Aboriginal Family Law Services

Submission to the Department for Child Protection

and Family Support

Review of the *Adoption Act* 1994, Consultation Paper May 2018

Lodged by 18 May 2018

1. About Aboriginal Family Law Services (WA)

The Aboriginal Family Law Services (WA) is committed to being a leader in the provision of family violence legal services, support and education for Aboriginal and Torres Strait Islander people in Western Australia (WA) who have experienced, or, who are experiencing family and sexual violence. (**Please note**: The term Aboriginal is used herein to refer to both Aboriginal and Torres Strait Islander people wherever relevant.)

Funded by the Department of the Prime Minister and Cabinet (DPMC) under the national Family Violence Prevention Legal Service (FVPLS) Program, we are the largest FVPLS provider in Australia. The FVPLS program provides specialist legal services in the area of family violence matters. It aims to 'prevent, reduce and respond to incidents of family violence and sexual assault among Aboriginal people'.[1] Fourteen services are funded nationally to provide these services to 31 rural and remote locations.

Services are delivered in six regions across WA covering the West Kimberley, East Kimberley, Gascoyne, Midwest, Goldfields, and Pilbara regions. 47% of the state's Aboriginal population resides in these regions.[2]

Offices are located in Broome, Carnarvon, Geraldton, Kalgoorlie, Kununurra, and Port Hedland. From these locations outreach services extend to over 30 remote townships and Aboriginal communities. The corporate services office located in Perth provides strategic and management support to all regional offices including finance, human resources, administration, quality assurance and compliance functions.

2. Introduction

The Aboriginal Family Law Services (WA) welcomes the opportunity to have input into the Review of the Adoption Act 1994 Consultation Paper May 2018.

Aboriginal Family Law Services (WA) provides professional legal assistance to Aboriginal peoples that have experienced or are experiencing domestic or sexual violence. This submission on Review of the Adoption Act 1994 Consulation Paper will address terms of reference;

- the extent to which members of the public are aware of the effects of the Act;
- the effect of the Act on birth parents, adoptees and prospective adoptive parents and the relatives of parties to adoptions; and

[1] Productivity Commission (2014) Access to Justice Arrangements Draft Report, p 29
[2] Aboriginal and Torres Islander Census counts 2011 – Australian Bureau of Statistics http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2075.0main+features32011

- any other matters which appear to the Minister to be relevant to the operation and effectiveness of the Act.

The Aboriginal Family Law Services (WA) would be pleased to provide further information additional to this submission if required.

3. Background Information

It is common practice in WA for Aboriginal children who have become the responsibility of the CEO of the Department for Child Protection and Family Support ("**DCPFS"**) pursuant to permanent until 18 Orders, to subsequently be adopted by their carers. Usually with the support and blessing of DCPFS. The numbers of children – particularly Aboriginal children – entering out of home care, are significantly greater than non-Aboriginal Children[3]. The DCPFS is responsible for exericising these child welfare powers, as well as the *Adoption Act* 1994. It is the experience of the AFLS that there is interplay between these two legislations, as alternative permanent care options, for carers who wish to be granted responsibility for a child until that child reaches 18 years of age. It is the effect these two legislations have in conjunction with the other on Aboriginal children, that forms the basis of this submission.

3.1 Aboriginal Services Framework

The historical legacy of managing the welfare of Aboriginal people is stated in the *Aborigines Act* (1905), where it was the responsibility of the Chief Protector to control every aspect of Aboriginal people's lives, for the purpose of protection, control and segregation of all Aboriginal people in an attempt to assimilate future generations and cause the race to die out.

The later *Native Administration Act* (1936) empowered the Chief Protector to have total control of all Aboriginal children 21 years and under. This Act resulted in the suppression of Aboriginal languages and cultures in much of WA and the removal of many children from their families. The impact of these 2 Acts on Aboriginal culture and families within WA has been catastrophic.

Both of these Acts were administered by the Native Welfare Department. In 1972 this Department was abolished and its functions combined with the Child Welfare Department to form the Department for Child Protection. The Department for Child Protection was subsequently renamed as the Department for Child Protection and Family Support ("**DCPFS"**).

Today, DCPFS administers the *Children and Community Services Act* (2004) ("**Welfare Act"**) and the *Adoption Act* (1994) ("**Adoption Act**")

[3] Department for Child Protection and Family Support (March 2017) Out-of-Home Care Reform in Western Australia & why long term planning for children in care is so important.

3.2 Family Violence

It is believed domestic and family violence are the key drivers behind the overrepresentation of Aboriginal children in child protection[4] who are subsequently the subject of adoption. While there is limited recent data from WA to support this claim, the recent evidence from the Victorian Taskforce 1000 project – a review of the cases of the thousand or more Aboriginal children in care – has found that "well over ninety per cent of Aboriginal children entering care" have done so due to family violence.[5]

DCPFS is unable to state how many children WA are in the CEO's care due to family and domestic violence as they do not currently specifically capture and report on this data, however they estimate this to be between 70-90 percent. In their 2013-14 Annual Report they state that "Violence in the home, predominantly against women and children, is a major underlying factor in many child protection cases. Other common issues that lead to children being at risk of harm include parental drug and alcohol misuse, mental health issues and financial problems".[6]

Statistically Aboriginal women fare much worse compared to non-Aboriginal women in relation to the prevalence and impact of family and domestic violence:

- There is a higher use of restraining orders compared to the non-Aboriginal population, with a higher level of physical violence in these situations.
- Aboriginal women are statistically more prone to hospitalization and death as a result of family and domestic violence (35[7] times and 10[8] times respectively).

