North Australian Aboriginal Justice Agency

2 May 2025

Karen Broadfoot
Acting chief executive officer
Department of Children and Families

Email: [redacted]

Dear Ms Broadfoot

Submission to the review of the *Care and Protection of Children Act 2007* (Northern Territory)

The North Australian Aboriginal Justice Agency (NAAJA) provides high quality, culturally appropriate legal advice, representation and justice related services to Aboriginal people throughout the Northern Territory (Northern Territory). For over 52 years NAAJA has played a leading role in policy and law reform in areas affecting Aboriginal peoples' legal rights and access to justice.

NAAJA represents parents and other family members in proceedings under the *Care and Protection of Children Act 2007* (Northern Territory) (**Care Act**). This includes providing a duty service in the Family Matters Division of the Darwin Children's Court, Katherine Local Court, Tennant Creek Local Court and Alice Springs Local Court.

We refer to the correspondence from Emma White dated 3 April 2025. We thank the Department of Children and Families (**Department**) for the opportunity to provide a submission on the review scope and proposed terms of reference for the Department's review of the Care Act.

NAAJA endorses the submission provided by APO NT and provides this additional submission in relation to specific legal matters arising from our experience in providing legal assistance in the Family Matters Division of the Local Court.

Priorities for reform

While acknowledging that the Care Act is not without flaws, we submit that a comprehensive review of the Care Act should not be the highest priority for addressing poor outcomes in the care and protection of

children in this jurisdiction. We recognise that while there are areas which are appropriately in need of review—including those listed below—the Care Act is largely functional and appropriately balances the many diverse and competing considerations which are inherent to child protection legislation. Many of the issues within child protection in the Northern Territory arise from the implementation of the Care Act rather than its legislative content.

Care and protection listings before the Local Court are also rising in the Northern Territory, climbing from 1,444 in 2021-22 to 1,749 in 2024-25.[1] This increase reflects the growing pressures on the system and reinforces the need to prioritise reforms that will ease demand and improve outcomes for children and families.

NAAJA strongly recommends that the Department focus on addressing the practical barriers that are currently hindering better outcomes for children and young people in the Northern Territory, rather than focus of a review of the Care Act. This includes the recruitment and retention of highly skilled caseworkers; the provision of ongoing and specialised training and development for caseworkers; expediting carer assessments so more children in care can be placed with family; properly resourcing Aboriginal family led decision-making and mediation programs; and further investing in early intervention support programs with the aim of working with families and obviating the need for court proceedings. These are the kinds of reforms that address the everyday challenges of the system and that will deliver real change for the community.

We reiterate the position set out in the correspondence from the Legal Assistance Services dated 17 January 2025, which is **attached** to this submission. In particular, any proposed amendments that would weaken the Aboriginal child placement principles (**ACPP**) in section 12 of the Care Act should be excluded from the scope of the review. The ACPPs are designed to ensure that Aboriginal children remain connected to their culture, families, communities and country, and that Aboriginal families are able to participate in decisions about their children's care and protection.

In circumstances where 90% of the children in out of home care in the Northern Territory are Aboriginal, but only 23.8%[2] are placed with family, we strongly oppose any amendments to the Care Act which would weaken or water down the ACPPs. If the ACPPs are to be included in the scope of the review, this should be confined to considering mechanisms to strengthen them.

Proposals for inclusion in terms of reference

In the following section, we outline the matters which we submit should form part of the scope of any review of the Care Act. For each area identified we outline why reform is necessary and provide our general recommendations for change. Given the limited time available and the current scope directed to the terms of reference, our submission does not include exhaustive details or final proposals for reform. We would welcome the opportunity to provide further submissions or detail in relation to any of these proposals upon request.

Implementing a positive duty to take 'active efforts'

We consider that the Care Act should be amended to include an 'active efforts' framework similar to that adopted in New South Wales and Queensland. Active efforts are regarded as the 'gold standard' for how

[1] Local Court of the Northern Territory, *Local Court and Youth Justice Court Statistics to End of March 2025* (Report, March 2025) https://localcourt.nt.gov.au/sites/default/files/local_court_and_youth_statistics_to_end_of_march_2025_1.pdf.

