Submission to the review of the
2017 Children and Community Services Act 2004

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Post your submission to:

2017 Legislative Review
General Law Unit
Department for Child Protection and Family Support
PO Box 6334
EAST PERTH WA 6892

Section 1: Your Personal Details

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Ms Emma White  
Director General  
Department of Child Protection and Family Support  
189 Royal Street  
EAST PERTH 6004

Dear Emma


As Commissioner, pursuant to the Commissioner for Children and Young People Act 2006 (the Act), I advocate for all Western Australian children and young people under 18 years of age. I also have a legislated responsibility to monitor and review written laws, draft laws, policies, practices and services affecting the wellbeing of children and young people.

In performing my functions I must give priority to, and have special regard to the interests and needs of Aboriginal and Torres Strait Islander children and young people, and children and young people who are vulnerable or disadvantaged for any reason. The best interests of children and young people must be my paramount consideration and I must have regard to the United Nations Convention on the Rights of the Child (UNCROC).

With the above responsibilities in mind I welcome the opportunity to provide comment on the Department for Child Protection and Family Support (the Department) Review of the Children and Community Services Act 2004, Consultation Paper December 2016. Please find my submission, including 22 Recommendations, attached.

Yours sincerely

COLIN PETTIT  
Commissioner for Children and Young People WA  
18 April 2017

Caring for the future growing up today
COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE
SUBMISSION TO THE REVIEW OF THE CHILDREN AND COMMUNITY SERVICES ACT 2004 CONSULTATION PAPER DECEMBER 2016

Overview of relevant work completed or reviewed

This second review of the Children and Community Services Act 2004 (CCS Act) provides an opportunity to build on and strengthen the CCS Act in light of planned reforms by the Department, the findings and recommendations of child protection inquiries and reviews locally and in other jurisdictions, local and national research and the enhancements and reforms of equivalent legislation in other states and territories.

Comments provided by my office to the review of the Children and Community Services Act 2004 (2012) (2012 Review), and also on more recent consultation papers and work of the Department are also relevant to this current review, including:

- Feedback to the Department on the Independent Assessment Reports on Kath French Secure Care and residential care facilities in 2016 (our reference 16/7349 & 16/8516).

The following reports produced by my office are also directly relevant to the work of the Department and the CCS Act. Importantly these documents are informed by the views and experiences of children and young people:

- Speaking Out About Youth Justice. The views of young people who have had contact with Youth Justice Services, (December 2016).
- Speaking Out About Raising Concerns in Care. The views of Western Australian children and young people with experience of out-of-home care (October 2016).
- "Listen To Us": Using the views of WA Aboriginal and Torres Strait Islander children and young people to improve policy and service delivery (August 2015).

In developing my submission, I have also taken into consideration the findings and recommendations of the following state and national reviews and reports:


The Family Matters Report: Measuring trends to turn the tide on Aboriginal and Torres Strait Islander child safety and removal. SNAICC 2016.

A report on giving effect to the recommendations arising from the Investigation into issues associated with violence restraining orders and their relationship with family and domestic violence fatalities. Ombudsman WA 2016.

Annual Report 2015 -2016. Ombudsman WA.


When a child is missing Remembering Tiahleigh. A report into Queensland’s children missing from out-of-home care Queensland Family and Child Commission 2016.


Always was, Always will be Koori children. Systemic inquiry into service provided to Aboriginal children and young people in out-of-home care. Victoria Commission for Children and Young People 2016.


As a good parent would. Inquiry into the adequacy of the provision of residential care services to Victorian children and young people who have been subject to sexual abuse or sexual exploitation whilst residing in care. Victoria Commission for Children and Young People, August 2015.


Investigation into ways that State government departments and authorities can prevent or reduce suicide by young people. Ombudsman WA 2014.


Finally, I have reviewed the following equivalent legislation from WA and other jurisdictions:

Western Australia - Restraining Order and Related legislation Amendment (Family Violence) Act 2016.

South Australia – Children and Young People (Safety) Bill 2016.

Tasmania - Children, Young Persons and Their Families Amendment Act 2013.

Australian Capital Territory - Children and Young People (Transition from Out-of-Home Care) Amendment Act 2012.

Australian Capital Territory - Children and Young People Act 2008.
- Northern Territory - Care and Protection of Children Act 2007.

**Response to the Consultation Paper**

As indicated by the Department in the *Review of the Children and Community Services Act 2004, Consultation Paper* December 2016 (2016 Consultation), submissions may be made in response to the questions in the Consultation Paper, or on any other aspect of the Terms of Reference of the Review or the operation and effectiveness of the CCS Act\(^1\) (page 2.)

This submission provides responses to:

A. Already approved amendments agreed to by the previous state government noted within the Consultation Paper
B. Parts 1-5 Terms of Reference of the Review and some questions in the Consultation Paper
C. Other aspects of the operation and effectiveness of the CCS Act, including repetition of some previous recommendations from the submission by my office to the CCS Act Review in 2012.

**A. Already approved amendments noted within the Consultation Paper**

The Consultation Paper notes.

i. "Following the 2015 Legislative Consultation, the Minister for Child Protection, the Hon. Andrea Mitchell MLA, announced on 13 May 2016 the Government’s intention to amend the Act to focus it more effectively towards earlier decision-making for children’s long term care and legal status.
   - It is proposed the amount of time a child may be in out-of-home care without an application by the Department to the Children’s Court for a long term protection order – either a protection order (until 18) or a protection order (special guardianship) - will be two years, unless special circumstances warrant the Children’s Court extending that time limit to three years.
   - A principle is also proposed to provide that the child’s safe reunification with parents is the first priority wherever possible.\(^2\)

ii. "The Government has approved proposals for amendments to the Act aimed at strengthening the Department’s implementation of the child placement principle to maintain children’s cultural connections while in out-of-home care. These include:
   - A requirement for the Department to demonstrate its application of the section 12 child placement principle in the reports it is required to provide to the Children’s Court during protection proceedings. These are the reports required under section 61 in relation to applications for a special guardianship order, and section 143 of the Act in relation to applications for a protection order (time-limited) or protection order (until 18)."
• A requirement that a plan for maintaining a child’s culture and identity must accompany the reports the Department is required to provide to the Children’s Court under the above sections of the Act.