However, it is relevant to note that while Aboriginal people make up 3.1% of the Western Australian population, the Kimberley population is closer to 50%.[9] The region with the largest increase in Domestic Violence is the Kimberley, showing a 5-year increase of 79% in Domestic Violence Incident Reports (DVIR) that have been completed by police. These figures do not specify ethnicity so it is unknown how many of these DVIR relate to Aboriginal people.

Further ramifications of family and domestic violence on Aboriginal women and communities are visible through other indicators:

- Aboriginal people are overrepresented in the child protection system with Aboriginal children making up 53% of children in out of home care in WA.10

[4] Department for Child Protection & Family Support Op cit
[5] Victorian Aboriginal Community Controlled Organisations and Community Service Organisations (2014) Koorie Kids: Growing Strong in their Culture, A Plan for Aboriginal Children in Out of Home Care, October 2014 Update
[6] Department for Child Protection and Family Support (2014) Annual Report 2013-14
[7] Australian Institute of Health and Welfare (2006) Family violence among Aboriginal and Torres Strait Islander peoples http://www.aihw.gov.au/workarea/downloadasset.aspx?id=6442458606
[8] Family Violence Prevention Legal Services – Research and Needs Analysis Report, 16 July 2013, Nous Group
[9] Western Australia's Family and Domestic Violence Prevention Strategy to 2022: Achievement Report to 2013
[10] Department for Child Protection and Family Support, November 2015-2016 Annual Report

- The percentage of Aboriginal compared to non-Aboriginal children in care by region (including metro) in WA varies from 20% (Peel) to 100% (East Kimberley).11
- Aboriginal people are overrepresented in the prison system, comprising 40 percent of the total prison population, with the adult female prisoner population over 50 percent.12
- Children who experience family violence or have been in care are more likely to use legal aid as adults.13

For Aboriginal communities the prevalence and impact of family and domestic violence is understood in terms of loss of connection to family, culture and self.

Creating the conditions whereby trauma can be healed for those who have already experienced family and domestic violence is crucial to preventing violence for the next generations. A focus of resources and sustained effort is needed to break the cycle of violence.

3.3 Keeping Children Safe

The Aboriginal Family Law Service ("AFLS") supports effective child support services, structured systematically in a non-paternalistic way to respond to child mistreatment.

The historical approach to Aboriginal welfare issues was paternalistic, when case work professionals "adopt the position that they believe they know what is wrong in the lives of service recipient families and they know what the solutions are to those problems".[14] A paternalistic approach is harmful to families because it disenfranchises the families that DCPFS wants to assist.[15]

Given the intense and personal impact the DCPFS predessesors had on the lives of Aboriginal people and the damage it caused to individuals, familes and communities, it is more important than ever for DCPFS to be supportive towards Aboriginal families, by consistently delivering transparent and appropriate assistance when required.

Unfortunately, in the experience of AFLS, many cases in the regions are conducted contrary to the progressive intentions of DCPFS. It is a requirement of the Welfare Act that DCPFS take active and genuine attempts to reunify a child with its parents before seeking until an 18 years old order or adoption of that child.

[11] Department for Child Protection and Family Support, November 2014
[12] Australian Bureau of Statistics (ABS), 4512.0 - Corrective Services, Australia, September Quarter 2014 (4 December 2014) (Table 14)
[13] Productivity Commission (2014) *Access to Justice Arrangements*, Inquiry Report No. 72, p 777
[14] Turnhell & Murphey *Signs of Safety Child Protection Approach and Framework: Comprehensive Briefing Paper* (August 2014), Resolutions Consultancy pg 8
[15] Ibid pg 8

It is the experience of AFLS that legislated reunification attempts often do not occur. Instead, a yound child, often a new born baby, will be taken by DCPFS into a 2 year protective order with little, or no, attempts made at reunification. Then at the expiration of the 2 years, the carer often with DCPFS blessings, seeks an until 18 Order and / or applies for adoption.

3.4 Forced Removal of Aboriginal Children

Whilst removal of young children from their families on a permanent basis may sometimes be necessary, for it to be occurring without consistent attempts to reunify a child with support to the child's family risks the dangerous type of practice that saw Aboriginal children removed en masse from their families and many other children tragically displaced through forced adoptions prior to the 1980's.

How can a child by the age of 2 years old, having been removed since birth, be labelled too 'disadvantaged' to remain or be reunited with his or her family? How can the future of the child be guaranteed better with an adoptee parent until that child is 18 years old? Or how can anyone be certain the birth parents will remain a permanent "risk" until a child turns 18 years old?

