

ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC)



**SUBMISSION TO THE COMMONWEALTH SENATE COMMUNITY AFFAIRS REFERENCES
COMMITTEE INQUIRY INTO OUT OF HOME CARE**

30 October 2014

ABOUT THE ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA

ALSWA is a community based organisation which was established in 1973. ALSWA aims to empower Aboriginal peoples and advance their interests and aspirations through a comprehensive range of legal and support services throughout Western Australia. ALSWA aims to:

- Deliver a comprehensive range of culturally-matched and quality legal services to Aboriginal peoples throughout Western Australia;
- Provide leadership which contributes to participation, empowerment and recognition of Aboriginal peoples as the Indigenous people of Australia;
- Ensure that Government and Aboriginal peoples address the underlying issues that contribute to disadvantage on all social indicators, and implement the relevant recommendations arising from the Royal Commission into Aboriginal Deaths in Custody; and
- Create a positive and culturally-matched work environment by implementing efficient and effective practices and administration throughout ALSWA.
- ALSWA uses the law and legal system to bring about social justice for Aboriginal peoples as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation, legal education, legal research, policy development and law reform.
- ALSWA is a representative body with executive officers elected by Aboriginal peoples from their local regions to speak for them on law and justice issues. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law, and human rights law. ALSWA also provides support services to prisoners and incarcerated juveniles. Our services are available throughout Western Australia via 14 regional and remote offices and one head office in Perth.

THE INQUIRY

On 17 July 2014 the Senate referred an inquiry into out of home care (OOHC) to the Community Affairs References Committee ('the Committee'). The terms of reference for the inquiry are:

Out of home care, including;

- (a) drivers of the increase in the number of children placed in out of home care, types of care that are increasing and demographics of the children in care,
- (b) the outcomes for children in out of home care (including kinship care, foster care and residential care) versus staying in the home;
- (c) current models for out of home care, including kinship care, foster care and residential care;
- (d) current cost of Australia's approach to care and protection;
- (e) consistency of approach to out of home care around Australia;
- (f) what are the supports available for relative/kinship care, foster care and residential care;

- (g) best practice in out of home care in Australia and internationally;
- (h) consultation with individuals, families and communities affected by removal of children from the home;
- (i) extent of children in out of home care remaining connected to their family of origin; and
- (j) best practice solutions for supporting children in vulnerable family situations including early intervention.

The Committee is required to report by the second sitting week in February 2015.

INTRODUCTION

ALSWA represents and deals with matters concerning children in OOHC (and their families) in a number of different contexts. Lawyers from the Family Law Unit represent parties involved in child protection proceedings. Lawyers and court officers from the Criminal Unit represent children who are in OOHC during criminal proceedings. Additionally, lawyers from the Civil Law and Human Rights Unit have represented children (and/or their family members) in relation to complaints or concerns about their treatment while in OOHC and in relation to the management of their cases by the Department for Child Protection and Family Support ('DCPFS'). This submission has been largely informed by the experiences of ALSWA staff in these areas and a number of case studies are included in this submission.

Specific reform of the Western Australian child protection system is not within the jurisdiction of the federal government. Therefore, ALSWA does not make any direct recommendations for reform of legislation or practice in Western Australia. Instead, this submission discusses a number of problems experienced by Aboriginal people in Western Australia in relation to OOHC and highlights issues for general reform.

Background

As acknowledged in the Inquiry's terms of reference, the number of children in OOHC in Australia is increasing. While this general trend is clearly concerning, the ALSWA is gravely troubled by the disproportionate rate of Aboriginal children in OOHC (and the disproportionate rate of Aboriginal children receiving child protection services). As demonstrated by the data referred to below, Western Australia has the unenviable status of having the highest rate of overrepresentation of Aboriginal children in child protection services (including OOHC). And, it is not just in relation to Aboriginal children under state care where Western Australia performs so poorly – Western Australia also has the highest rate of overrepresentation of Aboriginal children in juvenile detention in Australia.¹ As will be discussed later in this submission, children who are simultaneously under state care and involved in the juvenile justice system are especially vulnerable, disadvantaged and marginalised.

The Australian Institute of Health and Welfare's recent report on child protection found that in 2012–2013 there were 135,139 children receiving child protection services in Australia (at a rate of 26.1 per 1000 children aged 0 to 17 years). A total of 91,370 children were the subject of a child protection

¹ Office of the Inspector of Custodial Services, *Directed Review into an Incident at Banksia Hill Detention Centre on 20 January 2013*, Report No 85 (2013) [8.13]–[8.14].

investigation; 51,997 were on a care and protection order;² and 50,307 children were in OOHC.³ The rate in Western Australia is slightly below the national rate (24.1 per 1000 children).⁴

In 2012–2013 Aboriginal and Torres Strait Islander⁵ children were **eight times** more likely than non-Aboriginal children to have received child protection services (a total of 36,656 Aboriginal children received child protection services).^{6,7} As highlighted above, **Western Australia** had the highest overrepresentation rate: Aboriginal children in Western Australia were approximately **14 times** more likely than non-Aboriginal children to have received child protection services. As the report observed:

The reasons for the over-representation of Indigenous children in child protection substantiations are complex. The legacy of past policies of forced removal; intergenerational effects of previous separations from family and culture; lower socioeconomic status; and perceptions arising from cultural differences in child-rearing practices are all underlying causes for their over-representation in the child welfare system.⁸

The data shows that the ‘most common type of substantiated abuse for Aboriginal and Torres Strait Islander children was neglect, which represented 40% of substantiations (compared with 23% for non-Indigenous children). The proportion of substantiations for all other abuse types was accordingly higher for non-Indigenous children’.⁹ Neglect (whether real or apparent) of Aboriginal children is closely linked to social and economic disadvantage (eg, poverty, homelessness, overcrowding, unemployment, mental health issues and substance abuse). While the safety of children must always remain the priority, a key overarching goal of any child protection system should be to reduce the number of children in OOHC (and, thereby, increase the number of children who remain living with their families). However, the child protection system is not equipped, in isolation, to reduce the level of social and economic disadvantage suffered by many Aboriginal families (eg, it cannot create more employment opportunities nor can it increase the number of viable accommodation options). For that reason, ALSWA emphasises that sustainable positive outcomes are only likely to be achieved by a whole-of-government approach to reducing the level of disadvantage experienced by many Aboriginal people.

The Federal Government must continue to work in conjunction with state and territory governments and in partnership with Aboriginal communities to provide adequate resources, services and programs to address the unacceptable level of socio-economic disadvantage experienced by many Aboriginal families.

As at 30 June 2013, there were 13,952 Aboriginal children in OOHC across Australia (constituting 34% of all children in OOHC). The rate of Aboriginal children in OOHC was **10.6 times** the rate for non-Aboriginal children.¹⁰ Again, **Western Australia** has the highest rate ratio in the nation -

² Since 2009–2013 the rate of children subject to statutory child protection orders has increased and it has been observed that the ‘increases in the overall number of children on care and protection orders during this period are being driven by the substantial increase in the number of Aboriginal and Torres Strait Islander children on orders’: Australian Institute of Health and Welfare, *Child Protection Australia 2012–2013* (2014) Child Welfare Series No 58, 43.

³ Australian Institute of Health and Welfare, *Child Protection Australia 2012–2013* (2014) Child Welfare Series No 58, 10. Some children were involved in more than one type of child protection service: 56% of children were subject to an investigation only; 26% of children were subject to a care and protection order and in out of home care; and 8% of children were subject to all three parts of the child protection system (12).

⁴ Ibid 12.

⁵ In this submission, ALSWA uses the term ‘Aboriginal people’ or ‘Aboriginal children’ to refer to Aboriginal and Torres Strait Islander people and children.

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⁷ Australian Institute of Health and Welfare, *Child Protection Australia 2012–2013* (2014) Child Welfare Series No 58, 14.

⁸ Ibid, 25.

⁹ Ibid, 26.

¹⁰ Ibid, 51.

Aboriginal children in Western Australia were **16.1 times** more likely to be in OOHC than non-Aboriginal children (almost 49% of children in OOHC in Western Australia were Aboriginal).¹¹

The National Framework for Protecting Australia's Children 2009-2020 recognises the importance of maintaining the safety of Aboriginal children and maintaining their connection to family and culture. Outcome 5 under the National Framework provides that Indigenous children should be supported and safe in their families and communities and that:

Indigenous children are supported and safe in strong, thriving families and communities to reduce the over-representation of Indigenous children in child protection systems. For those Indigenous children in child protection systems, culturally appropriate care and support is provided to enhance their wellbeing....Maintaining connection to family, community and culture is essential within a framework that respects the physical, mental and emotional security of the child. This is particularly important in light of the historical experiences that Aboriginal families have had with child protection agencies.¹²

Nevertheless, it is clear that the number of Aboriginal children in OOHC is increasing. As recently stated by the Deputy Chairperson of the Secretariat of National Aboriginal and Islander Child Care (SNAICC), Geraldine Atkinson that:

We are seeing a modern version of the Stolen Generation unfolding, in terms of the devastating impact the removals is having on children, their families and communities; and also in the powerlessness many of our families are feeling when dealing with the child protection system.¹³

Ms Atkinson further observed that as part of SNAICC's consultations with Aboriginal people

[W]e have heard that Aboriginal and Torres Strait Islander families feel powerless in dealing with the system, they are fearful of it, it doesn't listen to their needs and it doesn't understand cultural differences, including traditional child rearing practices, which at times is leading to children being wrongly removed from their families.¹⁴

In addition to the need to adopt a whole-of-government and partnership approach to reducing disadvantage, ALSWA is of the view that the Western Australian child protection system must be more responsive to and understanding of Aboriginal tradition and culture and the reality of the circumstances in which many Aboriginal families are living.

