"When they're finished with me I'll be a white fella"

- Comment made by our client in response to case planning

The Aboriginal and Torres Strait Islander Women's Legal and Advocacy Service

The Aboriginal and Torres Strait Islander Women's Legal and Advocacy Service (ATSIWLAS) is a community legal centre that is managed and directed by Aboriginal and Torres Strait Islander women. We have provided integrated services to A & TSI women in South East Queensland since 1995. As well as legal representation, ATSIWLAS provides culturally appropriate family and court support and healing programs.

ATSIWLAS employs 1.4 permanent solicitors. We also have 1.2 solicitors who are currently employed on 6 month contracts.

Despite our stretched resources, we provide legal advice to Aboriginal and Torres Strait Islander women throughout Queensland. We provide representation to clients in a range of civil and family law matters – including representing women in child protection matters.

Our women

ATSIWLAS currently employs 7.6 full-time equivalent staff. 5 of our staff are Aboriginal women. These staff members include women who have social science, counselling and health science qualifications and who have had long and successful careers. The ATSIWLAS board is comprised of 9 Aboriginal and Torres Strait Islander women. The women on our board include Elders, community leaders, and other professional women. These women are also mothers, grandmothers, aunties and strong members of the Aboriginal community. Like many other Aboriginal and Torres Strait Islander women, the women who are involved in managing, directing and working at ATSIWLAS are strong in their culture and provide nurturing and safe family environments for their families.

ATSIWLAS also acknowledges the hard work and dedication of the other Aboriginal and Torres Strait Islander women and also non-Indigenous women who have been instrumental in ATSIWLAS' development and survival.

In addition to the purpose of acknowledging and paying respect to the women who have sustained our service, we highlight the qualifications, dedication and strength of our women to counter the stereotypes that exist in relation to Aboriginal peoples.

The emerging issues paper produced by the Queensland Child Protection Commission of Inquiry ("the Commission") says that *"Aboriginal and Torres Strait Islander people also struggle with mental health, drug and alcohol abuse…"* [1] We suspect that many families that come into contact with child safety services are experiencing difficulties that are associated with mental health and drug and alcohol abuse and that singling out Aboriginal and Torres Strait Islander families in relation to this issue perpetuates stereotypes which are not helpful in understanding why Aboriginal and Torres Strait Islander children are over-represented in the child protection system.

Summary

In summary, based on our experience working with Aboriginal and Torres Strait Islander women, we believe that Aboriginal and Torres Strait Islander children are over-represented in the child protection system because of the following:

1. THE LACK OF UNDERSTANDING OF ABORIGINAL AND TORRES STRAIT ISLANDER CULTURES

The child protection system in Queensland, applied to Aboriginal and Torres Strait Islander peoples, is based on a false assumption that Aboriginal and Torres Strait Islander peoples are not able to take care of their own business. The current system is a model of risk assessment that uses social determinants as risk factors.

We have seen no evidence to suggest that Aboriginal and Torres Strait Islander families are more likely to abuse their children. We have seen countless examples of the inflexible and culturally homogenous application of the child protection system on assessments of Aboriginal families. Departmental officers, independent assessors and report writers have all failed to demonstrate any understanding of the importance of culture to Aboriginal and Torres Strait Islander peoples. Among other things, this leads to Aboriginal and Torres Strait Islander peoples' parenting techniques being held to be deficient.[2]

Our view is that a system that is designed, delivered and monitored by Aboriginal and Torres Strait Islander peoples would take a new approach to child protection.

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[1] Queensland Child Protection Commission of Inquiry: emerging issues: September 2012, page 12.

[2] Examples from our case work include families being criticised for sleeping in one room or for sleeping on mattresses, for supervision being shared by multiple family members and for households having people coming and going from them.

The government should recognise its limitations in relation to designing and delivering a culturally appropriate child protection system and should allow us to develop a system that best meets our needs.

Our view is supported by the observation made by the United Nations Special Rapporteur on the Rights of Indigenous Peoples after he visited Australia in 2009 that "there is a need to incorporate into government programmes a more integrated approach to addressing indigenous disadvantage…one that not just promotes social and economic well-being of indigenous peoples, but also advances…self-determination and strengthens cultural bonds."[3] The Special Rapporteur recommended that the Government include in its initiatives the goal of advancing self-determination by encouraging indigenous self-governance at a local level, ensuring indigenous participation in the design, delivery and monitoring of programs and promote culturally appropriate programs that incorporate or build on indigenous peoples' own initiatives.[4]

It should be emphasised that if Aboriginal and Torres Strait Islander peoples are given this opportunity it is imperative that we are able to do so using our own consultation and decision making processes. We believe that this will ensure that women are properly involved in the process.

