunification fails or is not possible, it is often many years, if ever, before some children and young people in the care of the state will be given the certainty of knowing who will be their permanent carer... This Inquiry considers it takes far too long for a child to achieve placement stability and this exposes too many children to additional trauma. Barriers to applying Victoria's existing legal provisions for adoption and permanent care arrangements must be identified and removed. Greater certainty should be provided to these children and young people as soon as possible. The number of placements should significantly be reduced.²⁹⁷

The subsequent Victorian amendments reflect the Inquiry's emphasis on stability of placement, not just legal permanence. The child protection orders now available in Victoria are:

- an order requiring a person to give an undertaking;
- family preservation orders;
- family reunification orders;
- care by Secretary orders;
- long-term-care orders; and
- permanent care orders.²⁹⁸

The closest equivalents to Victoria's long-term-care order and permanent care order in Western Australia are protection orders (until 18) and protection orders (special guardianship), respectively. However, unlike in Western Australia, the CYF Act allows a number of conditions to be placed on both orders and places a number of legislative restrictions²⁹⁹ on the making of each. For example, the Victorian Children's Court is not able to make a **permanent care order** for an Aboriginal child placed with non-Aboriginal carers unless it has received a report from an Aboriginal agency recommending the making of an order.³⁰⁰

Similar to a permanent care order, a **long-term care order**, which confers parental responsibility on the Secretary of the Department of Human Services (DHS) until the child is 18, cannot be made unless the Court is satisfied there is a specific carer with whom the child can live.³⁰¹ Further, the Court must not make a long-term care order for a child over the age of 10 years if

²⁹⁴ Ibid s 83.

²⁹⁵ Ibid s 83(5A).

²⁹⁶ The amendments were made under the *Children, Youth Families Amendment (Permanent Care and Other Matters) Act 2014* (Vic).

²⁹⁷ Phillip Cummins et al, Report of the Protecting Victoria's Vulnerable Children Inquiry – Volume 1, Victoria (January 2012) xxxvii ('*Cummins Inquiry*').

²⁹⁸ *Children, Youth and Families Act 2005* (Vic) ss 275 and 319.

²⁹⁹ For long-term care orders see Ibid ss, 290(2), for permanent care orders see Ibid ss 322 and 323.

³⁰⁰ *Children, Youth and Families Act 2005* (Vic) s 323.

³⁰¹ Ibid s 290(2)(a).

the child opposes the order.³⁰² If the child's placement subsequently breaks down, the matter must come before the Court again. Essentially, a child can only be placed on a long term or permanent care order in Victoria if he or she has a permanent placement.

In addition, there are two separate types of orders which confer parental responsibility on the Secretary of DHS and are time-limited: family reunification orders and care by Secretary orders. A **family reunification order** may contain any condition that promotes reunification, is in the best interests of the child and is capable of being carried out.³⁰³ A family reunification order does not remove parental responsibility from parents in respect of long-term decision-making about a child, but does confer parental responsibility and custody on the Secretary of DHS. The legislation places a number of timeframes on the making and extending of a family reunification order including the following:

- If a child has been in care for less than 12 months, the order can only be made for the period that would result in the child being in care for 12 months cumulatively. That is, if the child was in care for 4 months when the Court makes the order, the order can only be made for up to 8 months.³⁰⁴
- If a child has been in care for less than 24 months, the order can only be made for the remaining period that would result in the child being in care for 24 months cumulatively. That is, if the child had already been in care for 14 months when the Court makes an order, the order can only be for up to 10 months.³⁰⁵
- A family reunification order cannot be made if a child has been in out-of-home care for longer than 24 months.
- The Court may extend a family reunification order provided the extension would not mean the child is in out-of-home care for a period exceeding 24 months.³⁰⁶

Unlike a family reunification order, no conditions can be placed on a **care by Secretary order**. A care by Secretary order is a mandated two year order³⁰⁷ and can be extended any number of times provided the Court considers that a permanent care order or a long-term-care order are not appropriate, or there are 'exceptional circumstances' to justify the making of the order.³⁰⁸ The existence of the care by Secretary order creates flexibility for the Court to act in the best interests of an individual child where a family reunification order is no longer available due to the strict timeframes which apply, but a long-term-care order or a permanent care order is inappropriate. The Victorian legislation creates a clear nexus between the availability of a permanent placement and the Court's powers to make a long-term or permanent care order.

In September 2016, on request of the Victorian Minister for Families and Children,³⁰⁹ the Victorian Commission for Children and Young People commenced an inquiry into the implementation of amendments under the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (Vic) six months after they came into effect (the Inquiry). The Inquiry's report *Safe and Wanted* was delivered to the Minister for Families and Children and the Secretary of DHS on 30 June 2017³¹⁰ but was not available to the Review before completion of this Report.

³⁰² Ibid s 290(2)(d).

³⁰³ Ibid s 287(1)(d).

³⁰⁴ Ibid s 287A(2).

³⁰⁵ Ibid s 287A(3).

³⁰⁶ Ibid s 294A(1)(b).

³⁰⁷ Ibid s 289(1)(b).

³⁰⁸ Ibid s 294A(2).

³⁰⁹ The Minister may request an Inquiry under section 38 of the *Commission for Children and Young People Act 2012* (Vic).

³¹⁰ Submissions to the Inquiry are publicly available on the Commission for Children and Young People website at <https://ccyp.vic.gov.au/upholding-childrens-rights/ministerial-inquiries/permanency-amendments-inquiry/>.

7.3.3 South Australia

In August 2016, the South Australian Royal Commission's report included a recommendation to introduce permanency planning timeframes in the *Children's Protection Act 1993* (SA).³¹¹ In response, the South Australian Government did not support the adoption of the strict reunification timelines recommended:

*The South Australian Government firmly supports the importance of timely decision making to promote stability for children, and accepts part B accordingly. However, legislating the tight timeframes recommended by the Royal Commission would not recognise the importance of maintaining the court's discretion to make orders in accordance with the child's best interests. The Department for Child Protection should use these timelines to inform their practice as they accord with the developmental needs of a child. The court should not be limited to extending the timeframe to only six months, but as the circumstances fit in children's best interests.*³¹²

7.4 2015 Consultation on permanency planning amendments

This section addresses the 2015 Consultation on proposed permanency planning legislation and the Review's recommendations in respect of the subsequent legislative proposals developed.

7.4.1 Permanency planning timeframes

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

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

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

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

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

The 2015 submissions on reducing the length of time a child could be in care without a permanent order varied widely. Support for legislating timeframes was provided on the basis that two years provided sufficient opportunity for parents to achieve reunification and would focus parents and the Department on assertively addressing issues in order to achieve reunification earlier.

However, some argued that permanency planning timeframes should be abandoned and that flexibility should be maintained in all circumstances to allow for the best interests of individual children. The majority of submissions opposing timeframes in legislation did so on the basis that services may not always be available to support parents to address their parenting issues, and that two (or three) years was insufficient time for parents to make lasting behavioural change. It was noted services often had extensive waiting lists and access to services for families living in regional and remote locations was a particular concern.

There was also a concern that imposing strict timeframes on temporary orders would require increased resources within the Courts and Department in order for matters to be heard in a timely manner.

³¹¹ Recommendation 70, *South Australian Royal Commission*, above n 185, xxxvii.

³¹² *Ibid* 64.

Following the consultation, it was proposed that there be a two-year limit placed on the period of time in which a child could be in out-of-home care without an application for a permanent order being lodged in the Children's Court. However, this period could be extended to three years if the Court determined that special circumstances existed which warranted extending the consecutive time before which an application for a permanent care order must be made.

The majority of submissions supported linking extensions of protection orders (time-limited) to circumstances where reunification was viable or progressing, citing that such measures would increase the accountability of both the Department and families in relation to reunification, and provide timely certainty for children who were unlikely to be reunified.³¹³ It was therefore also proposed that the Court could make a time-limited order only if satisfied there was a possibility of the child's reunification with parents, and an extension of such an order could be made only if the Court was satisfied reunification was progressing or viable.

7.4.2 Review submissions on permanency planning

Submissions to the Review on permanency planning expressed concern about the previously approved amendments introducing timeframes. The Commissioner for Children and Young People's submission gave strong support for the Department's policy without legislative change on timeframes. He emphasised the importance of providing early intervention services to support reunification in the context of permanency planning, and the Department's accountability to demonstrate how it had done this. It was recommended the Department not proceed with the previously approved amendments.

WACOSS acknowledged:

...the importance of providing continuity of care for children and the need to ensure children bond with nurturing supportive care givers. In addition, we acknowledge that there is also significant concern within the community that the periods of time within which permanency decisions are made are discriminatory. ...The Council recognises that the needs of children are paramount and children must be kept safe. We continue, however to have significant reservations about the application of permanency principles.

Particular concern was expressed about the disproportionate impact the proposals would have on Aboriginal children and families. Aboriginal Family Law Services submitted that the theory underpinning permanency planning – attachment theory – is inconsistent with Aboriginal child rearing practices,³¹⁴ as did submissions from SNAICC et al and the Aboriginal Legal Service:

The nuclear family is not the most common residential form; it is the extended family that is the norm (ed. Smith 2000). Typically, an Indigenous household consists of a small, multi-generational core of kin with a highly mobile fringe of transient members. The responsibility for child care and rearing is distributed widely amongst a range of kin (Daly & Smith 1999), making any Western notion of 'primary carer' meaningless.³¹⁵

SNAICC et al strongly opposed the proposed timeframes for permanent orders and recommended that requirements for holistic stability planning be included with sufficient flexibility to determine what is in each individual child's best interests:

Permanency in the care and protection sector has been defined as comprising three key aspects – "relational permanence (positive, caring, stable relationships), physical permanence (stable living arrangements) and...legal arrangements".³² Recent state and territory reforms across Australia have tended to focus on the latter two. We submit that

³¹³ *Building a Better Future*, above n 19, 63.

³¹⁴ Aboriginal Family Law Services citing Department of Family and Community Services, *Warrki jarrinjaku jintangkammanu purananjaku = Working together everyone and listening: Aboriginal child rearing and associated research: a review of the literature*, Literature Review, Canberra (2002).

³¹⁵ Quoted in Aboriginal Family Law Service submission: Robyn Penman, *The 'growing up' of Aboriginal and Torres Strait Islander children: A literature review*, Occasional Paper No.15, Department of Families, Community Services & Indigenous Affairs (2004) 25.

this has been to the detriment of key aspects of relational permanence that are central to the well-being and lifelong outcomes of Aboriginal and Torres Strait Islander children.... For Aboriginal and Torres Strait Islander children, permanence is identified by a broader communal sense of belonging; a stable sense of identity, where they are from³⁵ and their place in relation to family, mob, community, land and culture.³¹⁶

7.4.3 Review deliberations on timeframes

The Review's deliberations on proposals for legislated permanency planning timeframes were systematic. In addition to considering the nine written submissions to the Review and the previous *2015 Consultation*, they involved consideration of: permanency planning and its relational, physical and legal aspects; the literature and evidence related to permanency planning; the Department's permanency planning policy, recent implementation actions and the current policy review; the existing legislative framework under the Act; developments interstate where permanency planning timeframes have been introduced in legislation or considered; the proposed permanency planning amendments prior to the change of government in March 2017; and possible unintended consequences, including for Aboriginal children, families and communities.

The Review also invited Dr Tracy Westerman,³¹⁷ Indigenous Psychological Services, to share her professional insights with the Committee. Dr Westerman talked about the importance of developing culturally-informed theories of attachment and stability to inform permanency planning for Aboriginal children and some of the cultural tools and approaches available.

With similar reasoning to the South Australian Government, referred to at 7.3.3 above, the Review concluded it did not support the introduction of strict timeframes in legislation in recognition that decision-makers must always be provided with sufficient legislative flexibility to meet the needs and best interests of individual children. In doing so, the Review strongly supported the Department's work on improving implementation, monitoring and evaluation of its permanency planning policy, including its current policy review and work on integrating the elements of the ATSI Principle into permanency planning for Aboriginal children in care. Reasons for arriving at this decision included:

- There are anecdotal signs that the significant investment the Department has made since 2015 in permanency planning training and practice development appears to be gaining traction by promoting earlier decision-making for children's continuity of care.
- The need to bed down in practice the suite of significant out-of-home care reform actions, including implementation of the *Earlier Intervention Strategy* (for example, the Aboriginal In-home Support Services), before adopting significant legislative reform on permanency planning.
- The Department's Permanency Planning Monitoring Framework and Outcomes Framework, which is building an improved database, through which the permanency planning policy can be evaluated to better inform legislative policy and practice.
- The current review of the policy, which is focussing on achieving a more holistic understanding and application of the policy as one that focuses on addressing the relational, physical and legal elements, which all contribute to creating continuity and stability for children.
- The submissions, particularly from Aboriginal organisations, that inflexible timeframes in legislation would have a disproportionate impact on Aboriginal children and families.

³¹⁶ Submission from SNAICC et al informed by [32] Tilbury, C. and Osmond, J. (2006). 'Permanency Planning in Foster Care: A Research Review and Guidelines for Practitioners', *Australian Social Work* 59(3), 268 and [35] Yeo, SS. (2003). 'Bonding and Attachment of Australian Aboriginal Children', *Child Abuse Review* 12, 293.

³¹⁷ Dr Westerman is of the Njamal people near Port Hedland in Western Australia and holds a Post Graduate Diploma in Psychology, a Master's Degree in Clinical Psychology and Doctor of Philosophy (Clinical Psychology). She is a recognised leader in the Aboriginal mental health and suicide prevention fields, achieving national and international recognition

- Review Recommendation 41, that section 9 be amended to ensure the principles must be observed by a court and tribunal. This will require the Children’s Court to apply the principles to its decision-making in child protection proceedings, including the principle of decision-making as soon as possible to ensure long-term stability for the child (s.9(ha)), and that decisions about a child should be made promptly having regard to the child’s age, characteristics, circumstances and needs (s.9(h)).
- The impact of delays that are beyond the control of children and families, such as access to services, particularly in regional or remote areas: and the impact of inflexible timeframes on older children, who may be required to be subject to a permanent order against their will or individual best interests, and on children whose parents are incarcerated for offences that may be unrelated to child protection concerns.
- Having regard to the Review’s guiding principles that:
 - Recommendations for significant legislative change should be evidence-based, with due consideration given to possible flow-on effects including unintended consequences.
 - 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.
 - Child protection legislation should be sufficiently flexible to enable decisions to be made in the best interests of individual children.

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Safety, stability, continuity of care and relationships and a sense of identity and belonging for children in the CEO’s care should continue to be promoted through implementation of the Department’s permanency planning policy and the policy should continue to be monitored and evaluated on an ongoing basis to determine its effectiveness in contributing to timely decision-making that achieves these outcomes.

7.4.4 Strengthening permanency planning principles

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

The 2015 Consultation Paper suggested one way this might be achieved could be by referring to the importance of continuity and permanency’ to a child in section 8(g) rather than the current reference to continuity and ‘stability’. Submissions on this question varied. Ultimately, it was decided at that time that no such amendments would be pursued in view of the subsequent proposal to introduce timeframes by which an application for a long-term order must be made.

In reviewing the 2015 Consultation, the Review considered that the current principles in the Act sufficiently emphasise the importance of early planning and decision-making in the interests of a child’s long-term stability. Further, the Review agreed with 2015 submissions which preferred the term stability to permanency because “*the term permanency emphasises long-term fixed arrangements whereas stability encompasses broader considerations such as the safety, strength and security of the arrangement.*”³¹⁸

³¹⁸ Aboriginal Legal Service.

7.4.5 Protection orders (supervision)

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

A protection order (supervision) does not remove parental responsibility from parents but enables the Department to assess and monitor a child's wellbeing for the duration of the order through the development of a safety plan. Children subject to this type of order are not in the CEO's care. The goal with a protection order (supervision) is to promote a child's safety and wellbeing over time and support the parent/s to become more protective, while maintaining the stability of the child's living and care arrangements.

Views on reducing the maximum length of an initial protection order (supervision) and subsequent extension of the order from 24 months to 12 months were balanced.

A number of the *2015 Consultation* submissions considered 12 months was sufficient time for families and the Department to be operating in a supervisory context, and it was thought that a reduced timeframe would provide a more targeted approach and motivate families to address issues of concern in a timely manner. Most submissions commenting on this question indicated that a 12-month extension should be sufficient. Others considered 12 months for an initial order was insufficient time for some parents to address their issues. It was also suggested that reduced timeframes could increase stress on families and result in non-engagement, and that reducing the maximum allowable period of a supervision order could result in more children entering care.

The majority feedback suggested that three years under a supervision order, comprising a two-year initial order and a 12-month extension, would provide sufficient time for parents to address issues and if longer was required it may be that a different order would be more appropriate.

Some, however, queried the need for reducing the time frame of these orders at all given the Department can already apply for protection orders (supervision) for periods of less than two years. It was suggested this should occur more frequently in practice according to the individual circumstances of children and families. Importantly, some feedback noted the Department could increase its use of protection orders (supervision) to support the reunification phase when a child is transitioning back into parents' care.

The resulting proposal following the *2015 Consultation* was to reduce the maximum period for an extension of an order from 24 months to 12 months. In reviewing this, the Review considered, however, that the legislation as it currently stands is sufficiently flexible to respond to individual circumstances and therefore proposed no legislative change. There was also a view that protection orders (supervision) should be used to a greater extent to prevent children entering care and to support reunification.

7.4.6 Naming of protection orders

Consultation question 8: *Do the names of the current protection orders adequately reflect the status and purpose of the orders?*

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

In the context of refocussing protection orders to promote permanency planning, the *2015 Consultation* sought views as to whether the names of the existing protection orders accurately reflected their purpose in the permanency planning continuum of 'temporary' and 'permanent' phases of care. Further consideration of this issue was deferred to the Review.

