Inquiry into the Child Protection System in the Northern Territory
GPO Box 1708
DARWIN NT 0801

18 March 2010

Dear Child Protection Board Members,

Thank you for the opportunity to make a submission to this Inquiry.

As requested by the Board, we advise the following:

- This submission is made by the Northern Territory Legal Aid Commission. The contact person is Fiona Hussin, 89993000.
- We do not request that any of the submission’s content be treated as confidential and not for publication; and
- We do not wish to remain anonymous

Introduction
The NT Legal Aid Commission (‘the Commission’) was established in 1990 under the Legal Aid Act. The Commission’s role was envisaged to be ensuring that the protection or assertion of the legal rights and interests of people in the Northern Territory are not prejudiced by reason of their inability to:

- Obtain access to independent legal advice;
- Afford the financial cost of appropriate legal representation;
- Obtain access to the Federal or Territory legal systems;
- Obtain adequate information about access to and their rights under the law and legal system; or
- By reason of their social exclusion to obtain access to that system.
Our Functions
The Commission delivers preventative services to inform and build individual and community resilience through:

- Community Legal Information
- Free Information, including through our legal information line
- Referrals to other legal and related service providers
- Indigenous Outreach Project

The Commission delivers legal services to assist people to resolve their legal problem before it escalates, such as:

- Legal advice clinics in:
  - Criminal law
  - Child in need of care matters
  - Family law matters
  - Civil law

- Duty lawyer services in:
  - Criminal law
  - Child in need of care matters
  - Civil law
  - Mental Health Review Tribunal

The Commission provides dispute resolution services in relation to family law matters which consist of lawyer assisted negotiation and participation in the legal aid Family Dispute Resolution Conferencing Program.

The Commission provides legal assistance through grants of aid across a range of areas including:

- Family law matters
- Family violence (through the Domestic Violence Legal Service’)
- Child in need of care proceedings
- Criminal law matters
- Immigration matters
- Civil law

The Commission continues to perform an overarching role in increasing links between legal assistance providers with other service providers to ensure clients receive ‘joined up’ service provision to address legal and other problems.

Service Delivery Locations
The Commission delivers all of the services listed above from our offices in:

- Darwin
- Palmerston
- Katherine
- Tennant Creek
Alice Springs

The Commission also:

- delivers Community Legal Education outside of the offices across the NT, including in remote communities.
- attends Nhulunbuy Court on a duty basis each month.
- attends other courts at locations outside of office locations, on a needs basis on occasions where other legal services are unable to act due to service delivery parameters or for ethical reasons, such as a conflict of interest.

Previous Inquiries
The Commission welcomed the focus on addressing the needs arising out of the Ampe Akelyerneman Meke Mekarlo “Little Children are Sacred Report” (the AAMM report), in particular those relevant to our services. The report contained valuable recommendations in relation to the need for proactive and long term approaches to addressing offending such as:

- improved resources for child protection services and police;
- improved access to rehabilitation for offenders;
- a comprehensive alcohol supply reduction strategy; and
- strengthened community justice mechanisms which would enhance community participation in law and justice concerns.

The Commission has expressed concerns that the national emergency response to the Report has detracted from the content of the AAMM Report and there is an urgent need for collaborative implementation of some of the recommendations which are vital to child protection issues in the NT.

We have made submissions to successive Inquiries since the Intervention¹ that there is a need to refer back to the content and recommendations of the AAMM Report. We trust that this inquiry will consider these and other relevant reports.²

Educational Materials
The Commission has identified enhanced understanding of child protection proceedings as a priority for legal education in the NT. This has arisen both through consultations as part of our Indigenous Families Project in the NT and

---

¹ Submission to the Legal and Constitutional Senate Inquiry on the Intervention; Submission to the Senate Community Affairs Committee on the further laws relating to the intervention; Submission to the Senate Select Committee of Regional and Remote Indigenous Communities; and Submission to the Review of the Intervention; Attendance at Future Directions Consultations regarding the NTER; and submission to the Senate Community Affairs Committee regarding the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009.

² The SNAIC State of Denial Report into the neglect and abuse of Indigenous Children in the NT; The HREOC Report Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities; The NT Youth at Risk Task Force; The Review of the Community Welfare Act; The NT Sexual Assault Taskforce.
also through our experience in advising and representing parties to proceedings.

