Child Protection Inquiry Submission

Law Society Northern Territory

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Introduction

The Law Society Northern Territory (LSNT) welcomes the opportunity to provide a submission in response to the Child Protection Inquiry. Thank you for your understanding in allowing for an extension to submit this paper.

The Society has been involved in responding to major changes to Child Protection affairs in the Northern Territory (NT) and hopes to continue this involvement through this submission and any consultation with future amendments to the Care and Protection of Children Act (CPCA).

This response outlines some concerns the Society has with the current system of Child Protection in the NT. It aims to provide recommendations to deal with these concerns. Further, the Society generally supports the Melville and Child 7 Coronial Inquests.

1. Child Representatives

1.1 The role of the child's representative

There is little guidance as to the role of the child representative other than as set out in s146 (6) and (7) of the CPCA:

S146 (6) The legal representative of a child must:
(a) act in the best interests of the child regardless of any instructions from the child; and
(b) present the views and wishes of the child to the Court.
(7) For subsection (6), the legal representative may:
(a) interview the child; and
(b) explain to the child the role of the legal representative; and
(c) present evidence to the Court about the best interests, and the views and wishes, of the child; and
(d) cross-examine other parties to the proceedings and their witnesses; and
(e) make applications and submissions to the Court for the child; and
(f) lodge an appeal against a decision of the Court for the child.

The Supreme Court of the Northern Territory in Warbrooke v McGregor and Others\(^1\) has determined that the role of the child's representative is akin to the role of the Independent Children's Lawyer in Family Law Act proceedings.

The nature and role of the Independent Children's Lawyer in Family Law Act proceedings is guided by the leading cases of \(P\) and \(P\)\(^2\) and \(B\) and \(R\) and the Separate Representative.\(^3\) These cases provide the following:

In \(P\) and \(P\)\(^4\), the Full Court addressed the nature and role of the child representative:

1. To act in an independent and unfettered way in the interests of the child.

2. To act impartially but if thought appropriate make submissions suggesting a particular course of action if he/she considers that this is in the best interests of a child.

3. To inform the court by the proper means of the children's wishes in relation to any matter in the proceedings but is not bound to make submissions on the instructions of a child.

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\(^1\) Warbrooke v McGregor and Others [2001] NTSC 18
\(^2\) P and P (1995) FLC 92-615
\(^3\) B and R and the Separate Representative (1995) FLC 92-636
\(^4\) Supra at 2
4. To arrange for the collation of expert evidence and ensure that all evidence relevant to the child’s welfare is before the court.

5. To test by cross-examination the evidence of the parties and the witnesses.

6. To ensure that the views and attitudes brought to bear on the issues before the court are drawn from evidence and not from a personal opinion of the case.

7. To minimise the trauma to the child associated with the proceedings; and to:

8. Facilitate an agreed resolution to the proceedings.

The case of *B and R and the Separate Representative (1995)*³ added to guidelines appointing a separate representative:

1. The separate representative is entitled to ask questions which are relevant to the welfare of the child or otherwise permissible irrespective of whether the effect is to adduce evidence which could have been led by a party.

2. The separate representative is entitled to the same rights and is subject to the same obligations as an advocate for a party both including the right to ask leading questions of a party as a witness.

3. The separate representative may, depending on the circumstances, indicate to the court the orders which he/she proposes either at the commencement of the hearing or in final address.

The LSNT is of the view that, despite the CPCA and the case of *Warbrooke v McGregor and Others*⁶ there is widespread

³ Supra at 3
misunderstanding of the role of the child representative in CPCA proceedings.

The LNST proposes that section 146(6) and (7) be expanded to include the principles enshrined in *P v P* and *B v R and the Separate Representative*.

The Society also proposes that there be mandatory training for NTFC caseworkers and managers as to the nature of the role of the child’s representative.

### 1.2 The appointment of the child’s representative

Under section 146 of the CPCA the court may appoint a child representative if the court considers that it is in the best interests of a child to do so.

There is little guidance under the CPCA for the appointment of a child representative other than as set out in section 146(2) which provides for the appointment where either the child or a parent opposes the application being made.

In practice, however, there is a problem with the appointment of the child’s representative.

At present, the system requires a prospective child representative to apply for a tender for the work. The tender is paid for by NTFC, then decided upon by a panel that includes NTFC staff members.

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6 Supra at 1  
7 Supra at 2  
8 Supra at 3
The Society is of the view that there is a perceived conflict of interest in the tender stage of the process of appointment; in that NTFC pays for and has a say in the appointment of a child's representative.

The Society has previously written to the Department of Justice and the then Minister for Families and Children, Malandiri McCarthy voicing concern about this perceived conflict of interest in 2005 and 2007.

It is recommended that there be a change to this system to something akin to the appointment of separate representatives under the family law system via an independent body that is separate from NTFC.

