Aboriginal & Torres Strait Islander
Legal Service (Qld) Ltd

www.atsils.org.au

Level 5, 183 North Quay Brisbane Qld 4000
PO Box 13035, George Street Brisbane Qld 4003
T: 07 3025 3888 | F: 07 3025 3800
Freecall: 1800 012 255
ABN: 116 314 562

26 February 2016

Department of Communities, Child Safety and Disability Services

Legal Policy and Legislation

Review of the Child Protection Act

GPO Box 806

BRISBANE QLD 4001

By email: CPAReview@communities.qld.gov.au

Dear Colleague,

Re: Review of the *Child Protection Act* (Qld) 1999

We appreciate the opportunity to make a submission in relation to the Review of the *Child Protec ion Act* (Qld) 1999 ('the review').

We commend the Government for its commitment to implementing the recommendation as outlined in 'Taking Responsibility: A Roadmap for Queensland Child Protection'.

The Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd ('ATSILS') provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Our primary role is to provide criminal, civil and family law representation (inclusive of child protection representation). We are also funded by the Commonwealth to perform a State-wide role in key areas of Law and Social Justice Reform, Community Legal Education and monitoring Aboriginal and Torres Strait Islander Deaths in Custody. As an organisation which for four decades has practiced at the coalface of the justice system, we believe we are well

placed to provide meaningful comment, not simply from a theoretical or academic perspective, but also from a platform based upon actual experiences. Consequently, we hope that our comments are of assistance in this very important area of much needed reform.

Yours faithfully,

Shane Duffy

Chief Executive Officer

Preliminary Comment

The Queensland Child Protection Commission of Inquiry commenced hearing evidence in July 2012 with the final address being made in March 2013. In July 2013 the Commission's report 'Taking Responsibility: A Roadmap for Queensland Child Protection 'was handed down. The 'Queensland Government's response to the Queensland Child Protection Commission of Inquiry Final Report' sets out the recommendation that were accepted, those that were accepted 'ín principle' as well as the various stages of implementation.

Our organisation is aware of, and has been consulted in relation to some of the Department of Justice and Attorney General's projects aimed at implementing the recommendations of the Commission of Inquiry.

We give below our response to the questions posed in the public consultation document for the review of the *Child Protection Act* 1999. Our response has taken into consideration feedback from our child protection practitioners around the State.

CONSULTATION QUESTIONS:

1. **Do you have any feedback on the implementation of changes made to the *Child Protection Act 1999* introduced in the first stage of the child and family legislative reforms?**

The first stage of legislative changes included the creation of the Office of the Public Guardian (Public Guardian Act 2014) which took on some functions of the former Adult Guardian and the function of the Child Guardian formerly held by the Commission for Children and Young People and Child Guardian.

We were provided with an opportunity to address our submission on the three Bills to the Health and Community Services Committee when the Bills were before the Parliament.

On the whole there has been positive feedback from our child protection practitioners about the creation and implementation of the role of the child advocates. This appears to have contributed to some extent to increased child focussed decision making in matters since that role was established in 2014. However it is our submission that there is still much work to be done in providing a better framework for these matters.

The child advocate's role is pivotal in advancing the best interests of the child/ren or young person/s directly to the department with respect to care needs, outside of the court process and as such that aspect of the role needs to be further reviewed.

Our position remains that, given the over representation of Aboriginal and Torres Strait Islander children in the Queensland Child Protection System special provision must be made for the appointment of Aboriginal and Torres Strait Islander staff to community visitor and child advocate roles. The commitment to identified roles may assist in removing the cultural barriers that may limit the child or young person's engagement with the child advocate. It is our submission that the child can then also be further supported to obtain cultural information on family and possible placement options. This role should also be re enforced for children on long term orders to ensure those children's connection to family and cultural needs continue to be met.

The Department of Communities, Child Safety and Disability Services' records show as at June 2016 55.9% of Aboriginal and Torres Strait Islander children are *in out of home care placed with kin, other Indigenous carers or Indigenous residential care services*. This in reality means the child placement principle is only working for just over half of Aboriginal & Torres Strait Islander children in care. What these statistics do not address is the suitability or cultural appropriateness of these placements. For example, there are instances where Aboriginal children are placed with Torres Strait Islander carers and vice versa. In other instances children are placed at a great distance from their biological families. This is not acceptable and needs urgent address.