We have developed two key resources to enhance awareness in this area:

- **DVD, ‘Family problems: Your Rights When Things Go Wrong’.** In Warlpiri and Wurrumungu. The DVD was launched in 2008. It was developed and filmed in Tennant Creek over 18 months with local actors, filmmakers and interpreters. The DVD includes 3 distinct stories which provide information about the legal process and implications of restraining orders and child protection. Each story is separately translated into Warumungu and Warlpiri with English subtitles. The focus on child protection was in response to community concerns raised in a series and consultations and workshops the Commission held as part of the process.

- **Factsheet ‘Child Protection Matters’.** The Commission became aware from our casework practice, that clients were waiting until in need of care proceedings were commenced in court before they were seeking legal help. The factsheet was developed to promote the benefits of people seeking early legal advice as a mechanism to resolve in need of care proceedings.

We are happy to provide copies of these resources should the Inquiry request them.

**Interagency Collaboration**

The Commission values interagency collaboration and cooperation as an important mechanism to facilitate the provision of ‘joined up services’ and ensure a continuity of service provision for clients. We are required to consider the implications of a report to NTFC in our operations, particularly in the assessment of whether a matter is suitable to proceed to a Family Dispute Resolution Conference, and therefore facilitate a process whereby parties reach an agreement about Family Law Matters.

Unfortunately, we do not often have access to sufficient information in relation to Child Protection investigations to enable us to process such matters.

Confidentiality provisions relating to some aspects of NTFC investigations could be relaxed if the parties consent to that for purposes such as ours which would enhance the support and assistance parties might receive and divert the matter from the Family Court.

**The Care and Protection of Children Act**

The Commission was involved in the process of reviewing the *Community Welfare Act* and made submissions to that review process.

The Commission makes the following submission to the Inquiry in relation to the *Care and Protection of Children Act (2008)* (‘the Act’).
Legal Proceedings
In legal proceedings the CEO is in the role of the model litigant, however often fails in this role as NTFC is poorly resourced and staff poorly trained in their role in Court proceedings. A Code of Conduct should be developed for all staff members as to this role. Nondisclosure of material, timeliness and adherence to legislation are major issues which obstruct fairness to the parties and appropriate care for children subject to orders.

Removal of Children from the Northern Territory by the CEO.
The Department of NT Families and Children (‘NTFC’) has routinely relocated children who are in the care of the CEO under provisions of the Act to homes outside the jurisdiction of the Northern Territory.

The Protocol for the Transfer of Care and Protection Orders and Proceedings and Interstate Assistance signed on behalf of the NT by the CEO on 15/6/2007 should be read in conjunction with and subject to legislation. (para 2) The Act in the NT does not allow for the placement of children outside of the jurisdiction of the NT except in accordance with the Act. This could be remedied by proper training of staff and clear and concise procedure manuals.

We raise the following concerns in relation to these practices:

- Such placements of children interstate occur without making application for or being granted a transfer under the provisions of the Act by the Court (s.160 – s.170) or complying with any of the administrative transfer provisions (s.155-s.159) such as parental consent (s.155 (h)) or the consent in writing of the receiving State. (s.155 (g)).
- Transferred children, upon relocation, have no protection under the Act or that of the resident State’s Child Protection legislation.
- The CEO and the Court cannot enforce any of the Orders made by the NT Court nor provide supervision as enacted as there is no jurisdiction to do so.
- The Foster Carers (registered pursuant to NT law) are not registered in the new resident State.
- Transferred children become “invisible”, with no legally enforceable supervision of the foster carers nor the Care Plans, the scheme relies entirely on the goodwill of the carers.
- Transferred children have no protection of the law or a Court unless they come to the attention of Child Protection Authorities in the resident State through suffering neglect or abuse in those States.
- Numbers of children in the above situation number from 40 to 200 (as stated by Counsel for the CEO to the Court)
- Parents and those having access to a child so removed are further separated from that child by distance and expense.