Bearing in mind the disproportionate number of Aboriginal children in OOHC, it is imperative that statutory child protection systems are highly responsive to and understanding of Aboriginal tradition and culture.

Legislative criteria for child protection intervention in Western Australia

Under s 28 of the *Children and Community Services Act 2004* (WA) ('the Act') a child is in need of protection (and thereby liable to statutory intervention) if, among other things, the child has suffered, or *is likely to suffer*, harm as a result of physical abuse, sexual abuse, emotional abuse, psychological abuse and 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. Therefore, it is important to acknowledge that a child may be removed from his or her family because a decision is made by DCPFS that the child is likely to

11 Ibid, 52.

12 Council of Australian Governments, National Framework for Protecting Australia's Children 2009–2020, 28.

13 SNAICC, 'Less Daunting and More Culturally Responsive Child Protection Systems will Lessen Trauma', *Media Release* (2 August 2014).

14 Ibid.

suffer abuse or neglect and the parents are unlikely to be able to protect the child from possible harm (ie, there does not necessarily have to be any evidence that the child has already suffered abuse or neglect). While this is clearly necessary in terms of protecting children from future harm, it has the potential of misapplication if assessments of a child's future safety are made without a clear understanding of cultural issues (including, for example, an understanding of the reasons why Aboriginal families may not appear to 'engage' with child protection authorities as a consequence of historical removal policies and general mistrust of government welfare agencies). Further, in cases where DCPFS consider that a child is at risk of future harm (but has not actually suffered any past abuse or neglect) every effort should be made to provide the parents/family with necessary supports to ensure the child's safety *and* to enable the child to remain at home. While acknowledging the obvious impact on resources and difficulties in recruiting and retaining caseworkers in the child protection system, ALSWA is of the view that ideally there should be a separate caseworker provided for the parents in such cases.

RESPONSE TO THE INQUIRY'S TERMS OF REFERENCE

DRIVERS OF THE INCREASE IN THE NUMBER OF CHILDREN PLACED IN OUT OF HOME CARE, TYPES OF CARE THAT ARE INCREASING AND DEMOGRAPHICS OF THE CHILDREN IN CARE

The Australian Institute of Health and Welfare report states that there has been a 29% increase in the number of children subject to child protection substantiations between 2010/11 and 2012/13; that the rate of children subject to care and protection orders has increased from 7.0 to 8.2 per 1000 children between 30 June 2009 and 30 June 2013; and the rate of children in OOHC has increased from 6.7 to 7.8 per 1000 children between 30 June 2009 and 30 June 2013.¹⁵ As highlighted at the outset of this submission, Aboriginal children are grossly overrepresented in the statutory child protection system and in OOHC in Australia and, specifically, in Western Australia.

The following table has been reproduced from data included in the Productivity Commission's Report on Government Services.¹⁶ It shows the total number of children in OOHC in Western Australia from 2005/06 to 2012/2013 (as well as the number of Aboriginal and non-Aboriginal children in OOHC during those periods). There has been an increase in the number of children in OOHC for both Aboriginal and non-Aboriginal children each year. Apart from one 12-month period (2007/8 to 2008/9) where the percentage increase was the same and one period where the percentage increase was higher for non-Aboriginal children, the percentage increase for Aboriginal children was substantially higher than for non-Aboriginal children in each other relevant period. The greatest increase occurred between 2005/6 and 2006/7 and since 2009/10 there has been a significant increase in the number of children in OOHC each year.

15 Australian Institute of Health and Welfare, *Child Protection Australia 2012–2013* (2014) Child Welfare Series No 58, viii.

16 Australian Productivity Commission, *Report on Government Services*, (2014) Table 15A.19.

Year	Aboriginal	Increase (% increase)	Non- Aboriginal	Increase (% increase)	Unknown	Total	Increase in total (% increase)
2012- 2013	1800	186 (11.5%)	1781	21 (1.1%)	55	3636	236 (6.9%)
2011- 2012	1614	166 (11%)	1760	233 (15%)	26	3400	280 (8.9%)
2010- 2011	1448	206 (16.5%)	1527	33 (2.2%)	145	3120	383 (13.9%)
2009- 2010	1242	45 (3%)	1494	9 (0.06%)	1	2737	55 (2%)
2008- 2009	1197	119 (11%)	1485	17 (11%)	0	2682	136 (5.3%)
2007- 2008	1078	100 (10%)	1468	75 (5%)	0	2546	175 (7.3%)
2006- 2007	978	212 (27%)	1393	191 (15%)	0	2371	403 (20%)
2005- 2006	766		1202		0	1968	

The ALSWA acknowledges that there are likely to be a multitude of practical, policy and legal issues impacting on the rate of children in OOHC and, therefore, it is not possible to put forward one definitive reason for the increase in children in OOHC in recent years. Socio-economic disadvantage (including unemployment, poverty, mental health issues and substance abuse) clearly affects the ability of families to care for their children. Significantly, the extent of homelessness in Western Australia is an obvious issue impacting on the number of children in OOHC. The unacceptable waiting lists for public housing¹⁷ coupled with the Department of Housing's 'three strikes policy' for disruptive behaviour in public tenancies¹⁸ is resulting in homelessness and/or overcrowding for many Aboriginal families. This, in turn, may become the basis for determining that parents are unable to properly care for their children.

It is also noted that in Western Australia the Act became operational in March 2006 (one period of significant increase as noted in the above table) and the introduction of mandatory reporting of child

¹⁷ It was reported in the media on 2 October 2014 that the proportion of public housing applicants waiting more than five years before obtaining a house has increased to almost 21% from 6.2% five years ago: Wearne P, 'Public Housing Wait Increases' *The West Australian* (2 October 2014) 20.

¹⁸ The Disruptive Behaviour Management Strategy (DBMS) was introduced in 2011 and results in eviction proceedings for public housing tenants who accumulate 'three strikes' for specified behaviour within a 12-month period. The Equal Opportunity Commissioner in Western Australia has observed that the DBMS increases overcrowding because 'when families are evicted as a result of the strategy, their only option (other than being homeless) is to stay with relatives. These relatives are often also tenants of the Department. This frequently creates increased noise levels in these households and raises the potential for antisocial behaviour. In turn, this adds to the likelihood of additional complaints under the DBMS': Equal Opportunity Commission Western Australia, *A Better Way: A report into the Department of Housing's disruptive behaviour strategy and more effective methods for dealing with tenants* (June 2013) 11 & 52.

sexual abuse by doctors, nurses and midwives, teachers and police officers in 2009 may have had some impact on the number of children in OOHC in the ensuing years because of increased reports of suspected abuse to DCPFS.

Further, DCPFS introduced the *Signs of Safety* framework in 2008.¹⁹ *Signs of Safety* was developed in Western Australia in the 1990s. It has been adopted in a number of other jurisdictions including the United States, Canada, United Kingdom, Sweden, Finland, Denmark, The Netherlands, New Zealand and Japan.²⁰ The 2012 review of the Queensland child protection system recommended that Queensland should adopt *Signs of Safety* (or something similar).²¹ Detailed information about the framework can be obtained from the DCPFS website.²² The Western Australian government's comments to the Productivity Commission's Report on Government Services explains that *Signs of Safety* 'is an approach that is rigorously focused on risk, emphasises putting families in the centre of assessment, planning and responsibility for the safety of their children, and working collaboratively with families even if children have to be removed'.²³ In summary, the framework is stated as encompassing a 'comprehensive approach to risk' which considers harm and danger at the same time as strengths and safety and is designed to be an inclusive process with full involvement of children, families and professionals.²⁴

While ALSWA is not in a position to critique the theoretical basis of the *Signs of Safety* framework, it is of the view that its application in practice is not always conducive to maximising child safety and/or enabling Aboriginal children to remain with their family. ALSWA has represented clients who have been involved in *Signs of Safety* assessments and associated *Signs of Safety* conferences and it appears that in some instances the primary focus is to ensure that the affected adult members of the family understand the reasons for state intervention rather than focussing on what is required to enable the child to remain or return to the family home. In this regard, it is noted that the policy itself states that it is to be used as a tool to, among other things, 'enhance children's and families' understanding why professionals are intervening in their lives'.²⁵

Further, in relation to the use of the *Signs of Safety* framework in the context of applications for statutory protection orders, a review of the Children's Court of Western Australia in 2011 noted that:

The principles underpinning the Signs of Safety project were universally welcomed, and some participants noted very good outcomes for children and their families. However, some concerns were expressed at the variable quality of Signs of Safety Meetings, which rely significantly on the skill level of facilitators, to engage parents and to manage complex negotiations in emotionally-heated environments. A particular concern was expressed about the potential barriers to participation for Aboriginal parents, especially those outside of Perth, for whom distance and associated barriers to timely access to information might impede equitable participation.²⁶

It is also apparent from ALSWA's experiences with clients involved in *Signs of Safety* assessments/meetings/conferences that the inherent power imbalance between the state and a parent(s) who has had a child removed or is facing the removal of a child is stark. If the intention is to

19 Department for Child Protection and Family Support, *Annual Report 2012–2013*, 1.

20 Department for Child Protection and Family Support, *The Signs of Safety Child Protection Practice Framework* (2011) 6.

