CHILD AND FAMILY FOCUS SA

Child and Family Focus SA (CAFFSA) Discussion Paper

2022 Review of the Children and Young People (Safety) Act 2017

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Acknowledgement

We acknowledge the traditional lands of the Kaurna people and acknowledge the Kaurna people as the custodians of the Adelaide region and the Greater Adelaide Plains. We pay our respects to Kaurna Elders past, present and emerging.

We acknowledge the traditional custodians of land beyond Adelaide and the Adelaide Plains, and pay our respects to all Aboriginal Elders past, present and emerging.

We acknowledge and pay our respects to the cultural authority of our Aboriginal and Torres Strait Islander colleagues and are grateful for the cultural expertise that they represent.

Summary

Child and Family Focus SA (CAFFSA) is the South Australian peak body and industry association representing the needs and interests of children, young people and families connected with or at risk of entering the child protection system, and the not-for-profit, non-government organisations who support them.

CAFFSA is undertaking a broad consultation with its Board, Policy and Advocacy Committee, networks and members on the review of the *Children and Young Person (Safety) Act 2017* (the Act) which was announced by Minister for Child Protection the Hon. Katrine Hildyard on Tuesday 6th September 2022.

CAFFSA welcomes the discussion paper prepared by the Department for Child Protection (DCP) which can be accessed here, and the 29 questions therein which have been posed guide government consultation on the legislation. ***CAFFSA intends to prepare a structured response to the questions in the DCP discussion paper in our forthcoming submission.***

The current paper is intended to facilitate a series of conversations between CAFFSA staff and members focusing on legislative changes that have previously been deemed important and worthy of consideration. It also incorporates issues members have raised in the context of the current legislative review. This paper should be read in conjunction with the Department for Child Protection's paper and does not seek to replace it.

The discussion paper has been structured in to two main parts.

The first explores the Guiding Principles[1] and Priorities in the operation of the Act[2] and considers how and to what extent certain amendments to this section could be of benefit to children and young people from the perspective of CAFFSA and its members.

The second part of this paper identifies and proposes amendments to particular sections of the Act for member agencies to consider, with the aim of further enhancing children's best interest and wellbeing.

Introduction

The DCP Discussion Paper's section on NGO Service Providers states:

Together with the Department for Child Protection, NGO service providers share in the responsibility for service delivery to best meet the needs of the children, young people and families in contact with the child protection system.

Acknowledging it can be challenging work, quality service provision in this context has the genuine capacity to transform and improve the lives of children and young people and families, and to strengthen the community as a whole.

As part of this review, we are keen to hear from our valued sector partners to explore ways the legislation could be improved to enable the sector to better care for, protect and support children and young people. (p. 19)

The question is also posed: ***What changes could be made to the CYPS Act that would improve the ability of NGO providers to deliver essential care and protection services to children and young people?***

[1] Children and Young Person (Safety) Act 2017 (SA) s 4, p.8
[2] *Ibid* s 7, p.8

The spirit of partnership evident in this narrative is shared by the sector. CAFFSA is seeking to provide suggestions that will strengthen the sectors capacity to play its part in strengthening the safety, welfare and wellbeing of children, young people and families. This Discussion Paper was written to inform a series on metropolitan and country consultations CAFFSA is running with members and their partners over September and October 2022, and seeks to answer the question above as comprehensively as possible.

Part One: Feedback on Guiding Principles and the Priorities in the operation of the Act

The South Australian Government and Department of Child Protection's Discussion Paper: ***Building the South Australian Child Protection System for the Future - Review of the Children and Young People (Safety) Act 2017*** (hereafter referred to as the DCP Discussion Paper) states

> *As part of this review, we will be considering what other matters or principles should be taken into account in child protection decision-making (p. 13)*

Questions posed by the Department are:

11. Do we have the right principles in place to guide decision making in South Australia's child protection legislation?
12. In addition to safety as the paramount consideration, should the legislation be explicit that the best interests of the child is a matter to be considered in decision-making?
13. Do you support changes to the legislation to make it clear that the Aboriginal and Torres Strait Islander Child Placement Principle is the paramount consideration - aside from safety – in all decision-making involving Aboriginal children and young people?

CAFFSA retains its position from its original submission on the *Children and Young Person (Safety) Bill* in 2016 that the best interests principle (otherwise known as the paramountcy principle) should be the overarching principle of the legislation.

As articulated in the United Nations Convention on the Rights of the Child (UNCRC), the best interests principle encompasses both children's safety and that which is necessary to maintain other facets of the child's overall health and wellbeing throughout the life-course.

