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Our ref: Children’s Law Committee/BDS

CPA Review
Department of Communities, Child Safety and Disability Services
Policy and Legislation
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Dear Child Protection Act Review Team

Options paper - The next chapter in child protection legislation for Queensland

Thank you for the opportunity to provide comments on the consultation draft of the next chapter in child protection legislation for Queensland Options Paper. The Queensland Law Society appreciates being consulted on this important reform project and would be pleased to continue to be involved throughout the policy and legislative process.

We also highlight that the Society is not in a position to provide unqualified support for the ‘options for new legislation’ provided in the Options Paper until we are provided with the details and specifics of the proposals.

This response has been compiled with the assistance of the members of the Children’s Law Committee who have substantial expertise and experience in this area of law.

1. Options for new legislation: A broader purpose and strengthened principles

The Society supports the Principles of the Act, Charter of Rights for a Child in Care and the statement of standards for children in care. In our view, these principles and standards are comprehensive and do not require substantial amendment. However, our members believe based on anecdotal experience that there is a lack of adherence to the Principles, Charter and Standards in practice. As such, we propose that the wording of the provisions be amended to give greater emphasis to the central and crucial role that these must be given in implementation of the Child Protection Act 1999 (the Act). For example, it may be appropriate to mandate that the Principles ‘must’ be considered instead of ‘should’ be considered.

In relation to Aboriginal and Torres Strait Islander children, the Act needs more focus on placing removed children with a kin carer where they are removed from parents. Research demonstrates attachment is a real issue for children in foster care. Children not in care of their kin will also disconnect with their culture and this will create a hole in their existence causing potential for heightened delinquency both as children and into adulthood. For example, in
practice this greater focus might be promoted, where there are proceedings before the court, by a requirement for the Department to depose in affidavit form the steps undertaken to source a kinship placement.

Generally, when a family comes to the attention of the Department and a child is placed into Departmental foster care, in the committee's experience extended family may often be unaware of the situation. Once they become aware of the situation, they may also be unaware that they can seek approval to care for the child or apply to be heard in any child protection proceedings (for example pursuant to section 113 of the Act). As a result, children may be placed into Departmental foster care when there would otherwise be a family placement available.

To promote consideration of family placements by the Department before a child is placed into Departmental foster care, the Committee recommends that consideration be given to strengthening, and where necessary enacting, appropriate legislative provisions. In practice, a greater adherence to principles requiring consideration of placing children with kin may be promoted by a requirement for the Department to depose to the enquiries made to source an appropriate family placement(s), and where relevant the reasons why a family member seeking to provide care for a child is not considered appropriate. In such a situation, the impinged family member would be able to apply to be heard in the proceedings before the Children's Court.

2. **Addressing the disproportionate representation of Aboriginal and Torres Strait Islander children**

In response to part 2, the Society is basing its comments on reports from legal practitioner members who work directly with Aboriginal and Torres Strait Islander children and families. These practitioners are in a unique position to observe the legislation in practice and are therefore able to provide useful suggestions on how the legislation might be improved.

In response to the Options Paper proposals, we strongly support more culturally attuned legislation. In this regard, we support the use of culturally appropriate case workers. It is envisaged that these case workers would be able to take a broad view and assist families and children whilst employing culturally sensitive practices. These case workers would also be able to contribute to culturally appropriate and informed engagement and decision-making in regard to allegations of abuse or neglect.

Option 2E proposes including a new power enabling the chief executive to delegate functions and powers in relation to a child that is the subject of a Child Protection Order to the chief executive of an Aboriginal or Torres Strait Islander agency. There exist similar services within the child protection service provision framework already. These include, but are not limited to, the Recognised Entity and other community based agencies. Where these agencies are engaged and case work is outsourced to them it is important to ensure that they are held accountable for the work that is undertaken. We would require further information about this proposal, including accountability mechanisms, to make an informed comment. In addition, we advocate that any steps taken toward implementing this option be informed by collaborative consultation with specialist Aboriginal and Torres Strait Islander legal and child protection service providers.
3. **A shared responsibility across government for child protection and wellbeing**

In our view, the proposed options are so high level that they will be difficult to implement on a practical basis. Furthermore, the Society notes that the Act already contains information sharing powers for a variety of purposes. As such, we consider that the relevant Departments be provided with education and training on the existing information sharing powers within the legislation and also be encouraged to use these powers with greater consistency.

In relation to the information shared, we note that in many cases, information relevant to a child’s carer/s would be limited to trauma based and practical needs of the child. In our members’ experience, sharing details about the personal history of the biological parents may be counterproductive to reunification efforts with limited other value.