• Amendments to the Regulations are also proposed to include a new assessment criterion for the approval of foster carers and family carers. In order to approve a carer under section 79(2)(a)(1), the Department will need to be satisfied the person is able to promote children’s cultural needs and identity (OOHC reform action 63). This will require amendments in 2017 to the carer competencies provided in regulation 4 of the Regulations. Work is underway to develop the guidelines, training and documentation necessary to support this change in the assessment of carers.¹³

In response to the previous government’s approved changes I take this opportunity to reiterate a summary of my comments submitted previously, in my response to the Out-of-Home Care Reform Legislative Amendment Consultation Paper November 2015 (2015 Consultation), for consideration by the new Minister for Child Protection.

• I strongly supported the Department’s current policy on permanency planning (without legislative change on timeframes), and indicated if the current policy was implemented fully and the timeframes met, the current policy would support stability and permanency for children as it is.

• I expressed concern with the Department’s 2015 Consultation as it did not provide any information about how the Department will address current issues impacting on implementation of the current policy, issues that seemingly will remain with or without legislative changes e.g. service availability, resources, skills of workers.

• With an increased focus on permanency planning for children and young people, I emphasised the Department’s responsibility to these children and young people and their families in the implementation of the policies and the services provided to families emphasising:
  o resourcing and use of early intervention services as critical to reducing the need for children and young people to enter out-of-home care and to maximise the prospect of reunification when they are placed in care.
  o families experiencing often long term, entrenched challenges require intensive support to make changes and to be able to provide loving and supportive homes for children and young people.

• Within permanency planning policy or legislation, the Department (on behalf of the State) should be accountable and able to demonstrate how it has made reasonable efforts to provide services that will help families remedy the conditions that led to the children coming into care. In essence the burden of proof should be with the State in the first instance to demonstrate how they have worked with families to effect and support change.

• With regard to Aboriginal¹ children and young people in particular I noted:
  o Aboriginal children are significantly over-represented, now comprising over 50% of all children in out-of-home care, and increasing at a significantly faster rate than non-Aboriginal children in out-of-home care.

¹ For the purpose of this submission the term Aboriginal encompasses Western Australian’s diverse language groups and also recognises those of Torres Strait Islander descent.
Aboriginal families often experience structural disadvantage which may be compounded by experiences of intergenerational trauma and the history of removal of children.

Aboriginal children, due to their over-representation in care, are more likely than other children to have permanent placements away from their parents.

- Family care has now overtaken non-relative care as the predominant out-of-home care arrangement type. Placement in permanent care with other family members does not remove the responsibility of the State to continue to support these children and their carers. Whilst there is a paucity of research into family care, increasingly concerns are being raised about the capacity of family placements to meet the needs of children placed in their care either formally or informally as the rates of long-term illness or disability among family carers is much higher than in the general population and many children find themselves in providing help, care and support to their family carers within the home.

- Children and young people in family care may also require ongoing support as they adjust to permanent care with family; reconcile issues related to their parents and/or trauma history, as well as the poor health or other social issues of their carer. It is my view that family carers should continue to receive long term financial and other supports when permanently caring for children. Furthermore, I believe support should also be given to children and carers in informal care arrangements. ⁴

The Consultation paper outlines five principles to guide the review. Changes to legislation with regard to permanency planning would be contrary to the first three of their principles:

1. Legislation should be developed or amended only when there is no other appropriate way of responding to an issue after taking all relevant circumstances into account.
2. Recommendations for significant legislative change should be evidence-based, with due consideration given to possible flow-on effects including unintended consequences.
3. Regard should be given to the principles of substantive equality in recognition of the differing impact legislation may have on certain groups in the community. ⁵

Recommendation 1
The Department does not proceed with the amendments on permanency planning approved by the previous government. The Department continue to enhance the implementation of its current permanency planning policies to improve stability for children and young people.

Recommendation 2
The Department engage in discussion and planning principally with Aboriginal stakeholders as well as other agencies of the State to address and reduce the over-representation of Aboriginal children and young people within the child protection system.
B. Parts 1-5 Terms of Reference of the Review

PART 1 - IMPROVING CONSISTENCY IN FOSTER CARER STANDARDS THROUGH THE ASSESSMENT, APPROVAL AND REVOCATION PROCESS

This Term of Reference seeks feedback on legislative options/models for improving consistency in the assessment and approval of people who wish to be foster carers and the revocation of approval of foster carers who no longer meet the required standards. The consultation paper states submissions to the 2015 Consultation from service providers in the out-of-home care sector gave in-principle support to improving cross-sector consistency in the foster carer assessment and approval process, and broad support for:

- cross-sector portability of a carer’s approval status;
- a requirement that carers report relevant changes in personal circumstances or history;
- a carer’s right to external review of a decision to revoke his/her approval as a carer; and
- a requirement that all foster carers caring for a child in the Department’s care meet the carer competencies, including employees in the community service sector.

- In my submission to that 2015 Consultation I supported all of the above and added:
- Legislative amendments which provide for a single decision-maker (such as the CEO of the Department) in respect of the approval and revocation of foster carers
- All carers (whether paid or unpaid), where a person cares for a child in their own home or a home provided by an organisation as the carer’s primary residence should be subject to a legislative carer approval process.

In the 2016 Consultation paper the Department has proposed three models for decision making. Consistent with my comments to the previous 2015 Consultation, and without information on the cost and efficacy of any of the three models, I make the following recommendation:

Recommendation 3
Any legislative amendments for improving sector-wide consistency in the approval and revocation of carers:

- be transparent and inclusive of both the Department and Community Sector Organisation’s carers,
- ensure equal levels of accountability across the Department and Community Sector Organisations,
- be an evidence informed approach,
- be efficacious in ensuring quality carer assessment reports and approval decisions,
- be cost and time efficient,
- provide all prospective carers and Community Sector Organisations equitable pathways for review and appeal.
PART 2 - IMPROVING OUTCOMES FOR ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN, FAMILIES AND COMMUNITIES

This Term of Reference seeks feedback on the operation and effectiveness of the principles relating to Aboriginal children, which are found in sections 12 to 14 of the Act; the consultation requirement in section 81; and references the five elements of the Aboriginal child placement principle developed by SNAICC, which aim to ensure children’s safety and connection to family and culture.