[2] SNAICC, *Family Matters Report 2024* (Report, November 2024) https://www.snaicc.org.au/wp-content/uploads/2024/11/241119-Family-Matters-Report-2024.pdf

services should be provided to a child and their family when going through the child protection system.[3] In 2018, federal community services ministers identified it as a national priority to 'implement active efforts in jurisdictions to ensure compliance with all five elements of the Aboriginal and Torres Strait Islander Child Placement Principle'.[4] In the Northern Territory, the coroner, in her findings in the *Inquest into the death of Baby G,*[5] has also recommended that the Attorney-General consider a reform of the Care Act to include the principle of 'active efforts' similar to the NSW provisions.[6]

The active efforts concept is drawn from the *Indian Child Welfare Act* (**ICWA**), which aims to ensure safety and connection for Indigenous children in the United States. Active efforts are defined as 'affirmative, active, thorough and timely efforts intended primarily to maintain or reunite an Indian child with his or her family'.[7]

Importantly, active efforts are to be culturally competent and 'should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and tribe.'[8]

Justice William Thorne, a retired judge on the State of Utah Court of Appeals in the Third District Court, said of active efforts:

> '[A]ctive efforts [is] not a measure of 'services,' but instead a different attitude or approach to 'helping' a parent or family succeed. Not judging, but healing. Not compliance focused, but oriented to assisting the parent and family. Not creating a parenting plan, but instead walking and working beside the parent and family. Active efforts is about doing things differently, not just more or increased amounts of the same things we have already been doing. It is about investing in the success of the family. It is about connecting them to healing. It is about walking beside them and lending them our strength when they need it. It is what we would do if they were our families. It is what we would do if their lives really 'mattered.' All families matter…and we should act like it'

Significantly, active efforts has been defined by United States of America (US) courts as implying a 'heightened responsibility compared to passive efforts'[9] and requiring more effort than a 'reasonable efforts' standard does. For example, in one US case, the court found that a caseworker had only made reasonable efforts by referring a parent for services as the referral needed to be followed through with supportive casework.[10]

Similarly, in another US case, the court found that a reasonable efforts standard might entail merely drawing up a plan and requiring the parent to use 'his or her own resources to bring it to fruition' while an active efforts standard, on the other hand, included 'tak[ing] the [parent] through the steps of the plan rather than requiring the plan to be performed on its own'.[11]

Active efforts have recently been legislated in both New South Wales and Queensland. In New South Wales, the secretary must act in accordance with the principle of active efforts in exercising any function under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (**NSW Care Act**). Active

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[3] Queensland Aboriginal and Torres Strait Islander Community Controlled Child Protection Peak, *Active Efforts in Practice* (Guide, Second Edition March 2023) 4.

[4] Ministers for the Department of Social Services, Community Services Ministers' Meeting Communiqué (2018) < https://formerministers.dss.gov.au/17966/community-services-ministers-meeting-communique-2/>.

[5] [2024] NTLC 16.

[6] *Inquest into the death of Baby G* [2024] NTLC 16 [136].

[7] *Indian Child Welfare Act 1978* (USA), § 23.2.

[8] *Indian Child Welfare Act 1978* (USA), § 23.2.

[9] In re A.N., 2005 MT19, ¶ 23, 325 Mont. 379, 384, 106 P.3d 556, 560.

[10] *In re Nicole B.*, 175 Md. App. 450 (at p. 472) (2007).

