



Response to a Review of the *Children's Court of Western Australia Act 1988* – Discussion Paper

Aboriginal Family Legal Service WA

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1 Introduction

Aboriginal Family Legal Service (AFLS) welcomes the opportunity to provide a submission to the Department of Justice's Review of the *Children's Court of Western Australia Act 1988* (the Act) – Discussion Paper.

AFLS is a specialist Aboriginal Community Controlled Organisation (ACCO) operating under the Family Violence Prevention Legal Service (FVPLS) program, funded directly by the Commonwealth Government through the National Indigenous Australians Agency. AFLS provides specialist legal assistance and wrap around non-legal supports to Aboriginal and Torres Strait Islander people experiencing or at risk of family and domestic violence and sexual assault.

In Western Australia, the Children's Court has the jurisdiction to deal with protection and care applications brought on behalf of the Chief Executive Officer of the Department of Communities pursuant to the *Children and Community Services Act 2004* (CCSA). It does not have power to make parental responsibility/parenting orders under the *Family Law Act 1975* (Cth) nor the corresponding *Family Court Act 1997* (WA).

Young people who are charged with criminal offences and aged between 10 and 18 years at the time of the alleged offence also appear in the Children's Court of Western Australia.

AFLS highlights that Aboriginal people have suffered trauma throughout their lives as well as intergenerational trauma from the ongoing effects of colonisation. Sadly, the court experience for many families contributes to retraumatisation of children and parents.

AFLS seeks to provide feedback to the Department of Justice's Review given the importance of this area of law to Aboriginal people in Western Australia.

AFLS submission to selected terms:

Question 3: Non-criminal jurisdiction of the Court

- (a) Are any changes required to the Act with respect to the non-criminal jurisdiction of the Court?

Yes, see below.

- (b) If your response to (a) is yes, please explain why and what changes you would suggest.

There is currently nothing in the Act to protect Aboriginal children engaged in the non-criminal jurisdiction of the Court, including applications made with respect to a child under the *Children and Community Services Act 2004* (s. 20 (1)(a)).¹

We note the commencement of the *Children and Community Services Amendment Act 2021* (Amendment Act) in law from 1 May 2022, which introduced key changes into child protection legislation regarding:

- Aboriginal children, families and communities
- 'Written proposal' for the wellbeing of a child
- Special guardianship orders
- Servicers for children in care and care leavers

¹ *Children and Community Services Act 2004* (WA) s 20(1)(a).

- Other miscellaneous changes.

Placement Priority and Cultural Support Planning

Under the Amendment Act, there is a new order of placement priority for an Aboriginal child, consistent with the Aboriginal and Torres Strait Islander child placement principle set out in section 12 of the *Children and Community Services Act 2004* (the Act). Under the Amendment Act, the new order of placement priority will be placement with:

- a. A member of the child's family
- b. An Aboriginal person in the child's community in accordance with local customary practice;
- c. An Aboriginal person in close proximity to the child's community;
- d. Either an Aboriginal person (who could be anywhere in WA) or a non-Aboriginal person in close proximity to the child's community; or finally,
- e. A non-Aboriginal person (who could also be anywhere in WA).²

Additionally, the Amendment Act now requires that before making a placement arrangement for an Aboriginal child in care, consultation must occur with *each of* the following:

- Aboriginal members of the child's family; and
- Subject to regulations, an Aboriginal and Torres Strait Islander representative organisation (ARO) approved by the CEO; and
- An Aboriginal officer of Communities who has relevant knowledge of the child, the child's family or the child's community.³

The Children's Court Act must be amended to reflect the new requirements around priority placement of Aboriginal children with family or a member of the child's Aboriginal community and consultation to inform placement and cultural support planning. We consider this essential to ensuring that Aboriginal children are not disadvantaged in the court system, when non-Aboriginal people are making decisions about their care arrangements.