The *Family and Child Commission Act* 2014 ('the QFCCA') established the Queensland Family and Child Commission, a statutory body reporting to the Premier to provide systemic oversight for child protection. The legislation provides that that the Commissioners must, in performing their functions ensure the *interests of Aboriginal people and Torres Strait Islanders are adequately and appropriately represented*. In our view the Commission must also focus on and give priority to scrutinizing whether the needs of indigenous children in Queensland in out of home care and in all aspects of the court system are met.

The Family and Child Commission's role includes among other things monitoring, review and reporting on the performance of the child protection system. We however note that the

Commissioners do not have the auditing and reporting functions of the former Commission for Children and Young Persons and Child Guardian. In our view a timely audit and dissemination of statistical information in relation to compliance with the child placement principal at S83 of the Child Protection Act is required due to the over representation of Aboriginal and Torres Strait Islander children in care.

Although the legislation was introduced in 2014 an Aboriginal & Torres Strait Islander Commissioner had not been appointed as at the end of 2015. We are now advised the appointment of the Aboriginal & Torres Strait Islander Commissioner is imminent.

Time and time again we see in our work clients who have experienced significant trauma and disassociation with family and land due to forcible removal over decades. This cycle cannot continue and needs to be addressed as a priority if the recommendations of the Queensland Commission of Inquiry are to be effectively implemented.

The renamed *Working with Children (Risk Management and Screening*) Act 2000 was introduced to streamline the Blue Card system. The changes to the Blue Card system have been extremely disappointing in that it has directly contributed to the rise in the rejection of Aboriginal & Torres Strait Islander kinship applications.

Inordinate delays in the consideration and issue of Blue Cards have had an overwhelming effect on our clients and on children, resulting in unacceptable disruptions to community and kin networks, and exponentially contributing to the likelihood of Aboriginal or Torres Strait Islander children being placed in culturally inappropriate placements. It is well established that such placements lead to long-term cultural identity crises that often sees these vulnerable children sucked into the criminal justice system. In our submission this is not the goal of protecting children on either a short or long term basis.

One practitioner reported that they had a client who waited 9 months for a response to a Blue Card application. In the meantime, children are living in less than ideal situations such as safe houses in the expectation they can live with their kin upon the completion of the Blue Card process. In remote communities such as Mornington Island and Doomadgee, often children are removed from their community and transferred to communities far from these areas thus cutting off or severely limiting access to family and culture. Given the long

periods of separation and the fact that more often than not children are placed with non-Indigenous carers the resultant cultural identity crisis continues to have a significant impact on these children.

In our view Blue Card applications should be prioritised for Aboriginal and Torres Strait Islander carers. In a child's life six months is an unreasonably long time. Blue card applications are known to take longer to consider with no feedback about the progress of the application to both the child and carer.

We also have concerns that the Blue Card Services are unable to cope with the large amount of applications they receive. In our view the current arrangements for assessing Blue Card applications should be reviewed with priority being given where Aboriginal and Torres Strait Islander children are concerned. It is unreasonable that a child should be removed from their family and community, and disconnected from their culture, simply because the prospective carer is waiting on a Blue Card. The damage to both the child and its family is immeasurable.

2. What should be the purpose of Queensland's child and family legislation?

The current purpose of the Act is to provide for the protection of children. We support the broadening of the purpose of the act to include to following provisions:

- Provisions that promote the wellbeing of children and young people;
- Provisions that acknowledge the primary role of parents, families and communities in safeguarding and promoting the wellbeing of children with a requirement for mandatory early intervention and community support;
- Provisions that provide for the protection and care of children in circumstances where their parents have not given, or are unlikely or unable to give, that protection and care;

- Provisions that establish and promote, and assist in the establishment and promotion, of services and facilities within the community and advance the well-being of children, young persons, and their families and family groups and that are—

(i) Appropriate having regard to the needs, values, and beliefs of particular cultural and ethnic groups; and

(ii) Accessible to and understood by children and young persons and their families and family groups; and

(iii) Provided by persons and organisations sensitive to the cultural perspectives and aspirations of different racial groups in the child's community.

3. **To what extent, if at all, should Queensland's child and family legislation set out the role of government in supporting families to care for their children?**

Section 7 of the *Child Protection Act (Qld)* 1999 sets out the chief executive's functions, primary among which, is supporting families to care for their children. In our view such support should include mandatory early intervention for Aboriginal and Torres Strait Islander families. Early intervention should be aimed at promoting conditions for a safe home at the early stages and strengthening families to prevent circumstances leading to removal. Responsibility should be delegated to Indigenous specific community organisations to play a pivotal role in the early intervention process.

