North Australian Aboriginal Family Legal Service

Royal Commission into the Protection and Detention of Children in the Northern Territory

SUBMISSION

16 December 2016

1. Introduction

This submission is provided by the North Australian Aboriginal Family Legal Service ('NAAFLS').

NAAFLS is a government funded Aboriginal organisation and NACLC accredited community legal service. As a Family Violence Preventative Legal Service, NAAFLS provides professional, comprehensive and culturally safe assistance and advice to Aboriginal and Torres Strait Islander victims of domestic and family violence and sexual assault.

NAAFLS currently assists 45 remote indigenous communities in the Top end of the Northern Territory and provides the following services:

- legal advice and assistance in areas of family violence, care and protection of children, victims of crime compensation, family law, wills, superannuation, housing and debt management;
- information, support and referral services;
- community legal education; and
- work in domestic and family violence prevention initiatives and law reform activities.

Although our legal service does not provide criminal law assistance or advice, we do work significantly in the child protection jurisdiction. It is in this context that we provide this Submission paper.

2. Comments and Recommendations

2.1 An Independent Child Care Agency

Unlike other jurisdictions, the Northern Territory does not have an independent child care agency tasked with protecting and promoting the rights of indigenous children and young people and providing them and their families with services premised on human rights, self-determination, cultural respect and safety.

In the child protection jurisdiction, the role of such an agency can be important in areas such as:

- early intervention and supporting families with parenting support services;
- provision of culturally appropriate family violence programs;
- provision of integrated family services;
- provision of programs to assist with the strengthening of culture; and
- involvement in policy, planning and major strategic projects relevant to this jurisdiction.

Most importantly, such agencies can play a significant role in assisting child protection and placement services to provide culturally appropriate and effective responses to Aboriginal

children and young people who are being placed in out of home care, and to adhere to legislative Aboriginal children placement principles.[1]

It is submitted such an agency is vitally needed in the Northern Territory to ensure Aboriginal children placement principles are not only adhered to, but significant members of the Aboriginal community can be involved in this process. There are instances for example where elders and other community members in remote indigenous communities can assist with ensuring the safety and support of families so as to assist children remaining with family in community. Examples include forbidding certain family members to attend a home and enforcing this by excluding them from ceremony and other cultural events. The notion of an independent Aboriginal child care agency that could facilitate the merging of our current legal system with traditional indigenous 'legal systems' and culture is worth exploring, particularly given the significant over representation of indigenous children in the child protection system and in out of home foster care in the Territory. It is submitted such an agency may assist in seeking to bridge the significant historical and cultural gaps arising from events such as those experienced by the stolen generation.

2.2 Improvement in the Conciliation Conference Process

The current legislation provides for mediation to occur both outside of (for example prior to a protection application being made) and during child protection proceedings.[2]

2.2.1 Conciliation Conferences during Proceedings

There is currently a practice direction of the court that provides: where an application for a protection order has been made and is opposed (in part or in full), the court in its discretion can order a conference occur between the parties for the purpose of determining what matters are in dispute or seeking to resolve matters in dispute. This can be ordered at any stage of the proceedings and directions can be made by the court as to the filing and serving of specified materials in advance of the conference. General provisions as to confidentiality, the ideal time for convening conferences (namely listings to occur as far as practicable within 4 weeks of the Response being filed); the need for a statement of issues (summarising the issues in dispute, the matters relied on in making the application and the relevant directions said to be necessary should the child be found to be in need of protection) are provided for in the practiced direction.[3]

The inclusion of a mediation or conciliation process during child protection proceedings is vital in seeking to provide early resolutions; assist in alleviating pressure from the court list and assisting with the formulation of outcomes that best suit the needs of the child and their family. Having said this, it is submitted the current conciliation conference process is far

[1] See for example the Victorian Aboriginal Child Care Agency ('VACCA'). In addition, Aboriginal Children's Services ('ACS') in New South Wales seek to place Aboriginal Children in culturally and socially appropriate care. The Queensland Aboriginal and Torres Strait Islander Child Protection Peak ('QATSICPP') in an independent agency that represents the safety and well-being of Aboriginal and Torres Strait Islander children and young people, providing (amongst other things) leadership in the development of policies and strategies to resource and strengthen capacity of Aboriginal and Torres Strait Islander controlled child protection agencies.