Article 3 of the UNCRC states as follows:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, ***the best interests of the child shall be a primary consideration****.*

2. States Parties undertake to ensure the child such ***protection and care as is necessary for his or her well-being****, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

CAFFSA suggests that the guiding principles of the Act be structured around those of the UNCRC, taking children's best interests to be of paramount concern. ***Safety continues to be a feature*** however should not be considered in isolation from other factors such as the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference (Article 8).

Including best interest of the child within legislation compels us to ask questions about how child protection practice responses will contribute to children and young people's wellbeing over their entire life-course, and what is required to reflect this at a particular point in time. It is critically important within a statutory framework that the *interests* of the child are not overly limiting or confined to safety only, as there are a range of other wellbeing considerations that must also be made.

At the most fundamental level, the aspiration should incorporate that children and young people live as full and contributing lives as possible – it is for this reason that "protecting children and young people from harm" is considered inadequate.

Specific amendments to this section are proposed as follows:

Section 4 (1) (a)[3]

Add as the first acknowledgment (a) that 'This Act shall be guided by the Principles and Articles of the United Nations Declaration on the Rights of the Child (1989)[4]

Add as the second acknowledgement (b) that 'This Act shall recognise and enforce so far as practicable Article 3 of the United Nations Declaration on the Rights of the Child (1989), including the provision that *the best interests of the child shall be a primary consideration*'[5]

Section 4 (2) (a)[6]

Replace 'to be safe from harm' with 'to have their best interests met which includes being safe from harm'

Section 7[7]

Replace 'Safety of children and young people is paramount' with 'Best interests of children and young people is paramount'

Subsequently, the Act should read 'The paramount consideration in the administration, operation and enforcement of this Act must always be to ensure that the best interests of children are being met, including being safe from harm'

CAFFSA supports changes to the legislation to make it clear that the Aboriginal and Torres Strait Islander Child Placement Principle is the paramount consideration – aside from safety – in all decision-making involving Aboriginal children and young people and will provide further detail on

[3] Children and Young Person (Safety) Act 2017 (SA) s 4 (1) (a), p.8
[4] The Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. It entered into force on 2 September 1990, in accordance with article 49.
[5] United Nations Declaration on the Rights of the Child (1989) s 3 (1)
[6] Children and Young Person (Safety) Act 2017 (SA) s 4 (2) (a), p.8
[7] *Ibid*, s 7, p.9

this position following consultations occurring later in September in response to the Commissioner for Aboriginal Children and Young People's Inquiry into the application of the Aboriginal and Torres Strait islander Child Placement Principle in the removal and placement of Aboriginal children in South Australia.

CAFFSA's Questions for the sector

Do you agree with the inclusion of the Principles and Articles of the UN Declaration on the Rights of the Child?

Do you agree with the call for the Act to incorporate the best interest of children and young people, including being safe from harm, as paramount?

Do you have other suggestions that could or should be of paramount consideration in the administration, operation and enforcement of the Act?

Are you comfortable with CAFFSA's support for legislating that the Aboriginal and Torres Strait Islander Child Placement Principle as the paramount consideration – aside from safety – in all decision-making involving Aboriginal children and young people?

Part Two: Discussion on specific proposed amendments

Title of the legislation

Whilst CAFFSA argues that the focus of the Act must be on the best interests of children as a paramount concern (the 'paramountcy principle' in children's protection legislation and family law legislation), there is scope to better conceptualise the child in the context of their family and the need to retain connection with family wherever possible.

CAFFSA proposes an alternative title for the Act that reflects the importance of conceptualising of children's wellbeing as being *inter-dependent* on broader family wellbeing and family cohesiveness:

Children, Young Person and Family (Safety and Support) Act 2022 (SA)

The emphasis in the title on 'support' speaks to the active efforts that must be made to invest in family support and family cohesiveness for the benefit and wellbeing of children and young people.

CAFFSA's Questions for the sector

Do you agree that broadening the title of the Act from a sole focus on child protection to that of the child's safety and support within the family context is a more appropriate way to describe the legislation?

If you do not agree, do you have an alternative title, or a reason the legislation should retain its original title?

Guardianship to be assumed by the Minister for Child Protection

CAFFSA supports the reversion to Guardianship of children and young people being assumed by the Minister for Child Protection.

The Act currently provides that *'If the Chief Executive issues an instrument of guardianship, the child or young person specified in the instrument will, for all purposes, be under the guardianship of the Chief Executive during the guardianship period.'*[8]

Whilst this issue may appear one of principle only, it is considered to be important that legal guardianship be assumed by 'the state' and its representative through the Minister for Child Protection.

It is consistent with a view that children's wellbeing (provided for by their legal Guardian), once removed from their family, should be elevated to the very highest level of government consideration and importance.

Such measures also allow parliament a direct and unfiltered line of sight to the children under the care of the state as the Minister can be asked direct questions, raising parliamentary responsibility for inquiring after their wellbeing and safety whilst in care.