In the sixties and seventies, a single parent upbringing was justification enough for the 'disadvantaged' tag. In such an environment, it was believed a child would live in poverty and despair, with little hope of a successful and happy life.[16]

With Aboriginal children, the prospect of being raised in an 'inferior culture' was enough to justify mass removal to institutions. A 'clean break' as early as possible would be a 'new start,' deliverance from the dark ties attached to the birth family being relinquished once and for all.

We now know the misery and suffering that adoptees and relinquishing mothers underwent from these practices, reflected in the over-representation of self-harm, suicide and mental illness among victims. Biology alone does not make a good parent, but estrangement from family and culture carries its own very toxic and devastating brand of disadvantage, and is a fundamental abuse of human rights.

The single mother stigma may be gone. But not the practice that mothers who are subjected to family violence from their ex partners are not fit to care for their children, even when the perpetrator is incarcerated and no longer a danger. Family violence, with accompanying physical and emotional abuse and neglect, is particularly rife among Aboriginal women, an all too common reason for the removal of Aboriginal children. Unfortunately for these mothers, the 'neglect' of their children is frequently brought about through violent family situations - accounting for 40.6 percent of cases.

For these women, their families and the children, more permanent removal of the children is crushing, maybe the ultimate factor in ruination of lives.

Yet rather than help families to remove the fear of violence from their lives with a chance to build a future, the answer is often to take away the children.

[16] Swain and Howe 1995 at page 151

And there are more sinister connotations to removal as well. Where single mothers were 'punished' in the past for their 'immorality,' it seems that women in violent relationships are similarly punished for their poor choice of partner, or for remaining in their communities and homelands, or simply because they were victims of violence.

Any legislation based on subjective criteria about 'advantages' of removing children requires careful scrutiny. Instead of adoption and long term care for these children, there should be wider resources put into helping families recover and reunify, and to fostering greater community ownership where Aboriginal people play a role in the safety of their own children. We should take lessons from the past and acknowledge that such a solution comes at a far lesser cost emotionally, socially – and economically.

The following case was heard on 15 February 2017. It encompases many of the concerns the AFLS has about removal of Aboriginal Children from their mothers. This is not a stand alone case of the management of Aboriginal children by DCPFS in rural WA. Although this case is not directly about an application for adoption, the Court found it likely that orders being sought would inevitably lead down that path, even though the Mother in this instance was not a risk to her baby.

Case Study 1

Decision 2017

DCPFS brought an application in the Children's Court in a remote region seeking consent orders between a Mother called M and Father called F, for baby A to have a permanent order for care with foster carers.

The foster carer was the paternal aunt and sister, both located a significant distance from the M.

The Court was not satisfied DCPFS had acted in the best interests of the child in all the circumstances. The Court held there would be no order.

Additionally, the Court expressed dissatisfaction about the conduct of the case worker involved in separating M from her baby A, with invasive ongoing involvement of DCPFS.

M & F resided in a small town. F was persistently violent towards M and M could not flee the relationship. F regularly breached his Violence Restraining Order requiring police assistance. On one occasion F trapped M in his paternal aunt's home. The paternal aunt was an approved carer by DCPFS. Finally M managed to call for help under a ruse. When police attended, M ran out distressed.

Despite this, DCPFS described the paternal aunt's house as safe for A, free from violence. At no time did DCPFS address whether this placement met the objects of the Welfare Act and whether it was in the best interests of A. The application for consent orders before the court included the paternal sister as an approved carer, also questionable in the circumstances as F mobilised his family to contact M in breach his violence restraining.

DCPFS removed A when A was 1 day old. A was removed because of F's violence towards M. Three weeks later, F was incarcerated. A was about 3 weeks old at the time. All issues with A's safety were resolved upon F's incarceration. However, A was not returned to M's care.

Instead, the case worker began imposing a series of new requirements before M could reunify with A. This included M skyping with A, as A had been removed from country and placed about 2000 kilometres away in the city. No other tangible efforts were made by DCPFS at reunification.

Even before M was able to comply with DCPFS requirements to skype with a 3 week old baby, DCPFS changed their mind again and sought a permanent order for the child to remain in care for another year.

In refusing to make an order for A, the court made the following findings:

1. Section 7 of the Welfare Act provides the paramountcy principle and section 8 the factors relevant to determining the paramountcy principle. The question of harm as set out in section 8 needs to be significant in nature.
2. The evidence led by DCPFS was not highly persuasive of further harm to A.
3. M had demonstrated capacity to protect her other children by arranging with the maternal Grandmother to keep the children safe during times of violence with M.
4. DCPFS was only interested in taking baby A into care.
5. DCPFS had considered the other children safe - until DCPFS wanted to seek an order for A. The court found the timing of DCPFS's new neglect concerns "suspicious to say the least".
6. DCPFS did not consult with Aboriginal persons pursuant to the Welfare Act.
7. DCPFS requiring M skype with A at only 3 weeks of age for reunification, was unreasonable.