21 Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Roadmap for Queensland Child Protection* (June 2013) xx.

22 Department for Child Protection and Family Support, *The Signs of Safety Child Protection Practice Framework* (2011); Department for Child Protection and Family Support, *Signs of Safety Policy* (2011); <http://www.dcp.wa.gov.au/Resources/Documents/Policies%20and%20Frameworks/SignsOfSafetyPolicy.pdf>.

23 Productivity Commission, *Report on Government Services* (2014) 15.68.

24 Department for Child Protection and Family Support, *Signs of Safety Policy* (2011) 2.

25 Ibid 3.

26 Clare M et al, *An Assessment of the Children's Court of Western Australia: Part of a national assessment of Australia's Children's Court* (2011) 24.

negotiate outcomes and involve all parties in the decision-making process, this imbalance must be recognised and accommodated. In addition, for many Aboriginal people the historical and continuing mistrust of child welfare agencies may result in the appearance of non-cooperation or disengagement. These factors must be borne in mind when assessments are made about the perceived willingness of parents to engage with DCPFS in the *Signs of Safety* process.

It is also noted the dual aims of providing permanency for children in care and reunification with parents will often be contradictory. ALSWA is of the view that, in some cases, insufficient resources and support are provided to enable reunification to occur. From a resourcing perspective, finding a permanent placement for a child (and obtaining a protection order until the child turns 18 years) is likely to be more palatable to the Department than a short-term protection order (or repeated short-term orders) with simultaneous supports to enable the child to eventually be reunified with his or her parents. Given the detrimental consequences of being removed from family, ALSWA believes that there should be a greater focus on working with vulnerable Aboriginal families to facilitate reunification. It is noted that DCPFS's policy in relation to permanency planning provides that, generally (from the time a protection order is made) the decision about whether reunification is possible and realistic must be made within 12 months for children aged less than two years and within 24 months for children aged 2 years or more.²⁷ In reaching a conclusion that reunification is not possible or realistic, it is vital that the Department takes into account the reasons why some Aboriginal families may appear to be or be reluctant to engage with child protection workers as well as the level of support actually being provided to that family to enable the child to returned safety. It also requires a determination not to abandon these families too readily.

THE OUTCOMES FOR CHILDREN IN OOHC (INCLUDING KINSHIP CARE, FOSTER CARE AND RESIDENTIAL CARE) VERSUS STAYING IN THE HOME

ALSWA makes no comment in relation to the outcomes for children in OOHC versus staying in the home other than to emphasise the high proportion of children in OOHC who become entrenched in the criminal justice system. This is discussed in detail below.

CURRENT MODELS FOR OUT OF HOME CARE, INCLUDING KINSHIP CARE, FOSTER CARE AND RESIDENTIAL CARE

Kinship carers

The DCPFS website does not contain a dedicated section for kinship care – relative care is mentioned as a subcategory of foster care.²⁸ Foster care (either general or relative) can be accessed via the Department or a non-government agency. There are nine non-government agencies currently listed on the Department's website – only one of these is an Aboriginal-specific agency (Yorganop Association Inc²⁹). There is no separate policy for relative foster carers (both general and relative carers are included within the *Foster Care Partnership Policy 2012*.³⁰

ALSWA notes that kinship care may be informal ie, where there is no statutory involvement of the child protection agency and the child is not under the formal care of the state. It has been reported that approximately 200 children are placed with informal relative carers in Western Australia each year. These arrangements are approved by DCPFS but, unlike formal relative foster carers, these carers do not receive a subsidy from DCPFS. Informal carers may be eligible for federal or state

27 Department for Child Protection and Family Support, *Permanency Planning Policy* (2012) 3.

28 <http://www.dcp.wa.gov.au/FosteringandAdoption/InterestedInFosterCaring/Pages/InterestedInFosterCaring.aspx>.

29 ALSWA notes that Djooraminda is an Aboriginal-specific program run by CentreCare and it receives referrals from DCPFS to provide, among other things, reunification services, family enhancement services and family support services.

30 <http://www.dcp.wa.gov.au/Resources/Documents/Policies%20and%20Frameworks/FosterCarePartnershipPolicy.pdf>.

assistance on the same basis as any other family. DCFPS makes a one-off establishment payment of \$1,000 to assist informal relative carers with the purchase of necessary items.³¹

As far as ALSWA is aware there are no specific Aboriginal kinship carer assessment tools in Western Australia.³² In this regard, ALSWA highlights the specific Aboriginal kinship carer assessment tool which has been developed by Winangay Resources. Its website states that:

The tools are culturally appropriate, strength based and rest on a strong foundation of Australian and international research. It has been developed to assess and support existing kinship carers. Through a series of interviews it identifies carer strengths, concerns and unmet needs.³³

ALSWA understands that this tool is used in New South Wales and is currently being trialled in Queensland. The Queensland Child Protection Commission of Inquiry referred to this tool in its final report:

The Commission would encourage the department to investigate the use of the simplified carer assessment tools as a way of making the process less confronting for families. Tools such as the Winangay Kinship Care Assessment Tools, developed by the not-for-profit organisation Winangay Resources, might be used as an alternative or component of the assessment process. This tool uses a conversational 'yarning' style to assess key areas of carer competency, and visual cards to identify competency in each of the core areas. The tool is designed to reduce power imbalances between carers and workers, enabling potential kinship carers to participate fully in the assessment process.³⁴

In its submission to the Senate Standing Committee on Community Affairs inquiry into grandparents raising grandchildren, Winangay Resources highlighted that generic assessment tools 'fail to capture the complexities of Aboriginal kinship care, are culturally insensitive and are predicated on an erroneous assumption that the child is not known to the carer and is a stranger to the potential carer'.³⁵

It is also important for child welfare policies to accommodate the specific needs of many kinship carers. For example, it has been observed that kinship carers 'often feel torn between the child's parents (usually their own child) and the needs of their grandchildren...as well as the relationship they have with their own grandchildren who do not live with them'.³⁶ It has also been found that generally kinship carers are likely to experience greater socio-economic disadvantage than foster carers and that kinship carers may experience harassment and pressure from families because of their involvement with child protection agencies.³⁷ Winangay Resources have commented that generally kinship care 'receives less monitoring, training and support' than general foster carers.³⁸

ALSWA is of the view that there should be specific policies and processes for Aboriginal kinship carers (including but not limited to culturally appropriate assessment tools and policies in relation to

³¹ <http://www.dcp.wa.gov.au/Resources/Documents/Policies%20and%20Frameworks/Policy%20-%20Establishment%20Payment.pdf>.

³² A literature review in 2010 found that Western Australia 'had no policies or procedures specific to kinship care': Boetto H, 'Kinship Care: A review of issues' (2010) 85 *Australian Institute of Family Studies Family Matters* 60, 66. The DCFPS Casework Practice Manual has a section dealing with 'Supporting Foster Carers'. Chapter Nine of the manual deals with Foster Carer Assessment and Review and includes relative carers.

³³ <http://winangay.com/>.

³⁴ Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Roadmap for Queensland Child Protection* (June 2013) 368.

³⁵ Winangay Resources, *Submission to the Senate Standing Committee on Community Affairs Grandparents raising Grandchildren*, Submission 107, 3.

³⁶ Boetto H, 'Kinship Care: A review of issues' (2010) 85 *Australian Institute of Family Studies Family Matters* 60, 62.

³⁷ *Ibid*, 62.

³⁸ Winangay Resources, *Submission to the Senate Standing Committee on Community Affairs Grandparents raising Grandchildren*, Submission 107, 3.

providing support to kinship carers). If an Aboriginal child must be removed from his or her family, the ideal is for the child to be placed with kin. If this occurs and there is no realistic possibility of reunification, there must be sufficient support to the carer to ensure that the placement is sustainable and successful.

Statutory child protection authorities should ensure that they develop and utilise specific policies and processes for Aboriginal kinship carers including culturally appropriate kinship carer assessment tools and support strategies.

Foster carers

Where an Aboriginal child cannot be placed with kin, in accordance with the Aboriginal child placement principle, it is vital that efforts are made to place the child with an Aboriginal general foster carer. DCPFS has acknowledged that there are challenges in recruiting Aboriginal foster carers.³⁹ As recently as September 2014, Wanslea (a non-government agency that provides services to children in OOHC in Western Australia) indicated, through its networks with other agencies, the pressing need to recruit more Aboriginal foster carers. According to Wanslea, it currently has 110 carers and only two of these carers are Aboriginal; however, 49% of their referrals are for Aboriginal children.