Aboriginal child placement principle

Prevention Each Aboriginal child has a right to be brought up within his or her own family and community.

Partnership The participation of Aboriginal community representatives, external to the statutory agency, is required in all child protection decision making, including intake, assessment, intervention, placement and care, including judicial decision making processes.

Placement Placement of an Aboriginal child in accordance with the child placement principle.

Participation Aboriginal children, parents and family members are entitled to participate in all child protection decision-making affecting them regarding intervention, placement and care, including judicial decisions.

Connection Aboriginal children in out-of-home care are supported to maintain connections to their family, community and culture, especially children who are placed with non-Indigenous carers’.

As Commissioner I support the above five elements and in addition have recently signed the Family Matters Statement of Commitment to the following principles:

1. Applying a child focussed approach
2. Ensuring that Aboriginal and Torres Strait Islander people and organisations participate in and have control over decisions that affect their children
3. Protecting Aboriginal and Torres Strait Islander children’s right to live in culture
4. Pursuing evidence based responses
5. Supporting, healing and strengthening families
6. Challenging systemic racism and inequities

In my role I aim to work collaboratively with Aboriginal people and their organisations to support the goal of the Family Matters campaign to ensure Aboriginal children and young people grow up safe and cared for in family, community and culture and to eliminate the over-representation of Aboriginal children in out-of-home care by 2040.

Many Aboriginal leaders have expressed to me their frustration at the ineffectiveness of meaningful consultation currently occurring with children and young people, their family members and communities at an individual child level as well as at a systems level to support the effective operation of section 81.
To my knowledge there has been no comprehensive research or review of the implementation of the Aboriginal child placement principle in this state equivalent to the work completed by the Victoria Commission for Children and Young People which highlighted the disparity between compliance with the principles at a policy and program level (strong compliance) and the overall practice compliance (minimal compliance).\(^8\)

The Department's own assessment and reporting on the Aboriginal child placement principle in WA focuses only on the proportion of Aboriginal children in the CEO's care placed in accordance with the Aboriginal and Torres Strait Islander child placement principle. The Department's Annual Report indicates this occurs in 66% of cases, with the agency target being 80%.\(^9\)

**Principles of self-determination and community participation**

The principles in sections 13 and 14 of the Act intend to support the operation and effectiveness of the Aboriginal child placement principle and full implementation in accordance with its objective “to maintain a connection with family and culture for Aboriginal children and Torres Strait Islander children who are the subject of placement arrangements.” – section 12(1).

Other jurisdictions in Australia have stronger language in comparable legislation:

**Victoria**

**Division 4—Additional decision-making principles for Aboriginal children**

12 Additional decision-making principles.

(1) In recognition of the principle of Aboriginal self-management and self-determination, in making a decision or taking an action in relation to an Aboriginal child, the Secretary or a community service must also give consideration to the following principles

(a) in making a decision or taking an action in relation to an Aboriginal child, an opportunity should be given, where relevant, to members of the Aboriginal community to which the child belongs and other respected Aboriginal persons to contribute their views;

(b) a decision in relation to the placement of an Aboriginal child or other significant decision in relation to an Aboriginal child, should involve a meeting convened by an Aboriginal convener who has been approved by an Aboriginal agency or by an Aboriginal organisation approved by the Secretary and, wherever possible, attended by

(i) the child; and

(ii) the child's parent; and

(iii) members of the extended family of the child; and

(iv) other appropriate members of the Aboriginal community as determined by the child's parent;
Queensland

6 Recognised entities and decisions about Aboriginal and Torres Strait Islander children

1. When making a significant decision about an Aboriginal or Torres Strait Islander child, the chief executive, the litigation director or an authorised officer must give an opportunity to a recognised entity for the child to participate in the decision-making process.

2. When making a decision, other than a significant decision, about an Aboriginal or Torres Strait Islander child, the chief executive, the litigation director or an authorised officer must consult with a recognised entity for the child before making the decision.

3. However, if compliance with subsection (1) or (2) is not practicable because a recognised entity for the child is not available or urgent action is required to protect the child, the chief executive, the litigation director or an authorised officer must consult with a recognised entity for the child as soon as practicable after making the decision.

New South Wales

Part 2 12 Aboriginal and Torres Strait Islander participation in decision-making

Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Minister, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under this Act that concern their children and young persons.

Development of Aboriginal community controlled organisations

I strongly support the intent of the four priority areas of the Department’s Aboriginal Services and Practice Framework 2016-2018: Capacity Building; Community Engagement; Practice Development; and People Development.

The stated aim of the Capacity Building priority area is to “enable and lead sector capacity building including the development of Aboriginal community controlled organisations (ACCOs) through a Department initiated ACCO Strategy; the strategic procurement of services that best meet the needs of Aboriginal children, families and communities; and the support of innovative and flexible service design and delivery.”

The Department’s Aboriginal Services and Practice Framework 2016-2018 states an Implementation Plan will be developed detailing specific actions, responsibilities and timeframes to deliver on the Priority Areas. To date I have not seen the Implementation Plan.

In the 2012 Review submission of this office it was noted that the Ford Review recommended “an Aboriginal Reference Group comprised of respected and senior Aboriginal people be established to provide input into policy, practice, and staff development and training programs should be established.” An Aboriginal Reference Group was established in 2008 and was subsequently replaced by the establishment of the Aboriginal Expert Panel. Currently however there appears to be no group of this type in place and it is not clear how members of the Aboriginal community are involved in providing input and feedback regularly on the work of the Department.
To date the input and advice the Department receives from external Aboriginal leaders and community members state wide is not transparent to the whole community and appears to be limited to minimal representation on the Department’s advisory groups. I am aware from Aboriginal leaders that discussions have been occurring with the Department to develop a peak body for Aboriginal service providers state wide who provide services to children and families within the child protection system. This is encouraging, however a significant shift in resourcing and supporting the Aboriginal community service sector to develop and manage their own service responses will empower and resource Aboriginal leaders, agencies and groups such as Family Matters WA, SNAICC, the Aboriginal Child Protection Council and the Kimberley Aboriginal Children in Care Forum to be instrumental in WA in developing a new approach to children protection. These leadership groups are rightly very concerned by the research which indicates “that on current trends the number of Aboriginal and Torres Strait Islander children in out-of-home care will almost triple by 2035.”