8. The significant distance put between M and A was noted.
9. Placing A with the paternal family gave F, the violent party, access to A during his jail term as well as when he was released from jail.
10. The paternal family's abuse against M was not considered by DCPFS and placing A with them was untenable.
11. Other potential carers on M's side were provided to DCPFS but not explored.
12. M likely signed consent orders for the paternal family to be carers out of duress by DCPFS.
13. There appeared to be a personality clash between M and the DCPFS case worker.
14. DCPFS appointed its most inexperienced case worker, with inadequate knowledge or understanding of Aboriginal cultural issues or expertise in complex cases.
15. The affidavit evidence of DCPFS was inconsistent with proven facts known to the Court.
16. Neither parent were adequately or properly supported by DCPFS to enable reunification.
17. A would be separated from her siblings.
18. Another year of A being in care would create a situation whereby A would never likely return to M because of attachment to her carers.
19. The Court accepted that DCPFS honestly believed it had worked with the family in the best interests of A, but advised DCPFS to do "some soul searching" as to "where their decisions are coming from".

In the experience of the AFLS, the discreet issues contained in Case study 1 are not unique to our clients. Had orders as sought by DCPFS been made, it was predictable that Baby A was on a path to likely being adopted by her carers.

Recommendation 1

The Adoption Act 1994 be amended to include express provision for the President of the Children's Court to publish cases at first instance of legal import and or legal interest, in an appropriately anonomised format to keep the public informed of adoption practices.

Recommendation 2

Amend Section 24 (2) (a) & (b) of the Adoption Act - Consent Requirement - Court may dispense with - to **exclude** Aboriginal Children from having a dispensation for the requirement of a persons's consent when a child is adopted.

Recommendation 3

The Adoption Act be amended to change the provisions in sections 55A, 55C, and 67 to prevent Aborignal Children being adopted after 2 years in the care of DCPFS with such change to make Adoption of Aboriginal Children the exception for permanent care and not the norm.

Recommendation 4

The Act be amended to include a requirement for siblings to be kept together and placed in the same home environment except in exceptional circumstances that prevent it. Keeping Aboriginal Children together should be the default position of the Act.

Recommendation 5

The Adoption Act be amended to make it compulsory for DCPFS to engage in Active Efforts to support a family, without reference to inadequate housing, substance abuse and non-conforming to social behaviours, unless those issues have caused significant harm to the child evidenced by proven facts.

Recommendation 6

Amend section 134 of the Adoption Act to require;

1. All children subject to adoption applications be legally represented.
2. Legal representation for children be referred to as " Child Representative"
3. Clarify the basis upon which the legal representative acts; on instruction or best practice guidlines
4. Legal representation for children to be culturally competent for Aboriginal children.

Recommendation 7

Amend the Act to include reference to mandatory monitoring of adoption placements with scope for return of the children to their protective parent if the placement does not provide a measurable improvement to the child's home experience within a specified parameter.

Recommendation 8

The Adoption Act be amended to include reference to a special requirement for DCPFS competence when intervening in Aboriginal families, with competence to include understanding of skills, knowledge and values relevant to the Aboriginal experience.

Recommendation 9

The Adoption Act be amended to repeal section 16A (a) and (b) and expand section 16A (c) to include express provision for each region to have an external body, group or organization separate to DCPFS to be appointed to review and monitor all Aboriginal out-of-home care cases that result in an application for adoption and for and the body group or organization to consist of Aboriginal members with cultural connections to country and kinship.

Recommendation 10

Amend the Adoption Act to include express recognition of Aboriginal Attachment to the extended family as different to the Notion of Western Attachment to the nuclear family

Recommendation 11

Amend the Adoption Act to exclude an Aboringal child being eligible for adoption if that child was apprehended by DCPFS soon after birth on the basis the child was “likely” or “it was possible” or “might” have suffered harm without any other tangible or factual reason for the baby being taken into care.

Recommendation 12

Amend the Adoption Act to clarify that adoption is not an appropriate alternative for a child who has a protective parent in cases where that protective parent is the victim of domestic and family violence.

Recommendation 13

Amend the Adoption Act to prevent a child from being placed with the perpetrator of domestic or family violence or his/her family.

Recommendation 14

The Act be amended to enact full and frank disclosure of all information related to an adoption application to all paries including birth parents in the case of children in the permanent care of DCPFS unless expressly prohibited by the Act and for such disclosure to be required within specified time frames.

Recommendation 15

The Adoption Act be amended to include requirement for an Aboriginal language interepreter fluent in the langurage of the regional area to be appointed to ensure all Aboriginal parties are fully informed of the circumstances and processes during an adoption application.

Recommendation 16

The Adoption Act be amended to include requirement for all DCPFS staff to be trained in understanding trauma and histories when working with Aboriginal People.

4. Transparency in Adoption Practices

It is important to note the current lack of transparency in WA child adoptions. All applications to the Children's Court and the outcomes go unreported, unless a matter is appealed.

This lack of exposure of DCPFS practices, external monitoring or review of cases by the legal profession and other interested parties, is of significant concern to the AFLS. The practices of DCPFS in Case Study 1 remain unknown to anyone not directly involved with the matter. Nor will the findings of the Magistrate involved and the significance of case law created by decisions be available for external legal consideration.