The Review did not consider there to be any pressing need to alter the names of the current protection orders and concurred with the view that renaming orders would not lead to improved outcomes for children and may lead to unnecessary confusion for no substantial benefit.³¹⁹

7.4.7 Safeguards for Aboriginal children

Consultation questions 10 to 12 asked whether the Act should be strengthened to ensure that: before the Court makes a long term order, it must be satisfied that the Aboriginal placement hierarchy under section 12 of the Act has been applied in the child's best interests; and whether the Department should be required to demonstrate its application of the Aboriginal placement principle in the reports it provides to the Court. These suggestions were strongly supported and the resulting proposals were also supported by the Review. They are addressed in Chapter 3 and Recommendation 8 of this Report.

7.4.8 A hierarchy of care

Consultation question 13: *Should the legislation set out an order of priority for orders which the Department and/or the Court must consider and 14: if so, what should the order of priority be?*

There was a strong consensus that the long term care decision for a child and type of order best suited to the child's circumstances should be determined on the basis of the child's best interests rather than an adherence to a priority of court orders. Instead, many of the 2015 submissions supported a hierarchy of permanent care, with overwhelming agreement that safely remaining with or reunifying with parents should be the first priority, wherever possible and in the child's best interests.

Rather than a priority of court orders therefore, the previously approved proposal was that there be a new principle establishing a hierarchy of care starting with reunification with parents, wherever safe and viable, then placement with family or a significant other where possible, ending with long-term care with another appropriate person. The Review agreed with the proposal.

Recommendation 36

The Act should contain a new principle that if a child is removed from the child's family, arrangements for the child's long-term stability should be considered in accordance with the following order of preference, as determined to be appropriate and in the best interests of the child:

- (a) reunification with the child's parent(s);
- (b) long-term care with other relatives;
- (c) long-term care with other appropriate persons.

7.4.9 Expedited protection proceedings

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

The 2015 submissions lent strong support to amendments facilitating more timely completion of protection proceedings. Delays in court processes were seen largely as parent-focussed rather than child-focussed. A number of submissions supported the approach of section 94 of *Children and Young Persons (Care and Protection) Act 1998* (NSW) as flagged in the *2015 Consultation Paper*.³²⁰ However, there was acknowledgement that increased resourcing for the Court would be required in order to implement such amendments.

³¹⁹ Aboriginal Legal Service submission to the *2015 Consultation*

³²⁰ *2015 Consultation Paper*, above n 5, 14.

Others highlighted the possibility that expedited protection proceedings could occur at the cost of a thorough examination of all relevant issues. Submissions not in favour of stronger requirements suggested the current legislation was adequate and government agencies needed to jointly address the issues that are resulting in drawn out protection proceedings.

Rather than adopting more prescriptive provisions similar to NSW, the Review supported the previously approved proposals, in Recommendations 37 and 38 below, to strengthen the principle in section 9(h) that decisions about a child should be made promptly, and section 145(3) which requires that protection proceedings “*are to be concluded as expeditiously as possible in order to minimise the effect of the proceedings on the child and the child’s family*”.

Recommendation 37

Section 9(h) of the Act should be amended to provide that not only should “*decisions about a child ... be made promptly having regard to the age, characteristics, circumstances and needs of the child*”, but they should also be made having regard to the possible harmful effect of delay in making a decision or taking an action.

Recommendation 38

Section 145(4) of the Act should be amended to provide that protection proceedings are to be concluded as expeditiously as possible in order to minimise the *possible harmful* effect of the proceedings on the child and the child’s family.

7.4.10 Contact with family

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

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

The majority of responses advocated that contact arrangements between children and their families should be determined on the basis of the best interests of individual children rather than legislatively linked to the granting of a permanent order. The importance of family contact in the context of permanency planning was explained by Tilbury and Osmand (2006):

...permanency planning is not only about placement. Most importantly, permanency planning is about relationships, identity and a sense of belonging (Brydon 2004; Fein & Maluccio 1992; Lahti 1982; Sanchez 2004). It is recognised that continuity and stability are not only found through placement, but that enduring relationships can be established and maintained through family contact (including with extended family such as grandparents, cousins etc.), community connections and relationships at school (Holland, Faulkner & Peres-del-Aguila 2005)....

The benefits of regular contact between children and their biological parents and other family members have been well recognised by research. Quality contact increases the likelihood of reunification so it is important to foster frequent contact from the very beginning of placement. Family contact is also associated with improved placement stability (Thoburn 2003). Birth family contact, even post-adoption, does not impede attachment to the new family unless the child consistently refuses contact and/or the child is scared about contact. A common mistake in permanency planning is underestimating children’s need for continuity and connections with family and culture of origin. Research shows ongoing contact is a protective factor that improves placement

*stability, it is not generally destabilising. However, contact does require careful consideration given the variety of reactions that all parties may experience. Decisions about the purpose, frequency and nature of contact need to be assessed for each individual child and family.*³²¹

Parent groups suggested court-ordered contact for all order types would provide all parties with clear parameters and reduce the risk of contact ceasing after permanent orders are put in place. Stories shared by parents illustrated that children's contact with their birth families, in light of multiple placement breakdowns and worker turnover, was often the one consistent feature of their care experience.

However, others suggested that increasing the ability of the Court to have decision-making power in relation to contact would result in less flexibility and decisions that may ultimately not be in a child's best interests. It was noted that contact can be destabilising for some children and impair their capacity to form a strong identity with their carer family.

The nature of contact - whether in person, phone calls, social media connection and frequency of contact - will generally need to change over time to be responsive to the needs of all parties involved. As such, following the consultation, an approach that retained the current flexibility in making contact arrangements, while increasing the Department's accountability to developing contact arrangements that support both the child's placement and family of origin identity where appropriate, was favoured.

The resulting proposal was that the principle in 9(g) should be strengthened to promote children's family relationships so far as is consistent with the child's best interests. It was also proposed the Department should be required to outline arrangements for promoting children's relationships with family, where appropriate, in the reports it is required to provide to the Court.

Submissions to the Review also addressed contact issues. The Aboriginal Legal Service expressed concern that, in some cases, once children are on a long-term protection order their contact with family is reduced to only a handful of times a year, supervised by Department workers for just a few hours on average. SNAICC et al submitted to the Review that:

...contact with family does not necessarily need to reflect permanency objectives and instead contact and family relationships will be promoted in line with a child's best interests. We support this position as consistent with a child rights-based approach,³⁷ and as a sound acknowledgement of the importance of a child's family connections. As further support for this position we refer to a recent review and analysis of attachment theory that found that "it is possible for children to maintain contact with birth parents or other caregivers without compromising the development of an attachment bond with a child's foster parent."³⁸ ³²²

The Review supported the previously approved proposal to strengthen the principle in section 9(g) so that continuity of a child's relationships is promoted so far as consistent with a child's best interests, and that the Department's reports to the Court should include an outline of the arrangements for doing so.

³²¹ Clare Tilbury and Jennifer Osmond, above n 276, 3,16.

³²² [38] Quoting Sara McLean (2016). 'Children's Attachment Needs in the Context of Out-of-Home Care', CFCA Practice Resource, November, available at: <https://aifs.gov.au/cfca/sites/default/files/publication-documents/cfca-practiceattachment.pdf>

Recommendation 39

Section 9(g) of the Act should be amended to provide that, if a child is removed from the child's family then, so far as is consistent with the child's best interests, the child's relationships with his or her parents, siblings and other relatives and with any other people who are significant in the child's life, should be promoted and the child should be given encouragement and support in maintaining contact with the relevant people.

Recommendation 40

The Act should be amended to require that an outline of the proposed arrangements for the wellbeing of the child in the CEO's written reports to the Court under sections 61 and 143 is to include arrangements for promoting the child's relationships with the child's parents, siblings and other relatives and other people who are significant in the child's life, where appropriate. In section 143, this should apply in respect of applications for a protection order (time-limited) or a protection order (until 18).

CHAPTER 8 Objects and principles in Part 2 of the Act

A number of submissions to the Review made recommendations related to the Act's objects and principles. The objects in section 6 of the Act provide a broad overview of the purpose of the legislation, and each of the provisions in the Act contributes towards the achievement of one or more of the objects. The objects of the Act are to:

- (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*
- (da) *to support and reinforce the role and responsibility of parents in exercising appropriate control over the behaviour of their children; and*
- (d) *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; and*
- (e) *to protect children from exploitation in employment.*

The principles contained in sections 8, 9 and 10 of the Act are the foundation on which the legislation is based and guide the exercise of the functions and powers provided under the Act:

- **Section 8** provides 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 fourteen guiding principles that must be observed in the administration of the Act.
- **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, subject to the age and level of understanding of the child concerned.

It is important to note that these principles operate alongside one another rather than in any order in which they appear in the Act or section of the Act. Only one consideration must be regarded as paramount above all: the best interests of the child.

In performing a function or exercising a power under this Act in relation to a child, a person, the Court or the State Administrative Tribunal must regard the best interests of the child as the paramount consideration – section 7.

8.1 The operation of section 9 and certain other sections

The important principles contained in section 9 must be observed: "*in the administration of the Act.*" It was always intended the principles in section 9 apply to all decision-making under the Act whether by the Department, a court or SAT. However, in a 2016 Children's Court decision in which a protection application was dismissed, the Magistrate decided not to apply section 9 in making the decision because the trial process was not part of the administration of the Act. The Magistrate interpreted the term '*in the administration of the Act*' as applying to the Department only, given it is the Department which is responsible for assisting the Minister in the administration of the Act. In *Farnell and Chanbua*,³²³ the Chief Judge of the Family Court also stated:

*Although it has been assumed in some decisions of single judges of the Supreme Court that s 9 has application to judicial proceedings, I would respectfully doubt that courts are concerned with the 'administration' of the legislation, which seems to me to be the responsibility of the relevant Minister and the Chief Executive Officer of her department.*³²⁴

³²³ *Farnell* [2016] FCWA 17.

³²⁴ *Ibid* [649].

Following these decisions, it was determined an amendment was required to clarify that the principles in section 9 should apply to all persons performing functions under the Act including the CEO, a court and SAT. Submissions from the Aboriginal Legal Service and Legal Aid also recommended the application of section 9 and other sections with similar wording be clarified through an amendment, namely: section 13 – Principle of self-determination; and section 14 – Principle of community of participation. The necessary amendments to these sections are included in Recommendations 15 and 16 of this Report.

Recommendation 41

Section 9 should be amended to clarify that the principles it contains are to apply to all persons performing a function or exercising a power under the Act, including the CEO, a court or tribunal.

8.2 Valuing children

The Review received a submission regarding the objects and principles of the Act from the Valuing Children Initiative (VCI). The VCI *“is an ambitious project that seeks to inspire Australians to value all children, understand that a child’s wellbeing is the shared responsibility of the entire community and ensure children are at the forefront of our considerations.”* Recommendations in their submission were *“intended to help drive the attitudinal and cultural change needed to help ensure the safety and wellbeing of children and recognise their needs and rights”*, and based on the important role language plays *“in signalling and reinforcing how we value children both individually and as a sector of society.”*

One of VCI’s recommendations was the introduction of a new object into section 6 *“to acknowledge the inherent value of all children and their right to protection and care.”* While it could be argued that the Act is self-evidently premised on the high value the State places on children (and their right to care and protection), it contains no express statement of this nature.

From a legislation perspective, the Review considered that the purpose of the Act is to provide the powers necessary to protect children from harm rather than to acknowledge children’s right to protection per se. Children’s right to be protected and cared for is expressed as a principle in section 9(c) of the Act – ‘the principle that every child should be cared for and protected from harm’ - and it was considered using the language of rights for this principle would not be consistent with the 13 other principles set out in section 9.

In respect of valuing children, the Commissioner for Children and Young People also submitted that the principles in the Act should be extended to *“acknowledge children as valued citizens who have rights that should be respected and ensured.”* The child protection legislation in South Australia, Tasmania and Victoria were cited as examples of such provisions. The Review favoured the approach taken in Tasmania under section 10D of the *Children, Young Persons and Their Families Act 1997* (Tas), which provides that *“A child is a valued member of society and is entitled to be treated in a manner that respects the child’s dignity and privacy.”*

The Review noted a further recommendation from VCI to reorder the first five principles set-out in section 9 of the Act to place the following principles about the child before those related to the parents, family or community of a child:

- (c) *the principle that every child should be cared for and protected from harm;*
- (d) *the principle that every child should live in an environment free from violence;*
- (e) *the principle that every child should have stable, secure and safe relationships and living arrangements;*

Amendments of this nature would have no substantive effect on the operation of the Act; however, they could be considered during the drafting of amendments resulting from this Review.

Recommendation 42

The Act should contain a statement which affirms children as valued members of society who are entitled to be treated with respect and dignity.

VCI also recommended an amendment to object (da) of the Act, which is “to support and reinforce the role of and responsibility of parents in exercising appropriate control over the behaviour of their children.” This object was included in section 6 on 1 January 2016 by the *Children and Community Services Legislation Amendment and Repeal Act 2014*. It corresponds with provisions for entering into responsible parenting agreements in Part 5A, which were also introduced at that time upon the repeal of the *Parental Support and Responsibility Act 2008*.

VCI recommended that the object in section 6(da) should be to support and reinforce parents’ role and responsibility “to appropriately and safely manage the behaviour of their children”, rather than: “to exercise appropriate control over the behaviour of their children.”

The Review endorsed this suggested wording because it aligns more closely with the principles of the Act and the Department’s Parent Support service, which is a strengths-based program that aims to assist parents develop parenting skills and their authority within their family.

Recommendation 43

The object under section 6(da) should be amended to align more closely with the underpinning principles of the Act and the aims of the Department’s Parent Support service.

8.3 Hearing the views of children

I reckon every kid should get to have a say even if they are 4 years old. It may not make sense but they should always get a say....and if it makes sense then it should be taken into consideration. Common sense should be applied and the maturity level. If the young person can make a good case they should be listened to. (17 year old, female) - CREATE.

8.3.1 Section 10 – the principle of child participation

Significantly, the Act enshrines the principle of children’s participation in decision-making through a stand-alone provision in section 10 – Principle of child participation:

- (1) *If a decision under the Act is likely to have a significant impact on a child’s life, then for the purposes of ensuring the child is able to participate in the decision-making process, the child should be given:*
 - (a) *adequate information, in a manner and language that the child can understand, about —*
 - (i) *the decision to be made; and*
 - (ii) *the reasons for the Department’s involvement; and*
 - (iii) *the ways in which the child can participate in the decision-making process; and*
 - (iv) *any relevant complaint or review procedures;**and*
 - (b) *the opportunity to express the child’s wishes and views freely, according to the child’s abilities; and*
 - (c) *any assistance that is necessary for the child to express those wishes and views; and*
 - (d) *adequate information as to how the child’s wishes and views will be recorded and taken into account; and*

- (e) *adequate information about the decision made and a full explanation of the reasons for the decision; and*
 - (f) *an opportunity to respond to the decision made.*
- (2) *In application of the principle set out in subsection (1), due regard must be had to the age and level of understanding of the child concerned.*

Decisions considered likely to have a significant impact on a child's life include, but are not limited to, decisions about:

- (a) *placement arrangements or secure care arrangements*
- (b) *care planning or provisional care planning decisions*
- (c) *providing the child with social services; and*
- (d) *the child's contact with parents, siblings and other relatives and any other people significant in the child's life - section 10(3).*

One of the tools the Department uses to elicit children's views and support their participation in care planning is Viewpoint, a computer based self-interviewing program. Every child in the CEO's care aged five to 17 years must be invited to undertake a Viewpoint questionnaire as the first step in the care planning process. During 2016-17, over 1,200 children in care shared their views with case managers; 51 per cent were Aboriginal³²⁵ (see 12.1 for more information about Viewpoint).

8.3.2 Submissions

Several Review submissions³²⁶ addressed the importance of legislation supporting children's participation in decision-making and providing opportunities for children to express their views, be heard and have their views respected and taken into account. The Youth Affairs Council submitted that:

...child participation is integral to achieving good outcomes for children and young people. We see it in our day-to-day work. If young people are given a voice, and are able to participate in decisions that affect them, it can lead to stronger more suitable decisions being made. Child protection is a space where this is particularly relevant.

This was also reinforced in a recent consultation the Commissioner for Children and Young People conducted with children and young people with experience of out-of-home care conducted in partnership with the Department:

They clearly expressed the importance of being given meaningful opportunities to make choices and have a say in decisions that affect them. Those who felt they could participate in such decision-making described a sense of empowerment, self-respect and confidence, and a greater capacity to speak up and be heard.³²⁷

8.3.3 Deliberations

The Review adopted a number of CREATE's recommendations to strengthen children's participation; for example, the following participants' suggestions for improving the Act³²⁸ were supported:

- amending the wording in section 10(1) of the *Principle of child participation* to replace 'should be given' with 'must be given'. This recommendation was also made by the Youth Affairs Council (see Recommendation 44); and
- requiring children to be given an opportunity and assistance to participate in care planning (see Recommendation 55).

³²⁵ *Final Report 2016/2017*, above n 10, 55.

³²⁶ Commissioner for Children and Young People; CREATE; Youth Affairs Council.

³²⁷ Commissioner for Children and Young People, *Speaking Out About Raising Concerns in Care*, The views of Children and Young People with experience of out-of-home care, Western Australia (October 2016) ('*Speaking out About Raising Concerns*').

³²⁸ As suggested through the consultation with 27 children and young people which CREATE undertook for the preparation of its submission.

However, other suggestions made by the young participants in CREATE's consultation were already thought to be adequately provided for in the legislation as explained here. For example, the suggestion for amendments providing children with a choice of whether or not they wish to participate is considered unnecessary: the principle that children should be given an opportunity to participate in decision-making does not operate to make a child participate against his or her will, and the principle of what is in the best interests of the child always applies.

A recommendation was also made to remove the 'restrictions of age' on children's participation, because the young participants believed all children and young people should be able to have their say regardless of age. In order for the principle to operate in practice, however, due regard must always be had to a child's age and capacity to participate and it is important that information and opportunities are pitched in an age-appropriate way. It is a reality this relies on the professional judgement of child protection workers and a range of other professionals and service providers who work with children. A further recommendation not adopted was to include 'child' in the participation principles relating to a child's parents and significant others in sections 9(J) and 9(k). The reason children are not included in these sections is because it was considered the participation of children in decision-making processes that impact on their lives was important enough to warrant a stand-alone section of the Act – section 10.