[2] Section 48, *Care and Protection of Children Act 2007* (NT).

[3] Practice Direction No 1 of 2015, *Care and Protection of Children Act 2007*(NT).

from adequate and would benefit from incorporating a strength based model similar to that used Victoria, for example.[4]

At present, there is a tendency for the court in CINOP proceedings to order a conference occur by a certain date. Parties are then required to arrange between themselves where and when the conference is to be convened. Often they are held at the office of one of the parties; are attended by the legal representatives without the parties being present in person and without an independent convenor; and are time limited (due to the demanding schedules of the legal practitioners). Whilst often allowing a time for parties to have 'without prejudice' discussions, it is submitted far more useful and suitable outcomes could be reached if a more structured model were utilised. Such a model should ideally:

- include appropriate intake procedures with assessments of risk to determine the suitability and format of the conference (for example whether it should be run as a shuttle conference or by way of a telephone conference);
- ensure the parties (including the child representative) exchange all relevant information by a fixed date prior to the conference including an outline of issues in dispute and clarification as to the order or outcome they are seeking (noting there may be changes in respect to these things since the filing of the application or responding material);
- be convened at a neutral venue (such as a venue near or in the court building);
- be convened by an independent convenor, specifically trained as chairperson to facilitate the process and to do so with the authority of the court; and
- follow a strength based structured program which allows the parties (including children where appropriate) to have their direct say and input in the conference in a manner conducive to seeking a resolution of some or all of the matters in dispute.

It is submitted such a model would facilitate more timely and improved outcomes for children and their families who are involved in child protection proceedings.

2.2.2 Conciliation Conferences Independent of Proceedings

Although there is the ability for mediation to occur between the parties prior to an application being brought to the court, this is generally not utilised. It is submitted a system similar to that used in the Family Law jurisdiction whereby non urgent applications cannot be brought to the court without the parties first seeking to mediate the issues in dispute (subject to certain specified exceptions) should also be considered.[5] This could readily be implemented at times when families are voluntarily engaging with the welfare agency and there is a strong potential for an escalation of events giving rise to removal of the child and an application for a protection order being made to the court.

In summary, it is submitted improved mediation and conciliation processes would assist with earlier resolutions of some matters and is likely to promote more realistic and workable orders that not only address the welfare concerns and best interests of the child, but empower family members to have a more effective say in the care arrangements and

[4] See the Victorian model guidelines at http://www.childrenscourt.vic.gov.au/sites/default/files/ccv_files/Guidelines%20for%20Conciliation%20Conferences%20-%201%20March%202016_0.pdf

[5] See section 60I *Family Law Act 1975 (*Cth).

addressing of protective concerns in relation to the child. Legislative and practice direction changes should be implemented to reflect this.

2.3 Improved Intake Assessments and Intervention

2.3.1 Intake Assessments

In the experience of our legal service, there are often discrepancies within Territory Families as to the level of alleged 'risk factors' and substantiation of these required to give rise to the removal of a child from the care of their parent or caregiver. For example, our service has known of incidents where, had the alleged protective concerns been more thoroughly investigated at the outset (by talking to the school, checking medical records or speaking to the manager of the safehouse from which the child was removed, for instance), the likelihood of the child remaining in parental care with relevant safety and welfare planning would have been greatly increased. This is to be compared with other instances where appropriate investigations were made at the outset and removal avoided. The discrepancy highlights the need for improved risk assessment tools that require consistency as to investigative measures required to be undertaken and addressed before removal is recommended. The risk assessment form used in relation to domestic and family violence as part of the family safety framework measures in the Northern Territory [6] could provide some guidance in this regard, with similar standardised tools being used for other areas of protective concerns including the meeting of medical and care needs of children who have high needs due to disabilities, for example.