In considering the Aboriginal child placement principle, the principles of self-determination and community participation, the implementation of the Priority Areas of the Department’s Framework and in reviewing the legislation relating to Aboriginal children I make the following recommendations:

Recommendation 4
The Department support the development of a peak body for Aboriginal community sector organisations who will be resourced and empowered to take on a mutually agreeable role in Western Australia which could include:

- Assisting organisations with the development of culturally appropriate, evidence informed, efficient, effective, services, for Aboriginal children, young people, families and communities.
- Representing the views and needs of Aboriginal children, young people, families and communities state wide to all levels of the government and non-government sector, the media and general public, in relation to social policies, community services planning and service delivery issues for children and young people at risk.

Recommendation 5
The Department develop the Implementation Plan for the Aboriginal Services and Practice Framework in conjunction with a peak body for the Aboriginal community sector organisations.

Recommendation 6
The Department, in conjunction with the peak body for Aboriginal community sector organisations, Aboriginal leaders and communities develop agreed legislative changes that strengthen meaningful participation and consultation of children and young people, families and community members all principles, definitions and relevant parts in the CCS Act.
PART 3 - SUPPORTING THE SAFETY AND WELLBEING OF CHILDREN AND FAMILIES EXPOSED TO FAMILY AND DOMESTIC VIOLENCE

This Term of Reference seeks feedback on any changes to the Act necessary to support the safety and wellbeing of adults and children subject to family and domestic violence. The Women’s Council for Domestic and Family Violence Services WA (the Council) have suggested there is an opportunity to support the Department’s work with children and adults experiencing family violence by considering revising the current CCS Act to reflect the new wording and provisions within the recently amended Restraining Order and Related Legislation Amendment (Family Violence) Act 2016 WA. For example, the new wider definition of emotional abuse within that Act which will be used by WA Police and judiciary when issuing Family Violence Restraining Orders (FVRO) or Police Orders from July 2017.

The new Act will include under section 6A:

1. For purposes of the Act, a child is exposed to family violence or personal violence if the child sees or heard the violence or otherwise experiences the effects of the violence.
2. Examples of situations that may constitute a child being exposed to family violence or personal violence included (but are not limited to) the child
   - Overhearing threats of death or personal injury to a person; or
   - Seeing or hearing an assault of a person; or
   - Comforting or providing assistance to a person who has been assaulted; or
   - Cleaning up a site after property damage; or
   - Being present when the police or ambulance officers attend an incident involving the violence.

Furthermore the Council have indicated that in order to keep children safe with the protective parent the Department should consider the opportunity to work within the Restraining Order and Related Legislation Amendment (Family Violence) Act 2016 WA. The Department can use the existing option of seeking Restraining Orders on behalf of children at risk of harm (Section 24A - an application for a FVRO can be made by a Child Welfare officer where the protection is for a child).

I do support the principle that perpetrators of family violence are solely responsible for that violence and its impact on others including children and young people and they should be held to account for their behaviour. I do not propose to comment on the consultation question related to a new offence type in the CCS Act other than to suggest the Department work with other agencies to thoroughly consider offence types within other legislation such as the Criminal Code, and the Restraining Order and Related Legislation Amendment (Family Violence) Act 2016 WA before considering changes to the CCS Act.

Recommendation 7
The Department thoroughly consider how it can enhance safety to children and young people experiencing family violence by using the Restraining Order and Related Legislation Amendment (Family Violence) Act 2016 WA to its fullest extent, which will be a more immediate solution to the issues raised in the Consultation paper ahead of any amendments to the CCS Act.
Recommendation 8
Following a period of review of the effectiveness of the Department’s use of the Restraining Order and Related Legislation Amendment (Family Violence) Act 2016 that the Department, in consultation with the community, including children and young people, consider if any further changes to the CCS Act are required to keep children and young people experiencing domestic violence safe.

PART 4 - THERAPEUTIC SECURE CARE FOR CHILDREN AT HIGH RISK

This Term of Reference seeks feedback on the legislation relating to secure care arrangements for children at high risk and specifically Consultation Question 7:

Would you support a limited increase in the maximum number of days a child may be placed in secure care under an initial secure care arrangement, and an extension of a secure care arrangement; for example, from 21 days to 28 days?

The Department notes in the Consultation paper “there is paucity of research on the effectiveness and practice parameters of secure care settings for children placed in secure facilities for child protection purposes (rather than for youth justice or mental health purposes), including evidence about the most effective length of time that should apply.”

Given the principles of the review include “2. Recommendations for significant legislative change should be evidence-based, with due consideration to possible flow-on effects including unintended consequences”15; and the Department’s own concern about the unexpected and increasing number of younger children requiring secure care,16 I do not support any extension to the time period of a secure care arrangement.

Furthermore in the consultation paper the Department notes practice challenges of a 21-day or less secure care period, including:
1. building therapeutic relationships;
2. responding to the complex and diverse nature of children’s needs within in a secure environment and gaining timely access to the specialist services necessary to address them during and post-secure care;
3. finding appropriate placement options in a timely manner (in practice, a maximum 21 day secure care period is often reduced to 15 working days placing pressure on the out-of-home care system to arrange complex support options for the state’s most challenging children); and
4. facilitating timely review of secure care decisions if applied for by children who have been administratively admitted17.