[8] Children and Young Person (Safety) Act 2017 (SA) s 45 (2), p.34

CAFFSA's Questions for the sector

Do you agree with the proposal to elevate the wellbeing of a child that has been removed from their family as a matter of Ministerial concern and Ministerial guardianship? If not, what are your reasons for keeping it the same?

Risk of harm definition and the introduction of an 'unacceptable risk of harm' definition

DCP's Discussion Paper poses the question 'Does South Australia have the legal threshold right for child protection? If not, what is the right threshold?' (p. 15)

CAFFSA agrees that current levels of reporting, climbing to one in three children in SA (amounting to one in four families experiencing a notification) are contributing to an overwhelmed system that cannot undertake the appropriate assessments to determine which children and families need a statutory response to keep the child safe from harm.

CAFFSA notes that a definition of 'unacceptable risk of harm' is provided for in NSW for the purposes of judicial decision making in cases where issues such as removal, restoration, custody, placement and contact are to be determined under the Children and Young Persons (Care and Protection) Act 1998 (NSW).[9] This highlights the centrality of a clear definition that guides decision-making.

Legislative thresholds of harm which are objectively verifiable, and which minimize subjective decision-making error and confirmation biases of child protection assessments are clearly essential. An example is clarifying that 'imminent risk of harm' exists where the child or young person, unless immediately removed, would sustain life-threatening bodily injuries, overwhelming psychological trauma of a type not characterized by normative stress responses, or death.'

In NSW, the law says a child or young person is at risk of significant harm (ROSH) if there are current concerns for their safety, welfare or wellbeing because of one or more of the following:

- if their basic needs are not met — for example, they don't have enough food or clothing, or don't have a safe or secure place to live

[9] https://www.judcom.nsw.gov.au/publications/benchbks/local/care_and_protection_jurisdiction.html

- parents or caregivers aren't arranging necessary medical care — for example, a child is very sick, but is not taken to a doctor
- a child or young person being physically abused or ill-treated — for example, where a child has bruises, fractures or other injuries from excessive discipline or other non-accidental actions
- a child or young person being sexually abused — for example, sexual activity between the child and an older child or adult
- risk of serious physical or psychological harm resulting from domestic violence — where a child could be injured by a punch intended for their mother, or a child can't sleep at night because of the fear there will be violence in the home
- risk of the child or young person suffering serious psychological harm — for example, a child having to take care of his parent, or a child being continually ignored, threatened or humiliated.[10]

Importantly, NSW legislated for 'significant harm' but not 'imminent risk.' CAFFSA suggests that including imminent risk is problematic because it may dissuade people from considering cumulative harm. In 2009 the threshold for legislative statutory authority intervention was amended from 'risk of harm' to 'risk of significant harm'. The NSW Interagency Guidelines outlines what is meant by 'significant' in 'risk of significant harm'.

"This means the concern is sufficiently serious to warrant a response by a statutory authority (such as NSW Police Force or Community Services) irrespective of a family's consent. What is significant is not minor or trivial and may reasonably be expected to produce a substantial and demonstrably adverse impact on the child or young person's safety, welfare or wellbeing, or in the case of an unborn child, after the child's birth. The significance can result from a single act or omission or an accumulation of these."11

Section 17 of the Act deals with the meaning of 'harm' and makes a distinction between both physical and psychological harm.[12] The conceptualization and definition of psychological harm' in this section is provided thus:

'psychological harm does not include emotional reactions such as distress, grief, fear or anger that are a response to the ordinary vicissitudes of life.'[13]

[10] www.facs.nsw.gov.au/families/Protecting-kids/reporting-child-at-risk/should-i-call/chapters
[11] https://reporter.childstory.nsw.gov.au/s/article/Significant-harm-policy-definition
[12] *Ibid* s 17, p.17
[13] *Ibid*, s 17 (2), p.17

CAFFSA is of the view that this definition lacks enough clarity to be easily interpreted or applied, subjectively oriented and difficult to understand in the way that it is phrased. CAFFSA proposes that an alternative definition of psychological harm is required that incorporates due consideration of children's experiences of trauma and complex trauma:[14]

'psychological harm is taken to exist where the child suffers psychological or emotional deprivation or trauma, or where there exist factors known to cause overwhelming psychological or emotional distress, trauma or complex trauma.'

Further consideration could be given to the definition of psychological harm provided for by the *Children, Youth and Families Act 2005 (Vic.)*:[15]
'…the child ***has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged.****'*

CAFFSA's Questions for the sector

Do you support further clarity in the legislation for the definition of psychological harm? If so, do you have a preference for either definition outlined above?

Do you support DCP's suggested changes of the threshold to *imminent risk of significant harm*?