2. THE POVERTY THAT MANY OF THE ABORIGINAL AND TORRES STRAIT ISLANDER FAMILIES THAT COME INTO CONTACT WITH THE CHILD PROTECTION SYSTEM ARE ENDURING

Indigenous children are more likely to come into contact with child safety services as a result of neglect than abuse.[5] According to Section 9(3) of the *Child Protection Act 1999* ("the Act"),[6] harm can be caused by neglect. A child will be deemed to be in need of protection and removed from their family if they have suffered harm or if they are at an unacceptable risk of suffering harm and the child does not have a parent who is willing and able to protect the child from harm. Neglect is not defined by the Act in Queensland. Definitions of neglect that are included in child protection

3 James Anaya, Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, situation of indigenous people in Australia UN Doc A/HRC/15/37/Add.4.

4 Ibid.

5 Human Rights and Equal Opportunity Commission 'Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families' (1997).

6 *Child Protection Act 1999* (Qld) s 9(3).

legislation in other jurisdictions in Australia,[7] and in relevant literature suggest that neglect refers to a failure to provide for a child's basic needs including food, shelter and clothing.[8] Clearly, neglect is linked to poverty.

ATSIWLAS welcomes a new strategy to address the over-representation of indigenous children in the child protection system. We consider the child protection system to be too closely related to the historical discriminatory policies of the past which deemed Aboriginality to be sufficient grounds for removal of children.[9]

According to the International Covenant on Civil and Political Rights,[10] when government programs are delivered so that they have an unjustifiable disproportionate adverse impact on a group of people who share an attribute, that program is discriminatory.[11] The graph on page 4 of the Commission's emerging issues paper illustrates the point that the current child protection system in Queensland is having a disproportionate adverse impact on Aboriginal and Torres Strait Islander children.

To be effective, any strategy to address the over-representation of Aboriginal and Torres Strait Islander children in the child protection system will need to address to the power imbalance and structural discrimination that is present in the current system. Consistent with human rights obligations in relation to self-determination and justified by economic evidence that shows that when Aboriginal and Torres Strait Islander peoples make their own decisions about what approach to take they consistently out-perform non-Indigenous decision makers,[12] any new strategy should be designed, delivered and monitored by Aboriginal and Torres Strait Islander peoples and any system or programs that are developed by the government should be developed in consultation with Aboriginal and Torres Strait Islander peoples and should only be implemented with the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples.

ATSIWLAS encourages the Queensland government to be an innovator – to create a new child protection system that recognises the importance of culture, which upholds the child's right to their culture, which recognises that the best place for children is with their families,

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7 For example *Children and Young People Act 1999* (ACT), *Children and Community Services Act 2004* (WA).

8 See 'Australian legal definitions: when is a child in need of protection?' NCPC Resource Sheet, April 2010 at http://www.aifs.gov.au/nch/pubs/sheets/rs12/rs12.html on 19 September 2012.

9 See the discussion of the *Industrial and Reformatory Schools Act 1865* in Human Rights and Equal Opportunity Commission 'Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families' (1997).

10 Australia ratified the International Covenant on Civil and Political Rights ("the Covenant") in 1980. The effect of ratification is that the State has an obligation to immediately take measures to respect, protect and fulfil the rights that are contained in the Covenant.

11 This is clarified, for example in see *Broeks v the Netherlands (174/84).*

12 Productivity Commission, Overcoming Indigenous Disadvantage Key Indicators, 2009.

that adopts a therapeutic rather than punitive model and that treats people with dignity, compassion and respect.

Our experience with child protection matters

In 2011/12 we assisted 95 Aboriginal and Torres Strait Islander women with child protection matters. These matters include representing mothers in child protection proceedings in the Childrens Court, representing grandmothers and other family members as non-parties to proceedings in the Childrens Court and assisting women when child protection orders are in place including through representation in family group meetings, through advocacy in relation to contact and placement decisions and through representation before the Queensland Civil and Administrative Tribunal.

ATSIWLAS uses a holistic approach to provide legal services that empower Aboriginal and Torres Strait Islander women. In addition to providing legal assistance to our clients, ATSIWLAS provides women with case planning support to assist them to improve their ability to care for their children and to deal with the trauma and grief that result from interactions with child safety services. We also offer counselling services, transport assistance and cultural and family support.

