



**Northern Territory
Legal Aid Commission**

Joint Submission

**North Australian Aboriginal Justice Agency (NAAJA)
and Northern Territory Legal Aid Commission (NTLAC)**

Care and Protection of Children Amendment Bill 2014

February 2014

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1. Introduction

The North Australian Aboriginal Justice Agency (NAAJA) and the Northern Territory Legal Aid Commission (NTLAC) have prepared this submission in response to the public release of the Care and Protection Amendment Bill 2014 ('the Bill'). These submissions set out NAAJA and NTLAC's concerns in relation to proposed introduction of the Permanent Care Orders into the NT child protection system.

NAAJA and NTLAC welcome the government's review of the Care and Protection Act and their commitment to providing permanent placements for children in out of home care. However, we are concerned that consultation with services and communities has not taken place prior to the bill and thus prevented a considered approach to how such legislation would be implemented in practice.

2. Our organisations

2.1 NTLAC

The NT Legal Aid Commission ('the Commission') was established in 1990 under the *Legal Aid Act*. The Commission's role was envisaged to be ensuring that the protection or assertion of the legal rights and interests of people in the Northern Territory are not prejudiced by reason of their inability to:

- Obtain access to independent legal advice;
- Afford the financial cost of appropriate legal representation;
- Obtain access to the Federal or Territory legal systems;
- Obtain adequate information about access to and their rights under the law and legal system; or
- By reason of their social exclusion to obtain access to that system.

Our Functions

The Commission delivers preventative services to inform and build individual and community resilience through:

- Community Legal Information
- Free Information, including through our legal information line
- Referrals to other legal and related service providers
- Indigenous Outreach Project

The Commission delivers legal services to assist people to resolve their legal problem before it escalates, such as:

- Legal advice clinics in:
 - Criminal law
 - Child in need of care matters
 - Family law matters
 - Civil law

- Duty lawyer services in:
 - Criminal law
 - Child in need of care matters
 - Civil law
 - Mental Health Review Tribunal
- The Commission provides dispute resolution services in relation to family law matters which consist of lawyer assisted negotiation and participation in the legal aid Family Dispute Resolution Conferencing Program.
- The Commission provides legal assistance through grants of aid across a range of areas including:
 - Family law matters
 - Family violence (through the Domestic Violence Legal Service')
 - Child in need of care proceedings
 - Criminal law matters
 - Immigration matters
 - Civil law

The Commission continues to perform an overarching role in increasing links between legal assistance providers with other service providers to ensure clients receive 'joined up' service provision to address legal and other problems.

Service Delivery Locations

The Commission delivers all of the services listed above from our offices in:

- Darwin
- Palmerston
- Katherine
- Tennant Creek
- Alice Springs

The Commission also:

- delivers Community Legal Education outside of the offices across the NT, including in remote communities.
- attends Nhulunbuy Court on a duty basis each month.
- attends other courts at locations outside of office locations, on a needs basis on occasions where other legal services are unable to act due to
- service delivery parameters or for ethical reasons, such as a conflict of interest

2.2 NAAJA

NAAJA was formed in 2006 with the merger of three existing Aboriginal Legal Services: the North Australian Aboriginal Legal Aid Service, established in 1972; the Katherine Regional Aboriginal Legal Aid Service, established in 1985; and the Miwatj Aboriginal Legal Service, established in 1998.

NAAJA has been delivering legal services and access to justice to Indigenous people in remote communities for the past 42 years. NAAJA provides criminal, civil and family law assistance to Aboriginal people across the Top End including in 20 remote communities.

It also delivers a range of innovative justice projects to Aboriginal people, including community legal education and throughcare support to Aboriginal people exiting prison and juvenile detention.

NAAJA is renowned for delivering innovative, high quality and culturally proficient legal services to Indigenous people and communities in the Top End of the Northern Territory. We have earned a reputation for delivering outcomes for Indigenous people.

NAAJA is now the largest legal practice in the Northern Territory. Over the last 7 years NAAJA has delivered criminal services in remote communities in 21,310 matters. NAAJA has delivered civil and family legal services in remote communities in 7,380 matters.

In 2010, NAAJA was awarded a Human Rights Award in the Law category for its history of protecting and promoting the rights of Aboriginal and Torres Strait Islander people and in 2014 NAAJA was an inaugural winner of a Northern Territory 'Fitzgerald' human rights award in the justice category. NAAJA's Youth Justice Team was a finalist in the 2014 National Children's Law Awards.