ALSWA also understands that if a foster carer is registered directly with DCPFS they are not permitted to also register with a non-government provider such as Wanslea. Similarly, if a person wishes to undertake the role of a pre-adoptive foster carer (ie, usually for newborn babies for a temporary period while the biological parents consider their options) that carer cannot simultaneously care for children under the care of the CEO of DCPFS. These restrictions create additional and unnecessary barriers for those Aboriginal people who are willing and able to act as foster carers.

One likely reason for the reluctance of some Aboriginal people to undertake the role of a general foster carer is the distrust of and resentment towards child welfare agencies as a result of past removal policies. The ALSWA is of the view that if Aboriginal-controlled agencies were supported and encouraged to provide support services directly to children in OOHC and their families, the number of Aboriginal foster carers would rise. The involvement of Aboriginal agencies in the provision of OOHC services is discussed further below.

The Federal Government and state and territory governments provide funding to enable Aboriginal community-controlled or community-based organisations to provide OOHC services to Aboriginal children and families.

³⁹ Department for Child Protection and Family Support, *Annual Report 2012–2013* (2013) 45.

Residential care

ALSWA acknowledges that there are cases where residential care is the only appropriate or available option for children in OOHC. However, it is critical that residential care facilities provided by DCPFS or non-government contractors maintain the highest standards in terms of promoting the long-term health and wellbeing of the children residing in those facilities (even where the placement is only short-term). Ideally, for Aboriginal children, there should be Aboriginal-controlled/managed residential facilities to ensure that the care of those children is undertaken in a culturally appropriate manner.

The ALSWA has recently represented two young males in the Children's Court of Western Australia for charges arising from alleged damage to a metropolitan residential facility and offences allegedly committed against support workers at this hostel. While not condoning any unlawful behaviour by these boys, ALSWA is concerned about the apparent state of the hostel and the conditions experienced by the residents. ALSWA has been told that the residents (at the time of receiving instructions there were two boys and one girl staying at the facility) are required to fend for themselves in relation to meal preparation. The two boys have explained that there is a lack of food at the hostel (sometimes there is nothing specifically available for dinner and the children make their own food such as two-minute noodles or eat leftovers but there are instances where there is nothing available at all). Sometimes there is no bread available for breakfast. Although the female resident has apparently been attending school, the boys have not and one client has told the ALSWA that he has not been to school for months while staying at the hostel. Furthermore, they are not taken on outings and are left at the hostel with nothing to do. It is not surprising that in such an environment and without anything meaningful or productive to do during the day, highly troubled and traumatised children may misbehave and be difficult to manage. The following case study also demonstrates some the problems encountered in residential care.

Case Study One

T was charged with assault against a youth worker at the At Risk Youth Accommodation Service (ARYA). At the time he was 14 years of age and under the care of DCPFS. T had stayed at ARYA on many occasions (sometimes for days or weeks at a time) over a number of months. He was found guilty of the offence after trial. The background to the offence is that T was staying at ARYA and was told to leave the property by the complainant after a smoking implement was found in his possession. T instructed that he asked for a smart rider for public transport and this was refused. During the trial, the complainant gave evidence that he could not recall this request; however, he also stated that if any such request had been made it would be refused because the rules of ARYA stipulate that if a resident is found in possession of drug paraphernalia (or drugs/alcohol) they are required to leave the premises and will not be given a lift to the train station or provided with any money/smart rider. When questioned during the trial about where T was supposed to go after being told to leave, the complainant replied 'That no longer becomes our issue, unfortunately. That is just a consequence of the behaviour'. When it was put to the witness that this wouldn't occur in a 'normal' family, the complainant replied 'But we are not family'. In a subsequent letter from DCPFS in response to a complaint lodged by ALSWA, it was stated that the 'Department and placement services do not evict children from services'. Nevertheless, this is, in reality, what occurred in this case.

The Service Agreement between the Community Development Ministerial Body and Life Without Barriers for the At Risk Youth Accommodation Service (2011) provides that the purpose of ARYA is to provide safe accommodation from 5 pm through to 10 am the following day for children aged 14-17 years in the CEO's care and for children aged 15-17 years who are not in the CEOs care. The service accommodates up to six children and is to provide two meals and laundry service. Under the agreement DCPFS has responsibility for providing 24 hour Smart Rider passes for all clients. ARYA is stated to be for clients who have a range of high to complex and challenging needs some of whom have refused to engage in other services and/or for whom no other accommodation is available. The service agreement also states that it is not intended that children will stay at the hostel for an extended period. However, as noted in the above case study and from ALSWA's experiences with other clients, some children have been accommodated at ARYA repeatedly and for prolonged periods.

As in the example referred to above, residents invariably prepare their own meals (eg, heating up microwave meals). Because ARYA is treated as emergency accommodation, and is only available during the specified hours, children who are attending school have nowhere to go immediately after school (eg, to complete homework, to have something to eat).

Irrespective of whether particular children under the care of the state are difficult to manage or have complex needs, ALSWA does not believe that it is appropriate for a 14-year-old child who is under the care of the state to be effectively evicted from his only residential premises without any money or access to public transport or alternative accommodation. While any residential facility needs rules (as is the case in any typical family home) the consequences for breaching those rules should not be of such a nature as to place a child at risk of further harm. As a point of comparison, if a private boarding school resident was expelled from the school for misbehaviour, the school would not tell the child to pack his or her bags and leave. Alternative arrangements to ensure the safety of the child would be put in place.

Statutory child protection agencies must ensure that children who are under state care and who are accommodated in residential facilities are provided with appropriate care irrespective of whether those facilities are provided on a short term or emergency basis.

Secure residential care

The Kath French Secure Care Centre in Western Australia commenced operation in May 2011. It is a six-bed facility for young people aged 12-18 years 'who present an extreme risk to themselves or others'.⁴⁰ ALSWA recognises that the residents of the Kath French Centre are likely to be some of the most traumatised children who are under the care of the CEO of DCPFS and have extremely complex needs. Bearing this in mind, it is imperative that interventions that involve the police and/or the justice system are only used as a last resort because such interventions are unlikely to compliment the therapeutic model of care adopted at the centre. ALSWA also considers that in some cases, the decision to place a child in the Kath French Secure Care Centre has been made as a punitive response to difficult and complex behaviours rather than a therapeutic response undertaken in the best interests of the child.

⁴⁰ Department for Child Protection and Family Support, *Annual Report 2012-2013* (2013) 16.

Case Study Two

M was 15 years old and was under the care of DCPFS. It appears that M's mother found him difficult to manage and was unwilling to care for him. At one stage, M contacted Crisis Care and requested help in relation to his substance abuse. M believed that if he addressed his substance abuse his mother would be willing to have him return home. ALSWA was instructed by M that his caseworker advised him that he could attend DAYS (a substance abuse rehabilitation centre) but he was, in fact, taken to the Kath French Secure Care Centre (it seems that this miscommunication was inadvertent). M was extremely angry about being taken to the centre.

Some time following his admission, there was an incident at the centre. The witness statement of a centre worker prepared for the purposes of the criminal proceedings against M indicated that she saw M talking on the phone to his caseworker and it appeared that the call did not go well because he became agitated as soon as the call ended. M became verbally abusive to staff and began throwing items around the room. When M approached the TV cabinet, police were called. M damaged the TV cabinet and assaulted a worker by pushing him in the chest with both hands. The worker suffered a graze when M was being restrained. M was charged with damage and assault public officer. M also had other charges in court relating to similar behaviour at a DCPFS hostel.

When M appeared in court for the charges relating to the Kath French Centre, he was remanded in custody because DCPFS indicated that it would not sign his bail. M had significant behavioural and mental health issues and significant criminal record. M pleaded guilty to the charges. M was sentenced to a term of four months detention. However, as M was placed in secure care as a result of being traumatised and highly troubled, and the conduct giving rise to the charges was engaged in when M was extremely angry about his placement at the centre, ALSWA is of the opinion that the recourse to criminal proceedings in these circumstances was a punitive and excessive response to a complex situation.

Accountability and court supervision

Under the Act, the Children's Court of Western Australia has jurisdiction to determine whether a protection order will be made (and, if so, the duration and conditions of the order). Once a protection order is in place, the Children's Court will only revisit the case if an application is made for an extension or revocation of an order or for a variation of the conditions of the order. Consequently, decisions in relation to the ongoing care planning for and placement of children under the care of the CEO of DCFPS are not reviewable by the Children's Court.

A care plan is defined in s 89 of the Act to mean a written plan that:

- (a) identifies the needs of the child; and
- (b) outlines steps or measures to be taken in order to address those needs; and
- (c) sets out decisions about the care of the child including —
 - (i) decisions about placement arrangements; and
 - (iia) secure care decisions referred to in section 88G; and

- (ii) decisions about contact between the child and a parent, sibling or other relative of the child or any other person who is significant in the child's life.