Effectively, incidences are only known to those involved. Neither the legal profession nor the wider community are privy to circumstances surrounding adoption practices in WA.

AFLS is of the view there is a need for transparency. When dealing with children and especially in the context of vulnerable populations, such as Aboriginal families in WA where there is a history of paternalistic, intergeneral trauma and damaging social practices, transparency and compliance with legislation is paramount.

The existing culture of secrecy must change and become transparent, not only for the sake of the children involved but also for the credibility of the agencies that meter out actions and decisions. As stated by Lord Acton in the English case of *Roe v Minister for Health*;

> "Every thing secret degenerates, even the administration of justice: nothing is safe that does not show how it can bear discussion and publicity." [17]

Lord Denning M.R in his judgment in *Argyll v Argyll* [18] stated that the scope of 'public interest' is open-ended.

The AFLS does not advocate disseminating confidential information about adoption matters. But does recommend that checks and balances external to DCPFS should be in place to review all permanent out of home placements for Aboriginal children. The soaring and disproportionate numbers of Aboriginal children in out-of-home care requires it.

4.1 Adoption of Aboriginal Children is not a better alternative to Care & Protection Orders

The concept of permanence in adoption reflects the Western notion of stability within a household, attachment to the nuclear family and a requirement that the arrangement continue throughout childhood.

[17] *Roe v Minister for Health* (1954) 2 All ER 131
[18] *Argyll v. Argyll* [1967] Ch. 302,331 if.

Although Aboriginal cultures vary from group to group and between Aboriginal Countries, the practices of child rearing remains constant throughout. The Aboriginal way is "growing up" children, an approach conceptually different to western cultural precepts.[19]

Although the mother remains important in the care of a baby after it is born, the baby becomes part of the community group at birth. All members of the community engage with the baby and assist with the care of baby in a way not practiced in the Western tradition.

> "The details of kinship are complex… kin relationships and the associated obligations extend well beyond the immediate family group. Children are always surrounded by a range of people who can respond to their needs. For example, a child has several fathers and mothers. A father's brother is classified as, and is called, a father. The mother's sister is considered to be, and is known, as a mother (Edwards 1988)."[20]

It is not appropriate to impose Western cultural values for child rearing that undermine the Aborigninal experience on Aboriginal families in crisis. It is clear it is not working. It is the AFLS's position that out-of-home care placements based on western attachment theory deny the Aboriginal child a right to his or her heritage and culture, and perpetuates paternalistic practices against Aboriginal people.

Current practice also continues the disenfranchisement of Aboriginal people, after generations of children being removed from their kinship groups, irretreveably damaging many family relationships.

History has proven it is not in the best interest of the Aboriginal child to be removed for extended periods of time. The importance of community and kinship in raising a child is best summarized as follows;

> "The security of an Aboriginal child would be derived from a network of regular caregivers and acceptance in their community. Attachment in a network of multiple caregivers, takes on special significance. The opportunity of forming an enduring affective relationship with more than one specific person in the community allows the support and maintenance of the child's emotional health throughout their life span.
>
> Child rearing is literaly a family and community concern and is not confined solely to the parents of the child." [21]

The over representation of Aboriginal people in State care has existed since the 1930s.[22] Because of this tradition, Aboriginal families may be disproportionately placed under

[19] SNAICC (2011) *Growing up Our Way: Practice Matrix*

[20] SNAICC (2011) *Growing up Our Way: Practice Matrix* pg 32

[21] SNAICC (2011) *Growing up Our Way: Practice Matrix* pg 31

[22] H.Douglas & T.Walsh, *Continuing the Stolen Generations: Child Protection Interventions and Indigenous People* International Journal of Children's Rights 21(2013) 59-87

surveillance by DCPFS. The history is a significant trigger for attention on Aboriginal families.[23]

> "…..the loss of identity experienced by Stolen Generation children continues to be experienced by many Indigenous children who are removed from their famiies and placed in foster care, often far away from their communities. This loss further compounds the inter-generational problem, paving the way for yet another generation of institutionalized children."[24]

Sections 33A and 33B of the Children and Family Services Act 2004 are relied upon by DCPFS to focus on Aboriginal women about to give birth. Even unborn babies can be investigated by DCPFS under the Welfare Act. This, used in combination with Sections 28(2) where the test is "likely to suffer" harm, provides individual case workers a tool to arrange child care consistent with their own child rearing framework and in some instances, possible biases.

In fact, the wording in section 33B of the Welfare Act permits;

a) a DCPFS case worker to decide if an unborn child is "likely to suffer" harm after birth even if the mother has no history of harming a child in the past; and

b) for the case worker to meet with an authorized 3rd party to develop a plan for the care for the child (removed from the mother);

c) take the baby into care immediately after birth and place the baby in foster care.

The Adoption Act should take note that Aborignal children made the subject of adoption applications are often babies taken from their mothers at birth by DCPFS after inadequate or inappropriate attempts at reunification during the first 2 years of State care.