2.3.2 Proactive Intervention

Example - Family Violence

There is the ability for the welfare agency to be more proactive in seeking to assist families where protective concerns have arisen due to the occurrence of family and domestic violence.

Under the current legislation, there is provision for a child protection officer (as well as police) to apply for a domestic violence order ('DVO') for the protection of a child if the officer reasonably believes domestic violence has been, is being, or is likely to be, committed and the child's wellbeing has or is likely to be adversely affected (a 'section 29 application')[7] Indeed the provision states a DVO application *must* be made unless the officer reasonably believes a DVO is already in force; an application is already to be made; or a DVO is otherwise not necessary given there is some other order in force under another Act for the protection of the child.

In the experience of NAAFLS, there have been instances where children have been removed from their family where family violence has been a protective concern; police have not made a section 41 DVO; and the welfare officer (or police officer) has not otherwise sought to make a section 29 application for a DVO for the protection of the child. In such instances, family members have often had to wait for the opportunity of seeking legal advice (which is often delayed particularly for families living in remote indigenous communities)

[6] See http://www.pfes.nt.gov.au/Police/Community-safety/Family-Safety-Framework.aspx
[7] Section 29 *Domestic and Family Violence Act (*NT)*.*

before realising their rights to apply for a DVO which in turn assists in the addressing of the protective concerns at hand. A greater emphasis on the need for child protection workers (and police) to make a section 29 application and seek a DVO for the protection of the child (so as to potentially allow for the child to remain with the protective parent or family member) at the earliest possible opportunity needs to be implemented and adhered to in accordance with the legislative provisions.

Example – High Needs

In the experience of NAAFLS, there have also been numerous incidents where the welfare agency has removed children and placed them in out of home care away from community in favour of seeking to service the welfare needs of the child whilst remaining in their parent's care.

One example where this has occurred involved the removal of a CI year old non-English speaking Aboriginal child with high intellectual disabilities and needs from his parents who reside in an outstation approximately CI kilometres from the nearest remote community. Whilst the child was not attending regular schooling at the outstation school; had some medical (including speech therapy) needs that were not sufficiently being addressed; and the primary parent was at times exhausted due to the level of care needs of the child, the welfare agency removed the child and placed him in out of home care in CII with several English speaking, rotating carers. His schooling attendance gradually increased and he was able to see a speech therapist more regularly and visit a paediatrician, but at what cost did this occur to him, his sense of connection and culture and to the community in general? What will his likely care arrangements be for the next 8 years and as a high needs adult with disabilities? It is submitted a far more beneficial and long term cost saving approach would be to consider what services can be injected into his community or outstation and make provision for him to fly into CII for periodic medical assessments and therapy. Although this matter is ongoing, it highlights the potential for significant costs to be spent in association with long term care arrangements (until the child is 18 years of age and beyond), as opposed to spending money on intense services at the outset to support families in addressing the welfare concerns of the child in a manner that is less traumatic and builds on the strengths of family and culture to support the development and welfare of the child in accordance with the underlying principles of the relevant legislation.[8]

2.4 Review of Welfare Agency Decisions

At present, although there is the ability to make complaints as to the administrative process of the welfare agency through the agency's Practice Integrity and Complaints Management Branch (Territory Families); to the Ombudsman; and/ or to the Children's Commissioner Northern Territory, the Territory is lacking a structured review process allowing for internal and external review of care plan decisions.

In Victoria, a parent for example can seek the review of a case plan by a senior regional officer of the welfare agency at first instance. If dissatisfied with the outcome of the review, there is the ability to seek a further review by the Regional Director. There is also the ability to seek an independent review of the case plan decision by an independent Tribunal (the

[8] Part 1.3 *Care and Protection of Children Act 2007 (*NT).