[11] *A.M. v. State* (In re A.R.F.), 2021 UT App. 31, 484 P.3d 1185 (Utah Ct. App. 2021).

efforts must be made to prevent the child or young person from entering out-of-home care.[12] Where the child or young person has already been removed from their family's care, active efforts must be made to restore them to their parents, or to place them with family, kin or community.[13] Active efforts may include access to comprehensive assessments, inviting representatives of the child's family to participate in decision-making, searching for extended family, having culturally appropriate family preservation strategies, keeping siblings together and having regular visits with custodians.[14]

Queensland's 'active efforts' framework is particularly tailored to Aboriginal and Torres Strait Islander children. When making a significant decision about an Aboriginal or Torres Strait Islander child, a relevant authority must make active efforts to apply the Aboriginal and Torres Strait Islander child placement principle in relation to the child and in consultation with the child and the child's family, arrange for an independent Aboriginal or Torres Strait Islander entity for the child to facilitate the participation of the child and the child's family in the decision-making process.[15]

In both jurisdictions, active efforts mean purposeful, thorough and timely efforts to apply the principle.[16] Taking 'active efforts' as contemplated in the New South Wales and Queensland frameworks, is clearly consistent with the existing guiding principles of the Care Act and the best interests of children. The active efforts framework is about accountability. It is essential that any active efforts framework adopted in the Northern Territory is documented and produced into evidence, and that it is a matter for the court to determine whether the requisite standards of effort has been met by the welfare agency.

In order to achieve its purpose, an active efforts framework must require the Department to satisfy the court that appropriate steps have been taken, and provide appropriate mechanisms for the court to direct the Department to rectify any issues identified. For example, in New South Wales the Children's Court may adjourn proceedings if the court is not satisfied with the evidence adduced in relation to active efforts.[17] The court may also dismiss a care application or discharge a child from the care responsibility of the Department if the active efforts framework has not been complied with, but only if the court is satisfied that taking that action would be in the best interests of the safety, welfare and wellbeing of the child.[18] Anything short of this is insufficient in addressing deficiencies in providing appropriate support to families like those that were identified in the *Inquest into the Death of Baby B*.

Implementing a mechanism for independent review of case management decisions

As it stands, the Care Act permits parties to appeal to the Supreme Court of the Northern Territory against any order or decision of the court, other than a temporary protection order.[19] Other than for limited matters (e.g. in relation to the transfer of child protection orders), the Care Act has no broad, overarching formal or informal merits review avenues available to parties unhappy with a decision of the Department.[20]

It would simplify court proceedings if parents knew that there was a viable mechanism to seek appropriate review of decisions made by the Department during an order. All state jurisdictions provide for

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[12] *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9A(2)(a).

[13] *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9A(2)(b).

[14] Queensland Aboriginal and Torres Strait Islander Community Controlled Child Protection Peak, *Active Efforts in Practice* (Guide, Second Edition March 2023) 4.

[15] *Child Protection Act 1999* (Qld) s 5F(2).

[16] *Child Protection Act 1999* (Qld) s 5F(6); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9A(3).

[17] NSW Care Act section 63(4).

[18] NSW Care Act, section 63(5).

[19] *Care and Protection of Children Act 2007* (Northern Territory) s 140(1).

[20] See eg *Care and Protection of Children Act 2007* (Northern Territory) s 159(1).

a power to review decisions about placement arrangements and information sharing about a child in care.[21] Most other Australian jurisdictions, including Victoria, New South Wales, Queensland and Western Australia, provide an avenue for an external, independent review of Department decisions. Most jurisdictions also require decisions to undergo an internal review prior to proceeding to the external merits review process undertaken by a tribunal.[22] An independent review mechanism is paramount in ensuring that administrative decision-making be fair, transparent and timely. It also provides a child or young person's parents and family access and involvement in decision-making processes and the opportunity to have their voices and opinions heard.[23]