4. **If the legislation sets out the role of government in supporting families, should specific provisions be included to address the unique needs of Aboriginal and Torres Strait Islander families and children?**

Our organisation has a particular interest in legislative reforms that will meet the unique cultural needs of Aboriginal and Torres Strait Islander families and children. Although specific provisions in the existing legislation are designed to meet the needs of children and

young people, in particular 5, 5A, 5B, 5C sections 6 and sections 83 of the *Child Protection Act* 1999 difficulties are seen however at the implementation stage. For example:

- In relation to potential kinship carers, several practitioners reported instances where they have advised the Department of potential kinship carers and the Department either neglects to assess altogether or takes months to do so.

- Cultural needs of the Aboriginal or Torres Strait Islander child are often neglected and given little actual focus once placed in care. The continuity of cultural identity is of critical importance for the child. There is overwhelming evidence that a strong cultural identity is a protective factor, contributing to a child's resilience.

As previously stated, early intervention is critical.

Aboriginal and Torres Strait Islander child rearing practices and family and kin relationships within the communities must be taken into account.

As regards Torres Strait Islander traditional adoptions we note that although the Queensland Government carried out community consultations on the possibility of legally recognising Torres Strait Islander traditional adoptions we are not aware of action being taken to amend State legislation to allow full recognition of traditional Torres Strait Islander child rearing practices. To our knowledge this has caused immense difficulty to parties and children involved in traditional adoptions as well as the community.

5. **How should Queensland's child and family legislation promote children's rights and wellbeing?**

The Queensland Child and Family legislation can promote children's rights and wellbeing by providing guidance on what factors should be considered when considering a child's wellbeing. Our submission is that emphasis be placed on provisions relevant to Aboriginal or Torres Strait Islander child or young person's wellbeing, focussing on connection to their culture/clan/community/lands. We acknowledge that the legislation currently has specific provisions that enshrine the unique cultural rights of Aboriginal and Torres Strait Islander families' children and young people. There are particular provisions in principles 5A, 5B, 5C, 6 and sections 83 of the *Child Protection Act (Qld)* 1999 that could be adopted in guiding factors that may assist in promoting a child's wellbeing.

We also acknowledge the provisions in the Charter of Rights for a Child in Care at section 74 and Schedule 1 of the *Child Protection Act (Qld)* 1999. We note however that the Charter of Rights at Schedule 1 does not contain any specific provisions for Aboriginal & Torres Strait Islander children, in terms of their cultural heritage. We propose the inclusion of 'connection with culture and traditional customs' and that clause (c) be extended to include the words "or language group".

The effectiveness of such legislation however depends on its interpretation and implementation through proper incorporation into Department of Child Safety process and policies.

For a large number of Indigenous children the consequences of removal are dire. Residential placements commonly offered do not provide the safety and protection intended resulting in the same children being over represented in the criminal justice system. It is unacceptable that children removed from their families or cultural carers for protective reasons end up being neglected, abused or placed in unsafe conditions.

6. **Should the best interests of the child continue to be the paramount principle underpinning Queensland's child and family legislation? Why or why not?**

We agree that this should remain the focal point of the legislation. However the best interest tests need to be applied to acknowledge the long term impact of removal of indigenous children on the child, community, carers and parents on a holistic basis and should be reviewed on those lines. Better integration of culturally competent services will increase the applicability of the principle in our submission.

7. **Should the legislation set out the matters to be considered in determining the best interests of a child? Why or why not?**

We support the legislation providing for the specific matters to be considered in determining the best interests of a child. In practice the 'best interests of a child' leads to Magistrates and the Department making decisions based on opinion/bias instead of clear and concise objective elements. Furthermore, this approach appears to be inconsistent with the Federal Legislation in regard to the best interest principles and the factors the court must take into account.

Setting out the specific matters to be determined in Child protection legislation would give Children's Court Magistrates a more clear defined legislative path to base their decisions on, provide for a uniform approach between judicial officers, and provide parents with more certainty about processes and may also reduce their anxiety and frustration.

Factors relevant to determining the best interests of a child can currently be found in some of the principles of the Child Protection Act. Setting out such factors clearly should lead to improved child focussed decision making in our submission.