Written proposal for the wellbeing of a child

Further, the Amendment Act has introduced revisions to s. 143A of the *Children and Community Services Act*, requiring that 'written proposals' provided by the Department of Communities to the Court outlining proposed arrangements for the wellbeing of a child if a protection order (time limited) or extension, or a protection order (until 18) for a child has been applied for, must outline proposed arrangements for safeguarding and promoting the wellbeing of the child, including:

- Arrangements for promoting, where appropriate, the child's relationships with family or other people significant to the child;
- For Aboriginal children or children from culturally and linguistically diverse backgrounds, arrangements for placement in accordance with the Aboriginal and Torres Strait Islander child placement principle or CALD placement guidelines.⁴

² *Children and Community Services Amendment Act 2021* (WA) s 11(2)(c).
Children and Community Services Act 2004 (WA) s 12.

³ *Children and Community Services Amendment Act 2021* (WA) s 32.
Children and Community Services Act 2004 (WA) s 81.

⁴ *Children and Community Services Amendment Act 2021* (WA) s 62.

The child's cultural support plan must also be attached to the report and the proposal for an Aboriginal child must outline the placement consultation under s. 81. For protection orders (time limited), the report must outline proposed arrangements for working towards the child's reunification with parents or an explanation as to why this would be contrary to the child's best interests or not practicable.

The Children's Court Act must be amended to reflect the changes to written proposals to the Court, per the Amendment Act. It may do this through revisions to s.20 Non-criminal jurisdiction as regards children, which provides that the Court has jurisdiction to hear and determine all applications made with respect to a child under the *Children and Community Services Act 2004*.

Special guardianship orders

The Amendment Act explores a wider range of care arrangements for Aboriginal children in care. A protection order (special guardianship) (SGO) is an order that appoints one person or two people jointly, to be a child's 'special guardian'. The order gives parental responsibility for the child to the special guardian, to the exclusion of any other person, until the child reaches 18 years of age or the order is revoked under the Act. The child on an SGO is not in the CEO's care, and the special guardian does not have to consult with the Department of Communities.

When applying for an SGO for a child, the Department must provide the Court with a report that addresses the suitability of the person to be the child's long-term carer and the person's willingness and ability to. The report also has to outline the proposed arrangements for the child's wellbeing if an SGO were to be made (s.61).⁵

Under the Amendment Act, for Aboriginal children and children from a CALD background, the Department report must:

- Address the Aboriginal and Torres Strait Islander child placement principle or the guidelines for the placement of a CALD child; and
- Include a copy of the child's cultural support plan.

Before making an SGO for an Aboriginal child in favour of a non-Aboriginal person or persons only, the Court will have to consider a written report from an Aboriginal agency or suitably experienced Aboriginal person. This legislative requirement must be reflected in the Children's Court Act.

Dandjoo Bidi-Ak

The Dandjoo Bidi-Ak Protection and Care Therapeutic Pilot Court is an innovative initiative by the Children's Court, Department of Justice and Department of Communities. Notwithstanding concerns we have about the limited engagement of First Nations communities and services in the co-design and development of the Pilot, we strongly support the aims of the Pilot – to assist families to address the issues that cause them to come before the court in a holistic, therapeutic and culturally informed way, within a less formal, intimidating and adversarial environment.

Children and Community Services Act 2004 (WA) s 143A.

⁵ *Children and Community Services Amendment Act 2021* (WA) s 27.

Children and Community Services Act 2004 (WA) s 61.

Practice Direction 6 of 2021: Protection Proceedings of the Children's Court⁶ outlines at Direction 11. that:

- The Court is undertaking a Pilot List within the Protection and Care jurisdiction of the Court.
- The primary aim of the List is to encourage reunification between families.
- The Pilot List applies a non-adversarial, solution focused approach that incorporates the principles of therapeutic jurisprudence.
- The Pilot List is not subject to the same timeframes as the Protection and Care General List.
- The Court will assess the suitability of a matter for referral to the Pilot List by application of the Pilot Therapeutic List Eligibility Guidelines.
- Referral to the Pilot List is at the Court's discretion.
- Acceptance of a matter into the Pilot List is at the discretion of the judicial officer in charge of the Pilot List and subject to available placements.