These practice challenges, particularly 2-4 are systemic issues impacting on but unrelated to the secure care arrangement itself. On principle, children and young people should not be made to stay in secure care for a longer period as a result of the system being unable to provide appropriate services within current requirements. These services and processes should be provided in a timely manner and should receive priority attention given the impact on the experience of children and young people in the Kath French Centre.
I note that the CCS allows for the CEO of the Department to extend the period in secure care by up to a further 21 days (s.88F) where exceptional reasons exist in the circumstances of a particular child. In the absence of evidence of benefit to the contrary, I am of the view that further legislative amendment to extend the current period of 21 days is not in the best interest of the child.

This section of the Consultation paper also outlines section 125 A of the CCS Act related to oversight and specifically the appointment and functions of external assessors. The Department states the “broad powers in section 125A of the Act enable assessors to exercise a high degree of external oversight of secure care and residential facilities operated by the Department and the community service sector. Four assessors are currently appointed under a panel contract with the Department until 30 June 2017, and to date there have been five assessor visits to the Kath French Centre.”18 The Department also advises that “it provides copies of all assessor reports to Western Australia’s Commissioner for Children and Young People.19”

It is correct that I receive copies of all assessor reports for visits to the Kath French Centre and residential facilities as per a Memorandum of Understanding between our two agencies. The Kath French Secure Care Centre has been in operation since May 2011. A copy of the first assessment report (December 2011) was received in January 2012 by my office with reports on subsequent follow-up visits or new assessment visits totalling five in a four year period. Whilst it is agreed that any child admitted to the Kath French Secure Care Centre (or a parent or relative of the child) may ask to see and talk with an assessor and the Department must facilitate the meeting, according to the information provided to me by the Department in September 2016, there has been no instance of that occurring.

I wrote to the Director General in September 2016 and clearly stated “after considering the information provided I remain concerned about the robustness of the current Independent Assessment Report process for children in out-of-home care.” At that time I provided a summary of my concerns about the assessor process and made recommendations for improvement across four key areas: Purpose and Assessor Role; Assessment and Reporting Process; Involving Children and Young People; and Effectiveness.

It is my view that an assessment/monitoring function of any facility provided by government agencies (directly or through funded services) should be conducted within a transparent, coherent and comprehensive monitoring framework focused on ensuring the rights of children and young people are upheld, their needs are being met and a high standard of care is provided. External assessment is an opportunity for reviewing what an organisation says it will do and what it actually does. Reporting on results can lead to integrity, trust and confidence in the quality of care provided to children and young people and the identification of ways to improve the services they receive.

The Inquiry into the St Andrew’s Hostel Katanning20 clearly outlined the vulnerability of young people in residential services. Similarly the current Royal Commission into Institutional Responses to Child Sexual Abuse21, and the recent South Australian Royal Commission22 have also highlighted the serious and widespread abuse of children in a variety of institutional settings. As Commissioner Nyland states “prioritising the experiences of children, and creating an environment in which children can speak and be heard can prevent sexual
abuse. When the experiences of children are ignored or dismissed, those who are minded to commit abuse will flourish.” The importance of effective, independent oversight is critical to ensuring the safety and wellbeing of vulnerable children, particularly those who often lack the advocacy of capable parents.

**Recommendation 9**
The period of secure care should not be increased from the current 21 days.

**Recommendation 10**
The assessor role outlined in section 125A of the CCS Act be reviewed to provide for a more a robust mechanism that provides the high degree of independent, external oversight of secure care and residential facilities that is needed.

**PART 5 - THE INTERSECTION BETWEEN CHILD PROTECTION PROCEEDINGS AND PROCEEDINGS IN THE FAMILY COURT OF WESTERN AUSTRALIA**

This Term of Reference is intended to identify any legislative changes that could streamline and enhance the operation of the child protection and family law jurisdictions for children and families when the jurisdictions intersect. The Department advises in the Consultation paper that a separate working group of government and non-government stakeholders with legal expertise will address this Term of Reference for the Review. It is my understanding this group has yet to commence meeting.

Nationally a significant body of work has been conducted in the area by the Family Law Council with their review and recommendations outlined in The Final Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems (2016). Given this work, the specialist legal knowledge associated with these matters and the intersection of Part 5 and Part 3 of this Consultation paper I will await clear recommendations by the Department for changes to WA legislation and/or the CCS Act to make comment.

**C. Other aspects of the operation and effectiveness of the CCS Act - including repetition of some previous recommendations from the submission by this office to the 2012 Review of the CCS Act**

Based on the current cycle of reviews of the CCS Act the next review will not be until 2021-2022. Therefore I table for the Department’s consideration some areas not currently legislated and/or mentioned in the Consultation paper. Each of these topic areas requires input from key stakeholders, children and young people, and consideration of the research and learning from other jurisdictions. A brief description only of each issue is given.

**1. Rapid Response**

In my response by my office to the 2012 Review it was recommended “that consideration be given to amending the CCS Act to include the Rapid Response framework (2012, Recommendation 26).

The objects of the CCS Act are detailed in Part 2, section 6 a-e and clarify the purpose and intent of the Act. The first three objects are particularly pertinent to the way in which the
Department and other organisations resource and structure their services and responses to children, young people and their families:

a. to promote the wellbeing of children, other individuals, families and communities; and
b. to acknowledge the primary role of parents, families and communities in safeguarding and promoting the wellbeing of children; and

c. to encourage and support parents, families and communities in carrying out that role.

In December 2009, the Western Australian Cabinet endorsed *Rapid Response*, an across-government policy focusing on the development of a framework and action plan to ensure that children and young people in care receive priority access to services in relation to health, education, safety and wellbeing and housing.

Consistent with my office’s submission to the 2012 Review and my views expressed at the beginning of this submission, I believe the Department and other agencies of the State should be accountable to show that all reasonable efforts have been made to provide services for children and young people at risk of entering care, for those in out-of-home care and those leaving care. These children and young people should all have clear access to timely and comprehensive services to ensure their health (including mental health), education, housing, and other support needs are met.

**Recommendation 11**
The Rapid Response Framework be included within the CCS Act to ensure that timely and comprehensive services are made available to children and young people at risk of entering care, whilst they are in out of home care and when they leave care.

**2. Transitioning to independent living**

In the previous submission by my office to the 2012 Review it was noted that “International research consistently shows that young people leaving care are particularly disadvantaged and have significantly reduced life chances”\(^{25}\). This continues to be true and assisting young people to transition from care continues to be a critical role for the Department.