Submissions further recommended that children's participation in decision-making should be strengthened in relevant substantive provisions in the Act rather than relying on the operation of the child participation principle in section 10 alone.

Recommendation 55 of this Report acknowledges the need to introduce substantive requirements for enabling children's participation in planning processes during provisional protection and care and while in care, including cultural support planning and leaving care planning. Despite a previous view that the legislation was adequate in this regard,³²⁹ it was considered there needs to be a greater practice focus on enabling children to have a say about their placement arrangements, decisions about services they may require to address their needs and about contact with their parents, siblings, other relatives and significant others in their lives.

Recommendation 44

The principle of child participation in section 10 should be amended to state that children *must* be given the information, assistance and opportunities listed in section 10(1) instead of *should* be given.

8.4 Sibling relationships

Sibling relationships are often the longest and most enduring relationships across an individual's lifespan. The Act recognizes the importance of siblings in the following ways:

- The things that must be taken into account in **section 8** when determining what is in the best interests of a child include:
 - (d) *the nature of the child's relationship with the child's parents, siblings and other relatives and with any other people who are significant in the child's life;*
 - (h) *the need for the child to maintain contact with the child's parents, siblings and other relatives and with any other people who are significant in the child's life;*
- The principles that must be observed in the administration of the Act under **section 9** include:
 - (ha) *the principle that if a child is removed from the child's family then, so far as is consistent with the child's best interests, the child should be given encouragement and support in*

³²⁹ 2012 Review, above n 13, 31.

maintaining contact with the child's parents, siblings and other relatives and with any other people who are significant in the child's life;

→ **Sections 39 and 89** require provisional care plans and care plans, respectively, to include decisions about a child's contact with his or her siblings.

CREATE³³⁰ addressed the importance of sibling relationships, recommending there be a new principle relating to the placement of sibling groups together:

It is vital that sibling groups are supported to stay together in care where it is safe to do so, and where this is in line with the children's wishes. Where this is not possible, children and young people should be supported to maintain regular contact and maintain a relationship, in line with their wishes and safety considerations (CREATE, 2014b; McDowall, 2015).

Aboriginal Family Law Services also submitted that "*proper consideration to keeping siblings together should remain paramount in all cases. Separation should only occur as a last resort after full and earnest attempts to keep siblings together,*" and recommended that keeping siblings together should be a requirement of the Act except in exceptional circumstances.³³¹

This view was supported in principle. However, in an environment where there is a shortage of carers generally and where many Aboriginal carers are already over-extended in their capacity to care for additional children, the introduction of a legislative requirement for siblings to be together in the same placement in all but exceptional circumstances would set the threshold too high.

One of the proposals arising from the *2015 Consultation* was that there be a separate principle which recognises the importance and enduring nature of sibling relationships. The Review supported this proposal. It was also thought, however, this could be strengthened to include the principle that every effort should be made to place siblings together wherever possible.

Recommendation 45

The Act should include the principle that, if a child is removed from the child's family then, so far as is consistent with the child's best interests and having regard to the child's views and wishes, the child should be placed with his or her siblings.

8.5 Interpreters

The Aboriginal Family Law Services' submission drew attention to the diverse Aboriginal groups living in their own distinct and often remote country, with different languages specific to each. It identified the need for the Department's caseworkers to use interpreters when dealing with people whose second language is English. The submission recommended the Act require the use of interpreters fluent in the language specific to the community, country or region in these circumstances.

Several sections of the Act recognise the importance of language and understanding, including section 153 which requires that if the Court is satisfied a party has difficulty understanding or communicating in English, or has a disability, it must "*take reasonable steps to ensure that the services of an interpreter or other appropriate person are made available to (a) party during the proceedings to facilitate the party's understanding of, or participation in, the proceedings.*"

The principles in sections 9(j) and (k) provide that 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

³³⁰ CREATE submission.

³³¹ Aboriginal Family Law Services submission.

decisions-making processes under the Act that are likely to have a significant impact on the child's life (j), and adequate information, in a manner and language they can understand.

Rather than introducing a legislative requirement which, for a variety of reasons may be unable to be complied with in every circumstance, the Review considered the principles of the Act should more directly recognise the need for interpreters to be used when the Department is addressing child protection concerns with parents and families who have difficulty communicating in English.

Recommendation 46

It is recommended the principles in section 9 of the Act include express reference to the use of interpreters when working with children, parents and families who have difficulty communicating in English.

CHAPTER 9 Shared responsibility for children in care

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

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

Consultation question 27: *How else could the concept of Corporate Parenting be expanded upon in the Western Australian context?*

The 2015 Consultation sought feedback on options for improving the delivery of services to vulnerable children, particularly those in the CEO's care, many of whom have experienced trauma through their childhood and require timely access to services to address their developmental needs and therapeutic needs. Options flagged included strengthening the existing provisions in section 22 of the Act or introducing specific obligations for agencies which could be prescribed in the Regulations.

9.1 Current approach

In performing functions under the Act, section 21(2)(b) requires the CEO to have regard to:

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

The CEO is also required by **section 22** to do the following when performing functions:

- (1) *...endeavour to work in cooperation with public authorities, non-government agencies and service providers.*
- (2) *...promote the establishment, implementation and regular review of procedures that facilitate such cooperation particularly in relation to the protection and care of children and the provisions of financial or other assistance.*

Under section 22(3) the CEO may request the assistance of a public authority or service provider "if the CEO considers that the authority or provider can assist in the performance of functions under the Act." **Assistance** includes the provision of advice, facilities and services (s/22(4A)), and section 22(4) provides that "public authorities or providers must endeavour to comply with a request under subsection 3 promptly if compliance is consistent with its duties and responsibility and does not unduly prejudice the performance of its functions."

The Department meets its obligations under section 22 through, among other things, the operation of memoranda of understanding with key partner agencies and the Rapid Response across-government framework and action plan which helps address the specific and complex needs of children in care including health, housing, psychological, educational and employment needs. Key agencies involved in the implementation of Rapid Response include the WA Police, Department of Education, Department of Health, Department of Corrective Services, Department of Transport and the Mental Health Commission. Other agencies included in Rapid Response which now operate within the Department under the 2017 Machinery of Government changes include the Disability Services Commission and the Housing Authority.

The 2015 Consultation Paper noted:

A policy level strategy for prioritising the needs of children in care relies on the working relationships and goodwill of agencies. Initiatives and agreements develop in the context of the resourcing capacity of an agency for which child protection is not recognised as an integral part of their role. As such, the will and capacity to provide services to children in

*care can be undermined by changes to resourcing and working relationships. A legislative imperative would recognise the special needs of children in care and the need for relevant agencies to prioritise services for meeting these needs.*³³²

9.2 Submissions

Submissions to the *2015 Consultation* provided strong support for a whole-of-government approach to services for children in care. Stronger legislation was seen as a chance to achieve greater accountability and enhance opportunities for children in care. However, government agencies expressed concern that prescriptive legislation requiring the prioritisation of services to children in care had the potential to conflict with agency policy or legislation and could prevent an agency from providing services that reflect the level of actual risk.

Some responses indicated that legislative changes were not necessary to ensure integrated service delivery, or would be ineffective because they could not be enforced, while others highlighted circumstances where legislation had been effective in enhancing rights – such as the Disability Access Inclusion Plans in place in Western Australia. Some support was expressed for broadening the scope of priority response to include children who may be at risk of coming into care, care leavers or children whose disadvantage and vulnerability had resulted in subsequent contact with the criminal justice system.

Several submissions to the Review also addressed the need for a whole-of-government approach to child protection. For example, WACOSS referred to its submission to the 2012 Review and noted that:

Improving outcomes for the most vulnerable children is not the sole responsibility of one Department and in spite of inter-agency initiatives such as Rapid Response, children and their families continue to “fall through the cracks”.

...The Council now strongly recommends that the CCS Act is reviewed to ensure that government departments who provide services to children are required to coordinate solutions across government agencies to ensure the protection and wellbeing of children.

The Commissioner for Children and Young People recommended that Rapid Response should be included in the Act to ensure that timely and comprehensive services are available to children at risk of entering care, those already in care and to young people once they have transitioned to independent living.

9.3 Deliberations

Following the *2015 Consultation*, one of the proposals developed was an amendment requiring certain public authorities prescribed in regulations to prioritise services to the groups below upon the request of the CEO, provided that doing so would not be inconsistent with their duties, or otherwise unduly prejudice the performance of their functions:

- children in the CEO's care;
- children under the age of 18 years who are or were under a protection order (special guardianship); and
- children and young people who have left care and are eligible for leaving care services until the age of 25 years under section 96 of the Act.

This proposal included requiring the CEO of a public authority, upon request, to provide the CEO with written reasons for non-compliance if the public authority did not intend to comply because to do so would be inconsistent with its duties and responsibility and unduly prejudice the performance of its functions.

In considering this proposal as requested by the Minister (see section 1 of this Report), the Review was mindful of the pressures facing government services in the current economic

³³² *2015 Consultation Paper*, n 5, 21.

climate, but also of anecdotal evidence that child protection workers experience continuing difficulties accessing services for children in care under Rapid Response. The Review supported the proposal.

Recommendation 47

Section 22 of the Act should be amended to require:

- (1) a public authority prescribed in regulations to prioritise and provide services to the following persons in compliance with a request from the CEO for assistance made under section 22 of the Act:
 - (a) children in the CEO's care;
 - (b) children aged under 18 years who are or were under a protection order (special guardianship); and
 - (c) children and young people who are eligible for leaving care services under section 96 of the Act,provided compliance with the request is consistent with the public authority's duties and responsibilities and does not unduly prejudice the performance of its functions; and
- (2) the CEO of a public authority, upon request, to provide the CEO with written reasons for non-compliance with a request if the public authority does not intend to comply because to do so would be inconsistent with its duties and responsibility and would unduly prejudice the performance of its functions.

CHAPTER 10 Protection and care of children in Part 4 of the Act

10.1 Grounds for protection

Section 28(2) of the Act sets out the grounds on which a child in Western Australia may be found to be in need of protection. A child is ***in need of protection*** if:

- (a) *the child has been abandoned by his or her parents and, after reasonable inquiries —*
 - (i) *the parents cannot be found; and*
 - (ii) *no suitable adult relative or other suitable adult can be found who is willing and able to care for the child;*or
- (b) *the child's parents are dead or incapacitated and, after reasonable inquiries, no suitable adult relative or other suitable adult can be found who is willing and able to care for the child; or*
- (c) *the child has suffered, or is likely to suffer, harm as a result of any one or more of the following —*
 - (i) *physical abuse;*
 - (ii) *sexual abuse;*
 - (iii) *emotional abuse;*
 - [(iv) *deleted*]
 - (iv) *neglect,**and the child's parents have not protected, or are unlikely or unable to protect, the child from harm, or further harm, of that kind; or*
- (d) *the child has suffered, or is likely to suffer, harm as a result of —*
 - (i) *the child's parents being unable to provide, or arrange the provision of, adequate care for the child; or*
 - (ii) *the child's parents being unable to provide, or arrange the provision of, effective medical, therapeutic or other remedial treatment for the child.*³³³

The majority of protection applications to the Children's Court are made under section 28(2)(c). The terms physical and sexual abuse are not defined: however, section 28(1) provides an inclusive definitions of emotional abuse and neglect, and harm means any detrimental effect of a significant nature on the child's wellbeing, whether caused by a single or a series or combination of acts, omissions or circumstances.³³⁴

The definition of harm was amended on 1 January 2016 to emphasise the impact of cumulative patterns of harm on a child's wellbeing. This occurred in compliance with a recommendation of the Ombudsman WA in the report *Investigation into ways that State government departments and authorities can prevent or reduce suicide by young people*.³³⁵

10.1.1 Forced marriage

The Review received three submissions on forced child marriage.³³⁶ The submission from Anti-Slavery Australia made a number of suggestions to strengthen legal options for protecting children at risk of being subject to forced marriage. Forced marriage is described as a form of gender-based violence and a human rights abuse. In 2013 forced marriage became a federal offence under the Commonwealth *Criminal Code Act 1995* and is defined as:

[O]ne party to the marriage (the victim) entered into the marriage without freely and fully consenting:

- (a) *because of the use of coercion, threat or deception; or*

³³³ CCS Act s 28(2)(c).

³³⁴ CCS Act s 28(1).

³³⁵ Ombudsman Western Australia, *Investigation into ways that State government departments and authorities can prevent or reduce suicide by young people*, Report, Western Australia (9 April 2014) 122, recommendation 9.

³³⁶ One from Anti-Slavery Australia and two submissions from private individuals.

(b) because the party was incapable of understanding the nature and effect of the marriage ceremony.³³⁷

The forced marriage of a child is a circumstance of aggravation and attracts a penalty of nine years for a person who is a party to the marriage and for a person who causes (or facilitates) the marriage of a child. Late 2015, the legislation was amended to include a rebuttable presumption that a person under the age of 16 years is not able to consent to a marriage.

While the prevalence of forced marriage in Australia is difficult to identify, the Anti-Slavery submission indicated that in 2015-16 the Australian Federal Police received 69 new referrals relating to forced marriage compared to 11 in the previous year, and forced marriage constituted approximately 12 per cent of Anti-Slavery Australia's active client profile.

A number of legal options for responding to the threat of the forced marriage of a child are available under the Family Court Act and the Restraining Orders Act. These include parenting orders and child-related injunctions to help secure a child's safety; for example, Family Law Watch List orders can place a child on the AFP's watch list to prevent the child's removal from the country; and orders or injunctions are available for the personal protection of a child or the parent or person with whom the child is to live, spend time with or communicate with under a parenting order.³³⁸

Child protection jurisdictions in Australia are able to respond to forced marriage under their provisions for the protection of children, without express reference to forced marriage.³³⁹ In Western Australia, children facing a forced marriage or already married may meet the threshold for protection arising from harm caused by physical abuse, sexual abuse, emotional abuse or any combination of these. Upon finding a child in need of protection, the Court may place the child under a protection order (supervision) or a protection order, which removes parental responsibility from the child's parents.

One of the additional measures suggested by Anti-Slavery Australia included expanding Western Australia's mandatory reporting laws to include the reporting of any circumstance where it is suspected a child is at risk of significant harm, and defining harm to include forced marriage. Another was to expressly include forced marriage as a ground for protection in section 28 of the Act. Two submissions from private individuals recommended that 'child marriage' and female genital mutilation should both be subject to mandatory reporting laws and become a separate grounds for intervention to protect a child as a form of mental abuse.

Deliberations

The 2012 Review examined in detail the operation and effectiveness of the mandatory reporting provisions in sections 124A to 124H, including submissions that female genital mutilation and forced marriage should require mandatory reporting.³⁴⁰ That review affirmed the policy settings in place which limit mandatory reporting laws to the reporting of child sexual abuse. Neither did the current Review support the expansion of the mandatory reporting provisions.

The Review recognised the forced marriage of a child as a serious form of child abuse. The Department's Casework Practice Manual provides resources for child protection workers on responding to early and/or forced marriages including *End Forced Child Marriage: Best Practice Response Guidelines*.³⁴¹ The Review contemplated specifying forced marriage as a form of emotional abuse in addition to psychological abuse and exposure to family violence. However, it was decided that the forced marriage of child already provides clear grounds for protective

³³⁷ *Criminal Code Act 1995* (Cth) s 270.7A(1).

³³⁸ *Family Court Act* s 235; *Family Law Act* s 68B.

³³⁹ Tina Jelenic and Matthew Keeley, 'End Child Marriage: Report on the Forced Marriage of Children in Australia,' Research Report, National Children's and Youth Law Centre, Sydney (2013) 13 (*End Forced Marriage*).

³⁴⁰ 2012 Review, above n 13, 46.

³⁴¹ *End Forced Marriage*, above n 339.

intervention as a form of emotional abuse (as does female genital mutilation as a form of physical abuse).

10.1.2 Abandonment and unwillingness to care for a child

Section 28(2)(a) provides that a child is in need of protection as a consequence of being abandoned by his or her parents. In practice, this provision can be restrictive, as it requires that the parents cannot be found. Initially, the Department may be unable to locate a parent or parents, but if parents are subsequently found during protection proceedings the basis for a protection application under this ground falls away, even if a parent is unwilling to care for the child. Consequently, the ground of abandonment is almost always pleaded in a protection application in combination with the likelihood of the child suffering harm as a result of neglect or emotional abuse under section 28(2)(c)(iii) and (v) of the Act.

Equally, section 28(d) of the Act refers to a parent's inability to provide or arrange for the provision of adequate care for the child, or effective medical, therapeutic or other remedial treatment for the child, but not an *unwillingness* to do so. Unfortunately, there are instances where a parent will refuse to care for or make such arrangements, despite being present and able.

The Review considered that sections 28(a) and (d) of the Act should be amended to capture scenarios where parents are unwilling to care for a child, not just where they are unable to or where they cannot be found.

Recommendation 48

Section 28(2)(a)(i) of the Act should be amended to apply in circumstances where parents cannot be found or, if found, are unwilling to care for the child.

Recommendation 49

Sections 28(2)(d)(i) and (ii) of the Act should be amended to apply in circumstances where parents are unable or unwilling to provide, or arrange the provision of adequate care.

CHAPTER 11 Protection orders

11.1 Protection orders (supervision)

A protection order (supervision) enables the CEO to supervise the wellbeing of a child for the period of the protection order without assuming parental responsibility.³⁴² A number of conditions can be placed on a protection order (supervision) to support parents to care for their child while under the supervision of the Department.