Every care plan is required to be reviewed by the CEO of DCPFS at least once every 12 months. The child, a parent or other person who the CEO considers has a significant interest in the wellbeing of the child may apply for a review of the care plan and any such application is referred to the 'Case Review Panel'. The Chairperson of the Case Review Panel is a person with legal training and members of the Panel are not employees of DCPFS. The Case Review Panel prepares a report with recommendations to the CEO; however, the CEO has the power to make whatever decision he or she wishes in response.⁴¹ The CEO is required to provide written reasons for the decision made following the review by the Case Review Panel. A person aggrieved by the decision of the CEO may apply for a review before the State Administrative Tribunal.

It has been observed that 'questions of the long term care, and parental responsibility, in respect of a child fall within the jurisdiction of the Children's Court. The question of parental responsibility, and the duration of orders conferring parental responsibility, is not, therefore, a matter to be dealt with by way of a care plan. Nor is it appropriate for the Tribunal, in its reviewable jurisdiction in relation to care plans, to make decisions inconsistent with the nature of the protection order to which the relevant child is subject'.⁴² It was further stated that 'where fundamental changes which are proposed in the approach to a care plan are inconsistent with the protection order to which the particular child is subject, an application should be made first at the Children's Court to revoke and replace the protection order. The care plan can then follow the Court's decision as to the appropriate protection order'.⁴³

The process to seek a review of a care plan requires a written application setting out the grounds for review and must, generally be made within 14 days of receiving a copy of the care plan (the application can be made by the child, a parent, a carer or other person the CEO considers to have a significant interest in the wellbeing of the child). Likewise, applications for revocation of protection orders to the Children's Court must be made formally in approved written forms. ALSWA is concerned that for many Aboriginal children in OOHc the capacity to initiate this process is questionable. Unless a child or parent seeks legal advice it is unlikely that any review will be sought.

The Western Australian Ombudsman has the power to investigate complaints about government agencies; however, this is also largely dependent on an individual initiating the complaint process.⁴⁴ For children in OOHc who are particularly vulnerable and may not have the support of any independent adult, the likelihood of a complaint being made is very small. The Commissioner for Children and Young People in Western Australia does not have the power to investigate individual complaints, although one function of the office is to monitor trends in complaints.

It is noted that the Advocate for Children in Care (who is an employee of the Department) assists children in accessing formal complaint processes; however, in 2013–2014 the Advocate was contacted by only 322 children and young people (and as at 30 June 2014 there were 4,237 children in the care of the CEO, therefore this represents only 7.5% of children in care).

41 See *Children and Community Services Act 2004* (WA) ss 90–93.

42 *DH and the Department for Child Protection* [2011] WASAT 146, [43].

43 *Ibid* [60].

44 The Ombudsman can undertake an own-motion investigation into matters of public administration. In 2011, the Ombudsman published its report following an own-motion investigation into the administration of the care planning provisions of the *Children and Community Services Act 2004* (WA). This investigation was initiated as a result of the Ombudsman's function of reviewing child deaths.

Bearing in mind some of the problems raised in this submission in relation to children in OOHC, ALSWA is of the view that there is a strong case for the establishment of an independent, transparent and accessible process to monitor and review decisions about the day-to-day care and welfare of children in OOHC. One option would be to provide for an expanded role for the Children's Court whereby a regular review of the child's care plan and associated matters is required irrespective of any individual instigating the process. As evidenced in two case studies below, there are instances where clear inaction by DCPFS (ie, locating appropriate accommodation for children under its care) has been rectified once the issue is drawn to the attention of the court.

Decisions about the placement of children in OOHC and their ongoing care planning should be regularly reviewed by an independent, open and transparent body (ie, court) and the process for review should not be dependent upon a child, parent or carer initiating the review.

CURRENT COST OF AUSTRALIA'S APPROACH TO CARE AND PROTECTION

ALSWA makes no comment in relation to this term of reference.

CONSISTENCY OF APPROACH TO OOHC AROUND AUSTRALIA

ALSWA is not in a position to comment on the details of child protection and OOHC systems in each Australian jurisdiction. However, there is one particular area ALSWA wishes to highlight – the lack of Aboriginal-specific or Aboriginal-controlled non-government organisations involved in the OOHC system in Western Australia.

As far as ALSWA is aware there is only one Aboriginal-specific non-government agency in Western Australia providing services to children in OOHC and their families/carers. In contrast, in New South Wales there are a number of Aboriginal-controlled OOHC service providers with plans to extend the number in the next few years. New South Wales is in the process of transitioning the OOHC system to the non-government sector. As at 30 June 2013 it is reported that 42% of children in statutory OOHC were with non-government agencies (an increase from 23% from 2012).⁴⁵ It is intended that within a period of approximately 10 years the entire OOHC system will be run by the non-government sector. Absec (the peak body for Aboriginal OOHC agencies in New South Wales) is working together with the Department for Family and Community Services to develop the capacity of Aboriginal community-controlled agencies to deliver OOHC services. It has been stated that:

The intention is that each child in statutory foster care and statutory relative/kinship care and their carers will be supported by a non-government organisation. Every Aboriginal child in statutory foster care and statutory relative/kinship care and their carers will be supported by an Aboriginal organisation.⁴⁶

Similarly, the plan for the transition of OOHC to the non-government sector includes as one of its guiding principles that 'all Aboriginal children and young people in OOHC will be cared for by Aboriginal carers, supported by Aboriginal caseworkers employed by local Aboriginal managed agencies'.⁴⁷ ALSWA understands (from attendance at a conference in Sydney in August 2104) that in 2012 there were six Aboriginal agencies providing OOHC services in New South Wales. Now there

⁴⁵ Productivity Commission, *Report on Government Services* (2014) 15.65.

⁴⁶ Aboriginal Child, Family and Community Care State Secretariat, *Information for Foster and Relative/Kinship Carers with Aboriginal Children* (undated).

⁴⁷ Ministerial Advisory Group on Transition of Out-of-Home-Care (OOHC) Service Provision in NSW to the Non-Government Sector, *OOHC Transition Plan: Stage 1 – The 'who' and the 'when'* (October 2011) 4.

are 12 Aboriginal agencies and nine partnership agencies. The aim by 2017 is to have the entire state of New South Wales covered with access to local OOHC Aboriginal services. SNAICC has recently indicated it support for the approach in New South Wales where Aboriginal people 'have more responsibility for the design and delivery of family support and out-of-home-care services'.⁴⁸

Sufficient resources and support should be provided to appropriate Aboriginal community-controlled or community-based organisations to enable such organisations to provide OOHC services to Aboriginal children and their families/carers.

WHAT ARE THE SUPPORTS AVAILABLE FOR RELATIVE/KINSHIP CARE, FOSTER CARE AND RESIDENTIAL CARE

DCPFS *Financial Support Information: General Foster Carer Subsidy* provides that the general foster carer subsidy as at July 2012 is \$344.81 per fortnight for a child 0-6 years; \$406.01 for a child 7-12 years and \$467.20 for a child 13-18 years. Foster carers are also eligible for four days of respite care per month (depending on the availability of respite carers). Additional payments are made three times a year for clothing and extras such as school, sport and work uniforms are paid for separately.

The DCPFS Casework Practice Manual includes various policies and provisions that indicate that the Department supports the foster carer by involving the foster carer in decision-making and case planning and providing support to meet the child's needs. However, as is apparent throughout this submission, seemingly good policy does not always result in good practice. ALSWA is aware of instances where foster carers who have highly traumatised children under their care do not always receive access to necessary support services (eg, psychological support services for the child). One foster carer advised ALSWA that she took over the care of a highly damaged five-year-old child who needed help but no external assistance was provided (despite requests). Eventually, as a consequence of the lack of assistance provided and the needs of other children under her care, this carer returned the child to the Department. The child was subsequently placed in another foster family who also demanded assistance which was finally provided because that family also indicated that they could not care for the child without additional support. The same foster carer advised that in some cases insufficient information about the background of the child and the circumstances of their removal from family is provided to the foster carer. The information provided by DCPFS may only indicate the current reason for removal (ie, abuse or neglect) without sufficient detail and also without detail about past (as distinct to current) abuse or neglect. In one instance, the carer was caring for a child who she believed was in state care due to serious neglect and resulting medical and health issues only to find out from extended family that the biological mother had physically harmed the child.

ALSWA also highlights that there are many children that come to the attention of DCPFS but the state plays no ongoing role in supporting the child or their carers because family members (eg, grandmothers, aunts, uncles) have sought and obtained custody of the child in the Family Court. In many instances, this has occurred at the instigation or encouragement of DCPFS (in other words, if the particular family member does not obtain custody of the child, DCPFS indicates that it will initiate statutory protection proceedings in relation to the child). In these cases, the family member who obtains custody of the child does not receive any support (financial or otherwise) from DCPFS.

⁴⁸ SNAICC, 'Less Daunting and More Culturally Responsive Child Protection Systems will Lessen Trauma', *Media Release* (2 August 2014). See also SNAICC, *Family Matters: Kids safe in culture, not in care*, Western Australia Issues Paper (2014) 11.

Without additional support in these cases, some of these arrangements will fall down and DCPFS may end up being responsible for the care of the child in any event.

BEST PRACTICE IN OOHHC IN AUSTRALIA AND INTERNATIONALLY

ALSWA does not make any comment on this term of reference.