“Young people leaving out-of-home care (OOHC) face this transition to adulthood without family support and with significant extra barriers such as poor mental health, intellectual and physical disabilities, and developmental delays. They are further disadvantaged through structural impediments and economic and social policy factors, such as the lack of affordable or appropriate housing and high unemployment.”\(^{26}\)

The Australian Institute of Family Studies also state “despite state and national government commitment to better support young people leaving care, evidence suggests there are continuing shortfalls in policy and legislation.”

I therefore reiterate Recommendation 18 from the 2012 Review submission of this office, that consideration be given to including a new, specific section in the CCS Act detailing the leaving care process and transition to independent leaving for young people up to 25 years.
I also support the work of the WA Home Stretch Guiding Committee who with others nationally are advocating for the option for young people to remain, if they choose, in state care until the age of 21 years.

Recommendation 12
The Department work collaboratively with the WA Home Stretch Guiding Committee, CREATE and other key stakeholders, including children and young people in out-of-home care to immediately address implementation issues and gaps within the current leaving care planning legislation and policy.

Recommendation 13
The Children and Community Services Act 2004 be amended to include a new specific section detailing the leaving care process and transition to independent leaving for young people up to 25 years.

Recommendation 14
The Department develops legislative amendment(s) in this review period to provide for an option for young people to remain, if they choose, in state care until the age of 21 years.

3. Problematic or Harmful Sexual Behaviours

Case Study 45, held in October 2016 by the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) was a public inquiry into problematic or harmful sexual behaviours by students in schools. The Royal Commission released a research report Help-seeking needs and gaps for preventing child sexual abuse (March 2017) which outlines the current service landscape and implications for policy and practice at all levels - primary prevention and secondary and tertiary responses.27

Identifying and responding to problematic sexual behaviours is a complex issue that requires thoughtful and sensitive management to ensure the best interests and wellbeing of all children concerned are served. The Victoria Children, Youth and Families Act 2005 now contains legislated provision for children in need of therapeutic treatment (Division 3) with provisions for reports about children aged 10 years or over and under 15 years of age who exhibit sexually abusive behaviours and are believed to need therapeutic treatment.

A therapeutic treatment report can be made by any community member, Victoria Police or the Criminal Division of the Victoria Children’s Court. This legislated response ensures assessment of a child’s behaviour and provision of therapeutic intervention and provides an opportunity, where appropriate, for diversion from the justice system. Therapeutic interventions are designed to address the harmful behaviours of children and young people and prevent future harm to others.

Recommendation 15
The Department develops legislated provisions for therapeutic treatment for children and young people who have harmful sexual behaviours.
4. Strengthening the Principles of the CCS Act

Section 9 of the CCS Act details the principles that are to be observed in the administration of the Act and currently they are largely concerned with the protection and safety of the child, and the need to respect and maintain familial relationships. Consistent with Recommendation 1 of the 2012 legislation review submission of this office I believe there is still scope to extend and strengthen the existing principles within the CCS Act to acknowledge children as valued citizens who have rights that should be respected and ensured. Equivalent legislation from other jurisdictions (see section 1 for full titles) provides a useful guidance in this area:

South Australia

**Guiding principles Chapter 2, Part 1, 3 (1)**

3 Parliamentary declaration

(1) The Parliament of South Australia recognises and acknowledges that:
   a. children and young people are valued citizens of the State; and
   b. the future of the State is inextricably bound to the wellbeing of all its children and young people; and
   c. it is of vital importance to the State, and all of its citizens, that all children and young people are given the opportunity to thrive.

Tasmania

**Principles to be observed in Dealing with Children**

10D Treating child with respect

1. A child is a valued member of society and is entitled to be treated in a manner that respects the child’s dignity and privacy.
2. All children are entitled to have their rights respected and ensured without discrimination.
3. Any decision under this Act relating to a child should be made.
   a. promptly having regard to the child’s circumstances; and
   b. in a manner that is consistent with the cultural, ethnic and religious values and traditions relevant to the child; and
   c. with, as far as practicable, the informed participation of the child, the child’s family and other persons who are significant in the child’s life.

Victoria

**Division 2 10 Best interests principles**

(2) When determining whether a decision or action is in the best interests of the child, the need to protect the child from harm, to protect his or her rights and to promote his or her development (taking into account his or her age and stage of development) must always be considered.

(3) (a) the need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention into that relationship is limited to that necessary to secure the safety and wellbeing of the child;

(3) (c) the need, in relation to an Aboriginal child, to protect and promote his or her Aboriginal cultural and spiritual identity and development by, wherever possible, maintaining and building their connections to their Aboriginal family and community;
Tasmania

**Best Interests of Child**

(i) the need to provide opportunities for the child to achieve his or her full potential;

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**Recommendation 16**

The Department in consultation with children and young people, agencies and other community stakeholders strengthen the principles for children and young people, their parents and communities within the CCS Act.

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**5. Cumulative Harm**

In 2015 the Ombudsman of Western Australia’s completed an investigation into ways that State government departments and authorities can prevent or reduce suicide by young people.\(^{26}\) I note the Department agreed to the recommendations in that report.

As per my submission to the Department on the Earlier Intervention and Family Support Strategy 2016\(^{29}\) I noted recommendations 9-12 are of particular relevance to earlier intervention as they refer to the effects of cumulative patterns of harm on a child’s safety and development and the need for recognition, assessment of and appropriate responses to cumulative harm arising from child maltreatment.

The Ombudsman in the 2014 report states that “legislation and policies in some other states and territories explicitly identify that child protection authorities need to undertake holistic assessments so as to recognise cumulative harm. However, there are no explicit legislative requirements in Western Australia for undertaking holistic assessments so as to recognise cumulative harm”\(^{30}\). The Ombudsman recommended:

- Recommendation 9: The Department for Child Protection and Family Support considers whether an amendment to the Children and Community Services Act 2004 should be made to explicitly identify the importance of considering the effects of cumulative patterns of harm on a child’s safety and development.
- Recommendation 10: The Department for Child Protection and Family Support considers the revision of its relevant policies and procedures to recognise, consider and appropriately respond to cumulative harm that is caused by child maltreatment.