50. Conditions of protection order (supervision)

- (1) *It is a condition of every protection order (supervision) that a parent of the child keeps the CEO informed about where the child is living.*
- (2) *A protection order (supervision) may include conditions to be complied with by —*
 - (a) *the child if, in the opinion of the Court, the child is able to understand the condition; or*
 - (b) *a parent of the child; or*
 - (c) *an adult with whom the child is living.*
- (3) *A protection order (supervision) must not include a condition about —*
 - (a) *the person or persons with whom the child is to live, unless the condition relates to the child living with a parent of the child specified in the order; or*
 - (b) *who is to have responsibility for the day-to-day care, welfare and development of the child.*

Although section 50(3) was originally intended to maintain the status quo in respect of a child's living arrangements, the section has lacked clarity on whether the current wording allows for a condition which alters the living arrangements of a child in preference of one parent over another regardless of the pre-order arrangements.

The Aboriginal Family Law Services submission suggested an amendment to clearly enable a protection order (supervision) to include a condition that a child live with a protective parent in situations of family violence. One of the Department's metropolitan offices also recommended expanding the capacity of a protection order (supervision) to place conditions about the parent with whom a child must reside and/or contact arrangements.

The Review agreed that despite its original intent, enabling the Court to make a condition on a protection order (supervision) as to the parent with whom the child is to live, could be useful in family violence situations to support a protective parent and prevent the need to bring the child into the care of the CEO.

Recommendation 50

The Act should be amended to clearly allow a protection order (supervision) to contain a condition as to the parent with whom a child should live.

11.2 Protection orders (special guardianship)

11.2.1 Background

Under section 60 of the Act, a protection order (special guardianship) (SGO) is an order which gives parental responsibility for a child to an individual, or two individual's jointly, to the exclusion of all others until the child reaches 18 years of age. SGOs may contain conditions about contact

³⁴² CCS Act s 47.

between the child and another person but cannot include any other conditions.³⁴³ Additionally, the Court may order the Department to pay a fortnightly amount to the special guardian in accordance with the Regulations.³⁴⁴ The Department may apply for an SGO either as a first protection application for a child, or in order to revoke and replace a protection order (time-limited) or protection order (until 18).

SGOs were introduced under amendments to the Act on 31 January 2011. In effect, these amendments renamed the provisions regarding protection orders (enduring responsibility), and introduced a new provision in section 69A to enable carers to apply for an SGO in the Children's Court. Carers are only eligible to do this if they have had the care of the child under a protection order (time-limited) or (until-18) for at least two years immediately preceding the application.

SGOs were never intended to be pseudo-adoptions, as special guardians receive court-ordered payments from the Department to help support the child. The Casework Practice Manual³⁴⁵ and the Department's *Information Sheet for Prospective Special Guardians*³⁴⁶ describes SGOs as an appropriate protection order where: reunification is not possible or in the best interests of the child; a carer has been identified as suitable, willing, able and safe to provide long-term care for the child; case management is no longer required; and the making of an SGO would provide the child with a long-term stable living arrangement. In assessing the suitability of the proposed special guardian:

*An assessment must take into account the carer's capacity and commitment to preserve the child's cultural, ethnic and religious values and traditions, and how [the proposed special guardian] can maintain contact with the child's parents, siblings, other relatives, and other people who are significant to the child life.*³⁴⁷

Section 61 of the Act requires the Department to provide the Court with a written report which outlines the proposed arrangements for the wellbeing of the child and details the carer's suitability, willingness and ability to provide long-term care for the child. If Recommendations 10 and 12 are implemented, written reports for an Aboriginal child will also require the Department to demonstrate compliance with the placement hierarchy in section 12 of the Act and consultations under section 81 of the Act, and such reports must be accompanied by a cultural support plan for the child. Equally, Recommendation 57 recommends cultural plans for CaLD children in the same scenario.

Unlike care planning decisions in written proposals, or the recommended cultural plans that would attach to protection orders (time-limited) or (until 18), the contents of the written report or cultural plan that accompany SGO applications would not be reviewable by the Care Plan Review Panel process.

11.2.2 Submissions

A number of stakeholders recommended the Review consider amending the Act to provide that other types of conditions (beyond just contact) may be placed on SGOs. These included:

- *...the Department amends the special guardianship provisions of the Children and Community Services Act 2004 to include a child's right to maintain their name, identity, cultural background and links with their community;*³⁴⁸
- *...a protection order (special guardianship) must include the condition that the child may not be permanently removed from Western Australia by or on behalf of the special guardian without any order of the court expressly permitting such removal;*³⁴⁹ and

³⁴³ Ibid s 63.

³⁴⁴ Ibid s 65.

³⁴⁵ *Casework Practice Manual*, above n 80, Ch 3.3 - protection orders (special guardianship).

³⁴⁶ Department for Child Protection and Family Support, *Prospective SGO carers*, Information Sheet, Western Australia (undated).

³⁴⁷ *Casework Practice Manual*, above n 80, Chapter 3.3 - protection orders (special guardianship).

³⁴⁸ Commissioner for Children and Young People.

³⁴⁹ Aboriginal Legal Service.

- *Section 61 (2) [of the Act] include a provision that the Court will not make an order unless a child or young person provides consent to this (in accordance to their capacity to provide consent).*³⁵⁰

A number of these issues were also raised during the 2012 Review, including a child's right to maintain their name, identity, cultural background and links with their community.³⁵¹ The 2012 Review considered the existing provisions in the Act including:

- **section 8(1)(j)** of the Act which requires the Court to consider: “*the child's cultural, ethnic or religious identity (including any need to maintain a connection with the lifestyle, culture and traditions of aboriginal people or Torres Strait Islanders)*”;
- **Section 9(i)** of the Act which enshrines the principle that: “*decisions about a child should be consistent with cultural, ethnic and religious values and traditions relevant to the child;*” and
- **section 61 (4) and (5)** which require the Court to consider specific requirements when placing Aboriginal or CaLD children.

It determined that, at that time, these provisions adequately reflected the special considerations that should be made by the Department and the Court in respect of SGOs. However, since 2012 the number of SGOs has significantly increased giving the Department a clearer understanding of the emerging issues. The Review considered the possibility of the need for additional SGO conditions, particularly in light of the emphasis this Review has placed on culturally safe practices.

11.2.3 Deliberations

Members of the Review expressed serious concern about the long-term impact on children and future generations of a legal framework which enabled a special guardian to change the name of a child, relocate to another jurisdiction and not comply with an agreed cultural plan. The risk of deterring potential special guardians by the introduction of conditions on SGOs was balanced against a child's right to have stability of relationships and culture, not just placement. This is consistent with the Department's approach to permanency planning which states as a fundamental principle:

*...that when children are unable to live with their family, efforts to promote the connectedness of family and significant relationships with people who are important to them are essential to the child's culture, identity, and sense of belonging.*³⁵²

The Review agreed there was a need for safeguards to preserve the child's identity and connection to culture under orders where the Department is no longer involved. The conditions in submissions were considered separately and informed by other Australian jurisdictions with comparable orders. In particular, the conditions that can be, or must be placed on, a permanent care order under Victorian child protection legislation, including the following, were considered in detail:

s.321 Permanent care order – Children, Youth and Families Act 2005 (Vic)

(1) A permanent care order—

- ... (ca) must include a condition that the person caring for the child must, in the best interests of the child and unless the Court otherwise provides, preserve—
 - (i) the child's identity and connection to the child's culture of origin; and
 - (ii) the child's relationships with the child's birth family; and ...
- (e) may include conditions that the Court considers to be in the best interests of the child concerning contact with the child's siblings and other persons significant to the child; and
- (f) in the case of an Aboriginal child, may include a condition incorporating a cultural plan for the child...

³⁵⁰ CREATE.

³⁵¹ 2012 Review, above n 13, 28.

³⁵² Permanency Planning Policy, above n 277, 2.

11.2.4 Name, identity and culture

Children's name

The 2012 Review was aware that some special guardians had sought a name change for children in their care through applications to the Register of Births, Deaths and Marriages, without the consent of the child's birth parents.³⁵³ The 2012 Review considered the issue of name changes in the context of a child with 'sufficient maturity and understanding' consenting to or seeking the change. However, the Department's records indicate that the most common age bracket in which SGOs are sought and made is 5 to 9 year-olds, followed closely by children aged 1 to 4 years and it may be possible, under section 19 of the *Births, Deaths and Marriages Registration Act 1998*, that a special guardian could successfully apply to change the surname of a child in the absence of the child or birth parents' consent if the child is under 12 years. This prompted reconsideration of the issue.

The Review considered the significance of a child's name in relation to the child's sense of identity, and considered it was undesirable to allow a special guardian to change a child's name, other than in exceptional circumstances and where a court determined it to be in the best interests of the child. It was acknowledged that in some exceptional cases there would be a strong 'best interests' argument for changing the child's name, but it was envisaged this scenario would be rare.

Identity and culture more broadly

Beyond preserving a child's name, the Review considered the importance of preserving children's identity and right to be connected to their culture of origin. The United Nations Convention on the Rights of the Child articulates the importance of "a child's right to preserve his or her identity, including nationality, name and family relationships"³⁵⁴ and right to enjoyment of culture.³⁵⁵ The Review considered this right as one which attached to all children and which warranted a mandatory condition for all SGOs.

Submissions, including SNAICC et al, emphasised the importance of connection to culture and identity for Aboriginal children generally, but in particular for those in out-of-home care. The Review appreciated the importance of these issues specifically in relation to Aboriginal children in acknowledgement of the high number of Aboriginal children in care and the serious concerns submissions from Aboriginal organisations expressed regarding the impact of loss of connection to culture and identity on Aboriginal children. This message was further strengthened by Dr Tracy Westerman³⁵⁶ who spoke to the Review Committee about the importance of a sense of cultural identity on the wellbeing of Aboriginal children throughout the stages of development and into young adulthood.

SNAICC's June 2017 resource paper *Understanding and Applying the Aboriginal and Torres Strait Islander Child Placement Principle* sets out the fifth element of the Principle, Connection, as:

*Aboriginal and Torres Strait Islander children in out-of-home care are supported to maintain connections to their family, community, culture and country, especially children placed with non-Indigenous carers.*³⁵⁷

SNAICC's resource paper suggests possible legislative amendments which would reflect best practice in achieving connection for Aboriginal children and partnership with Aboriginal people including legislation which:

³⁵³ 2012 Review, above n 13, 28.

³⁵⁴ *United Nations Convention on the Rights of a Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 8 September 1990) art 8.

³⁵⁵ *Ibid* art 30.

³⁵⁶ See 7.4.3 of this Report .

³⁵⁷ SNAICC *Resource for Legislation*, above n 70.

- *Recognises a child's right to enjoy culture with community;*
- *Recognises a child's right to contact with family;*
- *Allows contact with family to be court ordered...;*
- *Requires a cultural care plan for all children in out-of-home care (OOHC) that is implemented and regularly reviewed;*
- *Specifies safeguards in relation to permanency of care provisions that maintain connections to family, community, culture and country...*
- *Requires ACCOs to approve permanent care decisions, including whether a permanent care order (or similar) is pursued through court proceedings...³⁵⁸*

The Review also considered a submission from the Aboriginal Legal Service advocating a condition prohibiting special guardians from travel outside the jurisdiction, but considered the crucial element was maintaining a child's connection to culture and community, whether carers relocated, for example, to the Northern Territory or elsewhere within Western Australia. Safeguards should require an ongoing commitment to the child's identity and culture.

To this end, the Review agreed the Act should enable the Court to include conditions on an SGO which incorporate elements of a child's cultural plan. The conditions reflecting the contents of a cultural plan would need to be specific enough to be enforceable, but flexible enough to extend across the life of the SGO. Conditions may include the child returning to country for ceremony, more generally to maintain relationships with siblings, family and kinship and connection with the community, or opportunities to learn or retain language as a key component of cultural identity. Recommendations 33 and 34 of this Report propose the Family Court as an appropriate avenue for varying, adding to or substituting conditions on SGOs.

To further build on the theme of creating appropriate safeguards for Aboriginal children, and in acknowledgement of the historical context of Aboriginal children being cared for by non-Aboriginal carers, the Review contemplated provisions akin to section 323(2) of the *Children, Youth and Families Act* (Vic) which provide that the Court cannot make a 'permanent care order' (equivalent to an SGO) for an Aboriginal child, solely with a non-Aboriginal special guardian, unless it has received a report from an Aboriginal agency recommending the order.

s.323 Restrictions on the making of permanent care order in respect of an Aboriginal child - Children, Youth and Families Act (Vic)

- (2) *The Court must not make a permanent care order in respect of an Aboriginal child unless—*
- the Court has received a report from an Aboriginal agency that recommends the making of the order; and*
 - a cultural plan has been prepared for the child.³⁵⁹*

This would not prevent an Aboriginal child having a stable placement with a non-Aboriginal carer where it is the best available option in the best interest of that child.

The Review Committee was divided on whether the Court's making of an SGO should be contingent on an Aboriginal agency's recommendation. However, the Review's final position was that before making an SGO for an Aboriginal child solely with non-Aboriginal carers, the Court should be required to consider a report from an Aboriginal agency.

Unlike the reference to an Aboriginal representative organisation in Recommendation 9 of this Report, which is intended to be a broad and inclusive definition for the purposes of consultation, in this context the Review considered an Aboriginal agency would need to be limited to ACCOs involved in child protection and family support service delivery or Aboriginal people with relevant qualifications. If implemented, work would be required to identify the agencies and persons who could provide the required court reports.

³⁵⁸ Ibid.

³⁵⁹ *Children, Youth and Families Act 2005* (Vic) s 323(2).

Recommendation 51

- (1) The Act should be amended to provide that protection order (special guardianship) must include the following conditions:
 - (a) the name of a child cannot be changed:
 - (i) without a court order granting permission to do so because exceptional circumstances exist; and
 - (ii) in the case of a child with sufficient maturity and understanding, unless the child consents; and
 - (b) a special guardian must preserve the child's identity and connection to the child's culture of origin, unless the Court otherwise provides in accordance with the child's best interests;
- (2) The Court should have discretion to incorporate specific elements of a child's cultural plan as conditions of a protection order (special guardianship).
- (3) The Court must not make a protection order (special guardianship) for an Aboriginal child solely with a non-Aboriginal carer unless it has considered a report from an Aboriginal agency or Aboriginal person with relevant qualifications in respect of the making of a protection order (special guardianship).

11.2.5 Death of a special guardian

When two people are special guardians jointly, if one of the guardians dies the other will have sole parental responsibility for the child who is the subject of the order. However, where a sole special guardian or a couple jointly holding special guardianship die, there is arguably a legal vacuum in relation to who has parental responsibility for the child.

Generally, if the subject of a legal order dies the order ceases to have effect. However, in the case of an SGO the person who is the subject of the order is the child. An SGO does two things: it allocates a special guardian/s parental responsibility and excludes the parental responsibility of all other others. Where a sole special guardian dies, an SGO potentially continues in effect to the extent that it excludes the parental responsibility of the parents and the Department, leaving the child with no person holding parental responsibility for them.

Given that an SGO is applied for and granted on the basis that it is in the child's best interest to be on a long-term order, it may not be appropriate for parental responsibility to revert to the biological parents. Equally, having a situation where the CEO automatically assumes parental responsibility on the death of a special guardian could be problematic in situations where the Department has not been informed about the special guardian's death. The Department could unknowingly have responsibility for a child it does not have any current contact with.

The Review considered that the approach taken in Victoria provides an appropriate solution. In Victoria, once the Secretary of DHS is aware that a person with parental responsibility for a child under a permanent care order has died, the Secretary must notify the Court. From the date of the court notification, the permanent care order is taken to be a care by secretary order (which transfers parental responsibility to the Secretary).

Recommendation 52

The Act should be amended to provide that if the Department becomes aware of the death of a sole special guardian, or both joint special guardians, it is required to notify the Court and once the Court receives the notification the protection order (special guardianship) is taken to be a protection order (until 18).

CHAPTER 12 Children in the CEO's care

12.1 Advocacy and child-friendly complaints system for children in care

Several submissions called for the establishment of an independent advocacy and complaints system for children in care.³⁶⁰ The role of the Department's Advocate for Children and Young People in Care (the Advocate) is to support children in care to know their rights and to have a say in decisions that affect their lives. The Advocate provides children in care with:

- individual advocacy services so they can have their views heard and negotiate changes;
- support for accessing formal complaints and appeals processes; and
- improving participation at individual and group levels.

In 2016-17, the Advocate was contacted by, or on behalf of, 334 children in care. Of this group, 39 per cent were Aboriginal and three per cent were from a culturally and linguistically diverse background.³⁶¹ Placement arrangements and contact issues were the most common reasons for seeking assistance from the Advocate.

As addressed at 2.3.6 in Chapter 2, strengthening independent oversight of the out-of-home care system has been under the spotlight of the Royal Commission and national agenda for improving out-of-home care outcomes for children in state care. Given the Department is currently both the funder and largest provider of out-of-home care services in Western Australia, and is responsible for monitoring CSO and Department service delivery, submissions argued there was a need for greater independent oversight of the system.³⁶² The Department acknowledged this situation leads to a perception of a conflict of interest in its submission to the Royal Commission's consultation paper on out-of-home care,³⁶³ and referred to the previously mentioned reforms underway including the review of *Better Care, Better Services* standards to create Safety and Quality standards,³⁶⁴ and Reform Action 66 to establish independent oversight of the Safety Standards by the Ombudsman WA.

12.1.1 Submissions

Eight submissions suggested that, to further avoid conflicts of interest, the Advocate should be independent of the Department as occurs in other states. It was also noted that only 35 per cent of the 96 children and young people interviewed for a recent project knew about the Advocate and only one position is the dedicated advocate for the 4,795 children currently in care.³⁶⁵

In their pre-budget submissions for the WA state Budget 2017-18, both the Youth Affairs Council and WACOSS advocated for the development of an appropriately resourced external child protection oversight process and an independent child advocacy and support service:

*While the WA Ombudsman now has responsibility for hearing individual complaints, many children may be unwilling to engage with the formal complaints system without the significant support of someone they trust. Consequently, an independent community-based support service for children experiencing abuse or neglect, working in close partnership with existing child protection complaints processes and the statutory authority responsible for external oversight of the out of home care system is recommended.*³⁶⁶

³⁶⁰ CREATE; Youth Affairs Council; WACOSS.

³⁶¹ *Final Report 2016/2017*, above n 10.