In other jurisdictions in Australia, once an order is made for a child to be separately represented, Legal Aid Commissions nominate the child's representative. This occurs through a panel of lawyers that the individual commission has deemed suitable to carry out this important role on the basis of skill and experience in the area. These appointments are funded by a grant from the state governments to the Commission.

The Society recommends that an independent body (upon receiving an order from the court) nominates the lawyer to represent the child from a panel of suitably qualified lawyers. The funding for this role should be provided to the independent body by the NT government.

This will ensure the independence of the child representatives from NTFC. It will ensure there is funding for the child representative to gather their own evidence via independent assessments of the family and/or the child; if that is necessary.

A further issue has arisen with the CPCA in that NTFC is determining which cases require a child representative. Whilst some Magistrates will consider the appointment of a child's representative on the first return date of an application, some Magistrates do not consider it unless and application is made by the CEO or by another party.
The Society is concerned that this may mean that there are some cases in which children are not receiving representation despite there being good reason for the appointment.

We propose that section 146 be amended such that the appointment of a child's representative must be considered by the court on the first return date of the application and on any review dates and may be considered at any time thereafter.

The legislation should also be amended to provide greater guidelines about the circumstances in which a child's representative must be appointed, including but not limited to:

1. Where there appears to be an intractable conflict between NTFC and the parents and/or the person/persons who were the carer of the child before the proceedings commenced.

2. Any case in which a child of mature years is expressing strong views, including the giving of effect to would involve changing a long standing custodial arrangement or a complete denial of access to one parent.

3. There are issues of significant medical, psychiatric and psychological illness or personality disorder in relation to the child.

4. One of the parties proposes that the child will either be permanently removed from the jurisdiction or permanently removed to such a place within the jurisdiction as to greatly restrict contact.

5. Cases in which it is proposed to separate siblings.
6. Where neither parent is legally represented and the orders proposed substantially change the care arrangements of the child (eg the removal from a parent's care).

7. Where a child of mature years or parent opposes the making of an order

8. Where it is otherwise in the best interests of a child.

The legislation should also be amended to ensure that the appointment of the child representative continues for the life of the welfare order. This will enable the child's representative to continue to monitor the welfare of the child and, if deemed appropriate, to bring the matter back to court for further consideration.

2. Assessments in court proceedings

During court proceedings, assessments are often obtained by NTFC of children and parents. The LSNT agrees with this practice, however, there needs to be more transparency about the appointment of an expert as follows:

1. A letter of instruction should be prepared by the party seeking the assessment and a copy should be given to each of the parties.

2. All communications between the expert and the caseworker should be documented to ensure only information that is fairly balanced and accurate is given to the expert

3. All communications between the expert should be attached to the report with the letter of instruction and this should be annexed to an affidavit.
Under the Local Court Practice Directions for the CPCA any assessments made by experts are to be annexed to the affidavit. This does not occur uniformly in practice and compliance with the practice direction is sought by the Society.

3. Reviews

The preceding Act, the Community Welfare Act, provided for court reviews of children at least every 2 years or earlier if the court deemed appropriate.

The CPCA does not provide for reviews. Once long term orders are made there is no process for a review by the court of the circumstances of children in care unless one of the parties makes a further application.

When final orders are made the court endorses a care plan for the child. It is not uncommon in practice for the care plan to radically change following the making of an order. The LSNT is critical of this practice as it is the care plan for the child that the court approves of when making the order.

Common radical changes include:

- Drastic changes to the amount of access children have with their parents and other significant people in their lives
- Drastic changes to the placement of a child (including placements outside of the jurisdiction)

At present there is no mechanism for the court to review the progress of children in the care system unless a party makes an application to the court seeking to vary or revoke the order.
The LSNT supports the views of the Coroner in the coronial inquest into the death of Deborah Melville, in that the CPCA should be amended to provide for reviews by a court at least every 2 years and more frequently if the court considers that this would be in the best interests of the child.

The LSNT also considers it appropriate for the CPCA to be amended to require an application for a review to be made by the CEO where there is a drastic change in the care plan of a child (before such changes are implemented) in circumstances including, but not limited to, the following:

1. Children being returned to the care of a parent or family members when this was not envisaged in the care plan.

2. The placement of children outside of the jurisdiction before such placement when this was not envisaged in the care plan.

3. Care plans being unable to be enacted due to the resistance of an older child when the older child is engaging in risky behaviour such as substance misuse, alcohol misuse, criminal activity and regular absconding from their placement, training facility or school.

Furthermore the LSNT supports a change to the CPCA such that the CEO must inform the child's representative of any proposed drastic changes to the care plan so the child's representative can make independent inquires about the proposed changes and offer any alternatives that he/she considers are in the best interests of the child.

The LSNT also proposes that there be regular audits of the child protection system to ensure compliance with the CPCA and internal policies, such audits to be independent of NTFC.