Each jurisdiction has the power to review a specified set of child protection related decisions. Victoria provides a straightforward example of how such a system might be implemented in the Northern Territory. In Victoria, legislation mandates that the secretary prepare and implement procedures for the review within the Department of decisions made following the making of a protection order.[24] The secretary (or if delegated power, the principal officer of an Aboriginal agency)[25] is also required to provide a copy of these procedures to the child and their parent.[26] The Victorian Department of Families, Fairness and Housing publishes plain English information sheets online to assist parents and families to navigate the review process. An internal review request must be made within 28 days from the date of the decision, whereupon a senior divisional officer will arrange a meeting with the child and/or their family. The child protection practitioner can also organise an interpreter to explain the internal review procedure to parties.[27] Once they have exhausted this option, a child or young person and their family are able to apply to the Victorian Civil and Administrative Tribunal for an external review.[28]

The Care Act would benefit from implementing a structured process for review of Department decisions relating to the care and protection of children. By providing a legislative avenue for both internal and external merits review, and by ensuring that affected parties understand their rights, the Department will be better able to assist families to actively participate in decisions about their children's care and protection.

Provisional protection whilst protection order is in place

The test for enacting provisional protection is that the CEO must reasonably believe that a child is in need of protection and that provisional protection is urgently needed to safeguard the wellbeing of the child.[29] As it currently stands, the CEO does not hold the power to enact provisional protection whilst a protection order is in force.[30] This makes sense in circumstances where it is a precondition to making a protection order that the court makes a finding of fact that the child is in need of protection.[31]

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[21] Monash University, *ACT External Merits Review of Child Protection Decisions: Model Selection and Implementation Final Report* (Report, November 2022) 28.

[22] Monash University, *ACT External Merits Review of Child Protection Decisions: Model Selection and Implementation Final Report* (Report, November 2022) 28.

[23] Monash University, *ACT External Merits Review of Child Protection Decisions: Model Selection and Implementation Final Report* (Report, November 2022) 27.

[24] *Children, Youth and Families Act* 2005 (Vic) s 331(1).

[25] *Children, Youth and Families Act* 2005 (Vic) ss 18(1), 332.

[26] *Children, Youth and Families Act* 2005 (Vic) s 331(2).

[27] Victorian Department of Families, Fairness and Housing, *Review of a decision made by Child Protection under a protection order – Information for parents* (Information Sheet, July 2021) 2.

[28] *Children, Youth and Families Act* 2005 (Vic) s 333.

[29] Care Act section 51(1)(a).

[30] Care Act section 51(1)(b).

[31] Care Act section 129(1)(a).

However, in practice, the exclusion on enacting provisional protection whilst an order is in force creates a barrier to implementing less intrusive orders as required by the guiding principles in section 10A and as a precondition to making a protection order in section 129(b)(ii). The Care Act[32] and existing Departmental policy[33] clearly contemplates protection orders being made which do not give parental responsibility (PR) or daily care and control (DCC) to the CEO. In an appropriate case, a protection order with supervision directions only is clearly a less intrusive order for the court to make. However, in our experience the Department is commonly unwilling to agree to a protection order without PR or DCC because the Department has less capacity to intervene if urgent risk factors emerge (including unforeseen risk factors) than if there was no order in place because there is no capacity to take the child into care. Although the CEO could bring the matter back to court, this obviously takes time which in some cases could pose a material risk to children.

We submit that the review should consider amendments to the Care Act to allow the Department to assume DCC for a child for a short period of time whilst an order is in force, to ensure that appropriate steps can be taken to protect the safety and wellbeing of a child and allow the matter to return to court.

It is essential that any such regime builds in appropriate safeguards. When an order is in force, the court has made a concluded determination as to the best interest of the child and what order and directions are appropriate. This determination should not be able to be readily upended through a discretionary decision of the Department. Any such power should only allow the child to be brought into care for a period long enough to allow the matter to come back to the court for further consideration in light of any change in circumstances.