The Adoption Act needs to be amended to repeal adoption of Aboriginal children unless in long standing circumstances of real & imminent danger without any chance of future change to that danger and even then, placements should not be with any person with a history of violence. In such circumstances, a 2 year care and protection order is adequate to ensure a child's safety and wellbeing, without the need for the permanency of adoption as the solution.

Reunification should remain the single focus of all child placements throughout childhood and all steps necessary should be taken to achieve this outcome. Adoption prevents this from occurring and therefore should be a last resort for Aboriginal Children with no other genuine prospects of stability.

No Aboriginal child should be at easy risk of removal until adulthood because it is not possible to predict if the future holds better alternative care options for that child. In the context of Aboriginal child rearing, flexibility is a constant.

[23] Ibid
[24] Ibid pg 63

4.2 Separation of Siblings

Case study 1 exempflies the experience of the AFLS that children are commonly separated from siblings when care and protection placements are made, with little or no consideration of how this separation may affect the child's family relationships over time. Even within the Western notion of child rearing, it is not acceptable for siblings to be separated. This dynamic understanding of child rearing is reflected in the best interests principle in international child rights law.[25]

Canadian research has found a direct correlation between lack of continuity in the personal identity in First Nations youth and the high rates of youth suicide in those populations. Importantly, the increased rate of youth suicide falls to zero in communities where cultural connection, practice and self governance factors are present.[26]

Although circumstances of risk may not facilitate placement of a child with its parents, proper consideration to keeping siblings together should remain paramount in all cases. Separation should only occur as a last resort after full and earnest attempts to keep siblings together.

4.3 Consider parents as carers, before placing a child for adotption.

Given the importance of a child maintaining contact with kin and country, failure to explore family possibilities is a serious indictment on the rights of the Aboriginal child as mandated in the Act.

In the experience of the AFLS, often a mother whose child has been apprehended is still the best option as a carer. There is provision for parents to have care of their own child while working to satisfy DCPFS requirements. However, this seems to rarely be considered by DCPFS or even understood as a possibility by the parent, given its rarity.

Consequently, a child might be eligable for adoption in circumstances where the protective parent could have cared for the child under DCPFS supervision. And at the end of 2 years of welfare imposed separation, the child and parent become permenatly separated because the DCPFS appointed carer has formed an attachment and wants to adopt the child and DCPFS has not taken steps to reunify the child with it's parents.

Aboriginal parents engaged with DCPFS often have a history of involvement with child protection over generations, where English is not the first language or where they live in remote and rural areas. Instead of presuming that parenting difficulties result from parental inadequaties, social disadvantage of those parents should be considered and support provided as best practice.

[25] Rutter M (2008) Implications of Attachment Theory and Research for Child Care Policies in Cassidy and Shaver *Handbook of Attachment: Theory, Research and Clinical Applications* London Guilford Press

[26] SNAICC (July 2016) *Achieving Stability for Aboriginal and Torres Strait Islander Children in Out-of Home Care* pg 7

> "neglect (*of a child*) should be considered to be a sign that the family is in need of support, rather than as a reason to remove a child."[27]

Placing children with parents, ideally for reunification, should be the focus of DCPFS involvement. However DCPFS uses its power to keep children away from parents it has historically considered a risk.

This is counter to the Act's mandate to facilitate reunification with parents before adoption is considered.

Under the United States model, the State must satisfy the court that "Active Efforts" have been made to provide the services and programs required by a family to enable them to care for the child before the State can remove a Native American child from their family.[28]

"Active Efforts" is a higher standard than "Reasonable Efforts". And inadequate housing, alcohol abuse, and non-conforming to social behaviours are **not** clear and convincing evidence that a child will suffer damage by remaining with its parents.

It is fair to say that active efforts in this context are not being practiced in WA.

4.4 Compulsory Independent Children Lawyer

In the experience of AFLS, a legal representative in adoption cases is rarely appointed if ever.

Section 134 of the Adoption Act refers to legal representation for the child. It is discretionary.

It is the contention of AFLS that every child before the Court persuant to an adoption application, because it is considered in need of protection, requires separate representation by a legal practitioner. The competing nature of the parties involved in protection cases requires the interests of the child be independently represented.

Further, the term "legal practitioner" as referred to in the Adoption Act does not clearly specify the sole representation of only the interests of the child. For this reason, AFLS suggests the name of "legal practitioner" for children be changed to "Child Representative"

All legal representation for Aboriginal children should be by lawyers, preferably Aboriginal lawyers trained as an Independent Children's Lawyer (ICL) and competent in Aboriginal culture, and community complexities.

[27] H.Douglas & T.Walsh, *Continuing the Stolen Generations: Child Protection Interventions and Indigenous People* International Journal of Children's Rights 21(2013) 59-87

[28] Ibid

Placements without legal representation leave both the parents and the child vulnerable. Research has shown that people who repeatedly experience negative events over which they have no control may start to assume it is not possible to control situations.[29]

Many Aboriginal people see themselves as powerless to oppose to DCPFS intervention, partly because of generations of their families being taken and likely because they were removed as children as well.[30]

> "With Indigenous parents…. Ive noticed that a lot (of them) think that once child safety becomes involved that's the end of it for them, they can't do anything more, they can't challenge the process. They don't understand that they can try and negotiate with the department to seek some different orders, If orders are indeed necessary"[31]

AFLS considers it necessary for a legal representative to be appointed for the child in adoption applications so the aboriginal voice is heard before orders are made.