8. **What additional factors, if any, should be considered in determining the best interests of an Aboriginal or Torres Strait Islander child?**

Additional factors relevant to determining the best interest of an Aboriginal or Torres Strait Islander child include:

- Contact arrangement between family and child.
- Contact arrangements between child and extended family.
- The critical connection between the child's wellbeing and continuity of cultural identity.
- What arrangements are in place for child to stay connected to their community and culture (and sometimes this may be more than one group or culture for indigenous children). Available information suggests that continuity is rare especially for children in long term care placed with non-Indigenous carers.
- The requirement for a cultural support plan.
- Indigenous specific organisations to facilitate supervised time, with a view to progressing from this as the parent/s carer/s progress and are supported.
- Children's best interests should be set out in the legislation as a non-exhaustive list of factors to make it clear that all matters must be considered, including the ***severe impact*** of the removal from one's own family.
- The importance of cultural knowledge in making decisions about a child's best interests.

9. **How can the legislation best support children to express their views and wishes, and ensure their right to participate in important decision making processes that affect them?**

In our view organisations that provides direct support services to families and children are in a better position to provide more meaningful feedback based on individual needs

assessments. However, it is our submission that cultural needs should be prioritised for all Aboriginal and Torres Strait Islander children.

10. **How can Queensland's child and family legislation enable families to get the support they need, when they need it, to keep their children safely at home?**

We note the legislation has some mechanisms in place and that they are insufficiently utilized. As previously outlined there should be a focus on mandatory early intervention with greater community involvement for Aboriginal & Torres Strait Islander families.

11. **How should the legislation reflect Aboriginal and Torres Strait Islander concepts of family, kin, community and culture?**

Aboriginal and Torres Strait Islander child rearing practices and family kin relationships within those communities are of utmost importance.

Consultation must occur directly with the community for their views on how these concepts could be reflected in legislation bearing in mind the paramount principle for administering the Child Protection Act.

12. **What are your views on the way in which 'parent' should be defined in Queensland's child and family legislation? Is the definition used in the Commonwealth family law applicable to Queensland's child protection and family support service system?**

From the feedback received, the supported position was to adopt the definition in section 11 to apply consistently throughout the act, and further insert 'cultural carer' to take into consideration 'cultural carers' or extended family or community members who take on the responsibilities of parent in Aboriginal and Torres Strait Islander communities.

We note that the *Family law Act* 1975 provides that in relation to the application to Aboriginal or Torres Strait Islander children in identifying a person or persons who have exercised, or who may exercise parental responsibility for such a child the court must have regard to any kinship obligations, and child-rearing practices of the child's Aboriginal or Torres Strait Islander culture.

In that regard we would also refer to the Torres Strait Islander traditional adoptions and the inordinate delay in incorporating these practices into State legislation.

13. How can Queensland's child and family legislation best contribute to building a community where children are safe, connected and able to thrive?

For Aboriginal & Torres Strait Islander communities all power to keep the children safe in their own community is taken away when Child Safety services intervene. Greater emphasis on early intervention and support to families with community participation, in our view, should contribute to positive change. However, the underlying socio-economic disadvantage also has to be addressed as a matter of priority.

We note that section 7 of the *Child Protection Act* currently outlines the chief's executive's functions. As previously pointed out, included in those functions are particular obligations placed on the Chief Executive to support families to care for their children. We are not aware of any provisions in place to ascertain how is this obligation fulfilled and its measurability. In our view accountability, regular monitoring, and timely reporting is essential. This in our view should form part of the Aboriginal & Torres Strait Islander Family and Child Commissioner's obligations

14. **Should Queensland's child and family legislation outline the roles and responsibilities of relevant government and non-government agencies for children's safety and wellbeing? Why or why not?**

It is in line with the recommendations made following the enquiry that a community based response is best to provide for this aspect.

Statutory child protection intervention should be one of last resort, although in reality this is not the case. On the one hand there is concern that defining the roles for service providers could lead to greater intervention or interference by the department of child safety.

15. **How should Queensland's child and family legislation relate to other laws, including Queensland's domestic and family violence protection laws?**

There should be consistency between and in the application of the legislation with the primary purpose being: to protect the child from harm, as well as provide protection to their carer/parent/family from family violence.

16. **Does the concept of 'child in need of protection' set the right threshold for determining the point at which government intrusion into the private affairs of a family are justified? Do you consider this threshold too high or too low? Why?**

This appears to be consistent with the United Nations Convention on the Rights of the Child which balances privacy concerns with the need for intervention and protection.

