Northern Territory
Legal Aid Commission

Submission to Economic Policy Scrutiny Committee regarding Bill to amend the Care and Protection of Children Act

23 April 2019

Introduction

NTLAC thanks the Economic Police Scrutiny Committee for the opportunity to make a submission in response to the Care and Protection of Children Act Amendment Bill.

NTLAC is largely supportive of the proposed reforms and consider that they are significant in working towards implementing some of the key Royal Commission's recommendations relating to children in need of protection.

We are particularly pleased with the focus on early intervention and the strengthening of sections relating to Territory Families' obligations to preserve and promote the relationship between the child and their family.

About NTLAC

NTLAC is an independent statutory body established under the *Legal Aid* Act NT (1990) and is governed by a Board of Commissioners appointed by the NT Attorney-General. NTLAC provides information, community legal education, legal advice, representation and assistance to persons in a range of matters, including:

- Child in need of care;
- Domestic violence;
- Family law, including Family Dispute Resolution;
- Criminal law; and
- Civil law.

NTLAC aims to ensure that the protection or assertion of the legal rights and interests of people in the Northern Territory are not prejudiced by reason of the inability to:

- obtain access to independent legal advice;
- afford the financial cost of appropriate legal representation;
- obtain access to the Federal or Territory legal systems; or
- obtain adequate information about access to the law and legal system.

NTLAC also provides early intervention and prevention services pursuant to the *National Partnership Agreement on Legal Assistance Services* the ('NPA') between the Australian and NT Governments. These services include legal information, education, referral, advice, family dispute resolution services and legal and non-legal task assistance.

NTLAC is a Northern Territory-wide legal service provider with offices across the NT and fits within a matrix of legal and related service providers in the NT. NTLAC's head office is in Darwin, with regional offices located in Palmerston, Alice Springs, Katherine and Tennant Creek[1]. NTLAC's client base is approximately 30% Indigenous. Due to the high levels of geographic remoteness in the NT, many people in the NT are not able to access NTLAC services in person. People who speak English may access services of the Commission by phone, however a high number of people in the NT do not speak English as a first language[2]. While there have been significant improvements in access to interpreters and training of interpreters and professionals who use interpreters in recent years, there are still significant concerns at the lack of accredited indigenous language interpreters in languages required and in the ability of professionals and services such as the courts to use interpreters appropriately. Even with the facility of interpreters, geographic remoteness and post colonisation factors create additional barriers to Indigenous clients accessing legal services from a remote location.

Legal service arrangements

NTLAC provides key service types:

- Legal information and referral.
- Duty lawyer services - initial representation in court for clients who do not have their own legal representation;
- Legal advice - provision of legal advice by telephone, in person at clinics and through outreach programs;
- Legal Task assistance – limited assistance to address a legal problem before it escalates.
- Non-Legal Task Assistance – Social support to address concerns related to
- Casework - legal representation at court, tribunal, mediation or other body for which a grant of aid had been submitted and approved;

[1] The Tennant Creek office was established following the report NTLAC, *Justice Too Far Away* 2003, which has been provided to the Commission

[2] ABS, Australian Social Trends, 4102-0

- Family Dispute Resolution - lawyer assisted family conferencing chaired by a Family Dispute Resolution Practitioner; and
- Community legal education.

1. Key Supported Reforms

Proposed amendments to section 8, 10 and 10A send a strong message to Territory Families to focus on keeping children with their family where possible and to only do what is necessary to keep them safe. These principles promote greater accountability and transparency of Territory Families and guide their actions. The overriding consideration continues to remain the best interests of the child to ensure that these principles are treated as an ancillary concern so children are kept safe from abuse and neglect by virtue of s6 (2) which provides: *'Anyone exercising a power or performing a function under this act, must as far as practicable, uphold these principles'*.

Amendments to section 10 (2) increase children's participation in proceedings and will encourage legal representatives acting for children to turn their minds to people who have played a significant role in a child's care, welfare and development outside of their family and how best to ensure their support for children during proceedings.

A number of sections relating to care that are proposed to encourage meaningful participation and clear parameters for reunification are highly beneficial. We commend the NT Government for entrenching best practice into the legislation with amendments to section 122 (2) and (3), making it incumbent upon Territory Families to prepare and file a care plan contemporaneously with the application or alternatively 21 days after the application is made. This gives Territory Families time between having filed their protection application and affidavit, prioritising sourcing an appropriate placement arrangement and ascertaining what preliminary needs are identified for the child. This document need only be simple and clear, but can provide great comfort to families about what is happening for the child whilst in care. It is our experience that when care plans are actually filed they are too often vague, confusing and at times accusatory of parent's conduct, which deters parents' engagement and diminishes prospects of collaboration between family and Territory Families for the child. We are hopeful that these reforms are a step in the right direction and will result in parents gaining greater insight into their children's needs and improving their parenting capacity to address the same.