4. **A contemporary quality and safeguards framework**

We consider that the proposals suggested in the contemporary quality and safeguards framework are matters that are generally dealt with appropriately in the statement of standards. In our view, a penalty and breach provision should be considered, to strengthen the statement of standards and promote better compliance by all decision-makers under the Act. To promote accountability and public confidence in the administration of the Act it is also recommended that consideration be given to publication of decisions regarding breaches of the statement of standards and other breaches of the Act where appropriate.

In relation to proposal 4A, we would like further information on how the advocacy mechanisms and complaints procedures would operate in practice. For example, if a child has a complaint concerning the quality of the care they are receiving, how would the complaints process operate and how would the complaint mechanism be enforced? Furthermore, we request information on whether the proposed investigation and assessment process for complaints of sexual assault by children in care will mirror the Child Safety Practice Manual (and associated policies and procedures). We encourage you to make the Child Safety Practice Manual, policies and procedures, publicly accessible in full. We consider that this type of transparency is key to your aim to better enable a contemporary quality and safeguards framework.

In relation to proposal 4D, we encourage the specification of minimum qualifications for people working in residential care.

We also suggest that the Department consider amendment of the legislation to allow the issue of conditional blue cards in limited and appropriate circumstances. We appreciate that this might be out of the scope of this review, however we note it may have relevance to increasing the availability of family-based placement for children in out-of-home care.

5. **Meaningful participation by children in decision making**

The Society supports meaningful participation by children in decision making. Therefore, we agree with Option 5A which holds that children should have the right to express and have their views heard before a decision that affects them is made. We note that while these decisions are made by adults, underpinned by the Principles of the Act, we support the view that children's voices be heard in a meaningful way.

In our view, where legal issues arise, independent legal advice and legal aid applications should be offered to children who may have capacity to instruct a lawyer. We suggest that workers might benefit from information and/or training to help them identify what issues
require a legal referral. Meaningful participation by children involves more than just gathering and documenting the views and wishes using tools such as the "three houses tool." Meaningful participation includes supporting a child to access and understand accurate, relevant information. Where the issue is a legal one, or includes legal issues, we propose that support for participation should include help from a lawyer who is skilled in the representation of children. A referral for independent legal advice, from a legal aid, community based or Aboriginal and Torres Strait Islander legal service, should be offered to all young people in relevant circumstances. The lawyer will usually be able to assess whether the young person has capacity to instruct a lawyer about the issue in question after an initial consultation.

6. Child wellbeing and family support

The Society is supportive of option 6D which proposes that the legislation include a requirement that, before granting a child protection order, the Childrens Court must be satisfied that the Department has taken all reasonable efforts to provide support to the child and their family. We anticipate that this would require the Department to place evidence before the court of support services offered to assist the parents in addressing the identified child protection concerns and steps taken to engage the parents with those services. We note that if this option is implemented, we also suggest the Department should be in a position to provide the court with evidence of arrangements to support children and families when a child is taken into care, plans identifying the expected milestones and increased contact as a parent resumes care of a child, and transition plans for children leaving out of home care.

7. Working with families with parental agreement

The Society strongly advocates that all agreements must be in writing so that all parties are clear about their duties and obligations. Our members have reported that in their experience, interventions with parental agreements (IPAs) are often not documented in a form accessible to parents. Furthermore, in our view any written agreement must be read to parents who are illiterate and some mechanism should be incorporated in the Department's procedures to ensure that the parent has understood their obligations under the agreement. In our view, all agreements should, where possible, be executed by both parents (within the meaning given by the Act) of the subject child.

We are concerned about a recent trend by the Department to utilise IPAs and other informal interventions as an alternative to what should otherwise be an application for a Child Protection Order. This causes concern because a parent's access to legal aid, and ability to respond to an intervention is greatly impaired where an IPA is used to restrict a parent's contact with a child or places a child with one parent over another. We suggest the legislative framework and policy guidelines for IPAs should be reviewed to ensure that they are only used where a child remains in the primary care of both parents, or if placed with only one parent that this occurs with the non-custodial parent's consent.

Option 7B deals with the rights and responsibilities of a child’s parents during the process of developing and agreeing to a care agreement. The Society is concerned that currently, parents rarely have legal advice or representation before they enter into care agreements with the Department. Instead, parents are only provided with legal representation when they attend court.
We suggest that the standard information provided to parents considering whether to sign an intervention with parental agreement or care agreement contain a warning statement for parents to obtain legal advice. We suggest that parents should always have a meaningful opportunity to receive legal advice about the terms of a proposed agreement before any agreement is signed and there be judicial oversight in relation to care agreements. The Department should also provide referral options for obtaining this legal advice. Agreements should also clearly set out what the parents and the Department are each agreeing to do and the limits of the agreement. Where consent of both parents is not obtained for a care agreement, it is expected that the Department would seek that an application for an order be made unless it is clearly appropriate to rely on section 51ZE(4) of the Act.