The LSNT also proposes that the Department reconsiders the reappointment of lawyers in each office. Previously, this allowed for the
process to run much smoother and for legal documents to be prepared by lawyers, rather than case workers. Lawyers could also provide useful guidance to case workers and managers on compliance with CPCA and compliance with internal policies.

4. Staff turnover and allocation of resources

One of the great difficulties in the child protection system is the high turnover of staff and the stretched resources of NTFC. This often results in court reports being given to parties at the eleventh hour.

On duty days at the court (currently Thursdays) there are a large number of caseworkers at court (including team leaders and team managers). The Society respectfully suggests that there be a better allocation of resources on duty days. It is proposed that team leaders should be present at court as they alone have the power to make any major decisions. This will free up the time for the case workers on duty days. The Society understands that at times case workers will need to attend court to give evidence or when team leaders need more assistance with the file; however, this should only occur where necessary.

LSNT proposes that there be a better system of the handover of caseworkers and that the appointment of a new caseworker be communicated as soon as practicable to the child’s representative (if there is one) as well as to the parents and carers of the children.

5. Indigenous children and families

Section 12 of the CPCA stipulates that indigenous children should be placed with a member of the child’s family as a priority. However, LSNT argues that this section cannot supersede the paramount considerations of the best interests of the child in Section 10 of the Act.
The LSNT supports indigenous children being placed with their kinship group where it is in the best interests of children to do so. However, LSNT supports the findings of the Coroner in the Melville Inquiry that kinship placements should be thoroughly investigated to ensure such placements provide the basic level of care for children. The LSNT proposes an amendment to section 12 of the CPCA to ensure that kinship placements meet a basic level of care for children.

The LSNT proposes that there be a further amendment to section 12 of the CPCA to ensure that where indigenous children are placed with non-kinship carers they, insofar as is consistent with their best interests, are provided with opportunities to learn about and participate in their culture.

6. Model Litigant principles

The LSNT is of the view that the Department should adopt and implement model litigant practices and principles akin to other government bodies around Australia.

7. Problems arising from Sections of the CPCA

a.) Section 51

Section 51 of the CPCA provides the authority for the CEO to take a child into provisional protection.

S51 (1) The CEO may take a child into provisional protection if:

(a) the CEO reasonably believes:
   (i) the child is in need of protection; and
   (ii) the provisional protection is urgently needed to safeguard the well being of the child; and
(b) no protection order or temporary protection order is in force for the child.

There have been problems in practice with this section; particular subsection (b). When a child is under a protection order or temporary protection order NTFC does not have a mechanism to remove the child if the care provided to the child deteriorates rapidly subsequent to the protection order being made.

The Society recommends that the CPCA be amended to provide the CEO with the power to remove a child who is the subject of a protection order if it is in the best interests of the child to do so. The Society also submits a proviso should be added that in these instances the CEO must bring the matter back to the court with 72 hours of such removal.

b.) Section 123

There is a conflict under the Act between section 123 and the definitions in sections 21 and 22 in respect of the terms:

1. Parental responsibility
2. Daily care and control

When a court makes an order under section 123 that parental responsibility be shared between the CEO and a parent, and the daily care and control be with the parent, a conflict arises as to what powers the CEO has with respect to decision making about a child and what powers a parent has with respect to decision making about a child.

This occurs because there is an overlap between the definitions in section 21 and 22 which conflicts with the operation of section 123.
The LSNT is of the view that the conflict will be ameliorated if the definitions of both terms in section 21 and 22 be amended such that they are mutually exclusive as follows:

1. Parental responsibility is defined as the making of major long term decisions about a child including but not limited to where a child lives, major medical treatment, cultural and religious upbringing and education.

2. Daily care and control be defined as day to day decision making about a child’s care

c.) Section 135(1)(a)

Section 135(1)(a) of the CPCA provides obligations upon the CEO as follows:

(1) If the protection order gives daily care and control of, or parental responsibility for, the child to a person who was not a parent of the child, the CEO:
   (a) must give the parents of the child information about:
      (i) where the child is residing; and
      (ii) any arrangement that has been made for the care of the child; and
   (b) must provide opportunity for the child to have contact with the parents and other family members of the child as often as is reasonable and appropriate in the circumstances.

(2) Subsection (1) has effect subject to any contrary direction of the Court.

The LSNT is concerned about the blanket obligation placed on the CEO under section 135(1)(a) as this may lead to children and their carers being placed at risk by parents and others who have harmed, or who may
harm children. The Society does not consider these obligations to be in the best interests of the child in proceedings.

The LSNT supports the abrogation of section 135(1)(a).

Conclusion

The Law Society Northern Territory believes measures can be implemented, that will improve the system, the level of support for case workers, the inclusion of legal practitioners, and consequently, the value of life of children in need.

We are keen to contribute to any review of the Act or discussions on this matter. Thank you.

Yours faithfully

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