³⁶² Including from the Alliance and CYFFA; Centrecare; CREATE; MacKillop Family Services; the UWA Social Policy Practice and Research Consortium; Australian Association of Social Workers; Youth Affairs Council.

³⁶³ *Royal Commission Consultation Paper*, above 29.

³⁶⁴ *Building a Better Future*, above n 19, 46.

³⁶⁵ Youth Affairs Council.

³⁶⁶ WA Council of Social Service, *The Future in our Hands: Smarter Services; Stronger Families; Resilient Communities*, Pre-Budget Submission for the WA State Budget 2017-18, Western Australia (2017), 14.

The Commissioner for Children and Young People submitted that the Department should develop an internal child-centred complaint's management process based on best practice complaint resolution methods and that this should be included in the Act.

12.1.2 Deliberations

The Review acknowledged the substantial body of previous work on proposals for an independent child-focused central complaints avenue for children in Western Australia (possibly the Commissioner for Children and Young People) in response to a recommendation of the 2012 Blaxell Inquiry into St Andrew's Hostel in Katanning.³⁶⁷ While initially receiving Government support, this was further explored in the 2013 *Review of the Commissioner for Children and Young People Act 2006*³⁶⁸ and in a subsequent Inquiry by the Joint Standing Committee (Standing Committee) on the Commissioner for Children and Young People on ways the Commissioner could enhance the State's response to child abuse.³⁶⁹

Resulting from the further considerations, the Standing Committee recommended that: the Commissioner's office develop an education and outreach role to increase awareness of child abuse and its prevention; the *Commissioner for Children and Young People Act 2006* be amended to provide for a complaints monitoring function that extended to complaints made about services provided to children by public sector agencies and non-government services providers; and the Commissioner's office continue to develop a monitoring role with regard to system improvement and capacity building of the child protection sector.³⁷⁰

Apart from amendments regarding its complaints monitoring function, the Commissioner for Children and Young People has proceeded with this work and in May 2016 launched a range of resources promoting Child Safe Organisations including *Child Safe Organisations WA: Guidelines*; information for parents, carers and family; and child-friendly information for children on making a complaint.³⁷¹ Subject to consideration of any relevant recommendations in the final report of the Royal Commission,³⁷² the then Government deferred a decision on whether the Commissioner's complaints monitoring role should be expanded.

In addition, last year the Advocate partnered in a project with the Commissioner for Children and Young People and CREATE to inform the development of more child-friendly complaints processes for children in care. This culminated in the report *Speaking Out About Raising Concerns in Care*³⁷³ in which 96 children and young people in care shared their views and experiences of raising concerns and making complaints. This work is helping to improve practices and procedures to provide children in care with multiple methods and avenues for raising concerns.

The Department has commenced developing material for child protection workers and residential care staff which focusses on encouraging and supporting children to speak out about their concerns while in care through a number of avenues. This work will include examining options which make use of children's safety networks, and exploring the most effective ways of making

³⁶⁷ Blaxell, P, *St Andrew's Hostel Katanning: How the system and society failed our children – A Special Inquiry into the response of government agencies and officials to allegations of sexual abuse*, Public Sector Commission, Western Australia (2012) Recommendation 2.

³⁶⁸ Public Sector Commission, *Review of the Commissioner for Children and Young People Act 2006*, Review report, Western Australia, (May 2013).

³⁶⁹ Joint Standing Committee on the Commissioner for Children and Young People, *Everybody's Business – An examination into how the Commissioner for Children and Young People can enhance WA's response to child abuse*, Report No.7, Parliament of Western Australia (June 2016).

³⁷⁰ Ibid.

³⁷¹ Available at: www.cyp.wa.gov.au/our-work/projects/child-safe-organisations-wa/

³⁷² Government response to the recommendation of Report No.7 the Joint Standing Committee on the Commissioner for Children and Young People, *Everybody's Business – An examination into how the Commissioner for Children and Young People can enhance WA's response to child abuse*, [www.parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/58509757784F6C7848257FD400AA8FF/\\$file/66159736.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/58509757784F6C7848257FD400AA8FF/$file/66159736.pdf).

³⁷³ *Speaking Out About Raising Concerns*, above n 327.

sure children are aware of these avenues and that they feel safe to speak out. Safety networks include the child's care team. Care teams mostly comprise people who are part of their family or community who working together to meet the child's needs across the nine dimensions of care.

The Review supported this approach, but did not consider a child-specific complaints process should be provided in legislation. The Department's formal complaints process is policy-based, linking with the Ombudsman WA as the third tier of the process. As noted in submissions, the Ombudsman WA is also developing capacity to provide a direct child-friendly complaints response for children in care (rather requiring children to use the Department's three tiered complaints process), and over the past 18 months has visited and distributed materials to children in residential care facilities. This work is ongoing in collaboration with the Department.

Recommendation 53

In collaboration with partner agencies, the Department should strengthen and further develop child-friendly complaints processes for all children in care which:

- are targeted to the needs of different groups taking into account children's age and type of care arrangement;
- provide children with a range of options to speak out about their concerns;
- link-in with children's existing safety networks;
- are promoted through age-appropriate materials and platforms; and
- are understood and promoted, with children and their safety networks, by child protection workers and residential care workers.

The Advocate works closely with Department districts to promote information and awareness amongst staff and children in care about the importance of children's participation, the Advocate's role and availability and the Charter of Rights for Children and Young People in Care.

In addition to individual advocacy for children in care, the Advocate has a role to play in improving the overall operation of the out-of-home care system, and played a pivotal role in introducing Viewpoint³⁷⁴ to the Department in 2011. Viewpoint is a computer-based case management tool used to promote the participation and engagement of children in decision making, both at the individual level in relation to their own care and well-being and at the group level in relation to the effectiveness of service provision.

At the individual level, the questionnaires were first introduced so children could flag issues of concern and indicate their views, wishes and worries. Child protection workers are required to follow-up face-to-face with children to explore issues raised and generate actions in collaboration with the child which are then reflected in care plans.

More recently the Advocate worked on aligning the Viewpoint questionnaires with the Needs Assessment Tool (NAT) and out-of-home care Outcomes Framework the Department introduced in December 2016. Updates in data-linking between Assist and Viewpoint will soon enable child protection workers completing a NAT online to see a child's Viewpoint responses to questions related to the complex and changing needs of children in care across their dimensions of care. This will give children an additional opportunity to participate in their own assessments.

In addition, de-identified aggregated Viewpoint reports give children a voice at district, state and national levels on a number of issues including the following:

- districts can generate local data to incorporate the views of their particular children when identifying service priorities or developments

³⁷⁴ Viewpoint is used internationally, including in the United Kingdom, Ireland, the US, Canada and Europe, and is now also used in most Australian states and territories.

- team leaders and managers have a supervision tool to assist in evaluating practitioners' performance from the child's perspective
- the Department's Child Protection and Family Support management team receives six-monthly reports analysing children's feedback in the previous six months and earlier periods, providing information about what's changed, improved or deteriorated.

The Advocate also conducts six-monthly one-day workshops for care team leaders on evaluating children's feedback and developing service responses and practice improvements for working with children in care.

In relation to the role of the Advocate, the Review noted the limitations that have become inherent in the current model given that it relies on one advocate to fulfil an individual advocacy role for the high number of children in care state-wide, and a systems role in managing and promoting Viewpoint and identifying themes and trends to influence systems change.³⁷⁵ Again, subject to the findings of the Royal Commission, with the increase in the number of children in care and the disproportionate representation of Aboriginal children in care, it is time to consider the effectiveness of the current model of advocacy used to meet the needs of children in care.

The Review agreed Western Australia needed an advocacy model more suited to the current profile of children in out-of-home care, and that the independence of the individual advocacy role was fundamental. At the same time, the Advocate for Children in Care within the Department was regarded as an important role that should continue in conjunction with any new role which is established independent of the Department.

Recommendation 54

The model of independent child advocacy most appropriate for children in the CEO's care should be explored, taking into account the number of children in care across the State, their type of care arrangements and the high proportion of Aboriginal children in care.

12.2 Care planning

The care planning provisions in the Act received attention from a number of Review submissions. Identifying and meeting the needs of children in the CEO's care is one of the Department's core responsibilities. The Act contains three sections which require planning to be undertaken for children in care:

- **section 89** which requires a care plan for all children in the CEO's care;
- **section 39** regarding the preparation of provisional care plans for children who are taken into provisional protection and care and become subject to a protection application; and
- **section 88 I** which requires a child's care plan to be modified when placed in the Kath French Secure Care Centre under a secure care arrangement.

All children in the CEO's care are required to have a care plan prepared and implemented as soon practicable after coming into care. Practice requirements determine this to be 30 days within entering care.³⁷⁶ A **care plan** is a written plan which:

- (a) identifies the needs of the child;
- (b) outlines steps or measure to be taken to address those needs; and
- (c) sets out decisions about the care of the child.... Section 89(1).

³⁷⁵ As described in submission No.22b from the Department to the Joint Standing Committee on the Commissioner for Children and Young People, for its Inquiry into the role of the Commissioner for Children and Young People cited in *Everybody's Business – An examination into how the Commissioner for Children and Young People can enhance WA's response to child abuse*, Report No.7 (June 2016) 33.

³⁷⁶ This does not apply for children taken into provisional protection and care, who are required to have provisional care plans prepared within seven days (section 39), unless they are placed in secure care, in which case they must have a provisional care plan prepared within two working days (section 88 I).

Provisional care plans (section 39), and care plans which are modified when children are placed in secure care (section 88 I), also require these matters to be addressed.³⁷⁷

Care plans identify children's educational, health and cultural needs and the steps required to address them. The decisions "*about the care of the child*" which must be included in a care plan include decisions about the child's placement arrangements; secure care decisions specified in section 88G; and decisions about contact arrangements between the child and his or her family or others of significance to the child.³⁷⁸

Care plans must be reviewed at regular intervals not exceeding 12 months, and parties to the care plan who are aggrieved by a care planning decision, including the child or child's parent, may apply to the CEO for a review of the decision. This review is undertaken by the Care Plan Review Panel, which must consider the application and any other material referred to it and report to the CEO on its recommendation. During 2016-17, the Review Panel received 30 applications³⁷⁹ and held seven hearings, with six hearings upholding the Department's care planning decisions and one hearing resulting in the decision not being upheld. Eighteen applications were withdrawn or did not meet the criteria for a hearing. The main reasons for review concerned the contact decisions specified in a child's care plan.³⁸⁰ If a person is subsequently aggrieved by the CEO's decision based on the Care Plan Review recommendation, he or she may make an application to SAT for the CEO's decision to be reviewed.³⁸¹

12.2.1 Children's participation in care planning

The importance of hearing the views of children and their participation in decision-making has already been discussed in 8.3 of this Report. Viewpoint has made a positive contribution to care planning. In 2016-17, over 1,200 children in care used Viewpoint to share their views and care experiences. Responses were used to develop individual care plans as well as to provide group feedback about care experiences. Fifty-one per cent of Viewpoint participants were Aboriginal. The majority of Viewpoint participants reported high levels of satisfaction with their placement arrangements and their relationships with carers. However, significant numbers wanted more access to information about their personal histories and many were concerned about their academic performance, with some indicating they would benefit from better access to computers.

The principle of child participation in section 10 of the Act should underpin the Department's practice in all aspects of case management including care planning practice. However, to address anecdotal concerns about the extent to which children are involved in their care planning, the Review considered particular emphasis should be placed on providing children with participation opportunities in the care planning process.

Recommendation 55

The provisional care planning and care planning provisions in sections 39, 88 I and 89 of the Act should be amended to require that:

- (a) children are given opportunities and assistance to participate in the preparation of their care plans; and
- (b) to express their views and wishes,

including in the preparation of cultural support plans and leaving care plans, and their views and wishes should be recorded in the plan. (cont.)

³⁷⁷ Except for (c) above in relation to secure care.

³⁷⁸ CCS Act s 89(1).

³⁷⁹ Applications were received from 17 biological parents; four foster carers; one family carer; one maternal grandparent; three paternal grandparents; one maternal uncle; and, three maternal aunts.

³⁸⁰ Final Report 2016/2017, above n 10, 70.

³⁸¹ CCS Act ss 90(1), 93, 94.

This should be done giving due regard to the child's age and level of understanding and in a way that is guided by the principle of child participation in section 10 of the Act.

12.2.2 Modification of care plans

Section 89(4) enables the CEO to modify a care plan at any time if considered appropriate to do so, and section 89(6) requires that as soon as practicable after a care plan has been prepared or modified, "a copy of the care plan or modification" must be given to the child, each parent, any carer and any other person the CEO considers to have a direct and significant interest in the child.

The Review learned of anecdotal evidence that the Department has made care planning decisions that were not subsequently recorded as modifications in the children's care plans, either at all or not in a timely manner. When a care planning decision involves a decision about a child's placement or the contact a parent may have with a child, the implications of not modifying the care plan and providing the parties with a copy in a timely manner significantly impedes the right of the relevant party's to the care plan decision reviewed. The Review considered this required an amendment to clarify and strengthen section 89 to remove any doubt about how it should operate.

Recommendation 56

Section 89 should be amended to clarify that any change to a care planning decision must result in a modification of the child's care plan as soon as practicable after the decision has been made.

12.2.3 Cultural support plans for CaLD children

Similar to the cultural support planning amendments recommended in Chapter 3 for Aboriginal children in care, specific cultural support planning provisions are required for children from culturally and linguistically diverse backgrounds (CaLD). At 30 June 2017, there were 273 children in the CEO's care from a CaLD background. This compares with 250 at the end of 2014 and 239 at the end of December 2012. It appears that the number of CaLD children in care is relatively stable next to the increasing number of children entering care. The majority of CaLD children in care were located in metropolitan Perth (81%). The introduction of cultural support planning requirements in legislation, including that a cultural support plan should accompany the reports the Department must provide to the Court, will increase accountability.

Recommendation 57

It is recommended that:

- (a) a plan to address cultural support needs of children from culturally and linguistically diverse backgrounds – a cultural support plan – should become a specific requirement as part of a care plan under section 89 of the Act, and decisions about cultural support should be reviewable by the Care Plan Review Panel and the State Administrative Tribunal; and
- (b) it should be a requirement that a plan for maintaining a CaLD child's culture and identity – a cultural support plan – is to accompany the reports the Department must provide to the Court pursuant to section 61 when applying for a protection order (special guardianship) and section 143 when applying for a protection order (time-limited) or protection order (until 18).

12.3 Leaving care

Review submissions made recommendations related to leaving care planning and services for children who are leaving or have left the CEO's care. The importance of supporting children transitioning from state care is evidenced through the growing body of research on outcomes for children who have been in care. In 2015, the Senate Committee inquiring into out-of-home care expressed concern about poor outcomes across a range of indicators the evidence suggests children in care experience.³⁸² The evidence the Senate Committee heard indicated that once young people leave care they are more likely to experience homelessness and be exposed to drug and alcohol misuse and physical and sexual abuse.³⁸³ The Committee identified the support available to children transitioning from out-of-home care as a significant gap.³⁸⁴

In reviewing the existing leaving care provisions set out below, the Review considered the Act provides a strong level of support for care leavers until they reach 25 years of age. Nevertheless, submissions on leaving care referred to anecdotal evidence that this vulnerable group of young people are experiencing difficulties accessing their leaving care entitlements and services for a variety of reasons. The sections below address the matters that may be improved through clarifying or strengthening the existing leaving care provisions.

12.3.1 Current provisions

Leaving care provisions in the Act are located in the section 89 care planning requirements and in sections 96 to 100, which provide for assistance to be provided to care leavers. Under section 89(5), a child's care plan must be modified when the child is "*about to leave the CEO's care*", so that the plan:

- (a) *identifies the needs of the child in preparing to leave the CEO's care and in his or her transition to other living arrangements after leaving the CEO's care; and*
- (b) *outlines the steps or measures designed to assist the child to meet those needs –* Section 89(5).

Sections 96 to 100 provide for: who qualifies for leaving care assistance (s.96); children's entitlement to personal material when they leave care (s.97); the CEO's responsibility to ensure children are provided with social services to meet the needs identified in their care plan (s.98); the assistance the CEO must provide (s.99); and the CEO's power to provide financial assistance to young people once they have left care (s.100). A child qualifies for leaving care assistance if he or she:

- has left the CEO's care
- is under the age of 25
- at any time after reaching 15 was: under a protection order (time limited) or protection order (until 18); or was the subject of a negotiated placement agreement for at least 6 continuous months; or was provide with placement services under s.32(1)9a) for at least 6 continuous months – Section 96.

During 2016-2017, 205 children aged 15 years and over left the CEO's care and qualified for leaving care services. Of these, 174 were on protection order (until 18) and 29 were on a protection order (time-limited). The Department funds four leaving care services to which young people should be referred. Between them, the services take referrals from throughout Western Australia for children and young people aged between 14 and 25 years who are in, or have left, the care of the CEO, with priority given to those most at risk and who have experienced multiple placements.

³⁸² Senate Community Affairs Reference Committee, above n 287, 278.

³⁸³ Ibid 116.

³⁸⁴ Ibid.

The Review agreed with submissions³⁸⁵ that the leaving care provisions in section 89(5) need to be strengthened. The requirement that a care plan be modified when a child “*is about to leave the CEO's care*” is out-of-step with the demonstrated need for planning to commence much earlier during a child's time in care, the Department's leaving care own Casework Practice Manual guidelines,³⁸⁶ which require planning to commence from the age of 15 years, and with the National Standards for Out-of-Home Care, which state transition planning should start when a child reaches 15 years. This planning should include a focus on preparing for children's future education and employment opportunities and their development of independent living skills.

Similar to Recommendations 11 and 57 regarding cultural support planning, it is recommended a leaving care plan become a specific requirement as part of a care plan under section 89 of the Act.

Recommendation 58

A plan to address a child's leaving care needs – a leaving care plan – should become a specific requirement as part of a care plan under section 89 of the Act and planning to support a child's transition from care should commence when a child reaches 15 years of age.