Option 7E proposes an increase in the maximum duration of a child protection care agreement. The Society is concerned that the proposal does not specify a time for extension. We do not agree with Option 7E. Our view is that a care agreement is a highly intrusive intervention involving removal of children from their parents' day to day care, which currently occurs with little independent oversight. A greater duration warrants an application to the court for an appropriate order.

Option 7F proposes that the Department be enabled to direct a parent to do or refrain from doing something directly related to a child's protection during a care agreement. First, we consider that directing a parent to do something is inconsistent with the notion of an agreement. Further, without the intervention of the court it is unclear how any such direction would have greater authority than a request by the Department. In our view, this function is best placed with the courts and we urge you to implement the recommendation of the Court Case Management Committee to clarify that the Children's Court may give such directions to a parent while a matter is before the court. If the Department has significant concerns with the actions of parents, the matter should be referred to the court. In addition, we consider that the court is in the best place to direct a parent or make decisions regarding the removal of a child. Secondly, we are concerned that there is a lack of legal representation for parents in the completion of care agreements. These parents are often very vulnerable individuals and the Society is concerned that these persons are placed in position of unequal bargaining power with the Department if they are not legally represented. This situation is inequitable and unethical considering the significant intrusion on the rights and liberties of individuals.

8. Parental responsibility

Option 8A states: Maintain the broad definition of parent to apply throughout the legislation. The narrow definition of parent could be removed, and the definition of who has party status in court proceedings could be revised to include those persons with a legal interest in the proceedings. We consider that this option is confusing and would be unworkable in practice. We support retaining the definition of parent in relation to who has party status for a court proceeding. In our view, section 113 of the Act should be relied upon as it would not be effective to involve every person with a legal interest in proceedings. In our view, the current system of service upon parents should be retained.

If the proposal were implemented, this might create a situation where applicants (some of whom have no legal training) are required to make decisions as to who has a legal interest in the proceedings. This issue is exacerbated by the fact that 'person with legal interest' is not defined in the legislation.
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If this proposal is to be implemented, we strongly suggest that who is considered a 'person with a legal' interest be specified within the legislation. It is our strong view that consultation on this definition be undertaken.

However, we acknowledge that the definition of a "parent" may need to be broadened to include people who would culturally be considered a parent – for example, if a child has been living with kin under cultural traditions, that kin should be considered a parent.

Options 8B and 8C deal with parental responsibility and shared parenting orders, respectfully. We would be interested in being consulted on a proposal that would allow the court to make orders with greater flexibility which can be adapted to individual family and child circumstances.

We would require more information to make an informed comment on the proposals set out in Options 8A, 8B and 8C.

9. Collaborative case planning
The position of the Society is that these proposals require more detail and explanation before meaningful comment can be made.

10. Meaningful participation by families in decision making
The Society is supportive of Option 10B to embed natural justice and procedural fairness requirements into all relevant decision making points in the legislation. In regard to natural justice, we consider that some decisions should be reviewed by the original decision maker, that is the court, instead of the Queensland Civil and Administrative Tribunal.

To afford meaningful natural justice and procedural fairness to families, consideration must also be given to ensuring that legal advice and legal aid for representation is made available.

11. Information sharing
We respect the privacy of young people in care and any information sharing. Ideally, information sharing should only be exchanged with the consent of the child where appropriate. Only under exceptional circumstances (and in accordance with strict and defined guidelines) should information be shared without consent.

In regard to Option 11E, we agree that information about their personal and family history should be shared with adults who were children in out-of-home care should be enabled. We suggest that similarly, the legislation should support sharing this information with young people while they are still in care, as long as this is done in an age appropriate and supported way.

12. Permanency outcomes for children
The Society supports Option 12A which proposes the introduction of overarching permanency principles in the legislation.

The Society supports Option 12B to introduce provisions which specifically prohibit the making of one or more short-term orders that extend in total beyond the two-year period from the time the order is made, unless the court is reasonably satisfied that it is in the best interests of the child to do so. In our view, this strikes an appropriate balance between finality of decision-making for the child and flexibility to meet the particular needs of a child and their family when reunification remains achievable.
We note however, that our members have had experience of matters where multiple short-term orders have been made in circumstances where appropriate case work has not occurred during previous short-term orders. Any such change would need to be accompanied by appropriate resourcing to the Department and community organisations being asked to provide support to achieve reunification of children and families during an order, to avoid the real risk that long-term orders are made in circumstances where a parent would be able to safely care for a child if the appropriate support and case work had been provided.