4.5 Monitor Adoption Placements

In the AFLS experience there is no follow up by DCPFS once adoption orders are made about the placement of the child. It is therefore possible that unmonitored placements end up no better than the environment from which the child was taken, and sometimes worse. Had the Orders sought been granted in Case Study 1, the child may have been positioned into the violent environment the placement was intended to avoid.

If children are to be put into out-of-home care, it is the AFLS's position that the placement home must be tangibly better for the child. Equal or less care provided by the adoptive parents is not acceptable and is not a reason for a child to be adopted.

Without monitoring the child after a permanent placement is made, the quality of experience of that child is unknown.

[29] H.Douglas & T.Walsh, *Continuing the Stolen Generations: Child Protection Interventions and Indigenous People* International Journal of Children's Rights 21(2013)

[30] Ibid

[31] Ibid pg 64

4.6 DCPFS Case Workers need to have adequate expertise in Aboriginal culture to manage adoptive cases.

If child protection workers are to work effectively with Aboriginal people they must be culturally competent to do so. Three interactive components of cultural competency have been identified by Weaver in comprehensive research:[32]

1 Skills;

2 Knowledge; and

3 Values.

Skills entail general skills such as problem solving and comunication and containment skills (including patience, tolerating silence and listening).

Workers must have knowledge of Aboriginal diversity and their own self awareness of stereotypes, a knowledge of history and culture and contemporary realities.

As to values, workers require self-awareness, humility and willingness to learn, respect and open-mindedness and a clear understanding of social justice.

For a DCPFS case worker to be culturally competent to work with Aboriginal people, we suggest that worker needs to be highly skilled and experienced.

However, as can be seen in Case Study 1, workers are not always competent to fulfil their role. Lack of competency compromises both the worker and the family and leaves the child potentially vulnerable with the decisions that are made.

Ideally, workers with a minimum number of years experience and with a proven record of successful reunifications would be situated in DCPFS districts with high Aboriginal populations, such as the Pilbara and the Kimberley

AFLS also considers the understanding of trauma, particularly intergenerational trauma, without understanding history and trauma, workers will never understand Aboriginal history and culture.

4.7 Exernal Body to Monitor Adoption Applications

At present and as afore mentioned, there are no steps in place to externally monitor or even review the current practices of DCPFS, other than the Court at first instance. However, as also canvassed, the findings of the Court at first instance are not publishable.

[32] H.Douglas & T.Walsh, *Continuing the Stolen Generations: Child Protection Interventions and Indigenous People* International Journal of Children's Rights 21(2013) 59-87

There is no current system in place for persons external to a case to know if children subject to adoption are managed according to current legal requirements as stated in the Act.

It would be useful for WA to look to Manatoba in Canada. Manatoba has enacted signfificant changes to it's child protection laws, specifically to address issues surrounding First Nation difficulties, legislating for proper representation and cultural understanding.

Ideally an entirely separate branch of DCPFS might be legislated to take over management of adoption practices for Aboriginal children given the disproportionate number of Aboriginal children in our out of home care system.

4.8 Principle of Community Participation

As already canvased above, Community Participation does not always occur in Aborignal cases and often without explanation as to why.

It is the AFLS position that in administration of the Act, a kinship group, community group or representative organization must always be given opportunity and assistance to participate in the decision making process under the Act, and that such assistance is appropriate for every Aboriginal case. Unless respect and recognition are provided to Aboriginal communities, so they might make their own decisions about controlling the welfare of their own children, the current crisi in child care will likely continue.

4.9 Allow for Different Attachment to Care Givers in the Aboriginal Context

Attachment theory is a psychological model that attempts to describe the dynamics of long-term and short-term interpersonal relationships between humans. The theory underpinning permancy planning is attachment theory; the sooner an enduring attachment with a carer is established, the more stable the child and the better the outcome for the child.

Studies on Aboriginal child rearing practices have found this approach inconsistent with Aboriginal child rearing practices.[33]

> "The nuclear family is not the most common residential form; it is the extended family that is the norm (ed. Smith 2000). Typically, an Indigenous household consists of a small, multi-family, multi-generational core of kin with a highly mobile fringe of transient members. The responsibility for child care and rearing is distributed widely amongst a range of kin (Daly & Smith 1999), making any Western notion of 'primary carer' meaningless"[34]

[33] Department of Family and Community Services (2002). *Warrki jarrinjaku jintangkammanu purananjaku = Working together everyone and listening : Aboriginal child rearing & associated research : a review of the literature.* Dept. of Family and Community Services, Canberra

[34] Department of Families, Community Services & Indiginous Affairs (2004) *Occasional Paper 15 – The Growing Up of Aboriginal and Torris Islander Children: A literature Review.* Pg 25

It is inappropriate for DCPFS to continue to use attachment theory as a guide in determining what is in an Aboriginal child's best interests for placement. To do so is paternatistic and ignores the importance of culturally relevant Aboriginal child rearing practices.