Enact provisions in relation to mediation

Section 127 of the *Care Act* provides for the court to order mediation conferences, which can be convened for purposes specified by the court. However, this provision has never commenced. As noted by the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory (**Royal Commission**) '[i]t is difficult to conceive of many other areas of law in which avoiding contested litigation is as crucial'. The failure to commence section 127 is a missed opportunity to provide a mechanism for more trauma informed, restorative and sustainable non-litigated outcomes for child protection matters.[34]

Currently, the mechanism for alternative dispute resolution for child protection matters is primarily through case conferences. A case conference is a conference between the parties including their legal representatives to determine the issues in contest.[35] The court may at any stage of the proceedings order a conference between the parties for the purpose of determining and/or resolving matters in dispute.[36] The focus of a case conference is often on compromises and resolution of the proceedings, rather than addressing underlying issues or genuinely focusing on the child's best interest.

While case conferencing can be valuable in the resolution of care matters, these meetings can often be unsettling and adversarial settings for parents. Typically, the Department's legal representatives or case managers convene these conferences without an independent facilitator. This creates a fundamental power imbalance in the room between family members and a powerful government department, leading to parents feeling uncomfortable speaking freely or where Aboriginal families do not feel culturally safe. The Royal Commission also noted that that the utility of case conferences may be limited where there is

[32] Care Act section 123

[33] Strengthening Families Practice Guidance, [22.1]

[34] Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report, Chapter 34, p.480.

[35] Northern Territory Local Court Practice Directions, *Practice Direction 28 Care and Protection of Children*, [28.21].

[36] Northern Territory Local Court Practice Directions, *Practice Direction 28 Care and Protection of Children*, [28.21].

no independent facilitator to mediate between the parties and no clearly established procedure for conducting meetings.[37]

There has recently been an increase in mediation conducted in care proceedings under the *Local Court (Civil Jurisdiction) Rules 1998* (Northern Territory). In NAAJA's view, mediations are productive, focus the parties' attention and lead to better outcomes. In circumstances of very long wait times for trials in the Local Court, mediations provide an opportunity for a quicker resolution of proceedings in a manner which better preserves the essential relationship between the Department and families.

NAAJA therefore recommends that the review consider fully implementing recommendation 34.7 of the Royal Commission. That recommendation is that:

> Section 127 of the *Care and Protection of Children Act* (Northern Territory) be amended to delete the reference to 'mediation' and insert 'family group'. The section then be gazetted as coming into force as soon as practicable. The Care and Protection of Children (Mediation Conferences) Regulations be amended to reference 'family group conferences' for 'mediation conferences'.

Implement fair procedure for excluding a parent

Under section 125(1) of the Care Act, parents are deemed to be the respondents to any applications for a protection order.[38] Under section 100 of the Care Act, parents of the child must attend the proceedings unless the court directs otherwise. However, under section 126(1) the court may hear an application in the absence of the parents if:

1. The court is satisfied that the CEO has given the parent notice under section 124(1), or
2. The CEO has not given such notice, but the court is satisfied the application should nonetheless be heard in the absence of the parent.

Section 126(2) then curiously provides that section 126 'does not limit the court's power to exclude the parents (or anyone else) from court proceedings'. However, the Act does not otherwise confer an express power to exclude parents or others from proceedings, nor does it specify any criteria for this to occur.

In NAAJA's submission, there are some circumstances in which it is appropriate to exclude a parent from care proceedings. For example, in matters where it is established (for example through finalised criminal proceedings) that the parent has committed serious physical violence or sexual abuse against a child and their involvement in the proceedings would cause harm to the child and other parties. However, applications for protection orders fundamentally concern decisions in relation to a parent's own children. The need to exclude a parent in particular cases must be balanced against the fundamental right of a parent to be afforded procedural fairness in relation to decisions which affect them, in the sense of being given the information to be relied upon to make a decision and a reasonable opportunity to be heard by the court.

Currently, the Care Act does not specify a clear process for the exclusion of a parent, nor considerations the court is to take into account. Although the court may proceed to hear an application if service has not occurred, there is also no power to excuse the CEO from the statutory obligation to personally serve a parent (or serve the parent by other means if the court is satisfied that it is impracticable to personally serve them). This creates difficulties when the court material contains material relevant to the proceedings but disclosure of which may pose a risk to the safety and wellbeing of the child or another party.