Given that Dandjoo Bidi-Ak is a court of the Children's Court, and that the directions for its operation currently exist only in Practice Directions, we consider there should be legislative reference to the Court in the Children's Court Act.

We highlight that as a service provider, we have observed a number of challenges which impact on the ability of the Pilot to achieve its aims, including First Nations non-participation in the co-design and development of the Pilot, lack of clarity about the process for referral to the Pilot, lack of clarity about the JDFs and roles of court staff in the Pilot, lack of formality in the Court, decision making, interim orders and progress in the Pilot, and support services/linkage to support services. Nevertheless, we note that in July 2023, the Western Australian Office of Crime Statistics and Research allocated funding to Curtin University to conduct an Evaluation of the Dandjoo Bidi-Ak Therapeutic Pilot Court. The evaluation intends to:

- Assess the achievement of the aims and objectives of the Pilot Court
- Inform resourcing decisions and refinements to the Protection and Care therapeutic court model
- Assess the cultural safety and impact of court processes on Aboriginal children and families, and
- Contribute to improved outcomes for Aboriginal children and their families who are in contact with the juvenile system.

The outcomes of this evaluation may impact operational level aspects of the Pilot, but the therapeutic model itself will ultimately remain. For these reasons, we still consider that the Court should be legislated in the Children's Court Act.

Case Management List

Care and Protection cases started by the Department of Communities can be referred to the Case Management List at the Children's Court, which is a special court list for cases where a magistrate works closely on the case. The Department of Communities and at least one parent of the child at the centre of the care and protection matter must agree to participate in the

⁶ Children's Court of Western Australia, Practice Direction 6 of 2021: Protection Proceedings, https://www.childrenscourt.wa.gov.au/files/Practice_Direction_6_of_2021.pdf

Case Management List. Per Direction 15 of Practice Direction 6 of 2021: Protection Proceedings:

- Subject to resource availability, there will be a Case Management List within the Protection and Care jurisdiction of the Court.
- The primary aim of the Case Management List is to manage those cases that will benefit from intensive case management by a magistrate.
- The Case Management List is not subject to the same timeframes as the Protection and Care General List.
- The Court will assess the suitability of a matter for referral to the Case Management List by application of the Case Management List Eligibility Guidelines.
- Referral to the Case Management List is at the Court's discretion.
- Acceptance of a matter into the Case Management List is at the discretion of the judicial officer in charge of the Case Management List and subjective to available placements.

We consider that the Case Management List is generally operating well and for reasons similar to Dandjoo Bidi-Ak, should therefore be legislated in the Children's Court Act, in accordance with Practice Direction 6 of 2021.

Question 4: Review powers of President under s 40 of the Act

- (a) Should the President's review jurisdiction under s 40 of the Act be widened? If yes, why?

AFLS supports Judge Wager's views that 'it would be desirable for the President to have wider powers of review'.⁷ We note that the broadening of power to reconsider decisions is essentially procedural in nature and that the existing avenue of appeal to the Supreme Court would continue to be available.

Should the President's powers be extended, we recommend that section 40 of the *Children's Court of Western Australia Act 1998* (WA) be redrafted in clear language to provide that any magistrate's decision about decisions, sentencing options, sentencing and any other matters including mandatory sentencing, is within the power of review of the President.

- (b) If your response to (a) is yes, are there any orders made by a magistrate that should not be reviewable under the President's review jurisdiction?

NA.

Question 5: Scope of s 40 review

- (a) Should s 40 be amended to reflect that a s 40 review is a hearing afresh (hearing de novo)?