CONSULTATION WITH INDIVIDUALS, FAMILIES AND COMMUNITIES AFFECTED BY REMOVAL OF CHILDREN FROM THE HOME

ALSWA's views in relation to the Inquiry's terms of reference have been largely informed by the perspectives gained from representing children who are in OOHHC and their families in different legal contexts. ALSWA considers that the views of children in OOHHC are essential in order to properly understand the impact of being removed from one's family and to appreciate their needs.

CREATE Foundation published a report in 2013 in relation to the views of children and young people in OOHHC. The Western Australian government was the only state or territory government that refused to participate in the project. The report states that 'the government of Western Australia decided that it didn't want any children and young people in its care to participate in the project'.⁴⁹ It was further stated that Western Australia 'claims it has its own data collection system (so it doesn't need the Report Card)' but that all other states and territories also have their own data collection processes. The failure of the Western Australia government to participate in the CREATE Report Card means, as stated in the report, there is no Western Australia input into the 'external, independent appraisal of the system from the experience of those living it'.⁵⁰

Any reform to the OOHHC system must take into account the views of children who have experienced OOHHC or who are currently in OOHHC.

EXTENT OF CHILDREN IN OOHHC REMAINING CONNECTED TO THEIR FAMILY OF ORIGIN

As noted above, the National Framework for Protecting Australia's Children recognises the importance of maintaining connection to family and culture for Aboriginal children placed in OOHHC. In addition, the Aboriginal child placement principle is statutory enshrined in all jurisdictions including Western Australia.

The recognition of Aboriginal people under Western Australia's child protection legislation and policy

The child welfare and protection system in Western Australia is governed by the Act. The Act includes provisions specific to Aboriginal people. For example, s 8 of the Act lists a number of factors to be considered when determining what is in the best interests of a child and one of these factors is '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'. The definition of a 'relative' under s 3 of the Act recognises, for Aboriginal people, persons who are regarded under the customary law or tradition of the child's community as being equivalent to the child's parents, grandparents, step-parents, siblings, aunts, uncles, cousins and spouses.

⁴⁹ CREATE Foundation, *Experiencing Out-of-Home Care in Australia: The views of children and young people*, CREATE Report Card 2013, 80.

⁵⁰ Ibid.

Division 3 of the Act incorporates specific principles relating to Aboriginal children. Section 12 sets out the Aboriginal and Torres Strait Islander child placement principle and 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.

(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 of the child must, so far as is consistent with the child's best interests and is otherwise practicable, be in accordance with the 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 a Torres Strait Islander 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;

(d) placement with a person who is not an Aboriginal person or a Torres Strait Islander but who, in the opinion of the CEO, is sensitive to the 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.

In 2012–2013, the Aboriginal Child Placement Principle was adhered to in 69% of cases.⁵¹ What this means is that 69% of Aboriginal children under the care of the CEO of the Department were placed with an extended family member, an Aboriginal person in the child's community or another Aboriginal person or service.⁵² This is consistent with the national average. It is noted that in 2012–2013 New South Wales had the highest level of compliance with the Aboriginal child placement principle (approximately 80%).⁵³ The role of Absec in that jurisdiction and the expansion of Aboriginal organisations involved in the provision of OOHHC services are discussed above.

ALSWA notes that the data in relation to compliance with the Aboriginal Child Placement Principle does not indicate the degree of compliance in terms of the hierarchy of the placement options under the Aboriginal Child Placement Principle.⁵⁴ In other words, it does not show whether DCPFS endeavoured to find a placement with family before placing an Aboriginal child in a non-family placement. Having said that, data included in the Productivity Commission's Report on Government Services show that 49% of Aboriginal children were placed in relative/kinship care in 2012–2013 and this is higher than the proportion of non-Aboriginal children placed in relative/kinship care (39%).⁵⁵

Further, there are provisions under the Western Australian legislation that refer to consultation with and participation by Aboriginal people. Section 13 of the Act provides for the 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.

51 Department for Child Protection and Family Support, Annual Report 2012–2013 (2013) 7.

52 Ibid, 45.

53 Australian Institute of Health and Welfare, *Child Protection Australia 2012–2013* (2014) Child Welfare Series No 58,

53.

54 Productivity Commission, *Report on Government Services* (2014) 15.41.

55 Ibid, Table 15A.19.

Section 14 deals with the principle of community participation:

In the administration of this Act a principle to be observed is that a kinship group, community or representative organisation of Aboriginal people or Torres Strait Islanders should be given, where appropriate, an opportunity and assistance to participate in decision-making processes under this Act that are likely to have a significant impact on the life of a child who is a member of, or represented by, the group, community or organisation.

Section 81 of the Act provides that before the CEO of the Department makes a placement arrangement of an Aboriginal or 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.

DCPFS's Aboriginal Services Framework references the above legislative provisions and states that:

Aboriginal cultural connections need to be safeguarded for all children and their families to prevent the experience of separation and dislocation which, albeit for different reasons, may replicate the historical experience of many Aboriginal families.⁵⁶

The Framework further provides that the 'development and maintenance of family and cultural connections of Aboriginal children in the care of the CEO are set out in the Culture and Identity Plans, being part of the Care Plans, for all Aboriginal children. It is also noted that Aboriginal Practice Leaders (APLs) are positioned in each district and one of their roles is 'consultation regarding contentious matters and placement of Aboriginal children (as appropriate)'. The Framework states that 10% of staff employed by the Department are Aboriginal'.⁵⁷ Specifically, in relation to consultation with the Aboriginal community it is commented that the 'key points of consultation' are Native Title Representative Bodies and Prescribed Bodies Corporate (Land and Sea Councils) and Aboriginal Medical Services.⁵⁸ Issues concerning the maintenance of connection to family and culture are discussed further below. The DCPFS website list three agencies that are approved for consultation: Armadale Noongar Corporation; Yorganop and Ebenezer Home.⁵⁹

SNAICC (Secretariat of National Aboriginal Child Care) has recently stated that there should be 'greater compliance by authorities with the Aboriginal and Torres Strait Islander Child Placement Principle, including having cultural care plans for all children in care'.⁶⁰ In regard to Western Australia, SNAICC has observed that the principle under the legislation is not adhered to in practice.⁶¹ This view accords with ALSWA's experience – cultural plans are often insufficient and it appears that the legislative requirement to consult is frequently fulfilled by reference solely to consultation with the Department's own Aboriginal Practice Leaders.

56 Department for Child Protection and Family Support, *Aboriginal Services Framework* (2012) 4.

57 Ibid 6.

58 Ibid 12.

59 <http://www.dcp.wa.gov.au/FosteringandAdoption/InterestedInFosterCaring/Pages/CaringforATSI.aspx>.

60 SNAICC, 'Less Daunting and More Culturally Responsive Child Protection Systems will Lessen Trauma', *Media Release* (2 August 2014).

61 SNAICC, *Family Matters: Kids safe in culture, not in care*, Western Australia Issues Paper (2014) 11.

In respect to cultural plans, ALSWA has been told of one case where the only cultural issue mentioned in a care plan for an Aboriginal child who was in foster care with a non-Aboriginal family was that the carers should attend a university course to study cultural issues. In another case, two Aboriginal boys (aged 6 years and 8 years) were placed with their maternal non-Aboriginal grandmother. The written proposal (prepared pursuant to s 143 of the Act) and submitted to the court for the Department's application for a protection order (until 18 years) included a section headed 'Cultural' for each child. For each child this section only provided:

X is considered of Aboriginal origin and the Aboriginal Practice Leader is consulted on plans for X.

Other cultural plans observed by ALSWA simply acknowledge the importance of maintaining a connection to culture without actually providing any details of how this will be achieved. ALSWA considers that the approach to cultural care planning and maintaining connection to family and culture in Western Australia is insufficient and often appears tokenistic. ALSWA has seen cases where the contact between a child under the care of the CEO of DCPFS and his or her parents and extended family is extremely limited (eg, twice a year). Furthermore, the use of DCPFS Aboriginal Practice Leaders as the primary source of cultural knowledge and input is not appropriate. In one case, ALSWA attended a *Signs of Safety* conference along with its clients (the parents). During the process it was suggested by DCPFS that the Aboriginal Practice Leader attend the next meeting. When the parents discovered the identity of the practice leader, they essentially 'shut down' and refused to continue with the process at all. The clients later explained to the ALSWA lawyer that there was a long-standing issue between this particular person's family and their own and they would not discuss their children or their private lives with this person present.

ALSWA is of the view that where an Aboriginal child has been removed from his or her immediate family, a far greater effort is required to ensure that the child maintains a connection to culture and family and, to achieve this, more extensive consultation with members of the child's community is needed. Of course, maintaining a strong connection with family and community cannot occur at the expense of the child's safety. As stated by SNAICC, 'for cultural and spiritual reasons, maintaining contact or involvement with family or returning to family will always be in the Aboriginal and Torres Strait Islander child's best interests if safety issues can be addressed'.⁶²

An increase in Aboriginal-controlled non-government agencies in the provision of OOHC services (as suggested earlier) would be an important tool for this purpose. Local agencies with knowledge of the child's extended family network could be involved in developing appropriate cultural plans for Aboriginal children. In the absence of this, it is imperative that DCPFS properly consult with community members who have knowledge of the child's extended family and who can advise of appropriate options to strengthen and maintain connection to culture. For example, for an Aboriginal child who has been removed from country a plan should be developed to enable the child to visit and stay with extended family in his or her country for a reasonable period of time and on a regular basis.