Should there be any changes or exemptions to the existing mandatory reporting requirements? How else could mandatory reporters discharge their obligations (e.g. where support is already in place)?

Do you have any thoughts or suggestions regarding how can we more effectively access the capabilities of other government agencies and government funded NGOs to provide services to families where a child has been the subject of a screened-in notification?

[14] This definition is broadly based on the AIFS definition of 'emotional abuse' accessed at https://www.aihw.gov.au/reports-data/health-welfare-services/child-protection/glossary#ea
[15] Children, Youth and Families Act 2005 (Vic.) s 162(1)(e)

Aboriginal Children's Community Liaison Roles

In view of the significant over-representation of Aboriginal children and families in the Child Protection system and the stated goals of the Aboriginal Child Placement Principle, CAFFSA suggests legislative provision for and investment in *Aboriginal Community and/or Carer Liaison* roles.

These roles would assist Aboriginal families and communities understand and navigate the statutory system. They would provide access to safe, community-based experts who can provide advice and direction, as well as brokering key conversations in relation to the longstanding tensions between Aboriginal and the dominant western culture child rearing practices, especially as it relates to child safety and wellbeing.

In acknowledging that our past (and, in some cases, present) policies, practices and wrongs have created fear and distrust amongst Aboriginal people in services that have a child focus, CAFFSA believes that we need to continually work towards an environment and approach that builds trust with Aboriginal families and community, so they are more likely to access assistance and guidance in a safe, culturally appropriate way.

CAFFSA's Question for the sector

Should the legislation make provision for the investment in Aboriginal Community and/or Carer Liaison roles? If not, please feel free to outline your reasons.

Supporting Families Pre and Post Removal

CAFFSA commends the inclusion of the analysis and recommendations entitled *Responsibility for children and young people* in DCP's Discussion Paper, as follows:

> *Commissioner Nyland made it very clear that child protection is 'everybody's business'. This review provides an opportunity to consider whether the existing legislative framework enables us all to uphold our respective responsibility for protecting children and young people in our community, and what changes could be made to enable that to happen.* (page 14)

Service providers, including government and non-government agencies, can play an important role to make sure supports are in place for families who need them to stay safely together.

The DCP Discussion paper poses the following questions:

14. Should a public health approach be taken to child protection, and if so, how can the legislation support this?
15. How can the legislation enable everyone to take responsibility for the safety and wellbeing of children?
16. Should the legislation set out the roles and responsibilities of relevant government and non-government agencies for children's safety?
17. Should the legislation explicitly require the government to fund therapeutic interventions targeted to support families whose children have been identified as at risk of harm or abuse?

CAFFSA suggests the proposals set out in these questions should be strongly endorsed by the sector.

A public health approach aims to prevent or reduce a particular illness or social problem in a population by identifying risk indicators. It is an approach that aims to prevent problems occurring in the first place, quickly respond to problems if they do occur, and minimize any long-term effects – and prevent reoccurrence.

According to a public health model, primary, secondary and tertiary services are all critical elements in the child welfare and protection system. However, a well-balanced system has primary services as the largest component of the service system, with secondary and tertiary services comprising progressively smaller components of the service system. Investment in primary prevention programs has the greatest likelihood of preventing progression along the service continuum and sparing children and families from the harmful consequences of abuse and neglect.[16]

Many of the services that can address the drivers of abuse and neglect, such as substance misuse and mental health services, housing and homelessness services etc, are not administered by DCP and cannot therefore be compelled to prioritize families vulnerable to abuse and neglect.

[16] https://aifs.gov.au/resources/short-articles/public-health-approach-preventing-child-maltreatment, Accessed 11.05am 15/9/2022

CAFFSA acknowledges that early intervention and child reunification or family preservation is a priority for the South Australian government and the Department for Child Protection, however the legislative base for such provisions needs to be substantially strengthened for this to occur.

Section 33 of the Act allows for the Chief Executive of DCP to *refer a matter following notification to a more appropriate state authority*. This could be clarified and strengthened so that there is a legislative base which compels statutory child protection staff to refer families to supportive service and for those services to be compelled to respond.

This is not clear in the legislation, and the provision that this is the intention is also opaque, and thus the opportunity to provide ameliorative early intervention is lost, and children may suffer harm that could have been prevented or removed where that may not be necessary or required.

The system is difficult to navigate independently, and the family is only visible if they are referred by the state/DCP. This diminishes the probability of successful reunification. Following a child's removal, the biological family needs ongoing support to address the issues that impaired their parenting capacity, improve family functioning and their relationship with their child in order to improve readiness for reunification. When a decision is made to remove a child from their family home, the response to both the child and family must immediately prioritise stability and support as both an outcome and a platform for change. Interventions could also act as protective factors against the removal of future children, while investment could mitigate one of the great harms of the current system - multiple placements.