3. Submissions

3.1 Permanent Orders as last resort

NAAJA and NTLAC maintain that child protection orders should be used as a last resort to ensure children's safety. We recognise that stable, consistent placements are in the best interests of children in out of home care. However, we are concerned that Permanent Care Orders may not be the best means to ensure good outcomes for children in care and their carers if they are made too readily. It is our experience that many child protection orders are made in the absence of one or often both parents and with little guidance or support provided to parents about what they need to do to address protective concerns. The only safeguard is the requirement for care plans to be developed and regularly reviewed with input from the parents, and to be provided to the parents.

It is our experience that the Department of Children and Families ('DCF') does not undertake this care planning in most cases, in breach of their obligations under the Act. Consequently, the opportunity for parents to know what's happening for their children and what is expected of them is lost. In some cases this results in children remaining in care for longer than necessary. The child protection system should have the resources to enable a focus on early intervention and reunification with parents and other carers, especially when children are Aboriginal and the carers are not. NAAJA and NTLAC are extremely concerned at the chronic lack of services and intensive family support that are available to assist families in need. We reinforce that the best permanent home for a child is with family.

Recommendation 1: That the Bill be amended to state that permanent care orders may only be made as a last resort.
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Recommendation 2: That resources be invested in early intervention, intensive family support and reunification services.

3.2 Aboriginal Child Placement Principle and Cultural Care Plans

In the NT, Aboriginal children are disproportionately represented amongst the children in out of home care. As at June 2014 86% of the children in care were Aboriginal. Further, less than half of these children (41.7 %) were with Aboriginal carers.¹ Finally, the NT rate of placing children with Aboriginal carers is significantly lower than the national average (AIHW).

NAAJA and NTLAC have concerns about the lack of cultural safeguards for Aboriginal children in the current legislation. For example, unlike other jurisdictions, in the NT there are no current legislative provisions mandating ‘cultural plans’ for Aboriginal children in out of home care² and there are no provisions for Aboriginal agencies to advise on the placement of Aboriginal children.³

Given the statistics and the lack of existing safeguards in the legislation, we are concerned that introducing permanent care orders as proposed in the Bill will exacerbate the dislocation of Aboriginal children in care from their culture and identity. Without appropriate safeguards, NAAJA and NTLAC can not support the Bill.

NAAJA and NTLAC acknowledge the commitment contained in the second reading speech that permanent carers will be required to commit to maintaining family connections for Aboriginal children under permanent care orders. We also recognise that decisions about permanent care orders will need to be made in accordance with the Aboriginal child placement principle in section 12 of the Act. However there are no provisions in the Bill that require non-kinship or non-Aboriginal carers with a permanent care order to maintain an Aboriginal child’s contact with their family or culture. We note that section 12 of the Act is designed to emphasise Aboriginal children’s ‘sense of identity and sense of culture [is] to be “enhanced and preserved”’.⁴ With a permanent care order, the Department will cease to monitor the placement and therefore, there is no guarantee that commitments made by carers will be honoured. Such an important aspect of an Aboriginal child’s life as their connection to family and culture should not be left to the discretion of the carers.

The provisions about permanent care orders in the Victorian *Children, Youth and Families Act 2005* in our view contain appropriate safeguards with respect to supporting the cultural identity of Aboriginal children in care. Critically the Victorian legislation prevents the making of a permanent care order in the case of an Aboriginal child where it is proposed to place

¹ Office of the Children’s Commissioner Annual Report

² See for example s 176 of the Victorian Children Youth and Families Act 2005.

³ See for example s13 of the Victorian Children, Youth and Families Act 2005

⁴ *Growing them strong, together*, Report of the Board of Inquiry into the Child Protection System in the Northern Territory, 2010, M. Bamblett, H. Bath and R. Roseby Northern Territory Government, Darwin.

the child in the care of a non Aboriginal person unless certain conditions are met⁵ . Those restrictions include;

- the preparation of a report from the relevant Department certifying that no suitable Aboriginal care can be found,
- the child has been consulted and that the Secretary is satisfied that the permanent care order is in accordance with the Aboriginal Child Placement Principle.

In addition there is a requirement for an independent report to be provided from an 'Aboriginal agency' recommending the making of the order. There are no such restrictions in the Bill.

Secondly the Victorian legislation⁶ allows for permanent care orders to include mandatory conditions about contact with parents, and discretionary conditions about contact with siblings and other significant people provided those conditions are in the best interests of the child. By mandating conditions about contact with parents, the Court is required to consider the issue of ongoing contact between the child and their parents. The Victorian legislation also allows for the Court to order a permanent care order be subject to conditions in a cultural plan. If a cultural care plan is created under s176(4) of the Act the department is required to monitor the carers' compliance with that plan.