Examples from legislation in other states include:

**South Australia**

14 meaning of risk

(3) In assessing whether there is a likelihood that a child or young person will suffer harm, regard must be had to not only the current circumstances of their care but also the history of their care and the likely cumulative effect on the child or young person of that history.

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**Victoria**

Division 2 10 Best Interest principles

(3) (e) the effects of cumulative patterns of harm on a child's safety and development;
Tasmania

10 Best Interests of Child

- any persuasive reports of the child being harmed or at risk of harm and the cumulative effects of such harm or risk.

Recommendation 17
The Department amends the CCS Act 2004 to explicitly identify the importance of considering the effects of cumulative patterns of harm on a child’s safety and development.

6. The rights of children and young people to participate

Section 78 of the CCS Act requires the establishment of a Charter of Rights for all children in the CEO’s care and the provision of a copy of the Charter and written information about it to all children in care.

In the 2016 consultation 96 children and young people in WA with an experience of out-of-home care it was evident that not all children and young people consulted knew about the Charter of Rights. In the consultation, participants were asked whether they had heard about or seen a copy of the Charter. Of the 86 children and young people who responded to this question, 57 (66%) had seen or heard of the Charter, and 29 (34%) had not. For some of the children consulted the Charter of Rights had been useful to negotiate with the Department having their rights met in care.

As per the 2012 Review submission of this office it continues to be evident there is scope for expansion and strengthening the Charter of Rights within the CCS Act.

One way to strengthen the Charter of Rights is to amend the legislation to introduce a review of the Charter every five years. South Australia makes provision for such a practice in their legislation:

Part 4—Charter of Rights for Children and Young People in Care

1. The Guardian must prepare and maintain a Charter of Rights for Children and Young People in Care.

2. The Guardian
   a. may vary the Charter at any time; and
   b. must review the Charter at least every 5 years.

3. In preparing, varying or reviewing the Charter, the Guardian must invite submissions from, and consult with, to such extent as may be reasonable, interested persons (including persons who are, or have been, under the guardianship, or in the custody, of the Minister or the Chief Executive) with a view to obtaining a wide range of views in relation to the matters under consideration.

The South Australian Charter of Rights for children and young people in care provides a comprehensive list of ways in which the rights of children and young people in care should be evident and tangible to children and young people (see Appendix 1). The recent review
of the Charter in that state involved children and young people and reflects their language and participation.

Another way to strengthen the Charter is to enhance the language of compliance with the Charter in legislation. The legislated language in WA provides that ‘the CEO must promote compliance with the Charter of Rights’

The South Australian legislation states:

(9) Each person or body engaged in the administration, operation or enforcement of a relevant law must, to the extent that it is consistent with section 6 to do so in a particular case, exercise their powers and perform their functions so as to give effect to the Charter.

Government and non-government agencies register with the South Australian Children’s Guardian their commitment to applying the Charter in their policy and practice.

The New South Wales Legislation on the Rights of children and young persons in out-of-home care specifies:

(3) Each designated agency and authorised carer has an obligation to uphold the rights conferred by the Charter of Rights.

**Recommendation 18 (consistent with 2012 Review Recommendation 13)**

The Department amend section 78 of the *Children and Community Services Act 2004* to strengthen provisions relating to the Charter of Rights.

**7. Care planning for children and young people in care**

Comprehensive care plans that identify the needs of children and young people in care, detail how those needs will be addressed, and who will be involved are essential to the care, safety and wellbeing of children and young people in care. It is critical that these plans are comprehensive, complete, and reviewed at least annually.

I am aware of the reform work in progress by the Department with development of new Care Team Approach,\(^\text{39}\) model that outlines how Care Team members have a shared responsibility for meeting the needs of the child in their care journey and the importance of the child’s participation in the team.

However at this time I reiterate recommendations made in 2012 by this office, to use legislative amendment and powers to ensure children and young people are involved in their care planning and key decisions in their lives:

**Recommendation 19 (consistent with 2012 Recommendation 15)**

The Department amends section 89 of the *Children and Community Services Act 2004* to require the participation of a child in the preparation of his/her care plan, and for his/her views and wishes to be documented in the plan.

**Recommendation 20 (consistent with 2012 Review Recommendation 16)**

The Department amends the *Children and Community Services Act 2004* to include that:
• the Department of Health must conduct a health assessment within 30 days of a child or young person coming into care
• the Department of Health, in liaison with the Department for Child Protection, must develop, implement and review (at least annually) a child’s health plan (covering physical, mental and dental health)
• the Department of Education, in liaison with the Department for Child Protection, must develop, implement and review (annually) a child’s education plan.

Recommendation 21 (consistent with 2012 Review Recommendation 21) The Department amends the special guardianship provisions of the Children and Community Services Act 2004 to include a child’s right to maintain their name, identity, cultural background and links with their community.

Recommendation 22 (consistent with 2012 Review Recommendation 22) That based on best practice for child-centred complaint resolution mechanisms, the Department for Child Protection develops an internal child-centred complaints management process and the Department amends references this system in the Children and Community Services Act 2004.
Recommendation 1
The Department does not proceed with the amendments on permanency planning approved by the previous government. The Department continue to enhance the implementation of its current permanency planning policies to improve stability for children and young people.

Recommendation 2
The Department engage in discussion and planning principally with Aboriginal stakeholders as well as other agencies of the State to address and reduce the over-representation of Aboriginal children and young people within the child protection system.

Recommendation 3
Any legislative amendments for improving sector-wide consistency in the approval and revocation of carers:
- be transparent and inclusive of both the Department and Community Sector Organisation’s carers
- ensure equal levels of accountability across the Department and Community Sector Organisations
- be an evidence informed approach
- be efficacious in ensuring quality carer assessment reports and approval decisions
- be cost and time efficient
- provide all prospective carers and Community Sector Organisations equitable pathways for review and appeal.