Additionally, once a child or young person is **under guardianship**, neither DCP, DHS or any external agency assumes responsibility for the family of the child or young person. Whilst services may be *offered,* they are not legislated for. The kinds of family support services that need to be offered to families post-removal are only alluded to at Section 9 of the Act, whereby early intervention is identified as a priority. This is in the context of pre-removal and should be extended to all families either before or after their child has been removed from the state.

Research tells us that identifying children at risk of placement moves and putting effective interventions in place can help promote the resilience of carers, children and families of origin.17 (Vreeland et al., 2020).

[17] Vreeland, A., Ebert, J. S., Kuhn, T. M., Gracey, K. A., Shaffer, A. M., Watson, K. H. et al. (2020). Predictors of placement disruptions in foster care. *Child Abuse & Neglect*, *99*, 104283.

CAFFSA believes that the legislation ought to provide that all reasonable action has been taken by the statutory body to address safety concerns within the family prior to the child or young person being removed, including the pro-active identification and provision of intensive family support services.

The legislation should be explicit and directive about the need for DCP to refer families both pre and post removal for supportive services that could prevent removal or enhance the possibility of reunification. This would incorporate an onus on services such as mental health and substance abuse and counselling services to provide assessment and response and would also require agencies such as the Department of Health and Wellbeing to take a much more active role in child protection and child safety matters. Funding the required therapeutic responses arising from these actions would be essential to operationalise the intent of the legislation. The will to provide assistance to vulnerable children and families is not lacking in other government departments. It is inadequate resourcing driving harsh prioritisation and triaging out of needy children and families is the result.

DCP's Discussion Paper addresses this in the exploration of whether the legislation should embed the Aboriginal and Torres Strait Islander Placement Principle to the standard of active efforts and include the model of active efforts for all children and young people engaged with child protection?' (p 11.) CAFFSA strongly supports both of these proposals.

The term 'active efforts' originates from the Indian Child Welfare Act, which includes under Remedial services and rehabilitative programs; preventive measures the legislative mandate that "Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." [18] CAFFSA argues this provision should be incorporated for all children in the South Australian legislation.

DCP's Discussion Paper also focuses on some of these issues in the section *Ensuring access to supports* (p 17) as follows:

[18] Judge Leonard Edwards (ret.), Defining Active Efforts in the Indian Child Welfare Act, The NACC Guardian, National Association of Counsel for Children, Vol 21, No 01, Jan/Feb 2019

In discussions with children and young people, families, carers and partners, it is clear that we all want young people to have access to the best possible supports and services while in care and when transitioning to adulthood and independence. Currently, the Department for Child Protection is working with other government and non-government services providers through Investing in their future to make sure children and young people in care have priority access to the services they need such as health, mental health, disability and education support, as well as to other services that will support them to pursue their personal interests and aspirations.

The CYPS Act contains some provisions to reflect the Government's responsibility for children and young people's wellbeing and supports as they transition to independence. Some stakeholders have suggested that these need to be strengthened in line with community expectations.

DCP Discussion Paper Question

26. Could the CYPS Act be strengthened to enable all young people in care, and leaving care, to access the services they need to heal from trauma, to grow up healthy and strong, and to be supported as they transition into independence?

CAFFSA's Questions for the sector

Do you agree with the strengthening of the legislative base for 'least intrusive means of supporting families to create safe and stable environments for their children.'

Do you agree that the legislation should be explicit and directive about the need for DCP to refer families both pre and post removal for supportive services that could prevent removal or enhance the possibility of reunification?

Do you agree that the legislation should require agencies such as the Department of Health and Wellbeing to prioritise responses to the needs of children, young people and families who are at risk of entering, are currently engaged in or are exiting the child protection system? Should those roles be written into the legislation?

Do you could the CYPS Act be strengthened to enable all young people in care, and leaving care, to access the services they need to heal from trauma, to grow up healthy and strong, and to be supported as they transition into independence? Do you have any suggestions on how to do this?

Assessment of reunification capacity

Recommendation 70 of the Nyland Report called for the Agency (DCP) to assess and determine the possibility of reunification within six months for a child under two years; and within 12 months for a child over two years. If reunification is not possible, the Agency is to immediately apply for a GOM under 18 Order.

The ability to establish a reliable triage of children and their families with greater likelihood to be reunified so that they are likely to be subject only to short-term orders has, until now, proven difficult to achieve.

Without ongoing support and engagement with the family, it is difficult to make an accurate assessment on 'best connection', and best interests of the child. We believe the State has a responsibility to support families immediately once a child has been removed, doing so in the best and long-term interests of both the child and their family and the long-term outcomes of the child.