In contrast the permanent care orders proposed by the Bill only allow the court to make 'directions' authorizing the child to travel outside Australia without the parents' consent. The Bill states further that the Court "must not make any other direction".

Recommendation 3: That the *Care and Protection of Children Act* be amended to include safeguards to protect the connection to culture and family of Aboriginal children in the care of non Aboriginal carers. Specifically we recommend the introduction of cultural plans and an independent Aboriginal child care agency with a monitoring and consulting role.

Recommendation 4: That the Bill be amended to include legislative safeguards to ensure that Aboriginal children in permanent care placements are being provided with connection to family and culture. Specifically we recommend provisions similar to those in the Victorian *Children Youth and Families Act* setting additional requirements to be met before permanent care orders can be made in the cases of Aboriginal children and allowing the Court to place conditions about contact with parents and other family to be placed on permanent care orders.

Recommendation 5: Further in the cases of Aboriginal children proposed to be placed permanently in the care of non Aboriginal carers we recommend that it be mandatory for cultural plans to be a condition of the order.

⁵ Section 323

⁶ Section 321(1)(d) and (e)

3.3 Service

NAAJA and NTLAC acknowledge that the notice of application in section 137C of the Bill contain the same requirements as the other notice provisions in the *Care and Protection of Children Act*. It requires that the Department provide the parents with a copy of the application by personally serving them or if the Department considers that impracticable by leaving them at their last known address or sending them by post. We also note that section 137E of the Bill outlines, similar to the current section 126, that the hearing of the application may be heard in the absence of a parent.

The notice of order outlined in section 137L of the Bill requires parents to be provided with a copy of the order and a written notice explaining the order, stating that a party may appeal within 28 days and how the appeal may be made.

NAAJA and NTLAC are concerned that these notice provisions within the Bill will not effectively ensure that parents are provided proper notice. Given the serious and long-term nature of the Permanent Care Orders, NAAJA and NTLAC consider it essential that the Department is required to make every effort to ensure that parents are personally served, understand the nature of the application or order and have been afforded an opportunity to be heard and be legally represented. This must include the use of interpreters where necessary. We consider this especially important given that parents have no right to seek revocation of the orders and any appeals must be filed within 28 days of the order being made.

Recommendation 6: Section 137C to include more stringent requirements on the Department to ensure that parents are personally notified and informed of their rights in relation to any permanent care application and order.

Recommendation 7: Section 137C be amended to require that parents be served with a notice and application personally in the first instance and where this not possible that an application be made to Court for substituted service and/or dispensation of service (an application of which can be made to the Registrar of the Magistrate Court).

3.4 Parties

NAAJA and NTLAC are concerned that under s.137D of the Bill only the CEO, the parents, the child and proposed permanent carers are considered parties to the proceedings. There is no avenue for other family or people with an interest to join as parties. This option is provided in applications for other protection orders in the Act. Under s.125, any other person who has applied to the Court and is considered to have a direct and significant interest can be joined. NAAJA and NTLAC acknowledge that s.137H of the Bill allows the court to consider the wishes of 'any other person considered by the Court to have a direct and significant

interest'. We consider it important in certain cases for other persons to be joined as parties, again particularly noting the serious effects of a permanent care order.

Recommendation 8: Section 137D be amended to allow, at the Court's discretion, other persons to be made parties to proceedings for permanent care orders.

3.5 Application

The Bill outlines that only the Department may make applications for permanent care orders (s. 137A (2)) and apply for the order to be revoked (s. 137M). NAAJA and NTLAC recommend that all parties be able to apply for a permanent care order. We note that this is provided for in other jurisdictions such as Victoria's Permanent Care Orders. This will allow long-term foster and kinship carers who wish to become permanent carers to initiate the application themselves and not be forced to rely on the Department to initiate the application.

Recommendation 9: That section 137A(2) be amended to enable other parties to apply for a permanent care order.

3.6 Payment to Carers

NAAJA and NTLAC are concerned that carers who obtain permanent care orders will no longer be eligible for carer payments pursuant to section 82 of the Act. The second reading speech notes 'Once a Permanent Care Order is made, long term remuneration of carers through foster and kinship care payments and other costs currently covered by the Northern Territory Government will cease.' We submit that this will not be appropriate in all circumstances and some discretion should be available to make such payments. Carer payments for children under permanent orders exist in other jurisdictions.