Victorian Civil Administrative Tribunal ('VCAT')), usually after the internal review process has been exhausted. There is no such review process in the Northern Territory. This can lead to frustrating outcomes that do not serve the best interest of the child, particularly when long term orders are made (until the child is 18) with parental responsibility resting with the CEO (welfare agency) and there being limited capacity for a variation or revocation of such order being able to be sought.[9]

2.5 Improved Professional Services

Generally, there is a need for more thorough and trauma informed training for professionals working in the CINOP jurisdiction. This is required for not only welfare workers but lawyers representing parties, including representing children.

Often NAAFLS has experienced instances where professionals from both within the welfare system and the legal fraternity have tended to 'victim blame' one particular parent for not ensuring the protective concerns of the child are met, without properly understanding the dynamic that has lead to the welfare agency engaging with the family (particularly where there has been chronic family violence experienced by that parent). There have been incidents for instance where the child representative has indicated at first instance to parties that an order for a young child be made until that child is 18 "to save time in coming back in a year" when all other parties have supported a short term order in line with the underlying principles of the Act (to support families in safeguarding the wellbeing of the child)[10]. Training in line with the "Safe and Together" model developed by David Mandel and Associates would be beneficial in seeking to address this. Other training, such as the importance of having interpreters involved in explaining court processes and orders and also at meetings and other times of communication with the welfare agency would assist in alleviating miscommunications and misunderstandings that can often lead to orders and 'arrangements' breaking down between families and the agency. In another instance a child representative spoke to a young indigenous person to ascertain their views as to proposed orders. The young person was partially deaf and did not speak English as a first language. The child representative failed to ensure the young person had their hearing aid and an interpreter present when explaining the proposed orders and seeking the child's views. It is submitted mandatory trauma based training including training in social sciences around negligence and trauma on brain development, attachment and resilience theories, the importance of interpreters in providing the child with a voice in accordance with CROC principles[11] and the pitfalls of 'victim blaming' would assist in ensuring appropriate legal representation for children and young people in particular who are involved in the CINOP jurisdiction. This could perhaps be implemented by ensuring only those practitioners who

[9] Section 137 *Care and Protection of Children Act 2007 (*NT) provides a party to the proceedings for the making of an order may apply for a variation or revocation of that order (including by seeking an different order) where a change in circumstances justifies leave of the court to make such application, however a parent must not apply for a different order if the proposed new order gives parental responsibility to a different person (for example where the CEO has parental responsibility under the current order).

[10] Sections 7 and 8 *Care and Protection of Children Act 2007 (*NT)

[11] Article 12 The United Nations Convention on the Rights of the Child provides for children to have the right to give their opinion and for adults to listen and take such opinion seriously. Article 13 provides for the right to be informed and share opinions. Article 40 provides for the right to legal help and fair treatment in the justice system that respects the rights of the child.

have completed such training can appear on the panel of lawyers able to be appointed to represent children and young people in the CINOP jurisdiction.

3. Summary

In summary, there are a number of processes within the current child protection system of the Northern Territory that impede the Northern Territory Government's responsibility to promote and safeguard the wellbeing of children and support families in fulfilling their role in relation to children.[12]

It is submitted the introduction of an independent child care agency in providing culturally appropriate and effective responses to Aboriginal children being placed in out of home care and ensuring an adherence to the Aboriginal children placement principles is vital in seeking to address this deficit. Further, improved mediation and conciliation processes, intake assessment procedures and strength based intervention practices together with improved review processes in respect to care plans and other welfare agency decisions should be implemented to assist in ensuring the goals as to safeguarding the wellbeing of children and supporting families in fulfilling their roles in respect to children are best met. Finally, trauma informed training that avoids a victim blaming approach and understands the importance of enabling children and families to properly understand the child protection system through the use of interpreters and properly trained legal professionals, are vital in supporting these goals.

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[12] As provided in section 7 of the *Care and Protection of Children Act 2007* (NT).