NAAJA suggests that the review should consider an appropriate mechanism to allow the court in limited and appropriate circumstances to both exclude a parent and dispense with service of the court materials.

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[37] Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report, Chapter 34, p.497.

[38] See also section 94(1)(b).

Such a mechanism should require an application with is served on the party to be excluded (to ensure an appropriate level of procedural fairness) and provide express criteria to be met for a party to obtain an order that a parent not be permitted to partake in the proceeding. Some guidance can be taken from other jurisdictions on how to approach this matter, such as section 256A of the New South Wales Care Act. That section provides that the Children's Court may dispense with service if satisfied that there is an unacceptable threat to the safety, welfare or wellbeing of a child or young person or a party to any proceeding which would arise if documents were served. A party who is proposed not to be served with the substantive material would still be served with the application to dispense with service and be given an opportunity to be heard on that application.

Parties to proceedings

A further confusion in relation to the parties to proceedings arises from section 125(2)(c) of the Care Act, which provides that the 'the parties' to proceedings include 'a person proposed to be given daily care and control of, or parental responsibility for, the child under the order'. Section 94(1)(d) is in similar terms.

Uncertainty has arisen in practice as to when these provisions are engaged to deem a person a party to proceedings. It is relatively clear that it would extend to circumstances where the CEO proposes to give a third party (such as a family member) DCC or PR for the child in their application for a protection order. However, it is less clear whether the provision is engaged when other parties, including parents, 'propose' to give another person DCC or PR for the child, for example by making an interlocutory application for a family member to be given DCC on adjournment or by naming a family member in a response as a person proposed to be given DCC or PR on the final orders.

Giving a person the status of a party is a significant matter. They would be afforded all the rights of a party, including to withhold consent to resolve the proceedings. They would also be subject to all of the obligations of a party and could be subject to orders and directions of the court without their consent or even any knowledge that they are a party to the proceeding. They would be required to be afforded procedural fairness, including a proper opportunity to be heard.

We recommend that the review consider and clarify the circumstances in which, and means by which, a person may be 'proposed' to be given DCC or PR for the purposes of the Care Act.

Statutory requirement for court to consider the appropriateness of a care plan to meet the child's needs

Care plans are an essential part of the effective case management of children in care. The Care Act sets out a detailed regime for the preparation of care plans.[39] This includes the contents of the care plan, the requirement for children's wishes to be considered, the requirement for parents and other family members to participate in care planning, and the process for reviewing care plans.

The Care Act requires that a care plan, interim care plan or proposed care plan (if the child is not already in care) be filed with the application unless it is not reasonably practicable to do so.[40] Where it is not reasonably practicable to do so, the court may set a date for filing a care plan which must not be more than 21 days after the application is made. [41] The court is unable to make a protection order unless a care plan is provided to the court.[42]

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[39] Div 2 of Pt 2.2 of the Care Act.

[40] Care Act section 122(2)

[41] Care Act section 122(3).

[42] Care Act section 130(3).

The Supreme Court has recognised the importance of care plans to the court's consideration of a protection order. In *BJW v EWC* [2018] NTSC 47 at [168], the court on appeal said that the Local Court 'should have been provided with a more comprehensive care plan, and or other material, containing information and proposals concerning EWC's future care, for so long as the order was likely to run'. The court considered the comments of the New South Wales Supreme Court in *Re Tracy* (2011) 80 NSWLR 261 which said 'presentation of a care plan and its consideration by the court is not a formality. The court then decides the removal of the child or the allocation of parental responsibility with regard to a plan relevant to the current circumstances'.[43]

Commonly, care plans supplied to the court do not meet the requirements of Care Act. The template currently in use does not provide for 'the steps required to reunify the child with the child's parents' as required by section 70(2)(d). Often, the care plans do not provide any meaningful engagement with the 'cultural needs of the child', the 'actions that must be taken to address those needs' and for Aboriginal children, reasonable action to maintain and develop the child's Aboriginal identity and encourage the child's ongoing connection to Aboriginal culture, tradition, language and country.[44]

It is essential that a system is implemented to ensure accurate and appropriate care plans are developed and complied with. NAAJA recommends that the review process consider strengthening the provisions of the Care Act to require the court to be satisfied that a care plan meets the requirements of the Care Act and is appropriate to meet the child's best interests before an order can be made. The review should consider a mechanism to ensure that the requirements set out in the care plan are complied with.