In South Australia, 25% (one in four children) of the children and young people who exited the Child Protection system in 2018 experienced six or more placements, and approximately 10%, eleven or more placements. This is significantly higher than the national average of 10% and 2% respectively and is particularly acute for children and young people who have been in the State's care system for five or more years - 25% experienced 11 or more placements compared to 8% nationally (Report on Government Services, 2018).

The challenge of this level of movement is not only the insecurity felt by the child, but the reduced capacity for achieving or improving outcomes for the child and the family, in terms of reunification or 'best connection'.

The DCP Discussion paper canvasses these issues in the section on *Timely decision-making* (p. 16)

Since the CYPS Act commenced, many stakeholders have made submission that one way to improve outcomes for children and young people is to embed our commitment to timely decision-making throughout the legislation. These include suggestions to re-insert Investigation and Assessment Orders, to re-introduce the 10-week rule and to re-consider avenues for review.

CAFFSA' Questions for the sector

Are current timeframes for reunification as provided for in the legislation fair and reasonable (2 years maximum)? On balance, are the needs of child stability appropriately considered against their need for potential reunification with their families?

Should the legislation be strengthened to ensure assessments to determine the possibility of reunification occur?

Do you support DCP's suggestion that re-insertion of Investigation and Assessment Orders, re-introduction of the 10-week rule and re-consideration of avenues for review be considered in the re-drafted legislation?

The Age of Leaving Care and Supports for Young People Leaving Care

CAFFSA believes that **all** young people in care should have the choice to stay in care until the age of 21. The Government's current provision for young people in family-based care to stay in care until 21 should be extended to all young people, particularly those who live in residential and emergency care. This group often experiences the most complex needs, and the poorest life outcomes, which are compounded by the pressures of leaving care at the age of 18 – many into homelessness. Whilst CAFFSA notes the provision of support for foster and family-based carers for young people until the age of 21 which we welcome, the cessation of resourcing of support agencies for the young person is of great concern.

In a report published by Deloitte Access Economics in 2018[19] documented a federal and state cost benefit analysis of extending the leaving care age to 21 years, and found that the benefit to cost

[19] Deloitte Access Economics. (2018). 'A federal and state cost benefit analysis: Extending care to 21 years', Home Stretch Campaign, Anglicare Victoria

ratio was 2.0, indicating that every $1 spent on the program of supporting young people between the ages of 18 to 21 years would generate a return of $2. The savings to governments resulted from lower usage of Commonwealth and state government services by care leavers over a 40-year period (between the ages of 18 and 57 years). The intangible benefits of increasing the care-leaving age to 21 years include improved wellbeing and prevention of hospitalisation, alcohol and other drug use and mental illness, improved physical health outcomes, better outcomes for the children of care leavers and higher levels of social connectedness.

CAFFSA has observed that the Act's current provision that "The Minister must cause such assistance as the Minister thinks appropriate to be offered to each eligible care leaver for the purposes of making their transition from care as easy as is reasonably practicable", including "the provision of information about Government and other resources" (etc) is quite vague and currently equates to the provision of a service directory for young people and the development of a number of commendable but small pilot programs run by DCP and CREATE.

Characteristics of continuation of support services to the age of 21 in SA could include:

- Continuity of care from the organisation they have an established relationship with where a significant history of trust is a factor
- Formalising continued support until the age of 21 as young people transition in to adulthood and increasing independence
- Continued support to stabilise housing, health, education and employment until the age of 21
- Person-centred brokerage systems, with young people having agency in how they spend the funds and are actively involved in decision making
- Peer mentoring and peer support

CAFFSA's Questions for the sector

Should the Government's current provision for young people in family-based care to stay in care until 21 be extended to young people who live in residential and emergency care?

Should resourcing for support services be available for young people in family-based care until they are 21 years of age?

'Onus of proof' on biological parents

CAFFSA continues to be concerned about the role of the 'onus of proof'[20] in unfairly placing the burden of responsibility on parents to demonstrate to the Court that they are fit parents if they object to an order being made. The reversal of the onus of responsibility means that there is a risk that parents who may be able to demonstrate capacity and capability to care for their children in a safe environment are not *actively* afforded the opportunity to do so.

Further, CAFFSA believes that the current arrangement hinders the State's ability to support families to work with the system in order to be reunified with their children post-removal.

CAFFSA are being told by our member agencies that there are more families trying to access legal support in efforts to reunify with their child, and whilst we understand the intent to support placement stability and positive attachment, current legislative provisions for 'onus on objector' do not reflect a commitment to family preservation and re-unification.

The Act places the burden of proof on the objector, essentially requiring that if a family objects to an order being sought by DCP they must provide proof to the court that this order is unnecessary. This requires that a family, often a very vulnerable one, must understand legal processes at a high level, have the resources, skills and capacity to engage with that system and the ability to collect and present evidence in a manner acceptable to that system.