Given that we are also recommending cultural plans to be mandatory for all permanent care orders we would also recommend that funding be made available to carers in order to support children's ongoing contact with family and their culture. For children whose families live in remote parts of the NT, the travel costs associated with allowing children to return to community to visit family or for ceremonial purposes may be a burden for carers.

NAAJA and NTLAC also submit that, before consenting to a permanent care order, it is essential that a carer is fully informed and advised of the implications of the order and that resources are specifically available to carers to ensure children are able to maintain contact with family and their culture.

Recommendation 10: That a provision such as s483 of the *Children and Young People Act 2008* (A.C.T.) be incorporated so the CEO has discretion to make financial contributions to carer:

483 Enduring parental responsibility provision—financial contribution

(1) This section applies if—

(a) the Children’s Court includes an enduring parental responsibility provision in a care and protection order for a child or young person; and

(b) immediately before the order was made, the director-general had daily care responsibility for the child or young person.

(2) The director-general may provide financial or other assistance to the person to whom the provision transfers parental responsibility for the child or young person.

3.7 Provisional Protection

NAAJA and NTLAC are concerned with respect to the practical application of s51 of the current Act, namely that a child cannot be taken into provisional protection when a protection order or temporary protection order are in force. This is of particular concern when considering Permanent Care Orders as, in circumstances where a party who is not DCF has daily care and control of the child, the CEO will not have the power to take a child into provisional protection. This has the probably unintended effect of stopping less intrusive protection orders from being made, because if there is a protection order with only supervision directions, it appears the CEO cannot take a child into provisional protection.

While this issue is not central to the issue of Permanent Care Orders, it creates significant problems and could be easily remedied.

Recommendation 11: That section 51 (b) be deleted so that the CEO may take a child into provisional protection in exceptional circumstances regardless of whether there is an order in place.

Or, in the alternative, that s51 of the *Care and Protection of Children Act* be amended to incorporate a provision of provisional protection in exceptional circumstances when a Permanent Care Order is in place.

3.8 Extraterritoriality

Section 137J provides that the Court may make a permanent care order for the child even if the circumstances causing the child to be in need protection occurred outside the Territory. This may be problematic as the Court cannot be assured of the conduct of investigations and the protocol and procedure followed to come to the conclusion that protection was required.

Recommendation 12: That the Department set up a system of information exchange with other Australian jurisdictions to enable a greater access of information sharing and efficiency of process.

3.9 Ultra vires powers

NAAJA and NTLAC are particularly concerned with the proposed sections 137B (e) and 137F (3) respectively concerning the Court permitting the permanent carers to travel outside of Australia with a child. It is our contention that the Magistrates Court will be unable to issue such an order as overseas travel is a Commonwealth matter and a parent with no parental responsibility may issue an airport watch list order to prevent the child from being removed from the Commonwealth of Australia.

Recommendation 13: sections 137B (e) and 137F (3) be removed from the proposed Bill to prevent the Magistrates Court acting ultra vires.

3.10 Court to consider certain matters when determining whether or not to make a Permanent Care Order

The Court has broad powers pursuant to section 137H of the proposed Bill and can consider the parties to the proceedings wishes, the child's and any other person it considers relevant to the proceedings. Pursuant to subsection (b) the Court can also consider any other matters it considers relevant. NAAJA and NTLAC are concerned that the Court is provided with limited guidance as to what it can consider when determining an application for a Permanent Care Order.

Recommendation 14: That the Court be provided with some guidance as to section 137H (b) to determine what is in a child's best interests, for example based on the model of section 60CC factors in the *Family Law Act*.

3.11 Temporary Protection Orders

Temporary Protection Orders last for 14 days and therefore provide parents with limited opportunity to obtain legal advice prior to the CEO making an application for a protection order. This is particularly concerning to NAAJA and NTLAC as Temporary Protection Orders cannot be adjourned and we are unable to thoroughly explore a client's merit within such a short time frame. We suggest that this is considered through a consultative process to find a solution.

3.12 Intersection between the Family Law Act and Care and Protection of Children Act

If Permanent Care Orders begin to be made in the Northern Territory, it is reasonably likely that parental responsibility may need to be revisited if for instance, a significant change to the permanent carers' family unit occurs (for example the permanent carers separate) or if

the Family Court or Federal Magistrates Court are unable to order parental responsibility where no party to a proceeding is suitable and seek to refer the matter to the Department of Children and Families. Section 67ZC of the Family Law Act provides that the Court has jurisdiction to make orders relating to the welfare of children.