Recommendation 4
The Department support the development of a peak body for Aboriginal community sector organisations who will be resourced and empowered to take on a mutually agreeable role in Western Australia which could include:
- Assisting organisations with the development of culturally appropriate, evidence informed, efficient, effective, services, for Aboriginal children, young people, families and communities.
- Representing the views and needs of Aboriginal children, young people, families and communities state wide to all levels of the government and non-government sector, the media and general public, in relation to social policies, community services planning and service delivery issues for children and young people at risk.

Recommendation 5
The Department develop the Implementation Plan for the Aboriginal Services and Practice Framework in conjunction with a peak body for the Aboriginal community sector organisations.

Recommendation 6
The Department, in conjunction with the peak body for Aboriginal community sector organisations, Aboriginal leaders and communities develop agreed legislative changes that
strengthen meaningful participation and consultation of children and young people, families and community members all principles, definitions and relevant parts in the CCS Act.

**Recommendation 7**
The Department thoroughly consider how it can enhance safety to children and young people experiencing family violence by using the Restraining Order and Related Legislation Amendment (Family Violence) Act 2016 WA to its fullest extent, which will be a more immediate solution to the issues raised in the Consultation paper ahead of any amendments to the CCS Act.

**Recommendation 8**
Following a period of review of the effectiveness of the Department’s use of the Restraining Order and Related Legislation Amendment (Family Violence) Act 2016 that the Department, in consultation with the community, including children and young people, consider if any further changes to the CCS Act are required to keep children and young people experiencing domestic violence safe.

**Recommendation 9**
The period of secure care should not be increased from the current 21 days.

**Recommendation 10**
The assessor role outlined in section 125 A of the CCS Act be reviewed to provide for a more a robust mechanism that provides the high degree of independent, external oversight of secure care and residential facilities that is needed.

**Recommendation 11**
The Rapid Response Framework be included within the CCS Act to ensure that timely and comprehensive services are made available to children and young people at risk of entering care, whilst they are in out of home care and when they leave care.

**Recommendation 12**
The Department work collaboratively with the WA Home Stretch Guiding Committee, CREATE and other key stakeholders, including children and young people in out-of-home care to immediately address implementation issues and gaps within the current leaving care planning legislation and policy.

**Recommendation 13**
The Children and Community Services Act 2004 be amended to include a new specific section detailing the leaving care process and transition to independent leaving for young people up to 25 years.

**Recommendation 14**
The Department develops legislative amendment(s) in this review period to provide for an option for young people to remain, if they choose, in state care until the age of 21 years.
Recommendation 15
The Department develops legislated provisions for therapeutic treatment for children and young people who have harmful sexual behaviours.

Recommendation 16
The Department in consultation with Aboriginal leaders, agencies and other community stakeholders strengthen the principles for children and young people, their parents and communities within the CCS Act.

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The Department amends the CCS Act 2004 to explicitly identify the importance of considering the effects of cumulative patterns of harm on a child’s safety and development.

Recommendation 18 (consistent with 2012 Review Recommendation 13)
The Department amend section 78 of the Children and Community Services Act 2004 to strengthen provisions relating to the Charter of Rights.

Recommendation 19 (consistent with 2012 Review Recommendation 15)
The Department amends section 89 of the Children and Community Services Act 2004 to require the participation of a child in the preparation of his/her care plan, and for his/her views and wishes to be documented in the plan.

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- the Department of Health must conduct a health assessment within 30 days of a child or young person coming into care
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- the Department of Education, in liaison with the Department for Child Protection, must develop, implement and review (annually) a child’s education plan.

Recommendation 21 (consistent with Review 2012 Recommendation 21)
The Department amends the special guardianship provisions of the Children and Community Services Act 2004 to include a child’s right to maintain their name, identity, cultural background and links with their community.

Recommendation 22 (consistent with Review 2012 Recommendation 22)
That based on best practice for child-centred complaint resolution mechanisms, the Department for Child Protection develops an internal child-centred complaints management process and the Department amends references this system in the Children and Community Services Act 2004.
You have the right to feel good about yourself by:
- Being treated like other children and young people who do not live in care
- Knowing who you are and your history
- Knowing that people care about you
- Understanding where your family is
- Knowing about your culture
- If you are Aboriginal or Torres Strait Islander, knowing about your cultural and spiritual identity and your community
- Having all of your personal things kept safe - like photographs, school reports and special belongings
- Developing your talents and interests, like sport or art
- Keeping in contact with the people who help you feel good about yourself

You have the right to live in a place where you are safe and cared for.
This means a place where:
- People understand and respect your culture
- You are not hurt or made to feel bad
- You have someone to talk to
- You get treated with respect
- Things are fair
- Your thoughts and opinions are asked for and considered
- You get nutritious food
- You get decent clothes
- You have your own bed
- You have your own ‘space’ or a place where you can have some time on your own if you want it
- You have people caring for you who have special training about your needs
- You don’t have to move too much
- You know who to go to if you have a problem or want to complain about something.

You have the right to get the help you want or need. This means:
- Regular support and contact from your worker
- A plan which shows how and where you will be cared for
- A special plan for when you are leaving care
- A good education
- Extra support if you have special education needs
- Extra support if you have a disability
- Medical, dental and other care when you need it
- Preparation for employment and to live independently
- Support and a place to live when you leave care

You have the right to understand and have a say in the decisions that affect you. This means:
- Understand why you are in care
- Add information to your personal file
- Express your opinion about things that affect you
- Be involved in what is decided about your life and your care
- Know and be confident that personal information about you will not be shared without good reason
- Speak to someone who can act on your behalf when you cannot do this

You have rights.
If you feel that you are not being listened to or you need someone who can act on your behalf or you want to make a complaint. This is what you can do...
- Speak to your carer
- Speak to your worker
- Speak to the supervisor at your worker’s office
- Speak to the Guardian’s Office on 1800 275 664 or 8226 8570
- If it is after hours and urgent you can phone the Crisis Response Unit on 13 16 11

Chapter of Rights
for Children and Young People In Care

Office of the Guardian for Children and Young People  www.gcyp.sa.gov.au  08 8226 8570  gcyp@gcyp.sa.gov.au
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