Placing the onus on a family is not consistent with concepts of natural justice or fairness. This aspect of the legislation automatically assumes that the information and assessments being made by DCP are correct, fair and unbiased in all cases.

When the cost and availability of legal representation for families is considered, the further disadvantage driven by this part of the Act becomes evident.

The history and experience of Aboriginal Australians within the child protection and legal systems, where instances of institutional racism still exist, means that the Onus of Proof is yet another layer of injustice that is highly likely to contribute to a continued escalation of the over representation of Aboriginal children in the care system.

[20] Section 59, 'Onus on objector to prove order should not be made', Children and Young Person (Safety) Act 2017 (SA) s 59 (2), p.41

Currently, the system appears to primarily engage families when the only 'intervention option' is to remove the child, and once a child is removed, families are often left unsupported for up to 12 months before being assessed for reunification. In this time, the relationship and attachment between the child/family often deteriorates, and in the absence of knowing 'how' families are expected to change, the child's removal exacerbates the issues triggering the child's removal in the first place.

Essentially, we are missing many opportunities to support the family to stay together; and it could be argued that 'onus of proof' legitimises this and can have the effect of absolving the responsibility of the State to support families post removal, particularly if a family has failed to demonstrate to the court its inability or otherwise to care for the child in a safe environment.

CAFFSA's Questions for the sector

Should the *'onus on the objector'* be reversed, so that it is the responsibility of the Department / Crown to prove that a family does not have the capacity to care for their child?

Transfer of / Delegation of Guardianship

The DCP Discussion Paper notes:

> *Some jurisdictions have already taken steps to embed self-determination as a principle and to enable the exercise of child protection legislative authority by Aboriginal people. This includes the delegation of guardianship, investigation and case management functions.* (p. 12) and asks the following questions:
>
> *5. Should the CYPS Act explicitly recognize Aboriginal children's and families' right to self-determination and cultural authority?*
>
> *6. Do you support legislative reform that will explicitly provide for the progressive delegation of legislative functions to recognized Aboriginal entities?*

In other jurisdictions in Australia (notably NSW and VIC) legal guardianship is transferred or 'shared' with the community services/NGO sector, effectively allowing non-government organisations to discharge statutory guardianship responsibilities in such a manner that is timely and responsive to

the needs of children and young people. There has been a particular focus on delegating responsibility to Aboriginal organisations, in order to advance the Aboriginal and Torres Strait Islander Child Placement Principle. CAFFSA strongly supports these aims.

The Victorian Aboriginal Child Care Agency (VACCA) operated a pilot project, essentially operationalising transfer of guardianship from 2013 to 2015, allowing for an Aboriginal controlled organisation to have a pivotal role in assessing children's safety, stability and development through the specificity of their cultural lens. While the project worked with a small number of Aboriginal children, the results were highly encouraging. Despite most children being in care for very long periods – most for more than eight years – almost half went 'home' from residential or foster care to their parents or extended family members. These are children who were considered to have limited prospects of returning home.[21]

Overseas experience of delegation with non-Indigenous communities is also instructive. Findings include that poor planning around delegation of authority can delay decision making and lead to children missing out on opportunities that children living with their birth families have natural and easy access to. It can also prevent the child or young person feeling part of the foster carer's family or the daily life of their home because of problems obtaining consent to everyday activities, making them feel different from their peers and cause them embarrassment and upset.

Failure to delegate appropriately, or to make clear who has the authority to decide what, can make it more difficult for foster carers and residential workers to carry out their caring role and form appropriate relationships with the children in their care.[22]

CAFFSA is of the view that the Act should make provisions for the transfer or sharing of guardianship and formal case management responsibilities with ACCOs for Aboriginal children and young people, and that this should also be broadened to non-Aboriginal NGO organisations and service providers for non-Aboriginal children. This would allow the agencies, upon application for such a transfer to the Minister for Child Protection, to , assume legal guardianship upon an order being made by the Youth Court and facilitate the outcomes of a more culturally appropriate and responsive environment for the children and young people in their care.

[21] www.deadlystory.com/icms_docs/279200_a-step-closer-to-aboriginal-guardianship.pdf

22 http://hscchildcareprocedures.gov.gg/article/118361/Delegated-Authority

CAFFSA's Questions for the sector

Should there be provisions in the Act for 'transfer of/delegation of guardianship' to ACCOs and other non-Government organisations caring for both Aboriginal and non-Aboriginal children and young people? Do you have examples that would support your position that you are able to share with CAFFSA?