Sections 104A and particularly 124 and 137C embed well established principles enunciated in case law about procedural fairness. They are long awaited amendments and we welcome the promotion of ensuring service of applications on parents in a manner befitting the serious nature of these proceedings. Parents are more likely to be able to obtain independent legal advice and engage in the court proceedings from the outset. Territory Families are still able to make an application for substituted service/ dispensation of service as necessary. It is likely to save expense and avoid unnecessary adjournments being sought for parents to file responses, reunification planning, case conferences, and listing contested matters for final hearing. We recommend that similar amendments be made to section 106 relating to the service of Temporary Protection Order Applications *(please refer to recommendation 2).*

We support proposed amendments to section 129 to embed the well-established principle of orders being made that are the 'least intrusive' and confirms the position adopted by the Supreme Court.

Proposed amendments to section 123 enhance the Court's capacity to ensure that the day-to-day arrangements for a child in the care of Territory Families are in the child's best interest. Unfortunately, under the existing Act, there have been numerous cases in which although Territory Families evinced an intention to facilitate regular contact between a child in the care of Territory Families and the child's family, in practice that did not occur. To avoid confusion, we recommend a note be inserted below section 123 *(please refer to recommendation 3).* Proposed amendments to section 123 are a significant, positive step forward for parents who can seek directions from the Court for contact and other matters that typically fall within the purview of day to day care and control. It will give children a greater opportunity to maintain and develop their relationship with family. Parties must still be put on notice of proposed supervision directions and be given an opportunity to respond as to whether they are workable: *CEO Department of Children and Families v LB & Ors* [2015] NTSC 9 AT [36]. The discretion will still remain with the Court as to whether the proposed contact/ action are in the child's best interests.

2. Proposed changes to the Bill

2.1 Foster carers participating in proceedings as a matter of course

We are however, concerned with the proposal to serve carers with copies of applications for Temporary Protection Applications in 104A (1) and Protection Order Applications in 124 (1). There is no definition of *'carer'* in the Act and it is presumed that carers are: people caring for the child at the time such applications are filed and that this will include foster carers. The Royal Commission made several recommendations to strengthen the foster care system in Recommendation 33, but it did not recommend that foster carers be brought into child protection proceedings. It may be inferred that the Royal Commission, having conducted its very detailed and comprehensive inquiries, including the hearing of evidence from foster carers, had valid grounds for declining to make such a recommendation.

As proposed sections 104A- 1(b) and 124(1) (2) provide that an application may be heard and decided in the absence of the parents and carer, we assume that carers will be listed as parties to a proceeding from the outset. We consider that there are serious financial, legal and social implications of service upon carers of applications and urge reconsideration of these proposed amendments particularly if such carers have not been 'parties' in previous proceedings or orders in which they may or may not have been granted parental responsibility or daily care and control of the children.

Where Territory Families consider it appropriate they can make an application for a Permanent Care Order pursuant to subdivision 4 of the Act. Such orders permit the court to make final orders for children until they reach the age of 18. Territory Families are permitted to serve a copy of the application upon persons who Territory Families proposes to be divested with parental responsibility (which can include carers).

Foster carers can also currently make an application to be joined as a party to the proceedings but must make an application, as all family members who are proposing to join as parties to proceedings are required to do. They must then demonstrate to the Court that they meet the threshold test provided in section 94 (e) of having a direct and significant interest in the wellbeing of the child.

The current Act which does not permit carers being served with applications as a matter of course, ensures that carers who are not proposing to care for children during the course of a protection order, are not apprised of sensitive information about the child or child's family. Foster carers may care for children for a short period and children in care are often moved to at least two placements during the course of court proceedings and/or child protection orders. Foster carers are already able to provide input into care planning and meet with Territory Families caseworkers to discuss concerns and needs of children in their care.

Applications are often supported by affidavits containing highly sensitive or even inflammatory material which, if served on foster carers, is apt to cause avoidable and often misplaced concern or distress. They may assume that this untested evidence is true and correct, and potentially feel it is their obligation to intervene in court proceedings, possibly driven by a duty to protect the children entrusted in their care, encourage children to voice their concerns about parents, alienate children from their parents and endeavour to restrict contact between children and parents. It hinders the cooperative relationship a parent may develop with carers and is a missed opportunity for carers who are willing to model appropriate parenting, discipline and routines to parents open to learning the same.