Siblings in OOHC

As a related issue, ALSWA frequently deals with cases where siblings have been removed from their parents and placed in a number of different families. When this occurs, contact arrangements between siblings are rarely sufficient. In one example, all of the siblings resided in different locations within the metropolitan area and contact between them was only arranged to take place once a month. Further, it seems that DCPFS are quick to cease contact if any sort of problem arises rather

⁶² SNAICC, *Achieving Stable and Culturally Strong Out of Home Care for Aboriginal and Torres Strait Islander Children*, Policy Paper (2005) 1.

than seek solutions to enable future contact arrangements to work safely for the child. In another case, the children had been in the care of their grandparents for a considerable period but were removed by DCPFS because the parents continued to have contact with the children while they were in their grandparents care. Contact was arranged to enable the children to have ongoing contact with their grandparents who had been their primary carers. At a contact visit, the children saw the parents in the vicinity and became upset. Instead of endeavouring to work out an alternative way that contact could occur without any risk of the parents turning up, DCPFS just ceased all contact between the grandparents and the children.

In another case, there are five siblings who are all currently subject to statutory protection orders. The three boys have been placed in kinship care and have regular contact with one another. However, the two girls have been placed with different non-Aboriginal foster carers. ALSWA is representing the long term partner of the children's maternal grandmother. She has been assessed as unsuitable to care for the two girls because she already has too many other children in her care. The care plan initially allowed the girls to have weekly contact with their siblings at the grandmother's home. However, recently, all contact has been terminated between each girl and their brothers. ALSWA has been instructed that the reason provided by DCPFS is that one of the girls has become scared of Aboriginal people. This girl is actually fostered with other Aboriginal children.

BEST PRACTICE SOLUTIONS FOR SUPPORTING CHILDREN IN VULNERABLE FAMILY SITUATIONS INCLUDING EARLY INTERVENTION

ALSWA is strongly in favour of early intervention programs and initiatives in order to reduce the likelihood that Aboriginal children will be removed from their families. SNAICC observed that:

[I]n Western Australia in 2013 \$341.5 million was spent on child protection and out-of-home care services compared to just \$68.1 million expenditure on family support and intensive support services. Clearly a greater investment in prevention will significantly reduce the number of Aboriginal and Torres Strait Islander children being placed in out-of-home care and will also create significant long-term cost savings for government.⁶³

It is acknowledged that increasing resources for early intervention will initially require a much higher overall budget for DCPFS. However, in the longer term, savings will occur because fewer children will be under statutory protection orders and in OOHC. Early intervention programs must be properly evaluated in order to ensure that the most successful and effective programs continue to be funded.

In order to reduce the number of children in OOHC, increased resources are required for evidence-based effective early intervention programs for vulnerable families.

63 SNAICC, *Family Matters: Kids safe in culture, not in care*, Western Australia Issues Paper (2014) 14.

OTHER ISSUES

CHILDREN IN OOH AND THE JUSTICE SYSTEM

It has been found that children who are in OOH (or who have previously been in OOH) are overrepresented in the juvenile justice system.⁶⁴ The ALSWA is not aware of any available data or research in relation to the extent of overrepresentation of children in OOH in the Western Australian justice system. However, anecdotally a considerable proportion of ALSWA's clients appearing in the Children's Court of Western Australia have current or prior experiences of statutory child protection intervention and living in OOH. ALSWA lawyers who work on a daily basis in the Perth Children's Court estimate that up to 50% of the court list each day is comprised of children who are under the care of DCPFS. Given its role in providing legal advice and representation to children in the criminal justice system and also for families affected by child protection interventions, the ALSWA is well placed to provide observations in relation to this particularly vulnerable cohort of children in OOH.

It is acknowledged that there is a connection between past abuse and neglect that has resulted in a child being removed from his or her home and subsequent offending behaviour. However, that does not detract from the reality that the OOH experience itself also contributes to the likelihood of engaging in criminal behaviour. In other words, the more stable, supportive, appropriate and effective the OOH placement is the less likely the child will become enmeshed in the justice system. Furthermore, the ALSWA believes that children in OOH in effect become 'criminalised' in many instances as a consequence of the decision-making processes of DCPFS and the nature of the OOH experience. In this regard, it has been observed that:

Crucially, state parental responsibility for children and young people in care must not stop once they have offended and become troublesome as well as troubled.⁶⁵

The 'criminalisation' of children in OOH by child protection authorities

In all Australian jurisdictions, children aged 10 years or more may be held criminally responsible for behaviour that is contrary to the law. Children (particularly, young children) may engage in such behaviours in a family or school environment but nevertheless avoid formal intervention by the justice system. For example, damage or assault between siblings or among family members will often be dealt with without recourse to the police. Likewise, if a parent found a prohibited drug in their child's possession they would not necessarily contact the police and request that charges be laid. However, for many children in OOH the effective 'parent' is the state but the state is also responsible for administering the criminal law.

It has recently been highlighted that research in the United States and Australia has found that a 'substantial proportion of the offences committed by young people in [OOH] are placement-related; for example, property damage or assaults occurring in group homes'.⁶⁶ Further, it has been argued that the response to this type of behaviour results in the 'criminalisation' of these young people and is different to how such behaviour would ordinarily be managed in a family home.⁶⁷ In a study of 111

⁶⁴ See for example, Baidawi S et al, 'Setting Them Up to Fail: System responses to dual order Child Protection and Youth Justice Clients' (2014) 39 *Alternative Law Journal* 31, 31; McFarlane K, 'From Care to Custody: Young Women in Out-of-Home Care in the Criminal Justice System' (2010) 22(2) *Current Issues in Criminal Justice* 345, 345 where it is reported that the Wood Royal Commission in New South Wales found that 28% of males and 39% of females in detention had a history of OOH.

⁶⁵ Cashmore J, 'The Link Between Child Maltreatment and Adolescent Offending: Systems neglect of adolescents' (2011) 89 *Family Matters* 38.

⁶⁶ Baidawi S et al, 'Setting Them Up to Fail: System responses to dual order Child Protection and Youth Justice Clients' (2014) 39 *Alternative Law Journal* 31, 32.

⁶⁷ Ibid.

Children's Court files in New South Wales it was found that more than one-third of the young people appearing in court were or had recently been in OOHC. It was found that approximately 50% of the children who were in care were facing property damage offences (all allegedly committed in foster care or against the residential facility in which they were living).⁶⁸ It was observed that the historical practice of 'relying on police and the justice system in lieu of adequate behavioural management, remains'.⁶⁹

The ALSWA frequently represents children who are under the care of the CEO of DCPFS for placement-related charges. As discussed earlier, two young males have recently been charged for offences allegedly committed at a residential facility. Perhaps the starkest example of this approach involved an 11-year-old boy.

⁶⁸ McFarlane K, 'From Care to Custody: Young Women in Out-of-Home Care in the Criminal Justice System' (2010) 22(2) *Current Issues in Criminal Justice* 345, 346-347.

⁶⁹ Ibid 348.

Case Study Three

In 2014, when Q was 11 years old he was charged with a number of offences that allegedly occurred on property owned by DCPFS and against residential workers (two charges of assault public officer). Under the Western Australian Criminal Code, public officers include DCPFS residential workers. Q had been exposed to family and domestic violence; substance abuse; and neglect while in his mother's care and he is subject to a care and protection order until he is 18 years.

When Q was initially charged with the above-mentioned offences, the police refused bail and he spent a night in custody before being granted bail by the Children's Court. He had also been charged with four offences of damage and two further assault public officer charges that occurred earlier and in similar circumstances (ie, while he was at DCPFS accommodation). Although it appears that Q may have engaged in anti-social behaviour at times in the past, he did not have any criminal record. Q failed to attend one scheduled court hearing in relation to the charges but subsequently handed himself in to court.

The ALSWA prepared and forwarded a submission to the prosecution for all of the charges to be discontinued, primarily on the basis of his very young age and troubled personal circumstances. Given his age at the time of the alleged offences, the prosecution were required to prove pursuant to s 29 of the *Criminal Code* (WA) that at the time of doing the act that constituted the offence he had the capacity to know that he ought not to have committed the relevant act. The submission also highlighted that he had not engaged in formal schooling for months and was illiterate. The Director of Public Prosecutions discontinued all of the charges on the basis that the prosecution was not in the public interest.

While not condoning the alleged behaviour of Q, ALSWA highlights that although the charges were discontinued he has been drawn into the criminal justice system at a very early age as a consequence of the decision of DCPFS to involve the police in response to his conduct. His exposure to the justice system includes spending a night in custody and attending court on a number of occasions.