Clarify position with respect to extension applications

The Care Act provides for a regime to extend protection orders under section 136. However, that regime is rarely utilised in practice due to the decision of *In the matter of JA* [2012] NTMC 11. In that decision, Judge Oliver said that there was 'some doubt' about the ability to extend an order after the order expires and says that the 'better procedure' is to file a fresh application for a protection order.[45] That decision raised (although did not determine) the possibility that if the underlying protection order expires, then the application to extend the protection order may also lapse (as there is nothing to extend).

This decision appears to be the genesis of the long-standing practice of the CEO to file new applications, rather than applications to extend existing orders. This has effectively rendered section 136 of the Care Act otiose. In NAAJA's submission, this is a bad outcome for children, parents and families and the Department, as it means that the previous material and history is not put fully before the court when the CEO seeks a new order. This creates additional work for the CEO to file evidence of the history of the proceedings. It also means that the specific criteria in section 136(4) identified for consideration on an extension application are not explicitly considered when the CEO files a new application. Under that section, the court may consider any contravention of the previous order by a person or any contravention of this Act in relation to the child by a person. These matters are appropriate considerations when a protection order comes back to court.

We recommend that the review consider amending section 136 to clarify that an extension application remains valid even if the underlying protection order expires, and that upon the expiration of the order the court can continue to make orders granting DCC to the CEO or a family member on adjournment under section139(1)(a)(ii) from the date of expiry of the underlying order.

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[43] *BJW v EWC* [2018] NTSC 47 at 156.

[44] Care Act section 70.

[45] *In the matter of JA* [2012] NTMC 11 at [20]-[26].

Clarify that all proceedings under the Care Act are a no cost jurisdiction

The Care Act contains no express provisions in relation to costs in proceedings for temporary protection orders, assessment orders, protection orders or permanent care orders. There are also no express provisions in the Care Act in relation to costs of appeals to the Supreme Court.

In the absence of express provision, the general provisions with respect to costs which apply in each court apply to proceedings under the Care Act. The Local Court has a general discretion to award costs.[46] The Supreme Court also has a general discretion to award costs on an appeal.[47] However, the general rule is that the party who is 'successful' should have their costs paid by the other parties to the proceeding (although this is a matter for the court's discretion).[48]

The Care Act is an outlier in this regard. The legislation in all other Australian jurisdictions contains provisions that explicitly deal with costs, albeit with different levels of specificity, and limit the circumstances in which they may be awarded:

- The equivalent legislation in Victoria provides that costs are not to be allowed on an appeal or rehearing.[49]
- The equivalent legislation in New South Wales and Western Australia provides that each party is to bear their own costs, unless there are exceptional circumstances, or the claim is vexatious/frivolous etc.[50]
- The equivalent legislation in Queensland provides that each party must pay their own costs. It does not provide any exceptions.[51]
- The equivalent legislation in South Australia and Tasmania provides that the court may make an order for costs against the Crown. It does not state that cost orders may be made against any other party.[52]

Generally, parties (including the CEO) appropriately do not seek costs in Local Court proceedings. However, in NAAJA's experience there have been circumstances where the CEO will either seek costs, or will decline to agree not to seek costs, in appeals in the Supreme Court.

NAAJA exclusively represents Aboriginal clients. Most of its clients are reliant on social security payments and almost always face significant financial hardship. For those who are working, access to legal assistance from NAAJA is subject to a means test. Seeking costs in appeals therefore creates an insurmountable barrier to most of our clients, even if the prospects of success on appeal are good. For most clients, it is simply too much of a risk to face the prospect of paying the CEO's legal fees.