12.3.2 Entitlement to personal material

When children leave the CEO's care, section 97 of the Act provides them with a right to have any personal material held by the Department or a carer. Section 97(1) sets out the ‘personal material’ children are entitled to: their birth certificate; passport; school or other education-related reports; photographs; “*or any other document or material that is prescribed, or of a class prescribed, in regulations*”. To date, no regulations have been made prescribing additional personal material.

CREATE's consultation with children and young people identified many more items of personal significance that should be prescribed in regulations. These included:

- *information relating to family and cultural background, including, but not limited to, a family tree, contact details for family and communications with family;*
- *a life history of their time in care including, but not limited to, a life story book, placement history and contact details for carers;*
- *further information about the type of photos to be provided to a child or young person;*
- *any item that a child or young person has made such as artwork or school assignments, certificates or awards that they have received;*
- *case files or documents that relate to their life in care, or key decisions that were made in care;*
- *personal belongings such as treasured items, furniture, or gifts; health and dental records; identification documents;*
- *financial documents and information; and*
- *information on the supports available to young people leaving care.*

Some of the things participants wanted included were material goods or items that had been provided to them by the Department or given as gifts:

Like my stuff that's protected and treasured like a necklace someone gave you or anything like that (13 year old, male, Aboriginal).

[They should be given] Whatever they are given. Furniture that's bought for us throughout our time in care. Whatever [The Department] buys for the young person, the young person should be able to take. I was bought sheets and quilt covers and curtains

³⁸⁵ Centrecare; CREATE; Commissioner for Children and Young People; Alliance and CYFAA; Youth Affairs Council.

³⁸⁶ *Casework Practice Manual*, above n 80, Chapter 3.4– Planning.

as presents and then I wasn't allowed to take them when I left...If we are moving to independent living we should be able to take that stuff and then we wouldn't have to replace that stuff and it would come into handy (25 year old, female).

Recommendation 59

The *Children and Community Services Regulations 2006* should be amended pursuant to section 97(1)(e) of the Act to prescribe other documents or material that a child is entitled to when leaving the CEO's care.

12.3.3 Entitlement to leaving care services

Section 98(1) of the Act states that: "*The CEO must ensure that a child who leaves the CEO's care is provided with any social services the CEO considers appropriate having regard to the needs of the child as identified*" in the child's care plan.³⁸⁷

The Review was made aware of circumstances where care leavers have not been able to access assistance through social services because the matter they were seeking assistance for was not expressly included in their care plan. Amendments are required to section 98 to ensure that the CEO's consideration of what assistance is appropriate for a care leaver is not limited to those needs that are identified in care plans. There is any number of unforeseeable issues and circumstances that may arise for young people once they have left care, which it would be unreasonable to expect could be anticipated and documented in the care planning process.

Recommendation 60

Section 98 should be amended to clarify that the CEO must ensure that a child who has left the care of the CEO is provided with any social services that the CEO considers appropriate having regard to the needs of the child, regardless of whether a matter is expressly identified in the child's leaving care plan.

12.3.4 Care leavers to be informed of their entitlements

Anecdotal feedback suggests that leaving care services for young people up to 25 years of age are provided inconsistently depending on the knowledge and expertise of caseworkers and young people's knowledge about their leaving care entitlements. CREATE recommended there be an additional provision to ensure that children are made aware of their rights and entitlements to access support to the age of 25. The Review concurred this would be consistent with strengthening the leaving care provisions in the Act.

Recommendation 61

The Act should be amended to require that children are told about their leaving care entitlements and given written information about them.

Section 99 provides that a child who has left care and qualifies for assistance: "*is provided with services to assist the person to do any one or more of the following*:"

- (a) *obtain accommodation;*
- (b) *undertake education and training;*
- (c) *obtain employment;*

³⁸⁷ This section does not apply to children who cease to be in provisional protection and care and were never the subject of a protection order.

- (d) *obtain legal advice;*
- (e) *access health services;*
- (f) *access counselling services.*

Young participants in CREATE's consultation identified other areas in which they required leaving care support such as with accessing financial claims or entitlements, obtaining a driver's licence, developing life skills and obtaining case files or key documents. The Review considered section 99 provides broad scope for the type of services young people would need to achieve (a) to (b) above, including assistance to obtain their driver's licence. Nevertheless, amending the section to become an inclusive rather than finite list may assist in addressing concerns that the section is not sufficiently inclusive. It was also suggested the section should include reference to services "*and/or other forms of support*".

Recommendation 62

Section 99 of the Act should be amended to ensure that a person who qualifies for assistance is provided with services and other forms of support that may include, but are not limited to, any one or more of the things listed in that section.

12.3.5 Strengthening supported care beyond 18 years

The Review received submissions from eight organisations³⁸⁸ advocating what was referred to as 'raising the leaving care age to enable young people to remain in care until they turn 21' and supporting the Home Stretch campaign. Anglicare Victoria initiated Home Stretch in August 2013 to advocate for better supporting the continuing care of young people once they leave care upon reaching 18. The campaign builds on programs in the United States and the United Kingdom, which enable young people who have left state care to opt-in for extending foster care support to the age of 21 years. In the United Kingdom, legislation was introduced in 2014 to support 'staying put arrangements' that had been trialled for young leaving state care:

*The average age of leaving home is rising and the transition to adulthood is increasingly becoming more complex and elongated. The "Staying Put" initiative and participating authorities have been working to pilot ways to extend children/young people's transition to adulthood within a family and household supported environment. The intention being to ensure young people can remain with their former foster carers until they are prepared for adulthood, can experience a transition akin to their peers, avoid social exclusion and be more likely to avert a subsequent housing and tenancy breakdown.*³⁸⁹

Under section 23CZA of the *Children's Act 1989*, a staying put arrangement is an arrangement under which a person who was a former child 'looked after' by a local authority continues to live with the person who was his or her foster carer immediately prior to leaving care. Each local authority in England has a duty to monitor the staying put arrangement and to provide advice, assistance and support to the young person and the foster parent with a view to maintaining the staying put arrangement until the young person reaches 21. The support provided to the foster carer must include financial support.

According to a recent cost benefit analysis on the proposal to extend care in Victoria, it was estimated that for every dollar invested in supporting a young person through a staying put type of program in Western Australia, the return in savings or increased income would be \$2.17.³⁹⁰

³⁸⁸ These included the Alliance and CYFAA; Anglicare; Centrecare; Commissioner for Children and Young People; CREATE; MacKillop Family Services; Wanslea Family Services; WACOSS; Youth Affairs Council.

³⁸⁹ HM Government, "*STAYING PUT*" Arrangements for Care Leavers aged 18 and above to stay on with their former foster carers, DfE, DWP and HMRC Guidance (May 2013) 4.

³⁹⁰ Deloitte Access Economics, *Raising our children: Guiding young Victorians in care into adulthood*. Melbourne: Anglicare Victoria; *Socioeconomic Cost Benefit Analysis*, Report, Anglicare Victoria (1 April 2016), 60; Anglicare Victoria, *Extending Out of Home Care to 21 Years – Summary of the Australian Socioeconomic cost benefit analysis Report*, Victoria (April 2016) 5.

One of the young people who participated in CREATE's consultation for the Review observed the significant numbers of young people who remain in the family home during their transition to adulthood:

Do it. Because not everyone is ready to become an adult at the age of 18. It's statistically shown that even people out of the care of DCP stay with their parents until the age of 24 on average. [Staying in care until 21] helps them to mature more and just have a couple more years preparation (20 year old, male, Italian-Aboriginal).

Anglicare submitted that:

Whilst there are some available services to assist with the transition to leaving care, too many young people are still struggling to cope independently at 18 years after a life in state care and lack the support and stability they require for a positive future.

While acknowledging the significant resource commitment involved in establishing such a program, the Review gave strong in-principle support for an opt-in program to support continuity of care for some of our most vulnerable young people until they reach 21 years.

Recommendation 63

The State Government should give consideration to providing opt-in, ongoing support to care leavers up to the age of 21 years, including through the continued support of their placement arrangements or alternative accommodation assistance and a dedicated youth worker/mentor to support a person's access to leaving care entitlements in accordance with sections 96 to 100, and ways of achieving this should be explored. The leaving care assistance currently available to young people who qualify under section 96 the Act should continue to be provided up to the age of 25 years.

CHAPTER 13 Protection proceedings in Part 5 of the Act

13.1 Representation of children

Section 148 of the Act provides for the appointment of a legal practitioner to represent a child in protection proceedings, either on the Court's own motion or on application by a party. The section also details the circumstances in which a legal practitioner is to act on the instructions of the child instead of in the best interests of the child.

148. Legal representation of child

...

(4) *A legal practitioner who represents a child in protection proceedings must act on the instructions of the child if the child —*

(a) has sufficient maturity and understanding to give instructions; and

(b) wishes to give instructions, and in any other case must act in the best interests of the child.

(5) *Any question as to whether a child has sufficient maturity and understanding to give instructions is to be determined by the Court.*

Four submissions commented on the representation of children in protection proceedings, all four suggesting that either in every circumstance,³⁹¹ or in set circumstances,³⁹² it should be compulsory that children who are the subject of protection proceedings are appointed a legal representative. Legal Aid and Aboriginal Family Law Services both suggested:

- the legal representative of a child in protection proceedings should be referred to as a child representative;
- the complexities of determining the basis of representation of a child should be acknowledged; and
- legal representatives for Aboriginal children should be culturally competent.

Legal Aid and Women's Law Centre also recommended there should be guidance as to the roles and responsibilities of child representatives. The importance of conveying the views and wishes of the child to the Court during protection proceedings was also raised by Legal Aid.

A number of these issues were considered as part of the 2012 Review. Following consideration of the basis of separate legal representation of children under section 148 of the Act, the 2012 Review recommended:

- *The current model for legal representation of children in protection proceedings should be maintained. An age that attracts a rebuttable presumption that a child has 'sufficient maturity and understanding' to instruct a legal representative should be introduced.*
- *Relevant stakeholders should develop guidelines to: assist practitioners and the Court in assessing a child's capacity to instruct a legal representative; and provide criteria by which the presumptions about capacity can be rebutted.*
- *Guidelines should be developed to place minimum standards and responsibilities on legal representatives acting for children in protection proceedings.*
- *Section 148 should place an obligation on any legal representative acting on behalf of a child in protection proceedings to convey to the Court the child's wishes and views, as far as is practicable. This obligation should exist regardless of whether the child's legal representative is acting on instructions or in the best interests of that child.*
- *A legal practitioner appointed to act on behalf of a child in protection proceedings should be known as a "child representative".*

³⁹¹ Aboriginal Family Law Services.

³⁹² Legal Aid; Women's Law Centre.

These recommendations were referred to an interagency working group convened by the Department, comprising representatives from the Department, Legal Aid and the Youth Affairs Counsel of WA (the Working Group).

The Working Group viewed the introduction of an age that would attract a rebuttable presumption that a child is capable of instructing a legal representative as problematic. This was because age is only one of the factors which may impact on whether a child has sufficient maturity and understanding to instruct a lawyer. It was therefore not considered sufficiently determinative to warrant a rebuttable presumption and the Working Group preferred the flexibility of guidelines to assist legal representatives and the Court.

Through a number of workshops, the Working Group developed *Guidelines for Child Representatives in Protection Proceedings* and a *Child Representative Child Assessment Form – Children’s Court* to establish minimum standards and responsibilities on legal representatives acting for children in protection proceedings. These guidelines will assist practitioners and the Court in assessing a child’s capacity to instruct a legal representative. These documents were finalised in 2016 following endorsement by the President of the Children’s Court and are publicly available on the Children’s Court website.³⁹³

The Working Group also endorsed Recommendations 24 and 25 of the 2012 Review that the Act should include an obligation that a child representative convey the child’s views and wishes to the Court, irrespective of whether they are acting ‘on instructions’ or ‘best interests,’ and that legal practitioners appointed to represent children in protection proceedings should be known as ‘child representatives’. The Review supports the inclusion of Recommendations 24 and 25 of the 2012 Review in the next round of amendments.

13.2 Interim orders

Section 133(1) of the Act enables the Children’s Court make interim orders “*at any time in the course of protection proceedings.*” It was brought to the Review’s attention this can be problematic if the proceedings involve an application for the revocation of a protection order (time-limited) or a protection order (until 18).

While in force, protection orders (time-limited) or protection orders (until 18) confer on the CEO all the duties, powers, responsibility and authority which, by law, parents have in relation to their children (i.e. full parental responsibility).³⁹⁴

- A protection order (time-limited) expires on the date indicated in the order, unless the CEO applies for the revocation and replacement of the order before its expiry date. In this situation, the Act provides that the protection order (time-limited) continues to be in force until the application for revocation and replacement is determined, even if this is later than the date on which the order would otherwise expire.³⁹⁵
- A protection order (until 18) remains in force until a child turns 18 years or the order is revoked before that time.³⁹⁶ The same principle applies if the application is to revoke a protection order (until 18); again, the CEO continues to have parental responsibility for the child until the revocation application is finalised.

The Review agreed it was inconsistent for the Court to be able to make interim orders about contact and placement arrangements in circumstances where the CEO has parental responsibility under a pre-existing protection order.

³⁹³ *Guidelines for the Child Representatives in Protection Proceedings*, above n 266.

³⁹⁴ CCS Act ss 3,54, 57.

³⁹⁵ Ibid s 68(4).

³⁹⁶ Ibid s 57.

Recommendation 64

The Act should be amended to preclude the making of interim orders under section 133 where the protection proceedings relate to an application to extend, revoke or revoke and replace a protection order (time-limited) or a protection order (until 18).

13.3 Section 143 written proposals – content and enforcement**13.3.1 Background**

A written proposal is the Department's intended plan for a child for the duration of the protection order being sought. Under section 143 of the Act, written proposals must be filed during protection proceedings, or immediately after a finding that a child is in need of protection, where the application is for a protection order (supervision), (time-limited) or (until 18). Applications to extend or to revoke and replace existing protection orders must be accompanied by written proposal at the time of filing,³⁹⁷ unless the order being sought is a protection order (special guardianship).³⁹⁸

Written proposals were initially intended to focus on the proposed arrangements for meeting a child's individual needs during the period of a protection order, as reflected by the wording of section 143 of the Act.

143. CEO to provide Court with proposal for child

(1) In this section —

proposal means a document that outlines the proposed arrangements for —

- (a) *the supervision of the wellbeing of the child if a protection order (supervision) is made or extended in respect of the child; or*
- (b) *the wellbeing of the child if a protection order (time-limited) or protection order (until 18) is made or extended in respect of the child...*³⁹⁹

If the Department is applying to extend a protection order (time-limited), the written proposal must also include "*plans for securing long-term stability, security and safety in the child's relationships and living arrangements.*"⁴⁰⁰

In practice, the point at which a written proposal is filed during protection proceedings varies substantially between cases. Timing may depend upon a number of factors including the period of Department's involvement prior to taking protective intervention, where there are ongoing police investigations or where the Department is conducting assessments intended to inform the proposed plan. There are no legislative or policy guidelines on when written proposals should be filed in court.

Where parents have legal representation, the content of the written proposal is often negotiated during proceedings and may result in the parents' consenting to the order the Department is seeking. On occasion, however, the Court will request amendments to the written proposal before it is willing to make the orders being sought. Consequently, expectations about the content of written proposals have evolved. In relation to applications for protection orders (time-limited), proposals generally include information on placement, contact, what is required of parents to have their children returned into their care and the steps for how this will occur.

³⁹⁷ Ibid s143.

³⁹⁸ The legislation requires SGOs to be accompanied by a written report in accordance with section 61 of the Act. For information on written reports and SGOs see section 11.2.

³⁹⁹ CCS Act s 143.

⁴⁰⁰ Ibid s 143(4).

13.3.2 Submissions

A number of Review submissions requested amendments in relation to written proposals. The Aboriginal Legal Service, Women's Law Centre and Legal Aid all sought amendments to specify more comprehensively what should be required in proposals, particularly when the Department is applying for a protection order (time-limited). Each of these submissions provided a detailed list of proposed inclusions to section 143 of the Act.

There was a particular concern that the written proposals for Aboriginal children did not contain reference to, or sufficient reference to, the requirements of sections 12, 13, 14 and 81 of the Act or an adequate and detailed cultural plan. Review Recommendations 10 and 12 acknowledge those concerns and, if implemented, will require cultural plans to accompany section 61⁴⁰¹ reports and section 143⁴⁰² written proposals for Aboriginal children, and that written proposals and written reports detail how the Department has applied, or intends to apply the section 12 placement hierarchy including the consultations completed in compliance with section 81.⁴⁰³

The Aboriginal Legal Service submitted that:

*...parents are frequently presented with Written Proposals that are brief, lacking in details, lacking in direction and plans, and which do not explain how the child's best interests are met by the particular arrangements contained in the proposal.*⁴⁰⁴

They submitted this creates difficulties in their ability to advise their clients and prolongs proceedings.

Legal Aid submitted that:

...as the legislation does not provide guidelines as to the necessary content of these proposals; their content and structure vary greatly between case workers and between District Offices ...the content of section 143 Written Proposals now often has more information on the specific needs of the child(ren), detailed steps for parents to follow to increase contact and seek reunification and the timeframes to achieve such progress it is submitted this should be enshrined in legislation.

Legal Aid also submitted that a written proposal should contain a detailed road map for parents, children, the Department and the Court on the future plans for the child's care and relationships with family. SNAICC et al submitted that written proposals for protection orders (time-limited) or extensions should include arrangements for supporting families towards reunification.

The Review balanced the need to provide parents with sufficient details on the proposed arrangements for their child, and the plan for how reunification may be achieved, with the risk of creating a provision that was inflexible. The Review agreed it was important that written proposals include reunification plans for parents where reunification was the primary goal of the order being sought.

Recommendation 65

The Act should be amended to include a requirement that written proposals include an outline of arrangements for reunification and the supports that will be provided, where the CEO applies for a protection order (time-limited) or an extension of a protection order (time-limited) and reunification is being contemplated.

⁴⁰¹ CCS Act.