Option 12C suggests the introduction of provisions that require a case plan for a child to include permanency goals and plans for the child, including contingency plans if a child is unable to be reunified with their family in the foreseeable future. In this context, we note that are members are concerned that assumptions should not be made about the outcomes for different children within the same family. For an example, an assumption that an infant is unlikely to be reunified with their parent because an older sibling is under long term care order.

To ensure that all parties (both parents and the Department) are held to account the Society recommends that Part 3A and section 51A of the Act be expanded to include a requirement to provide a contact plan for all short-term order Applications that plan the reunification of the child to a parent’s care. A contact plan should identify the agreed upon milestones that each parent is expected to reach within a given time frame for their contact to increase, in addition to the six (6) month case plan review mechanism that is currently in place.

Currently in our experience case plans are often broad and non-specific. Because there is little by way of structure, case work often stagnates as formal reviews occur infrequently and parents quickly become disempowered. In our members’ experience, where clear case plan goals are set and aligned with incremental contact increases, parents are motivated and each party is able to account for the progress of the matter.

13. Young people transitioning to independence

Option 13A suggests including a requirement for a case plan for a child to include a transition to independence plan from the time the young person reaches the age of 15 years. This is already contained in the Child Safety Practice Manual and we agree that it should be included in the legislation. We support the proposals regarding case planning for transitioning from care as well as a greater emphasis on positive and proactive planning for the future for all children in areas such as education, career and medical needs.

Case planning processes generally still require attention. In some cases, case planning documents are still bulky, with a large amount of repetition, phrased in complex language, unchanged since the beginning of a court matter and with little practical value to the parents, children, Departmental workers, or judicial officers. We strongly support a review of the presentation and language used in case plans, and the utility of the current forms, with the aim of making case plans that are more practical and user friendly for all users. In this context, we also refer to our comments about case plans under the previous heading.

In relation to Option 13B, we agree that the Department must ensure the young person can access assistance to transition from being a child in care to independence, up until they reach 21 years of age. That is, the age of transition should be extended until a child is 21 years.

The Society proposes that there should be an expansion of what is reviewable to Queensland Civil and Administrative Tribunal - more than just placement and contact decisions which are
currently reviewable. An example of this expansion could include providing a child with the right to review a breach of the statement Standards contained in section 122 of the Act. This right to review is currently only provided to the Public Guardian in section 128(1)(b) Public Guardian Act 2014.

Our members have reported that some children have been placed in detention because there are no placements for them. This situation is completely unacceptable and requires urgent attention.

14. Other Queensland Child Protection Commission of Inquiry recommendations being considered and other matters

Recommendation 4.11

We support Recommendation 4.11 which proposes that the Department review its data recording methods so that the categories of harm and the categories of abuse or neglect accord with the legislative provisions of the Act.

Recommendation 8.9

Recommendation 8.9 proposes that the Department develop a model for providing therapeutic secure care as a last resort for children who present a significant risk of serious harm to themselves or others. The proposed model would include, as a minimum, the requirement that the Department apply for an order from the Supreme Court to compel a child to be admitted to the service.

In response to Recommendation 8.9, the Society responds as follows. Recommendation 8.9 will affect children and young people who do not meet the criteria to be detained under the involuntary treatment order scheme and have not entered the criminal justice system. In essence the Department would seek the detention of these children for purely therapeutic reasons.

The Society does not support this proposal. The Society is of the view that the issue of detaining children and young people in therapeutic secure care is a very complex matter. We do not consider an adequate case has been made out for the adoption of a secure care model in Queensland. We note that mechanisms currently exist for detaining children and young people with a mental health condition under the Mental Health Act 2000. Furthermore, children and young people who fall under the Disability Services Act may be dealt with under Part 10A of that Act. We consider the provisions of these Acts should be utilised in the first instance to respond to young people in care who may be dealt with under this legislation and suggest that any flaws in the existing system should be identified and addressed.

The use of therapeutic secure care should be very carefully considered due to its restrictive nature and by virtue of the fact that it impinges on the rights and liberties of the child. Due to the nature of these concerns, the Society opines that the use of therapeutic secure care for children and young people should be the subject of a separate options paper. The options paper should, inter alia, set out the specific aspects of several therapeutic secure care models and outline any associated obligations.