> "An aboriginal child's identity is determined by their parents. A child is born into their tribal/clan practices, customs and law. In traditional Aboriginal communities, this may determine who they can marry and what they can eat, and identifies the part of the courtry for which they are responsible. This also includes their religious practices and laws to abide by. The child's kinship system determines this."[35]

4.10 Support the Non Abusive Parent in Domestic and Family Violence Families

The correlation between child abuse and domestic violence is well recogised.[36] Children growning up exposed to family violence are vulnerable to abuse, such as;

1. physical abuse – approximately 60% occurs in families where there is domestic violence
2. child sexual abuse – perpetrators use violence against the protective parent to conceal their abuse of a child
3. neglect – over 80% of child deaths in WA revealed family violence as a contributing factor.

The AFLS maintains that victim safety and perpetrator accountability are necessary to achieve positive change for children exposed to family violence. It should not however, penalize a protective parent from caring from their child.

In situations where a parent has engaged with DCPFS, was caring for the child at the time the matter came to the attention of DCPFS, and the concerns in relation to safety relate to the other parent, the parent who is fulfilling their responsibility should be able to retain parental responsibility without their child becoming eligible for adoption after 2 years of State enforced care.

The Victorian legislation has already addressed this issue, referred to as a Family Preservation Order, pursuant to Section 280(1)(c) *Children Youth and Families Act 2005.*

[35] SNAICC (2011) *Growing up Our Way: Practice Matrix* pg 65 Op cit

[36] Department for Child Protectin and Family Support (2013) *Western Australia's Family and Domestic Violence Prevention Stratey to 2022.*

4.11 Never Place a Child with the Family of a Perpetrator of Domestic Violence

The AFLS does not agree with placement of children with perpetrators of family violence or their families in the Aboriginal context.

Aboriginal women, the same as non Aboriginal, want domestic violence to stop. Domestic and family violence is a real concern in Aborigninal communities.[37]

In the experience of the AFLS some case workers approach to domestic violence is sometimes lacking in cultural competency. Often times mothers are told to "leave" their violent partner before the children will be returned. Case Study 1 is an example of this.

However, in addition to the same risk factors that non-Aboriginal women face when leaving violent partners, Aboriginal women also carry an additional consideration. Often an Aboriginal woman is focused on rehabilitation of the offender and restoring relationships within the family and community because to leave often means having to move a long way away from the community. This puts pressure on the victims of violence within the community setting in ways often unique to Aboriginal victims of violence.

It is not unusual for a woman to become the target of hostility from the perpetrator's family if she leaves the relationship, and particularly if the perpetrator is imprisoned.

Placement of a child with the perpetrator's family may effectively prevent the mother from having contact with the child or put her at risk from the perpetrators family. It also causes the child to be at risk of contact with a person known to be violent without adequate supervision. Again Case Study 1 exemplifies these concerns.

4.12 Interpreters

Different Countries within WA have different languages specific to each. Usually English is not the first language of people living in remote areas. This results in parents not necessarily understanding what they are told by case workers.

When dealing with Aboriginal people in remote areas and communities where English is a second or subsequent language, interpreters should be made available for discussions with case workers.

4.13 Conclusion

AFLS works at the front end of legal support for families experiencing removal of their children into State care - followed by permanent separation, often by adoption. There needs to be clear guidelines on supporting families to keep children connected to their family roots.

[37] Department of Families, Community Services & Indiginous Affairs (2004) *Occasional Paper 15 – The Growing Up of Aboriginal and Torris Islander Children: A literature Review.*

The consequences of getting the care of children wrong are well understood. For example, the over representation of Aboriginal people in our criminal justice systems.

Review of the Adoption Act needs to understand the context of how Aboriginanl Children become the subject of adoption applications and why there is over representation of Aboriginal Children entering into the permanent care system. Unless this is achieved, the "best interests of the child" principle is not being put into practice.

There is strong and plentiful evidence about the needs of Aboriginal children.

The development of a sense of belonging and self may be severely compromised when raised out of one's own family. The circumstances of the removal, the quantity and quality of ongoing contact with parents, relatives and their kinship groups and the ability to adapt to the new living situation will impact on the child's development. [38]

Childhood trauma and the resultant impact on development lead to poorer outcomes in adulthood across all spheres – relationships, education, health (physical, cultural, spiritual), employment, and economic independence.

> "The absence of ongoing support can lead not only to poor outcomes in existing cases, but can contribute to an inter-generational perpetuation of the dynamics that lead to child removal."[39]

It is imperative for the issue of culturally secure practice for Aboriginal people to be considered in the recommendations of this inquiry.

[38] SNAICC (2014) Family Matters: Kids safe in culture, not in care, Western Australian Issues Paper
[39] Allison, F, Schwartz, M, Cuneen, C (2014) Indigenous Legal Needs Project WA, James Cook University p 188