Yes, s 40 should be amended to reflect that a s 40 review is a hearing de novo. We support the model outlined in the NSW Practice Note DC (Civil) No 5 states at 2.1: For the efficient disposal of cases it is generally desirable to deal with appeals based on the transcript plus any new evidence. Any objection to this course should be notified to the Court well in advance of the hearing.

- (b) Should s 40 be amended to reflect that:

⁷ *DLD v The State of Western Australia* [2018] WACC 4 [36].

- i. The order the Court may substitute must be one the President could have imposed at the time of the original sentencing?

Yes, had they had all the available evidence.

- ii. The factual circumstances the Court can have regard to on review are those matters which are before the Court at the time of the review?

Yes, to enable the Court to incorporate changes in circumstances into sentencing.

Question 6: Release of court ordered reports

Should S 51A of the Act be amended to provide a specific power for the Court to release court ordered reports to appropriate service providers and other agencies?

AFLS supports amending s 51A of the Act to provide a specific power for the Court to release court ordered reports to appropriate service providers and other agencies, based on our understanding that sharing information may assist the judicial system and may also ensure that a young person is supported to access appropriate services that best support their diversion from the criminal justice system. We emphasise that there must be safeguards in place to appropriately protect confidentiality in these circumstances.

AFLS endorses comments by the Law Society of Western Australia with respect to the information sharing capability of the Children's Court, as follows:

The Law Society proposes that the formulation of a practice direction by the presiding President be prepared so that the relevant and pertinent reports are shared with the legal practitioners to deal with the application and information sharing, whilst ensuring safeguards are in place.

The Law Society also submits that the Children's Court should be able to make orders on a case by case basis about information sharing, such as where the Court deems it a safety necessity for a school to receive a report or a portion of a report, rather than open access being provided to schools and other parties.⁸

Question 7: Identification of Children

Should the Act be amended to ensure that the identity of a child who interacts with the criminal justice system, regardless of whether they are charged or appear in court proceedings, is not disclosed?

AFLS supports the Act being amended to ensure that the identity of a child who interacts with the criminal justice system, regardless of whether they are charged or appear in court proceedings, is not disclosed.

⁸ The Law Society of Western Australia, Letter to Manager Legal Policy and Analysis, Department of Justice: Review Powers of the President of the Children's Court of WA and the Information Sharing Capability by the Children's Court, 5 March 2019, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/2019MAR05-Letter-to-DoJ-re-Legislative-Amendments-to-the-Childrens-Court-DEPARTMENT-OF-JUSTICE.pdf.

Question 8: Judicial registrar of the Court

What should be the powers and functions of a registrar appointed to the Court?

AFLS supports the inclusion of a provision in the Act similar to section 10C of the *Youth Court Act 1993* (SA), which provides that ‘Subject to the regulations, judicial registrars may exercise such jurisdiction of the Court as assigned by the Judge of the Court or the rules’. It is our observation that the workloads of judicial officers and many legal professionals are too high, and better resourcing of courts would likely reduce some of this pressure.

Given that a person appointed to be a registrar of the Children’s Court is to be taken to also have been appointed as a registrar of the Magistrates Court and vice versa, it is suitable that the powers and functions of a registrar appointed to the Children’s Court are consistent with those identified in the *Magistrates Court Act 2004* (WA). This includes:

Any or all of the Court’s jurisdiction and powers other than the power –

(a) in the exercise of the Court’s criminal jurisdiction -

(i) to find a person guilty or not guilty of an offence;

(ii) to commit a person for trial or sentence to another court; or

*(b) in the exercise of the Court’s civil jurisdiction, to enter a final judgment on a case after trial;
or*

(c) to find a person guilty of a contempt of the Court.⁹

This may include functions and powers similar to those appointed to Children’s Court judicial registrars in Victoria as set out in the *Children, Youth and Families (Children’s Court Judicial Registrars) Rules 2021*, including:

- The power to deal with listed matters whether or not contested;
- To deal with Criminal Division matters whether or not contested;
- To deal with Criminal Division matters – including diversion – if uncontested;
- To deal with Family Division matters whether or not contested;
- To deal with any other uncontested Family Division applications;
- To perform the duties and exercise the powers of registrars.¹⁰

This also includes powers to:

- Issue any process out of the Court;
- Administer an oath or affirmation;
- Extend an interim accommodation of a kind;
- Abridge or extend the bail of a person granted bail in relation to a criminal proceeding;
- Endorse a warrant to arrest;
- Do various things under intervention order legislation.¹¹

⁹ *Magistrates Court Act 2004* (WA) s 28(1).

¹⁰ *Children, Youth and Families (Children’s Court Judicial Registrars) Rules 2021* [S.R.No.22/2021] as amended from 23/07/2021 by S.R.No.90/2021.

¹¹ *Children, Youth and Families Act 2005* (VIC) S. 535(3).

Question 9: Operation and effectiveness

- (a) Are there any changes that should be made to the Act to improve its operation and effectiveness?

We have concerns regarding Practice Direction 4 of 2023: Criminal Proceedings, of the Children's Court. These may be addressed through amendments to the Act.

- (b) If your response to (a) is yes, why would these changes make the Act more effective?

The Law Society of Western Australia raised key concerns regarding efforts made in Practice Direction 4 of 2023: Criminal Proceedings to deal with Children's Court matters in a timely manner, as follows:

Due to the following factors, these matters may not always be able to progress promptly:

- *The limited availability of private lawyers in this jurisdiction;*
- *The length of time it takes to build rapport with clients, many of whom have complex personal circumstances; and*
- *The difficulty of obtaining instructions or relevant reports where the matter involves Foetal Alcohol Spectrum Disorders or other mental impairment issues.*

Of particular concern to the Law Society are delays caused by inadequacy of support services necessary to provide timely forensic reports from health, mental health, specialist and Juvenile Justice services. These are often crucial to progress a proceeding.¹²

We support the Law Society's recommendation that there be a greater investment to support provision of these reports, and further that the operation of the Practice Direction be reviewed to ensure it is meeting its aims and that unintended consequences have not emerged. We echo the Law Society's concerns that a potential unintended consequence may be greater delay from a plea of not guilty to a trial date, due to possibility that more matters may be listed for trial while charge negotiations are in progress or for the purpose of obtaining disclosure for a matter not covered by paragraph 7.5 of the draft Practice Direction.¹³ We emphasise the particular relevance of these challenges for Aboriginal children and families, who are overrepresented in the Court system and experience complex and entrenched barriers to justice.

We emphasise that in matters where forensic reports are being provided from health, mental health, specialist and Juvenile Justice services, they must be prepared by

¹² The Law Society of Western Australia, Letter to His Honour Judge Hylton Quail: New Practice Direction – Criminal Proceedings in the Children's Court, 18 April 2023, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/2023APR18-Letter-to-President-Childrens-Court-re-New-Practice-Direction-Childrens-Court-Criminal-Proceedings.pdf.

¹³ The Law Society of Western Australia, Letter to His Honour Judge Hylton Quail: New Practice Direction – Criminal Proceedings in the Children's Court, 18 April 2023, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/2023APR18-Letter-to-President-Childrens-Court-re-New-Practice-Direction-Childrens-Court-Criminal-Proceedings.pdf.

culturally competent and accredited professionals, who have an appropriate level of understanding of Aboriginal culture and the severe disadvantage experienced by Aboriginal people in Western Australia.

Question 11: Operation and effectiveness

- (a) The Act commenced operation before the CCS Act, CP Act, *Sentencing Act* and YO Act. Given the interaction between these Acts and the *Children's Court of Western Australia Act*, are there any changes that need to be made to the Act to ensure consistency between these different legislative frameworks?

See response to Question 3.