Removal of children in the above circumstances is ultravires, contrary to the objects and principals in the Act (s.4 - s12) and contrary to the UN Convention of the Rights of the Child (1991) to which Australia is a signatory.
Mandatory Reporting
We have concerns regarding the mandatory reporting obligations imposed under the Act. In short these are:

- Prior provisions regarding neglect and abuse were sufficient.
- Issues surrounding the failure of services to report neglect and abuse previously could be addressed by improved clinical governance and organisational procedures and training about the existing legislation.
- Current provisions impair the confidentiality between organisation and client and this impacts on decisions that are made about whether to access a service for assistance and the level of assistance a person is able to obtain (if they restrict the information they provide).
- The amendments to the Act could have been addressed by a same sex age defence in the NT Criminal Code.

We raised concerns with the previous Minister, Malandirri McCarthy and at a departmental level.

Appointment of a Child Representative
Pursuant to s 146 of the Act, the Court may appoint a legal representative for the child ("Child Representative") the section also briefly lists the role and duties.

In practise the CEO employs the Child representative from a list of approved Tenderers.(the Contracts are between the Legal firm and the Department of Health and Families) There are two tenders in Darwin, one in Katherine and two in Alice Springs (who also service Tennant Creek). The Child Representatives are paid by NTFC and their accounts approved by the caseworker in each case.

In practise the CEO delegate who decides if a child representative shall be employed and which tender, is the caseworker handling the file on behalf of the CEO.

The operation of the current scheme and practise is placing the CEO and the Child Representative in a position of conflict of interest. The Child Representative is employed by one of the parties, hence leading to claims of actual and perceived bias. The decision as to the employment or not, is made by a person not qualified in law and with a vested interest in the outcome of the proceedings.

The Commission submits that Child Representatives appointed and chosen under the Act must be appropriately qualified, (having completed the National Law Council of Australia’s Independent Children Lawyers Accreditation Course), paid on an equal basis from funding from the Department of Health and Families and chosen from a panel of qualified practitioners by an independent body.
Aboriginal Child Placement Principle

We support the Aboriginal Child placement Principle, and note that there has been some confusion about the purpose and operation of the principle within NTFC\(^3\). This confusion should not justify a diminution or eradication of the policy. Rather there should be a focus on clarifying the purpose and operation of the principle. For example, in Victoria, the *Aboriginal Child Placement Policy and Principle Guide for Child Protection Workers and Carers* has been developed\(^4\), which explains the purpose and operation of the principle:

The Purpose of the Aboriginal Child Placement Principle is to enhance and preserve Aboriginal children’s sense of identity as Aboriginal, by ensuring that Aboriginal children and young people are maintained within their own biological family, extended family, local Aboriginal community, wider Aboriginal community and their Aboriginal culture.\(^5\)

The objectives of the Principle are to ensure that, recognition is given to an Aboriginal child’s right to be raised in their own culture and, to the importance and value of family, extended family, kinship networks, culture and community in raising,— ‘growing up’—Aboriginal children. These objectives continue to be particularly relevant in the Northern Territory and every effort should be made to continue and strengthen the Aboriginal Child Placement Principle.

‘Family Way Placements’

The Commission is aware of a practice colloquially known as a “Family Way Placement”. A Family Way Placement is a placement where NTFC reach an unwritten agreement with family that a child will be removed from a parent and placed with another family member. NTFC may physically transport the child to the non-parent carer. The procedures NTFC apply to this practice appear to differ depending on the region. Until approximately December 2008, Family Way Placements appeared to be an accepted practice, of the Katherine and Tennant Creek Offices. In some regions, the procedures do not accord with natural justice and procedural fairness. Some parents are not advised that the placement must have their agreement and presume they have no choice but to comply with NTFC’s direction that the child be removed. In some cases parents are not informed that they can object to the removal.

This is process is in clear breach of the Act, as the CEO has no power over the child or responsibility for that child. The CEO has not conducted safety checks on the carers as would be done for foster carers. Parents have assumed NTFC’s actions to be lawful and beyond challenge. The Commission is aware of occasions when Northern Territory Police have subsequently enforced the removal of the child from a parent.

---

\(^3\) [http://mpegmedia.abc.net.au/local/darwin/201002/r516630_2832897.mp3](http://mpegmedia.abc.net.au/local/darwin/201002/r516630_2832897.mp3)


\(^5\) Ibid p 3
The Commission is not aware of Family Way Placements having occurred in recent times, but it is aware of at least one Family Way Placement that continues to operate.