The cost of serving applications upon carers, carers securing their own lawyers and engaging in court proceedings as a matter of course, will increase complexity, cause delays to the Court and ultimately greater expense to the taxpayers' purse as foster carers continue to receive payments throughout the course of the proceedings. We would appear to be the only jurisdiction in Australia that would permit carers being served with proceedings as a matter of course if this amendment is passed.

Finally, there is a risk that parents may attempt to recover children from carers' residences or incite/ encourage violence against carers who are caring for their children. *Please refer to Recommendation 4.*

2.2 The 'catch-all' construct as to when an application for and a protection order can be made for a child

The grounds for applying for a protection order in s.121(1)(a) and when a Court must make an order in s.129(a) should be simplified to provide for greater clarity and alignment with other jurisdictions by deleting subsections (ii) in both: *'would be in need of protection but for the fact that the child is currently in the CEO's care, and'* which is at odds with the definition of when a child is in need of protection in s. 20 and the definition of harm itself. *Please refer to recommendation 5.*

There may be circumstances where a child may be in the CEO's care on a temporary or short-term basis until appropriate care arrangements can be made either with the return to family or identifying other suitable family members.

No such provision appears in any other legislation around the country (except for a much narrower construct) and is a *'catch-all'*. Alternatively, the provisions could be amended in line with s. 72 of the Children and Young Persons (Care and Protection) Act 1998 (NSW) which directs the Court to consider whether an order should be made if at the time the application was made, a child was in need of care and protection and but for the existence of arrangements made for the protection of the child, *only* in circumstances of either the death of a parent or caregiver or pending proceedings or interim orders being in place.

2.3 Appeals from Temporary Protection Orders

Section 140 of the Act currently prevents respondents appealing Temporary Protection Orders. We have raised this issue with Territory Families on a number of occasions as a clear denial of natural justice. Temporary Protection Orders can be made consecutively up to two occasions (for a total of *28 days*) subsequent to a Provisional Protection Order. This is out of step with other jurisdictions which, for example, provide an appeal mechanism for similar orders, some of only 3 days duration.[3]

The removal of children from their families is a very serious matter and should be treated with careful consideration. We do not suggest that these Applications should be done away with and acknowledge the importance of an emergency mechanism to ensure the protection of children from abuse and neglect. This does necessitate an abridged hearing process including testing of the evidence, however this should not result in orders being made as a matter of course. Temporary Protection Order Applications ought to be treated with even greater caution, given that Territory Families gave evidence to the Royal Commission that Territory Families Team Leaders (who are not legal practitioners and thus not bound by the same obligations of candour to the Court).[4]

An appeal mechanism of Temporary Protection Orders:

a) Gives effect to recommendation 34.13 of the Royal Commission's recommendations;
b) Improves accountability and transparency of Territory Families and would be a positive step towards alleviating power imbalance between parents and Territory Families; and
c) Encourages Territory Families to work collaboratively with parents from the outset of proceedings (in line with the spirit of early intervention that this legislation is designed to promote). *Please refer to recommendation 6 and 7.*

3. Recommendations:

Recommendation 1: That proposed section 42(1)(cb) delete the words "Aboriginal communities" and include only the words "the community" because as it is currently worded it is discriminatory. It should be applicable to the community as a whole. This recommendation is self-explanatory.

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[3] *Child Protection Act (1999)* QLD S.51AG https://www.legislation.qld.gov.au/view/html/inforce/current/act-1999-010#sec.51AG and s.117 https://www.legislation.qld.gov.au/view/html/inforce/current/act-1999-010#sec.117

[4] Report of the Royal Commission and Board Inquiry into the Protection and Detention of Children in the Northern Territory, Volume 3A, Page 505.

Recommendation 2: Proposed amendments to promote service of applications on parents also be made to section 106 (2) relating to Temporary Protection Orders given this is a crucial stage in the intervention of the state and opportunity for immediate engagement with the family with legal and support services.

Recommendation 3: A note be inserted below section 123 stating: *'for example, directions may be made for Territory Families to facilitate supervised or unsupervised contact whilst they have daily care and control of a child'.*

Recommendation 4: That all references to 'carers' in section 104A and 124 be removed.

Recommendation 5: Delete subsections (ii) in both section 121 (1)(a) and section 129 (a): *'would be in need of protection but for the fact that the child is currently in the CEO's care, and'.*

Recommendation 6: That the words *'other than a temporary protection order'* be removed from section s140(1).

Recommendation 7: Amend section 106 to include that at the time of serving a temporary protection order on parents, a right of appeal and information about how to appeal is also provided to parents.

Please do not hesitate to contact us should you require any clarification about this submission.

Yours faithfully,

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