Providing effective representation to parents and family who are in contact with the child protection system is essential to ensuring that the voices of parents and families are heard, and that Aboriginal children maintain their connection to family, culture, language and country. Parents and families should be assisted to exercise their legal rights, to receive a fair hearing, and to be able to correct errors on

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[46] *Local Court (Civil Jurisdiction) Rules 1998 (Northern Territory) rr 28.02–38.03*.

[47] *Supreme Court Rules 1987 (Northern Territory) r 63.03*.

[48] *See Young v Chief Executive Officer, Housing [2021] NTSC 8 at [6]*.

[49] *Children, Youth and Families Act 2005* (Vic) s 430ZH.

[50] *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 88*; Children and Community Services Act 2004* (WA) s 155(1)(b). The WA provision confers a power on the Children's Court to make a cost order where proceedings are frivolous or vexatious. By implication, the court could not otherwise make a cost order. The position is less clear on appeal, and the general rule that costs follow the event may apply.

[51] *Child Protection Act 1999* (QLD) s 116.

[52] *Children and Young People (Safety) Act 2017* (SA) s 60; *Children, Young Persons and Their Families Act 1997* (TAS) *s 68*.

appeal. A person's means should not be a barrier to accessing justice, particularly in the context of child protection.

The general rule that costs should be awarded to a successful party should have no place in proceedings under the Care Act. It is essential to ensure that the care and protection system in the Northern Territory is set up to ensure fairness and facilitate access to justice. It is also essential that the system is set up to allow appropriate and meritorious appeals, including on procedural matters, to facilitate the development of the law, encourage consistency in decision-making and provide necessary guidance to practitioners and, ultimately, more certainty to litigants.

Accordingly, we recommended that the review considers amendments to the Care Act to ensure that costs cannot be awarded against parents and family members in care proceedings, including appeals.

Representation of children

The Care Act contains a regime for the appointment of legal practitioners to represent children in child protection proceedings. Per Article 12 of the *Convention on the Rights of the Child,*[53] children and young people have the right to participate in decisions affecting their lives and particularly in any judicial proceedings that affect them.

Section 143E of the Care Act provides for eligibility criteria for appointment as a legal representation for a child and responsibilities and standards to be met by practitioners appointed to represent a child may be made by regulation. NAAJA submits that these criteria should be set out in regulations and should require that:

- a practitioner has appropriate qualifications, skills and training to represent children, and
- practitioners appointed to represent Aboriginal children are appropriately qualified and have demonstrated ability to consider the unique cultural needs of Aboriginal children.

Once regulations are in place to ensure practitioners are suitably qualified to represent children, consideration should be given to amendments that require every child to be legally represented in care and protection proceedings.

Further consultation

We would welcome the opportunity for a workshop to further discuss any of the proposals raised in this submission.

We note that this consultation process is limited to the terms of reference for the review, and we understand that there is no planned opportunity for further consultation until the draft Bill is introduced into Parliament. Respectfully, this represents a lost opportunity to engage meaningfully with stakeholders in the community who have deep expertise in relation to the operation of the Care Act and its impacts on children, families and communities.

If the government is genuine in its commitment to reforming the Care Act in a manner which promotes the best interests of children and families, it must do so in full consultation with the sector. This initial consultation will no doubt generate a range of possible amendments from different stakeholders, many of which will warrant broader input and insights from other stakeholders.

We call upon the Department to ensure that any amendments to the Care Act are developed through a process of genuine and ongoing consultation with such stakeholders. We also recommend that the

[53] UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, CRC/C/GC/12, 20 July 2009, https://www.refworld.org/legal/general/crc/2009/en/70207 [accessed 01 May 2025]

Department establish an independent and adequately resourced expert advisory council or working group to consider the amendments.

Please do not hesitate to contact Andrew Roberts of our office at andrew.roberts@naaja.org.au should you wish to discuss any aspect of our submission.

Yours sincerely

Anthony Beven
Acting chief executive officer