Example: Mary and Allen obtain a Permanent Care Order to care for Betty. Three years after the order is made, Mary and Allen separate. They both want to continue to have care of Betty and cannot make a decision as to care arrangements.

Are they barred from initiating family law proceedings as the Department of Children and Families still have the capacity to revoke the Permanent Care Order? Is the only choice available to Mary and Allen to ask the CEO of DCF to revoke the order?

Recommendation 15: We recommend that this issue be considered carefully and a separate section be entered into the proposed Bill giving the CEO and parties to the proceedings the option of applying for a variation of an order.

3.13 Consultation

NAAJA and NTLAC are extremely concerned at the lack of specific consultation that has taken place with respect to the introduction of Permanent Care Orders into the NT child protection system. We acknowledge the importance of permanent and stable placements for children in out of home care and we support the government's commitment to providing permanent homes. However, we maintain serious concerns about the practical implications of the proposed legislation. We consider further discussion and consultation is required prior to the introduction of such legislation.

3.14 Conclusion

With the CEO's consent, carers can already access the Family Law jurisdiction to apply for final orders that they have parental responsibility and children live with them. The *Family Law Act (1975)* Cth already has provisions that orders must be made in the best interests of children. Stability for children is already a weighty factor and children's safety outweighs other considerations.

Creating a system for permanent care orders creates a second system to achieve the same end. Careful consideration should be given to assisting carers to access the Commonwealth Family Law System. This would require collaboration with the Family Law Court and Legal Service Providers. Collaboration is already happening about improving information sharing between the family law and child protection systems, so it could be efficient and timely to address this issue now.

Recommendation 16: That instead of creating separate Permanent Care Orders, parties are assisted to access the Commonwealth family law system

4 List of Recommendations in relation to the Bill

Recommendation 1: That the Bill be amended to state that permanent care orders may only be made as a last resort.

Recommendation 2: That resources be invested in early intervention, intensive family support and reunification services.

Recommendation 3: That the Care and Protection of Children Act be amended to include safeguards to protect the connection to culture and family of Aboriginal children in the care of non Aboriginal carers. Specifically we recommend the introduction of cultural plans and an independent Aboriginal child care agency with a monitoring and consulting role.

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Recommendation 5: Further in the cases of Aboriginal children proposed to be placed permanently in the care of non Aboriginal carers we recommend that it be mandatory for cultural plans to be a condition of the order.

Recommendation 6: Section 137C to include more stringent requirements on the Department to ensure that parents are fully notified and informed of their rights in relation to any permanent care application and order.

Recommendation 7: Section 137C be amended to require that parents be served with a notice and application personally in the first instance and where this not possible that an application be made to Court for substituted service and/or dispensation of service (an application of which can be made to the Registrar of the Magistrate Court).

Recommendation 8: Section 137D be amended to allow, at the Court's discretion, other persons to be made parties to proceedings for permanent care orders.

Recommendation 9: That section 137A (2) be amended to enable other parties to apply for a permanent care order.

Recommendation 10: That a provision such as s483 of the *Children and Young People Act 2008* (A.C.T.) be incorporated so the CEO has discretion to make financial contributions to carer:

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(2) The director-general may provide financial or other assistance to the person to whom the provision transfers parental responsibility for the child or young person.

Recommendation 11: That section 51 (b) be deleted so that the CEO may take a child into provisional protection in exceptional circumstances regardless of whether there is an order in place.

Or, in the alternative, that s51 of the Care and Protection of Children Act be amended to incorporate a provision of provisional protection in exceptional circumstances when a Permanent Care Order is in place.

Recommendation 12: That the Department set up a system of information exchange with other Australian jurisdictions to enable a greater access of information sharing and efficiency of process.

Recommendation 13: sections 137B (e) and 137F (3) be removed from the proposed Bill to prevent the Magistrates Court acting ultra vires.

Recommendation 14: That the Court be provided with some guidance as to section 137H (b) to determine what is in a child’s best interests, for example based on the model of section 60CC factors in the Family Law Act.

Recommendation 15: We recommend that this issue be considered carefully and a separate section be entered into the proposed Bill giving the CEO and parties to the proceedings the option of applying for a variation of an order.

Recommendation 16: That instead of creating separate Permanent Care Orders, parties are assisted to access the Commonwealth family law system.

The following organisations endorse this submission:

Central Australian Aboriginal Legal Aid Service Inc.
Central Australian Aboriginal Family Legal Unit
Central Australian Women's Legal Service
Katherine Women's Information Legal Service
Relationships Australia NT
Top End Women's Legal Service Inc.
YWCA of Darwin