⁴⁰² Ibid.

⁴⁰³ Ibid.

⁴⁰⁴ Aboriginal Legal Service.

13.3.3 Cultural plans and enforcement

A number of submissions sought enforcement mechanisms for contact, placement and reunification arrangements contained in written proposals. It was considered that all finalised protection orders should be able to contain conditions of contact, placement and reunification and that these conditions should be enforceable in the Children's Court.⁴⁰⁵ Other possibilities proposed included enabling the Children's Court to review care plans instead of the Care Plan Review Panel, followed by SAT if necessary.⁴⁰⁶ The Aboriginal Legal Service raised concerns in relation to the independence of the Care Plan Review Panel.

The Review considered the purpose of care plans in conjunction with the current process for the review of care planning decisions contained in written proposals.

13.3.4 Care plan review process

Section 39 of the Act requires a child to have a provisional care plan within seven days of coming into provisional protection and care. Similar to care plans, a provisional care plan must identify the needs of the child, outline steps or measures to be taken to address them, and set out decisions including placement, any secure care arrangements, and contact with parents, relatives, siblings and any significant others.⁴⁰⁷ There is no mechanism to review a provisional care plan because in the majority of time the plan is in force the case will be before the Children's Court, which can make interim orders on placement and contact.⁴⁰⁸

Once a protection order (time-limited) or protection order (until 18) is made, the Department must, as soon as practicable, prepare and implement a care plan for the child.⁴⁰⁹ Consequently, any care planning decisions contained in the written proposal should be included in a care plan as soon as practical after a protection order is made, unless there has been a significant change in circumstances.

Care plans may include decisions about contact, placement and measures to be taken to address the needs of the child,⁴¹⁰ and are reviewable under the Act.⁴¹¹ Importantly, if Review Recommendation 11 is implemented, the cultural plan will also form part of the care plan for children on protection orders (time-limited) or protection orders (until 18) and decisions in the cultural plan will be reviewable in the same way as other care planning decisions.

Within 14 days of receiving a care plan or modified care plan a child, parent, carer or any person considered by the CEO to have a direct a significant interest in the wellbeing of the child can apply to the CEO to review a decision reflected in the care plan.⁴¹² The CEO must refer this decision to the Care Plan Review Panel, which in turn must provide a report to the CEO for consideration.⁴¹³ Following consideration of the report the CEO may confirm, vary or reverse or substitute the decision, or refer the matter back to the Care Plan Review Panel for further consideration. The person can appeal the decision of the CEO to SAT.⁴¹⁴

Section 89(2) of the Act has the effect of requiring that, as soon as practical after an initial protection order is made, the child protection worker must prepare and implement that child's first formal care plan which would replace the provisional care plan. Provided the contents of the section 143 written proposal were accurate at the time the Court made the protection order, the presumption would be that any care planning decisions reflected in the written proposal would subsequently also be reflected in the initial care plan which is reviewable at first instance the

⁴⁰⁵ Aboriginal Legal Service.

⁴⁰⁶ Legal Aid; Women's Law Centre.

⁴⁰⁷ CCS Act s39(1).

⁴⁰⁸ Ibid s 133(2)(b).

⁴⁰⁹ Ibid s 89(2).

⁴¹⁰ CCS Act s 89 (1).

⁴¹¹ Ibid ss 90-95.

⁴¹² Ibid s 93(1).

⁴¹³ CCS Act s 93(5).

⁴¹⁴ CCS Act s 94.

CEO (informed by the Care Plan Review Panel) and subsequently SAT. The Review considered this was the appropriate mechanism for reviewing care planning decisions contained in written proposals.

13.4 Appeals

All appeals from interim or final orders of a Children's Court magistrate are heard by a single judge of the Supreme Court. The potential to seek review of a magistrate's interlocutory or final decision by the President of the Children's Court, under section 28 of the Children's Court Act, was ruled out in the decision of His Honour Judge Denis Reynolds, President of the Children's Court in *The Chief Executive Officer of the Department for Child Protection and Family Support v JMG* [2016] WACC 6 (*JMG*).

Section 28(1) of the Children's Court Act enables the President of the Children's Court to order that:

*...any original proceedings in which an order (not being an order made following conviction on indictment) was made against a child under the Young Offenders Act 1994 or the Children and Community Services Act 2004 be reheard.*⁴¹⁵

In *JMG* the Department made an application under this section seeking the review of a magistrate's decision not to adjourn a trial or list an interlocutory (an interim) hearing concerning contact. For the purposes of section 28(1) of the Act, His Honour found that a refusal to adjourn a trial was a decision, not an order, and that in itself excluded a review under section 28(1).⁴¹⁶ His Honour considered the terminology 'made in original proceedings' applies only to final orders made in original proceedings, not interlocutory orders and, further, that no final order available to the Court in protection proceedings could properly be described as an order 'against a child'.⁴¹⁷ Consequently, there is no current avenue of review of any decision or order made by a magistrate in the Children's Court to the President of that court.

The Review considered amendments to allow for an appeal of a decision or order by a Children's Court magistrate to be heard, at first instance, by the President of the Children's Court.

In the Family Court, decisions of registrars and magistrates (other than family law magistrates)⁴¹⁸ are appealed to a single judge of the Family Court, regardless of whether they are exercising federal or state family law jurisdiction.⁴¹⁹ The decision of a single judge of the Family Court exercising federal jurisdiction may be appealed to the Full Court of the Family Court.⁴²⁰ If the same judge is exercising state jurisdiction, the line of appeal is to the Full Court of the Supreme Court.⁴²¹ If Children's Court magistrates are given powers to make orders under the Family Court Act and Family Law Act, any decision of a magistrate under those Acts should follow the same respective lines of appeal.

The Department's Child Protection Legal Unit submitted that the avenue of appeal from interim and final decisions of Children's Court magistrates under the Act should be to the President of the Children's Court. The Legal Working Group considered that 'first instance' appeals should be to a single judge of the Children's Court. This is more consistent with appeals in the family law jurisdiction, and is likely to make review of decisions more accessible to parties. Any appeal from a child protection decision of a judge of the Children's Court should be to the Court of Appeal

⁴¹⁵ CCS Act s 28(1).

⁴¹⁶ *The Chief Executive Officer of the Department for Child Protection and Family Support v JMG* [2016] WACC 6 [18].

⁴¹⁷ *Ibid* [20]-[23].

⁴¹⁸ Appeals of interlocutory decisions under the *Family Court Act* by Family Law Magistrates are also heard by a single judge of the Family Court, see *Family Court Act* s 211.

⁴¹⁹ *Family Law Act* ss 96(1), 41(3); *Family Court Act* s 221(2); *Family Court Rules* r 25(2).

⁴²⁰ *Family Law Act* s 94(1).

⁴²¹ *Family Court Act* s 221.

Division of the Supreme Court. This would be consistent with appeals from the decision of a single judge of the Family Court exercising State jurisdiction.

Recommendation 66

The Act should be amended to provide that decisions of a Children's Court magistrate under the Act are reviewable, at first instance by the President of the Children's Court, with any subsequent appeal to the Court of Appeal of the Supreme Court.

13.5 Court proceedings and Aboriginal peoples

Submissions to the Family Law Council Interim and Final Reports noted the underuse of the Family Court by Aboriginal people and cited possible barriers including continuing mistrust of family law and child welfare courts, remoteness preventing access, the slow pace of proceedings, the cost of legal representation and the prescriptive nature of parenting orders that don't allow sufficient flexibility to accommodate the realities of some Aboriginal people's lives.⁴²²

SNAICC et al's submission to the Review added to the list of obstacles to Aboriginal peoples engaging in court processes (not limited to the Family court more generally):

*...cultural competence of the judiciary and lawyers; lack of child protection expertise of legal representatives; and the limited scope for Aboriginal participation in Court process.*⁴²³

Other states have been trialling alternative court processes to increase the participation of Aboriginal Australians when they are involved in child protection or family law proceedings. Submissions from SNAICC et al, Aboriginal Legal Service, Women's Law Centre and Legal Aid all recommended the Review consider the Koori Family Hearing Day (also known as the Koori List or Marram-Ngala Ganbu) being piloted in Victoria. The Koori Family Hearing Day was established following a recommendation of the 2012 *Protecting Victoria's Vulnerable Children Inquiry*.⁴²⁴ The 12-month pilot commenced in Broadmeadow's Children's Court on 1 July 2016 and aims to:

- *improve outcomes for Koori children involved in child protection proceedings;*
- *improve the participation of Koori families and communities in child protection proceedings;*
- *enable decision-making to be informed by an improved cultural understanding;*
- *encourage culturally appropriate processes to assist in decision-making reflective of the community to which the Koori child belongs;*
- *improve adherence to the Aboriginal Child Placement Principles set out in the Children, Youth and Families Act 2005;*
- *promote the provision of cultural support for Koori children (consistent with the cultural plans for children in out of home care) that maintain and develop the child's identity and connection to community and culture;*
- *provide court processes that enable Koori children, parents and others to participate fully in the proceedings in a manner that respects their cultural identity and needs in accordance with s522 of the Act [Children, Youth and Families Act 2005]; and*
- *provide court processes that promote cooperative relationships in accordance with s215B of the Act [Children, Youth and Families Act 2005].*⁴²⁵

The Koori Family Hearing Day sits once a week and proceedings are around the bar table where all participants are seated, including the Magistrate. Where possible the list is conducted by the

⁴²² *Family Law Council's Interim Report*, above n 129, 34-36.

⁴²³ SNAICC et al.

⁴²⁴ *Cummins Inquiry*, above n 297 Iviii, Recommendation 32.

⁴²⁵ Children's Court of Victoria, *Practice Direction No 4 of 2016 – Koori Family Hearing Day Broadmeadow's Children's Court, Marram-Ngala Ganbu*, 1 July 2016.

same judicial officer and is supported by a Koori Services Coordinator who is the point of contact for children and their families. The Koori Services Coordinator aims to promote and assist families' full participation in court processes, and provides information and referrals for relevant services/programs in conjunction with the Victorian equivalent of the Department. If matters are referred to conciliation conferencing, where possible, at least one of the convenors is Koori.⁴²⁶

In NSW, Her Honour Judge Sexton is trialling a similar approach in family law matters involving one or more parties who identify as Indigenous by creating a Specialist Indigenous List in the Federal Circuit Court in Sydney. The Specialist Indigenous List in family law parenting proceedings has many of the same features as the Koori Family Hearing Day. The proceedings are conducted in a less formal manner by the same judicial officer; there is a support worker present from the Wirringa Baiya Women's Legal Centre; and an Indigenous conference organiser from Legal Aid in NSW.⁴²⁷

Trialling this type of list in the Children's Court and Family Court could improve the participation of Aboriginal people in both child protection and family law proceedings in the short-term and inform the structures, conduct and processes of an integrated Family Court with a specialist Child Protection Division. A trial of an "Aboriginal list" in Perth Children's Court could occur without legislative amendment.

Given that 54 per cent of children in care in Western Australia identify as Aboriginal,⁴²⁸ the Legal Working Group supported the trial of an alternate court format which aims to increase the engagement and participation of Aboriginal families in protection proceedings. At the time of writing, the Legal Working Group was not aware of any published evaluation of the 12-month trial of the Koori Hearing Day in Victoria. However, the recommendations of any such evaluation could inform the trial in Western Australia. It was considered an Aboriginal consultant or liaison officer at the Children's Court and the Family Court could facilitate the specialist hearing day, as well as promote and support Aboriginal families' participation in the general protection lists on other days.

Recommendation 67

The benefits of undertaking a 24-month pilot in the Children's Court of a specialist list for protection matters involving Aboriginal families should be explored, informed by similar approaches in other jurisdictions such as the Koori Family Hearing Day (also known as the Koori List or Marram-Ngala Ganbu) being piloted in Victoria.

Recommendation 68

An Aboriginal liaison officer/consultant should be located at the Children's Court to facilitate the participation and engagement of Aboriginal families in protection proceedings to improve outcomes for Aboriginal children.

⁴²⁶ Ibid.

⁴²⁷ Law Society of Australia, *Specialist Indigenous List – Sydney Registry of the Federal Circuit Court of Australia* www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1197441.pdf .

⁴²⁸ *Final Report 2016/2017*, above n 10, 46.

CHAPTER 14 Miscellaneous

14.1 Charter of rights for families

The Review received a submission from the Family Inclusion Network of Western Australia Inc., which provides advocacy and support services to parents and family members who have contact with the statutory child protection system and whose children have been, or are at risk of being, placed in out-of-home care. The Family Inclusion Network submitted that many families in contact with child protection services have a limited understanding of the legislative framework through which the Department intervenes in their lives. They suggested that:

This can have serious implications for a transferability of their rights within the system and can also compromise the way they interact with the system. This is of particular relevance for Aboriginal families residing in remote and regional areas of WA.

To promote a shared understanding of behaviours between workers and families and to inform the Department's practice standards, participants in a Family Inclusion Network consultation conducted to inform its submission to the Review suggested that a charter of rights for families could be provided for in the legislation. It was suggested the principles in section 9 could inform the development of a charter.

It has been noted that charters of rights are not uncommon in organisations providing services to the community.⁴²⁹ The Review learned that in 1996, as the former Department of Family and Children's Services, the Department had a Customer Service Charter which provided a guaranteed minimum set of service standards and acknowledged that "*customers have a right to consultation, courtesy and the opportunity to express their views about services*". It also set out standards of service that could be expected.

In the contested and stressful arena of child protection it is inevitable that many parents will feel overwhelmed and powerless in their dealings with the Department. In this environment, the Review saw merit in developing a charter which sets out basic principles for relationships with parents and family members to operate in a respectful and fair manner. However, it was not considered this required legislation.

Recommendation 69

The Department should develop a charter of rights for families who come in contact with the Department as a result of concerns about the wellbeing of their children.

14.2 Sex Discrimination Act 1984 (Cth)

On 1 August 2013, amendments⁴³⁰ to the Commonwealth *Sex Discrimination Act 1984* (Sex Discrimination Act) came into effect making discrimination on the grounds of sexual orientation, gender identity and intersex status unlawful. Section 4 of the Sex Discrimination Act defines these terms:

gender identity means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.

intersex status means the status of having physical, hormonal or genetic features that are: neither wholly female nor wholly male; or a combination of female and male; or neither female nor male.

⁴²⁹ Hamilton S and Briathwaite V, *Parents and Family Members Matter: A Charter of Rights and Responsibilities for Parents and Family Members with Children in the Care of Child Protection Services in Australia*, Occasional Paper 22, Canberra: Regulatory Institutions Network Australian National University (September 2014), 6.

⁴³⁰ *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).

sexual orientation means a person's sexual orientation towards: persons of the same sex; or persons of a different sex; or persons of the same sex and persons of a different sex.

Initially, all states and territories were granted a temporary general exemption from the operation of these sections of the Sex Discrimination Act. Western Australia was granted a further temporary exemption in the Commonwealth *Sexual Discrimination Regulations 1984*,⁴³¹ which ceased on 31 July 2016. Since then, Western Australia has been exposed to potential breaches of the Sex Discrimination Act in circumstances where acts done in compliance with state legislation may contravene its provisions. There are two provisions in the Act which require amendments to avoid this.

Section 115 of the Act provides that a child may be searched, and the search must be conducted by an authorised or designated person “*who is of the same sex as the child.*”⁴³² In practice, searches conducted under section 115 of the Act are infrequent. However, if a search is conducted, the Secure Care Practice Manual and Residential Care Practice Manual require that:

*A child must, wherever possible, only be searched by an authorised officer or officers of the same gender. Where there is uncertainty about the child's gender, the authorised officer must ask the child whether the search should be conducted by a male or a female, and act in accordance with the child's answer. In the absence of an answer, the child must be treated according to his or her outward appearance of gender, and be searched according to that gender.*⁴³³

Section 192 makes it an offence to employ a child to perform in an indecent manner and provides that:

... a child is employed to perform in an indecent, obscene or pornographic manner if, in the course of the child's employment, the child ... is required to pose or move in a matter calculated to give prominence to sexual organs, the anus or, in the case of a female her breasts...

Sections 115 and 192 of the Act require amendments consistent with the requirements of the Sex Discrimination Act.

Recommendation 70

The Act should be amended to ensure sections 192(3)(a)(iii) and 115(2)(a) comply with the requirements of the *Sex Discrimination Act 1984* (Cth).

⁴³¹ *Sex Discrimination Regulations 1984* (Cth) as at 1 July 2016.

⁴³² CCS Act s 115(2)(a).

⁴³³ Department of Communities, *Secure Care Practice Manual*, Ch 6.17 Search and Seizure (19 July 2017).

CHAPTER 15 Appendices

APPENDIX A - List of submissions to the Review of the *Children and Community Services Act 2004*

1. Aboriginal Family Law Services WA
2. Aboriginal Health Council of Western Australia
3. Aboriginal Legal Service of Western Australia Limited
4. Anglicare Western Australia
5. Anti-Slavery Australia
6. Australian Association of Social Workers
7. Centrecare Incorporated
8. Child and Adolescent Mental Health Service
9. Commissioner for Children and Young People
10. Community and Public Sector Union / Civil Service Association
11. CREATE Foundation
12. Department of Child Protection and Family Support- Child Protection Legal Unit
13. Department of Child Protection and Family Support- metropolitan office
14. Department of Corrective Services
15. Djinda Services, Women's Law Centre
16. Family Court of Western Australia
17. Family Inclusion Network of Western Australia
18. Housing Authority Western Australia
19. Joe Bryant (private individual)
20. Key Assets Western Australia
21. Legal Aid Western Australia
22. Lyn Minchin (private individual)
23. MacKillop Family Services
24. Mental Health Commission
25. Ministerial Advisory Council on Child Protection
26. Peter Lambert (private individual)
27. SNAICC; Family Matters WA; Noongar Child Protection Council
28. Social Policy Practice and Research Consortium, University of Western Australia
29. Society of Professional Social Workers
30. The Alliance for Children at Risk (the Alliance) and the Children's Youth and Families Agencies Association (CYFAA)
31. Valuing Children Initiative
32. Wanslea Family Services Inc.
33. Western Australian Council of Social Service (WACOSS)
34. Western Australia Police
35. Women's Council for Domestic and Family Violence Services (WA)
36. Women's Law Centre
37. Youth Affairs Council of Western Australia

APPENDIX B - Report on implementation of recommendations of the 2012 Review of the Children and Community Services Act 2004

This paper reports on the implementation of recommendations of the 2012 statutory review of the *Children and Community Services Act 2004*. The majority were implemented on 1 January 2016 under *Children and Community Services Legislation Amendment and Repeal Act 2015*. More detailed information on the nature of the amendments is available on the Department's website: www.dcp.wa.gov.au/Organisation/Pages/Amendments-to-the-Children-and-Community-Services-Act-2004.aspx

Recommendation 1

The principles under section 9 should recognise the particular needs of children with a disability.