Approval of carers

Carer approval processes are detailed in Section 72 of the Act.[23] Section 72 (1) makes the provisions that 'The Chief Executive may, on an application under this section and by notice in writing, approve a person as an approved carer for the purposes of this Act.'[24]

CAFFSA notes that in practice, delays in the accreditation of new Foster Carers once the assessment process is completed by the assessor can occur because of the length of time for review and approval. This can be dependent on several factors such as the capacity of CARU at the time of submission and the level at which the assessment is prioritised within the current workload. This can cause unnecessary delays in the placement of young people and could have impacts such as young people remaining in residential facilities longer than required. The pressure on all approvals sitting with CARU could also be a factor in delays.

CAFFSA suggests legislating for a joint panel to review assessments (NGO and government). Such a panel would include a member of CARU, DCP, placement services unit (PSU), and the agency.

Assessments would be submitted to the panel members once completed by the assessor, approximately 1-2 weeks before the panel meets. The panel would review the applications, come together for the panel, and make the decision on the day to approve and make recommendations around carer registration (e.g 2 placements, aged 2-12yrs). This would facilitate a more holistic and potentially swifter approval and placement process.

[23] Children and Young Person (Safety) Act 2017 (SA) s 72, p.45
[24] *Ibid,* s 72 (1), p.45

CAFFSA's Questions for the sector

Should the Act make provisions for a joint Government / NGO panel to assess and approve foster carers?

The DCP Discussion paper also references the central importance of foster and kinship carers – a position fully supported by CAFFSA:

> *The future of a sustainable out of home care system is critically reliant on carers, and currently, more carers are needed to support the number of children and young people in need. In every way possible, we need to be encouraging more people to open their homes to care for children and young people. This review also provides an opportunity to think about whether we need to make changes to the CYPS Act to better support carers to care for children and young people, and embed DCP's 'Statement of Commitment' in legislation.*

CAFFSA's Questions for the sector

CAFFSA is also interested in the question posed in DCP's Discussion Paper (p. 18)

Can changes be made to the legislation which help us to further bring to life the 'Statement of Commitment'?

Do you have any views on the Connecting Foster and Kinship Carers suggestions for legislative change in their submission to the Carers Inquiry earlier this year?

Psychological / psychometric assessment of residential care staff

Section 107 (1) of the Act provides that:

A person must not be employed in a licensed children's residential facility unless the person has undergone a psychological or psychometric assessment of a kind determined by the Chief Executive for the purposes of this section.[25]

CAFFSA continues to be opposed to the inclusion in the legislation of these provisions on the basis that such tests are not predictive of predatory behavior and do not necessarily serve to safeguard children and young people in residential care facilities.

[25] *Ibid,* s 107, (1), p.63

Validity and reliability of tests and process

Psychometric processes need to demonstrate both reliability and validity of individual measures and actions. A measure is reliable when it consistently measures a construct across different participants. Whilst CAFFSA does not have information on the reliability of individual measures used in psychometric assessment, it is highly probable the online psychological measures have adequate levels of reliability. However, reliability within the interview process raises more concerns. CAFFSA understands that the assessment is conducted using structured interview questions (with 2 'structured' interview questions increasing assessment reliability), but we are concerned that there is only one person conducting the interview, and NGO staff are reporting significant variation in how the interviews are being conducted (e.g., degree of follow-up suggestions offered, how questions are being explored, prompting etc).

This suggests to CAFFSA that these interviews are potentially not being conducted in a consistent manner across the interviewers or organizations conducting them. Research demonstrates there are significant issues related to reliability of interviews conducted by two or more people (inter-rater reliability is low). Ensuring that the interviews are being conducted in a reliable manner across interviewers in order to minimize inter-rater reliability is a crucial consideration.

When it comes to implementation, it is acknowledged that no psychological testing process is fool-proof. On this basis, there is a need to balance the impact of false positives (a staff member is wrongly deemed non-suitable when they are actually suitable) and false negatives (a staff member is deemed suitable when they actually pose a risk to children).

There is overwhelming evidence that the current assessment process is placing significant stress and anxiety on individual staff, therefore, there is a high risk the assessment process is being confounded by these features (e.g., process is assessing situational anxiety). On the basis of this, there is an argument that psychometric does not offer reliable enough data on the suitability of an applicant to offset the stressful experiences applicants are required to undertake.

CAFFSA's Questions for the sector

Should the requirement for psychometric testing for all staff working in residential care facilities be removed from the Act?

Other matters not covered by this Discussion Paper

Are there any other provisions in the Act that you think should be either removed or incorporated into the amended legislation? Please feel free to provide details, your rationale and any interstate or international examples you may wish to include as further evidence.

Thank you for taking the time to engage with these important debates. CAFFSA will be collating responses to inform our final submission, and we are grateful for your generosity in considering the options and contributing to our advocacy in the interests of vulnerable South Australian children and families.