**Carer Support**

Carers require increased support by the CEO and in particular, “kinship carers”.

NTFC currently differentiate between “kinship carers” who are family members, and “foster carers” who are generally not part of the child’s extended family.

Foster carers and their environment are assessed pursuant to a process including criminal history checks and medical checks. Kinship carers and their environment appears to be assessed in a more ad hoc way, which leaves children more vulnerable to being placed with an inappropriate carer or in an inappropriate environment.

Foster carers are provided foster care payments, which can be substantial, especially for child with high medical needs. Kinship carers are not provided regular financial support, which exposes the child to a greater likelihood of inadequate care due to poverty.

Some kinship carers have, at their request, been allowed to become foster carers after completing the foster carer assessment. Others are told that NTFC policy does not allow them to become foster carers. Those carers sometimes struggle financially to look after the child who is in their care under the direction and control of the CEO.

We provide some brief examples of the difficulties in this area:

We are concerned placing children with “kinship carers” rather than “foster carers” indirectly discriminates against Aboriginal carers. In our experience, unpaid kinship carers are always Aboriginal carers. They are the only unpaid carers. By categorising a carer as a kinship carer, the CEO abrogates its responsibility to financially support those carers and therefore those children. Aboriginal carers often live in poverty and it is these carers that most require financial support to meet the needs of the children in their care.
Coroner’s recommendations
We support the Coroner’s recommendations that the Act be amended to incorporate basic standards of care.\textsuperscript{6} We support the Coroner’s recommendation that a delegate of the CEO be required visit each child under the care of the CEO every two months and to ensure the standard of care provided to the child meets the basic standard of care. We also support the Coroner’s recommendation that the Care Plan, that is required to be reviewed approximately each six months, address the basic standards of care.

We support these recommendations in a context where:

- In Alice Springs Protection Orders are commonly being made for children for a period of two years
- There is no external review of the care being provided to children during the duration of the Order.
- There is no right of a party to seek an administrative review of the care being provided to children during the duration of an Order.
- The CEO appears not be complying the internal review process of reviewing (and providing to relevant parties) a copy care plan 2 months after a Protection Order is made and each 6 months thereafter in most, if not all cases.
- The Act now allows Orders to lapse without an external or judicial review of the child’s circumstances.
- The CEO now allows Orders to lapse and the child to remain in the care of the carer (who is not the parent of the child) indefinitely.

Development of Regulations
Regulations should be developed to define the basic standards of care as recommended by the Coroner.

Regulations should be developed to afford procedural fairness to parents and other parties to the proceedings by:

- Providing for personal service of parents, rather than sending confidential and sensitive court documents to a party’s last known address. Mailing addresses are often shared by many other people and not often accessed by the addressee. Many parties are illiterate or semi-literate in English.
- Providing for minimum time frames for service, for example, 7 days, so that parties are served with sufficient time for them to be able obtain legal advice and representation and attend Court. Parties often live in remote communities, several hours and sometimes 10 or more hours drive away. Parties are often reliant on transport services that operate only twice per week. It is unfair to serve such parties by sending court documents that arrive in a communal mail box the day before Court.

Conclusion
In all proceedings and procedures under the Act, special care needs to be taken to ensure departmental staff have acted within their powers under the law. In the Northern Territory context of child protection, parties will often

\textsuperscript{6} Coroner’s recommendations from the Inquest in the death of a 12 year old girl
have particular vulnerability, including social isolation, remoteness, language, extreme poverty and social dysfunction and lack of access to support services. In these cases, departmental staff need to ensure that persons the subject of proceedings and procedures have not mislead parties about their rights under the law and have had access to independent legal advice and assistance.

The Commission would like to see a focus on the departmental processes of NTFC being brought into line with the legal powers available (or otherwise) under the Act. On many occasions these processes could be established by regulation. The absence of regulations to the Act is an indicator that this is not an area of priority, and this is reflected in the operations of the department in the areas raised in this submission.

Yours sincerely

Meredith Harrison
Deputy Director

\[\textit{Coroner's recommendations from the Inquest in the death of a 12 year old girl}\]