There is a new principle section 9(ia) of the Act which recognises the particular needs of children with disability.

Recommendation 2

- (a) The Act should enable the sharing of relevant information between prescribed public authorities under section 24A and:
- (i) "social services" funded through an agreement with the Minister under section 15;
 - (ii) their own funded agencies or those funded by any other prescribed public authority.
- (b) Protection from criminal or civil liability or breaches of codes/professional ethics should be provided when relevant information is shared in good faith.

New information sharing powers in section 28B enable *prescribed* (public) *authorities* to exchange relevant information with non-government providers of social services and independent and Catholic schools. Persons disclosing information in good faith or in compliance with a request under the provisions in section 28B are protected from civil and criminal liability and from breaches of a duty of confidentiality or secrecy imposed by law professional codes or of professional standards. (Note that following the amendments on 1 January 2016, section 28B contains the provisions that were previously in section 24A of the Act.)

Recommendation 3

- (a) The definition of *interested person* under section 23(1) should enable the release of information to a person who has a direct interest in the wellbeing of a person who was a child in the CEO's care and is eligible for leaving care services.
- (b) The definition of *relevant information* under section 23(1) should enable the release of information that is, or is likely to be, relevant to the wellbeing of a person previously in the care of the CEO who is eligible for leaving care services.
- (c) Section 23 and 24A should also include a regulation making power to enable the exchange of other types of relevant information consistent with the objects of the Act.

The definitions of *interested person* and *relevant information* in section 23(1) were amended accordingly, and a regulation-making power was provided in sections 23 and section 28B (previously section 24A) to enable other information to be prescribed as 'relevant information' for the purposes of information sharing under those sections.

Recommendation 4

Section 23 should enable the Department of Corrective Services to provide the Department with any report in its possession relevant to the wellbeing of a child or class or group of children, including pre-sentence reports.

This amendment was enacted by amendments to section 24A, which now provide the Department with access to copies of certain reports from the Department of Corrective Services.

Recommendation 5

Section 28 of the Act should be amended to:

- provide that *harm*, in relation to a child, means any detrimental effect of a significant nature on the child's physical, emotional or psychological wellbeing; and
- remove the ground of psychological abuse.

Section 28 was amended accordingly. Rather than being a separate form of abuse, psychological abuse is now included within a definition of 'emotional abuse'.

Recommendation 6

(a) Section 28 should provide that emotional abuse includes exposure to family and domestic violence.

(b) The information sharing provisions in sections 23 and 24A should expressly enable the sharing of information relevant to the provision of services to persons experiencing family and domestic violence.

(a) Section 28(1) was amended to provide that **emotional abuse** includes:

- a) *psychological abuse*; and
- b) *being exposed to family violence*.

(b) The definition of *relevant information* in section 23(1) and section 28A includes information that is, or is likely to be, relevant to "*the safety of a person who has been subjected to, or exposed to, family violence*" as defined in the Restraining Orders Act. This applies to both:

- the exchange of information with the Department under s.23 of the Act; and
- relevant information exchanged between prescribed authorities, or between a prescribed authority and a non-government provider or non-government school pursuant to section 28B of the Act.

Recommendation 7

The Act should be amended to ensure that section 35(1)(b), enabling the issuing of a warrant (provisional protection and care), can still be used even though a child may be temporarily in a safe place, for example a hospital.

Section 35 has been amended accordingly.

Recommendation 8

The Department should develop casework practice guidelines on managing the return of children under section 38(2) who are no longer in need of protection, having been taken into provisional protection and care under section 37.

These guidelines are provided in Chapter 2.2 of the Department's online Casework Practice Manual.

Recommendation 9

Western Australia should continue to work with relevant States and Territories to address cross-jurisdictional barriers to effective child protection practice.

WA is a signatory to the Interstate Child Protection Protocol (reviewed in 2016). In addition, a working group is implementing a project endorsed by the Children and Families Secretaries Group in April 2016, to investigate barriers to inter-jurisdictional child protection information sharing, propose potential solutions and identify opportunities to promote appropriate information sharing.

Recommendation 10

The Act should provide for the automatic revocation of a protection order (special guardianship) and ancillary payment order in the event that an adoption order is made in respect of the child.

Section 62 of the Act now enables this to occur.

Recommendation 11

Section 87(2) should provide for circumstances where:

- a carer of a child under a placement arrangement has refused, resisted or wilfully ignored a lawful requirement by an officer to hand over the child; and
- there are reasonable grounds to suspect there is an immediate or substantial risk to the wellbeing of the child.

Section 87 has been amended accordingly.

Recommendation 12

- (a) The CEO should be required to provide each party specified in section 89(6) with a copy of a child's care plan unless the CEO considers providing a copy of a care plan to a person would pose an unacceptable risk to the safety of the child or another person mentioned in the care plan.
- (b) A person denied access to a copy of a care plan should be provided with reasons for the decision and the right to a review.

Section 89 has been amended accordingly.

Recommendation 13

The State Administrative Tribunal should remain as the jurisdiction to review decisions of the CEO under section 94.

The SAT remains the jurisdiction to review decisions of the CEO under section 94 of the Act.

Recommendation 14

Section 94 should require that decisions of the State Administrative Tribunal which result in the modification of a care plan are to remain in force for a period of at least 12 months, subject to the CEO's power under section 89(4).

Section 94 has been amended accordingly.

Recommendation 15

The Case Review Panel established under section 92 should be renamed the Care Review Panel for consistency with amendments to the Act in 2011.

The name of the Case Review Panel has been changed to the Care Planning Review Panel.

Recommendation 16

Consultation should occur to examine further regulation in respect of tattooing, branding or body modification practices, including consideration of introducing a minimum age for tattooing and branding.

Following consultation, a minimum age for tattooing and branding was introduced into new section 104A of the Act.

Recommendation 17

The definition of police officer under section 3 of the Act should be repealed.

This section has been repealed.

Recommendation 18

The existing provisions for the reporting of child sexual abuse under the Act should be retained, with the exception of Country High School Hostels Authority staff being made mandated reporters of child sexual abuse as announced by the Government in response to Recommendation 3 of the Blaxell Inquiry.

Sections 124A and 124B were amended to include boarding supervisors working at boarding facilities as mandated reporters of child sexual abuse.

Recommendation 19

Mandated reporters should be provided with further guidance on:

- persons currently required to report under the definition of teacher;
- the range of behaviours that may constitute sexual abuse of a child;
- when a mandatory report is to be made.

State-wide training sessions conducted by the Mandatory Reporting Interagency Training Group continue to provide information on all aspects of the mandatory reporting requirements including guidance on the matters above.

Recommendation 20

Agencies should continue to support appropriate reporting of all forms of child abuse and neglect through the ongoing development and implementation of operational policies, guidelines and training.

This continues to occur and is further supported by the work of the Commissioner for Children and Young People's work on Child Safe Organisations.

Recommendation 21

Section 145 should include a principle that protection proceedings be conducted in a way that promotes co-operation and consensus, wherever possible.

This section has been amended accordingly.

Recommendation 22

(a) The current model for legal representation of children in protection proceedings should be maintained. An age that attracts a rebuttable presumption that a child has "sufficient maturity and understanding" to instruct a legal representative should be introduced.

(b) Relevant stakeholders should develop guidelines to:

- assist practitioners and the Court in assessing a child's capacity to instruct a legal representative; and
- provide criteria by which the presumptions about capacity can be rebutted.

"Guidelines for Child Representatives in Protection Proceedings" were developed by a working group convened by the Department comprising Legal Aid and the Youth Affairs Council and are published on the Children's Court website at:

www.childrencourt.wa.gov.au/files/Guidelines_for_Child_Representatives.pdf In preference to providing a rebuttable presumption on a child's capacity to instruct a legal representative, practice advice is provided in the Guidelines.

Recommendation 23

Guidelines should be developed to place minimum standards and responsibilities on legal representatives acting for children in protection proceedings.

As above.

Recommendation 24

Section 148 should place an obligation on any legal representative acting on behalf of a child in protection proceedings to convey to the Court the child's wishes and views, as far as is practicable. This obligation should exist regardless of whether the child's legal representative is acting on instructions or in the best interests of that child.

This amendment was deferred to the next set of amendments pending completion of the Guidelines developed under Recommendations 22 and 23, and will be included in the next amendment Bill accordingly.

Recommendation 25

A legal practitioner appointed to act on behalf of a child in protection proceedings should be known as a "child representative".

As above.

Recommendation 26

The Department should continue to work with stakeholders to establish a more streamlined system for managing cross-jurisdictional issues between the Children’s Court and the Family Court.

This work has continued and is discussed further in Chapter 6 of this Report.

Recommendation 27

An exemption should be provided in regulations made under section 191(4)(c) to enable children who have reached 13 years of age to be employed (or engaged in work) by a registered horse riding school where:

- written parental consent is provided; and
- the work occurs outside school hours but between the hours of 6am and 10pm.

This amendment has not occurred and requires further consideration.

Recommendation 28

- (a) The Act should provide for responsible parenting agreements to be an additional measure available to the CEO under section 32.
- (b) The objects of the Act should include to support and reinforce the role and responsibility of parents to exercise appropriate control over the behaviour of their children.
- (c) Additional amendments related to responsible parenting agreements should include:
 - the capacity for bilateral and/or multilateral agreements involving two or more of the three government agencies;
 - the capacity for agreements to be made with parents or other persons with day to day responsibility for a child
 - an enhanced principle of cooperation between government agencies.

The *Parental Support and Responsibility Act 2008* was repealed and the recommended amendments were made to section 6 and section 32 of the Act and introduced in new *Part 5A - Responsible parenting agreements*.

APPENDIX C – Provisions in the *Children and Community Services Act 2004* which align with the five elements of the Aboriginal child placement principle

PREVENTION

- Objects of the Act in section 6(a) to (c)
- Principles to be observed in section 9(b) and (f)
- Actions that may be undertaken in section 32(1)(a), (b), (ca) and (c)
- Actions that may be undertaken in section 33B(a) and (b)

PARTNERSHIP

- Principle of community participation in section 14
- Care planning provisions in section 89

PLACEMENT

- Aboriginal child placement principle in section 12
- Consultation requirement in section 81

PARTICIPATION

- Principles in section 9(j) and (k)
- Principle of child participation in section 10
- Matters to be taken into account when determining what is in a child's best interests in section 8(1)(f)
- Principle of self-determination in section 13 and community participation in section 14
- Prehearing conferences in section 136
- Consultation requirement in section 81
- Consideration views in care plan reviews including the child's and parents in section 90(2)

CONNECTION

- Matters to be taken into account when determining what is in a child's best interests in section 8(1)(h) and (j)
- Principles to be observed in section 9(g) and (i)
- Aboriginal child placement principle in section 12
- Principle of self-determination in section 13 and community participation in section 14

APPENDIX D – Recommendations of the Hands and Williams Report

Recommendation 1

That a joint partial concurrency model (ie, the Family Court concurrency model and the Children's Court concurrency model described in Chapter Four of this Report) be adopted.

Recommendation 2

That the Family Court of Western Australia, the Children's Court of Western Australia and the Department for Child Protection appoint representatives to undertake a 12-month data collection process to obtain accurate data about the extent of intersection between the protection jurisdiction and the parenting jurisdiction of the Family Court and that, following the completion of the data collection, a full cost analysis of the preferred models for implementation be conducted.

Recommendation 3

1. That the *Children and Community Services Act 2004* (WA) be amended to provide that where a child who is subject to a protection order, who is under provisional protection and care or who is subject to an application for a protection order in the Children's Court is subsequently made the subject of an application for a parenting order in the Family Court of Western Australia, the Department for Child Protection is required to intervene in the Family Court proceedings.

2. That the memorandum of understanding between the Family Court, DCP and Legal Aid WA be amended to provide that when sending an email notification under clause 2.1.2, if the child in question is currently subject to a protection order, is under provisional protection and care or is subject to an application for a protection order, DCP is required to include notification that it will be intervening in the parenting order proceedings if, and when, an application is filed. Further, the MOU should provide that as soon as an application is filed (which relates to the email notification) the Family Court should notify DCP so it can commence the relevant paperwork for intervention.³⁶

3. That the MOU should be extended to include the Children's Court (as per Recommendation 5) and that this extended MOU should provide that the Children's Court is to notify the Family Court if protection proceedings are adjourned in the Children's Court for the purpose of enabling a party to apply for orders in the Family Court.

Recommendation 4

That the Children and Community Services Act 2004 (WA) be amended to include provisions to enable the conditions of a protection order (special guardianship) to be enforced by a party in the Children's Court and to enable a person with parental responsibility for a child under a protection order (special guardianship) to seek a recovery order in the Children's Court in relation to a child who has not be returned to the person with parental responsibility. In addition, consideration should be given to whether any enforcement provisions are required in relation to protection orders (supervision).

Recommendation 5

1. That at the earliest opportunity the memorandum of understanding (MOU) agreed between the Family Court of Western Australia, DCP and Legal Aid WA in 2008 be revised to include the Children's Court and Magistrates Court as parties.

2. That the MOU be amended to reflect any new processes and procedures recommended in this report, including those contained in Recommendations 1, 3 and 6.

Recommendation 6

That the process for Department for Child Protection (DCP) referrals to the Family Court of Western Australia be revised to include:

1. A requirement under clause 2.1.2 of the memorandum of understanding (MOU) between the Family Court, DCP and Legal Aid WA that the email notification is to specify whether the referral is a 'genuine referral' or a 'notification only referral'. For 'genuine referrals' the email should also include a brief indication of DCP's level of support for the application as well as an indication of any significant child welfare concerns. For 'notification only referrals' the email provided under the

MOU should specify whether DCP has any concerns about the welfare of the child, whether it is currently undertaking assessments and, therefore, whether it may be in a position to express a view about the appropriateness of the application at a later time.

2. A requirement that for 'genuine referrals' DCP is to provide the party being referred with a letter of support briefly outlining the circumstances of the case and the basis for its support. Wherever possible, the DCP caseworker referring the person to the Family Court should assist the person to make contact with Legal Aid WA Family Court Services including assisting the person to make an appointment.
3. A requirement under clause 2.1 that if an application has not been filed in the Family Court within two months from the date of the email notification under clause 2.1.2, the Family Court Counselling and Consultancy Service will inform DCP by email of that fact so that appropriate follow up arrangements in relation to the family can be made.

Recommendation 7

That the Family Court of Western Australia institute a process to bring DCP responses in respect of Form 4s to the immediate attention of the judicial officer allocated to the case to enable that judicial officer to consider the response and make directions for the distribution of the response to parties.

Recommendation 8

That irrespective of whether the other recommendations in this report are implemented, a comprehensive training strategy be devised for all stakeholders in the child protection and family law jurisdictions and that, where possible, training be undertaken jointly by comparable cohorts (eg Children's Court and Family Court judicial officers; DCP caseworkers and FCCCS staff and independent children's lawyers, DCP lawyers and lawyers who represent parents). If other recommendations in this report are implemented, specific additional training should be formulated to reflect any changes to legislation, processes and procedures in either or both jurisdictions.

APPENDIX E – Abbreviations

2012 Review	<i>Report of the Legislative Review of the Children and Community Services Act 2004</i> , October 2012
2015 Consultation	A consultation the Department conducted in 2015 based on <i>Out of Home Care Reform – Legislative Consultation Paper</i> , Nov 2015
Aboriginal	Aboriginal and Torres Strait Islander
ACCO	Aboriginal community controlled organisation
AIHW	Australian Institute of Health and Welfare
ASPF	The Department’s <i>Aboriginal Services and Practice Framework</i>
ATSI Principle	Aboriginal and Torres Strait Islander child placement principle
CEO	Chief Executive Officer of the Department of Communities
Children	Children and young people under the age of 18 years
Children’s Court	Children’s Court of Western Australia
CSO	Community sector organisation. A CSO may be a not-for-profit or a for-profit organisation, a local government authority or a religious or charitable organisation which provides the community with services to meet a broad range of needs, including out-of-home care.
Family Court	Family Court of Western Australia
In the CEO’s care	A child is in the CEO’s care if he or she is: in provisional protection and care; on a protection order (time limited) or protection order (until 18); the subject of a negotiated placement agreement; or provided with a placement service under section 32(1)(a) of the Act
LDC	Learning and Development Centre, Department of Communities
NAT	Needs Assessment Tool
OOHC	Out-of-home care
OOHC Reform Strategy	Suite of reform actions contained in <i>Building a Better Future: Reform of the Out-of-Home Care Sector in Western Australia</i> , April 2016
Placement arrangement	An arrangement for the placement of a child under section 79(2) of the Act. Includes reference to a ‘care arrangement’
SAT	State Administrative Tribunal of Western Australia
SWA	Safety and wellbeing assessment
The Department	Department of Communities – Child Protection and Family Support Division
The Review	The current statutory review of the <i>Children and Community Services Act 2004</i>
The Royal Commission	Royal Commission into Institutional Responses to Child Sexual Abuse
The South Australian Royal Commission	Child Protection Systems Royal Commission, <i>The life they deserve: Child Protection Royal Commission Report</i> , Government of South Australia
The Victorian Royal Commission	Royal Commission into Family Violence, State of Victoria
WACOSS	Western Australia Council of Social Service

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