17. **What other measures could be considered when balancing a child's right to protection from harm with the child's and family's rights to privacy and self-determination?**

The disclosure of a parent's child protection history is a significant breach of privacy where specific details are given, for example, sexual abuse of the respondent leading to being placed in care as a child. Vague and inflamed allegations that are unsubstantiated continue

to be included in the histories provided to the court. Too often no emphasis is placed on the child's long-term wellbeing, and this becomes an obstacle to a holistic and community based solution to the care and protection needs of the child.

18. **How can Queensland's child and family legislation support collaborative community and family-led approaches to child and family support that meet the unique needs of Aboriginal and Torres Strait Islander children, families and communities?**

A community based response would best address this.

As previously stated we support mandatory early intervention and greater community involvement for Aboriginal and Torres Strait Islander families.

The role of the Recognised Entity ('RE') should be reviewed. Currently the RE is funded by Child Safety Services and operates under the direction of the Department. The Recognised Entity is a good concept but fails to deliver or add value to proceedings. At this stage the RE is not given any real capacity to value input. The Recognised Entity could be much more proactive in drafting cultural reports and assessing of kinship carers within Indigenous communities.

19. **How can Queensland's child and family legislation promote the importance of permanence and provide a range of options for providing children with relational, physical and legal permanence?**

Although there are adequate provisions contained in sections of the Child Protection Act (Qld) that provide for relational and physical permanence the difficulty lies in the lack of regard or limited consideration of these provisions in their implementation. Departmental

policies have to be reviewed to give genuine practical expression to the provisions of the Child Protection Act.

From a traditional/historical perspective Aboriginal and Torres Strait Islander children have been cared for by the community. “Permanence” can still be achieved for such children by remaining with family and community. The legislation could promote the importance of “permanence” for Aboriginal and Torres Strait Islander children so as to take into account the unique cultural differences in the raising of Aboriginal and Torres Strait Islander children, elements of which are still widely practiced and adapted in modern day Aboriginal and Torres Strait Islander families.

Anecdotally there appears to be little physical permanence for many Aboriginal and Torres Strait Islander children in care with frequent moves from one carer/home to another.

20. **What is needed in Queensland’s child and family legislation to ensure that young people receive the help they need to successfully transition from care to living independently?**

It is our submission that this requires consideration by the organisations that provide direct support services to families and children and can provide feedback based on individual needs assessments. We reiterate however that cultural needs should be prioritised for all indigenous children.

21. **How can the legislation reduce unnecessary red tape and make it easier for people to become carers, without compromising high standards of care for children living in out-of-home care?**

A mechanism exists within the legislation for a person to be considered a '*suitable person'*. Currently it is left to the legal representative for the respondent parent to submit suitability arguments which is also a potential for a conflict of interests.

Prospective kin carers do not usually have legal representation and may not be best equipped to draft their own materials or make their own submissions.

We propose amendments to the legislation to afford potential kin carers party status which will enable them to fully participate in the proceedings thereby qualifying for assistance from Legal Aid Queensland.

We suggest considering the widening of section 113 of the Child Protection Act, as well as the inclusion of the requirement for the judicial officer to consider at the start of the proceedings the suitability of any person volunteering to be a kin carer.

More focus has to be placed on proactive education and encouragement for prospective kin ship carers within communities. It might assist to have an Aboriginal or Torres Strait Islander defined position within the Department of Communities & Child Safety working closely with the Recognised Entity to educate and assist potential kinship and Indigenous carers and for priority to be given to such assessments in view of the high numbers of Aboriginal & Torres Strait Islander children placed with non-Indigenous carers.

22. How can Queensland's child and family legislation provide for the sharing of information about children and families between government and nongovernment service providers, to achieve the right balance between families' rights to confidentiality and privacy and the responsibility to protect a child from harm?

There are adequate mechanisms and safeguards contained in the Child Protection Act that provide for the sharing of information between agencies that are appropriate to ensure the families' right to confidentiality and privacy is maintained.

23. Is there anything else that the review should consider as a priority issue

Aboriginal and Torres Strait Islander parties in many instances do not have access to, or knowledge of, available culturally competent legal advice services. To overcome this we propose that the Department of Communities, Child Safety and Disability Services adopts a policy of ensuring referrals are made for legal representation as early as the Investigation and Assessment stage of intervention.

We reiterate:

- The need for an urgent review of the Blue card system.
- The urgent need for legally recognising Torres Strait Islander customary adoptions and incorporating such into State legislation.