Bail and children under the care of the state

Under clause 2, Schedule 1, Part C of the *Bail Act 1982* (WA) a child aged 16 years or less cannot be released on bail in the absence of an undertaking from a responsible person to ensure that the child complies with any requirement of his or her bail undertaking. Children aged over 17 years and considered to have sufficient maturity to live independently without the guidance or control of a parent or guardian can sign their own bail undertaking. Clause 2(1) provides that a responsible person means 'a parent, relative, employer or other person who, in the opinion of the judicial officer or authorised officer, is in a position to both influence the conduct of the child and provide the child with support and direction'.

For children who are under the care of the CEO of DCPFS, only a Departmental officer can sign a responsible person undertaking.

The DCPFS Casework Practice Manual provides, in relation to refusing a bail undertaking, that:⁷⁰

If the child's behaviour is of such concern to the Department that he/she may not comply with the bail conditions then, with the approval of the district director, the bail undertaking should

70 See <http://manuals.dcp.wa.gov.au/manuals/cpm/Pages/11YoungOffenders-IncludingChildrenintheCEO'sCare.aspx#CPMProcedure13>

be refused. This will occur when the Department does not have the capacity, despite strenuous efforts, to ensure the safety of the child and/or the community in circumstances when:

- The child may pose a significant risk to the safety of others.
- There is a risk that the child may endanger him/herself or self-harm.
- The Court has imposed conditions such as a curfew or 24-hour supervision, and this cannot be provided in the placement arrangement.
- The child has a history of extreme violence or sexual assault.

The child protection worker must consult with the district director, and the rationale for the decision not to bail the child must be documented and placed on file.

If required, the district director may consult directly with the Director, District Support and Coordination Metropolitan Services or with the Department's court officer.

Repeatedly, ALSWA is seeing cases where children under the care of the CEO of DCPFS remain in custody as a consequence of a decision by DCPFS not to sign the responsible person bail undertaking or a decision to postpone the signing of bail because a suitable accommodation placement is not available. ALSWA highlights that these children are the responsibility of DCPFS and the existence of criminal charges does not lessen that responsibility or shift it to another government agency. As provided for under the Act if a child is subject to a protection order (time-limited) or protection order (until 18) the CEO has parental responsibility for the child (parental responsibility is defined in the Act as 'all the duties, powers and responsibilities and authority which, by law, parents have in relation to children').

In some cases, DCPFS may decide not to sign the bail undertaking for a child under its care because it forms the view that the child will not comply with his or her bail conditions. Specifically, where older children are leaving DCPFS placements and 'self-selecting' to return to family DCPFS may not sign bail because the self-selected placement is not considered suitable. In such cases, ALSWA does not consider that it is appropriate for DCPFS to 'use' the criminal justice process as a form of ransom to force the child to live elsewhere. If the self-selected placement is considered unsafe DCPFS should be making arrangements to ensure alternative placements for the child or providing support to the family at the self-selected residence to reduce safety concerns. In this regard, it is noted that the Casework Practice Manual states that where children self select a placement that is not approved by the Department and the placement is considered unsuitable but not dangerous, the child 'should be offered guidance and alternative placement options'. Where the placement is considered dangerous the manual states that the Department 'has a responsibility to secure the child's safety'.⁷¹ ALSWA is of the view that where the self-selected placement is not so dangerous as to demand a response from DCPFS then consideration should be given to seeking a revocation of the child protection order so that the parents regain parental responsibility and have the right to sign bail on behalf of their child.

ALSWA acknowledges that Action 7 of DCPFS's *At Risk Youth Strategy 2011–2014* provides:

Participate in the development of a range of alternative bail placement options for young people with WA Police and Department of Corrective Services, the Children's Court of WA, and relevant agencies.

⁷¹ Department for Child Protection and Family Support, *Casework Practice Manual*, 7.10 Children in the Care of the CEO and Living in Self Selected Arrangements.

While ALSWA is not aware of the outcomes achieved under this action, the problems experienced by children in OOHC in relation to bail are current and ongoing. The following two case studies demonstrate these problems.

Case Study Four

D is 15 years old. He was charged with wilfully lighting a fire likely to injure or damage. The circumstances of the offence were that he lit several matches and threw them onto a grassed area of an oval causing a fire to start. The fire spread to an area of about two metres by one metre, burning the grass. D left the scene and, subsequently, the fire and emergency services attended and extinguished the fire. D had been under the influence of cannabis at the time and said that he threw the matches out of boredom. He did not intend to cause a fire that could potentially cause significant damage. D had no prior criminal history and had been under the care of DCPFS since he was six years old. When D appeared in court for the charge he was remanded in custody because there was no responsible person willing to sign a bail undertaking for him (including the Department). D spent a total of 55 days in custody before he was sentenced for the offence. During this period, ALSWA regularly made contact with DCPFS to inquire whether any accommodation placements had been found for D.

On the day of sentencing, there was still no accommodation placement put forward for D by the DCPFS (his legal guardian). There was a representative from DCPFS in court as well as D's case manager, the Assistant District Director and the District Director who were present via video-link. One Departmental representative explained that it was difficult to find appropriate accommodation for D because there are agreements between DCPFS and local communities that children who commit arson or light fires won't be placed in specified residential premises.

The sentencing judge specifically questioned the DCPFS representatives about what would happen to D if he was placed on a community-based order. The response was that they would have to try to see if there was anyone in the family who could look after him for a few days until alternative accommodation could be found. The following is an extract from the transcript.

Judge: 'Well, when he leaves the courtroom, where will he go?'

DCPFS Representative: 'Okay. There you've got me on that one. I can't answer that one, sir'.

Judge: 'He has been in custody for 55 days. I'm struggling, to be frank, that we've got the resources of the State and no disrespect to you good people, the resources of the State after someone in the care of the State cannot tell me, after over seven weeks, nearly eight weeks in custody where someone will go if they leave the courtroom. I'm struggling'.

It was only after this pressure from the judge, his indication that D would be placed on a community-based order that day and after the matter was stood down for a two hours that a residential placement was found.

Case Study Five

In May 2014, B (who was 16 years old) was charged with burglary and police refused to grant bail because they were concerned he may commit a further offence; there was no responsible adult to enter into an undertaking; DCPFS informed police that the DCPFS would not enter into any bail undertaking for him; and DCPFS had concerns for his safety and wellbeing in his mother's care. B spent a night in police custody and appeared in the Perth Children's Court the next day. B had been placed on a community based order in 2013 which had been completed and there had been no further offending since this time.

In court, the DCPFS court-based officer explained that the DCPFS did not wish to bail B because they were concerned that he would abscond from any placement and return to his mother. Further, the DCPFS had safety concerns for B whilst he was in his mother's care. The magistrate stated that:

So, you prefer him to be in Banksia Hill, on a charge that looks weak, than on bail because he doesn't do what you tell him? Is that where we're at? That's pretty much where we are at, isn't it?

The magistrate required the matter to be stood down so that the DCPFS worker could liaise further with B's caseworker and stated *'And I think you really need to have a talk with the caseworker, and say that if he gets locked up it's not being because of this charge. It is actually for other welfare reasons, which is not a good basis for locking people up'*.

When the matter was resumed, the DCPFS officer indicated that the DCPFS was prepared to bail him and would investigate options for a suitable placement. When questioned further as to whether the DCPFS would immediately sign his bail, the DCPFS officer replied 'no' because the District Office still needed to 'follow up' where B would be living. The magistrate indicated that this was not acceptable because that may take a week so he adjourned the charge for one week without any requirement for bail to be signed (ie, a notice to attend court was issued to B). He commented *'this charge will be long gone before anybody makes a decision in your Department. So it's just nonsense'*.

ALSWA highlights that if B had not been charged with burglary DCPFS would have had to deal with the problems in relation to B's living arrangements (ie, that he had returned to his mother's care against the DCPFS's wishes). As noted above, the justice system should not be used as a tool by the DCPFS to 'control' difficult children under its care or fail to provide suitable placements for children because the option of custody in juvenile detention is more readily available.

Child protection authorities should review and, where necessary, revise their policies and practice in regard to the institution of criminal proceedings against children under their care to ensure that criminal proceedings are only brought in relation to placement-related offences as a last resort. Likewise, child protection authorities who have legal responsibility for children should be generally required to sign bail for children under their care and only refuse to sign bail in exceptionally serious circumstances.

STAFF TURNOVER

While not unique to Western Australia, there is high staff turnover of caseworkers at DCFPS and this situation causes great difficulties for Aboriginal families. Bearing in mind the strained relationship between Aboriginal people and DCPFS, if a family is able to develop a reasonable relationship with a caseworker it is highly detrimental when that worker moves on. ALSWA is aware of one family who had five caseworkers in a 12-month period. When intervention by the Department commenced, the first caseworker contacted the family and advised that the child needed to be physically sighted. When the caseworker arrived, the child was in fact removed. The family understandably did not trust this caseworker; however, over time trust was established and the relationship between the caseworker and the family was working reasonably well. Soon after, this caseworker moved to a different district. The current caseworker has informed the family that the child needs to be physically sighted and, again, understandably the family is distrustful and does not take this requirement at face value (ie, they fear that the child will be removed).

Greater resources should be provided to child protection authorities to maximise caseworker retention.