Should this recommendation be adopted, however, the Society considers that substantial protections must be built in to ensure a model which best protects the rights of children. We note the following:
We support the recommendation which requires that applications should be made and considered by the Supreme Court of Queensland. We understand this is how the jurisdiction operates in New South Wales;

There must be a clearly articulated purpose and timeframe for contained treatment outlined in an application, and a statutory limit on the number of days which a young person can be placed in the facility (for example, in Victoria the period must not exceed 21 days and in exceptional circumstances can be extended for one further period not exceeding 21 days);

There should be clearly defined criteria for when the applicant can bring the application;

Reflecting on the historical abuse of care and control orders, it should be clearly provided for in legislation that patterns of sexual behaviour cannot be a basis for a secure care order;

The applicant must be able to demonstrate that all alternatives to secure care have been considered and where appropriate attempted, before the secure care application is made;

Young people and their families must be given access to legal representation and appropriate legal aid funding must be provided;

Young people and their families must be involved in the decision making process and in the plans for treatment;

Culturally appropriate placements and treatment must be available for Aboriginal and Torres Strait Islander young people;

Culturally appropriate placements and treatment must be available for culturally and linguistically diverse young people;

Complaint and review mechanisms must be in place for the young person and his or her family;

External independent assessors should be legislated for to inspect and oversee the management of these orders; and

An age restriction should be in place to ensure only older children can be subject to an order (e.g. only young people aged 15 to 18 years of age).

Recommendation 13.15(1)

We support Recommendation 13.15(1) which proposes that parents should be supported through child protection proceedings by providing them with information about how to access and apply for legal advice or representation, and ensuring parents are provided with reasonable time to seek advice.

Furthermore, we advocate for access to legal representation for parents from the IPA stage, through court proceedings and up until the time when orders are made. The Department is well represented in proceedings and often parents are unrepresented. The matters dealt with are serious in nature and the consequences are significant - for example, the ability of children to live with their parents. In this regard we strongly urge that further consideration be given to better funding of the legal assistance section to meet this need and redress the significant
imbalance in access to legal representation between the State and the children and families
who are subject to proceedings.

**Recommendation 13.23**

Recommendation 13.23 proposes the Childrens Court be provided with the discretion to make
an order for costs in exceptional circumstances.

Some of our members have noted cases where the Department has failed to comply with
court orders or systematically failed to discharge their commitments under case plans and
consider discretion to make a costs order against the Director of Child Protection
Litigation/Chief Executive may be appropriate in exceptional cases to encourage model litigant
behaviour and implementation of the relevant legislation. However, the Society does not
support a change that would allow the Childrens Court to be provided with the general
discretion to make an order for costs in exceptional circumstances. Our reasons are two-fold.
First, there is a new scheme in place for the litigation of child protection matters and we
consider that there should be ample opportunity to review and evaluate the success of this
scheme before considering the inclusion of costs orders. Secondly, the Society does not
support a situation where parents and other parties, including children and young people, may
be subject to costs orders. In our view, this may have unintended consequences. For
example, the threat of a potential order of costs against parents might deter these parents
from contesting applications, which would be undesirable. If this recommendation is accepted,
the Society’s view is that children should be excluded from the operation of this amendment.

In our view, we consider that other models that look at the litigation process should be
evaluated as potential options, as opposed to the judicial discretion to award costs orders. We
also recommend that a review mechanism be made available to parties on the
recommendation of the judicial officer.

Instead of conferring a judicial discretion to award costs orders, we suggest that judicial
officers be provided with the power to make recommendations to the relevant Departments
about addressing problems identified in the litigation process or to order an independent
review of the process.

**Recommendation 14.3**

The Society does not support Recommendation 14.3. We do not consider that identifying
information needs to be made public. We maintain that any misinformation can be corrected
without divulging identifying particulars. Our position is that the confidentiality of identifying
information should be preserved, even if the child is deceased. Furthermore, we note our
disappointment that this section of the options paper makes no reference to the notion that
these decisions should be made in the best interests of the child.
Legal Aid funding

Our members provide legal advice and representation in child protection matters in the role of lawyers acting for parents and for children. We note our comments throughout this submission about the importance of adequate legal aid funding for children and parents to be appropriately represented. Feedback from some members also suggests that a review of the structure of legal aid funding to allow for the filing of material on behalf of parties at an early stage (similar to grants of legal aid for family law matters), for example, may assist in ensuring a more equitable legal process given the funded representation of the Department and the Director of Child Protection Litigation. We appreciate that this might be out of the scope of this review, however we note it may have relevance to achieving many of the aims in a legal context.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Senior Policy Solicitor, Ms Binari De Saram on b.desaram@cls.com.au or 3842 5889.

Yours faithfully

[Signature]

Christine Smyth
President