The comments that are made in this submission are based on our experience acting for, supporting and working with Aboriginal and Torres Strait Islander women as they navigate the child protection system in Queensland. Our submission is motivated by the deep concern that we have in relation to the impact of the child protection system on Aboriginal and Torres Strait Islander communities, the inefficiencies, lack of cultural competence and lack of compassion that we regularly see in the delivery of child safety services.

Case studies of the experiences that our clients have had with the child protection system in Queensland are annexed to this submission.

The Child Protection Act 1999 ("the Act")

> ***"It would be deceiving…to let them think that a legal provision was all that was required…when in fact an entire social structure had to be transformed."***
>
> - Rene Cassin, during the drafting of the UN Declaration of Human Rights

When the Child Protection Bill 1998 was introduced into the Queensland parliament Minister Bligh commented that the over-representation of Aboriginal and Torres Strait Islander children in the State's care was "one of the most unacceptable issues facing child protection

in Queensland".[13] She pointed out that the Bill included the introduction of a legislative requirement that departmental officers consult with an "appropriate agency or community representatives" when making decisions about Aboriginal and Torres Strait Islander children, that they ensure the maintenance of Aboriginal and Torres Strait Islander children's cultural identity and that Aboriginal and Torres Strait Islander children should, where possible, be placed in the care of Indigenous families. Minister Bligh said that these measures would help to ensure that *"the atrocities detailed in the Bringing then Home report would never occur again."*[14]

While the introduction of special measures for Aboriginal and Torres Strait Islander peoples in the Act appear to have been well intentioned, they have not been sufficient to overcome the over-representation of Indigenous children in the child protection system.

THE CHILD PLACEMENT PRINCIPLE

"People don't want child safety all up in their business day-in and day-out. They're scared that child safety will start looking at taking their own kids."

- Comment made by a kinship carer when asked why there is a lack of Aboriginal kinship carers

Lack of adherence to the Child Placement Principle is well documented. The Commission has already heard evidence that indicates that Queensland is currently only placing 52.4 per cent of Aboriginal and Torres Strait Islander children in accordance with the Child Placement Principle.[15]

In our experience, lack of adherence to the Child Placement Principle is directly linked to the fear and distrust that is characteristic of the relationship between Aboriginal and Torres Strait Islander peoples and child safety services, manifested as follows:

1. Aboriginal and Torres Strait Islander peoples being fearful of being subjected to an assessment process that involves numerous non-indigenous peoples "coming to their home, going through their cupboards, and looking at how they live;"[16]
2. Departmental staff not giving serious consideration to the child placement principle. In our experience exploration of appropriate family members is often limited to asking parents to nominate a person who they think would be willing to take the child/ren into their care.

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13 Queensland, Second reading speech, Hansard, 10 November 1998.
14 Ibid.
15 Productivity Commission 2012, *Report on Government Services* referred to at page 7 of the Commission's emerging issues paper.
16 For example, see Witness Statement of Maniesha Jones dated 26 September 2012.

3. Aboriginal and Torres Strait Islander peoples continue to be refused blue cards or assessed as unsuitable due to criminal histories, over-crowded houses and prospective carers already having a number of children in their care.

Recommendations

We support the Child Placement Principal and do not see legislative change as the solution to the lack of adherence to it. An overhaul of Departmental policy so that the importance of maintaining Aboriginal and Torres Strait Islander children's connection to their culture is reflected in all decision making processes with continual cross-cultural training, the employment of well-paid and respected Aboriginal and Torres Strait Islander cultural experts and Departmental heads and managers who can demonstrate cultural competence would arguably improve the likelihood of front-line staff interacting in a culturally appropriate manner with Aboriginal and Torres Strait Islander families, build trusting relationships and improve the ability of the Department to identify appropriate family members.

Clearly, the kinship carer application process and the criteria for obtaining a blue card should be re-designed to ensure that more Aboriginal and Torres Strait Islander peoples are found to be suitable to care for children.

Recognised Entities

The Practice Manual used by Child Safety Officers in Queensland provides departmental officers with information about the role and significance of Recognised Entities. The manual describes the process as "active collaboration with the Aboriginal and Torres Strait Islander community" and a response to the "over-representation of Aboriginal and Torres Strait Islander children subject to intervention by Child Safety and the impact of past government policy."[17]

In practice, the role of the Recognised Entity is arguably tokenistic. When making a significant decision about an Aboriginal or Torres Strait Islander child the Department is required to give the Recognised Entity the opportunity to participate in the decision making process. When making a decision, other than a significant decision, about an Aboriginal or Torres Strait Islander child the Department is required to consult with the Recognised Entity. Neither of these provisions vests decision-making powers in the Recognised Entity. Child Safety Officers are simply required to determine whether the matter is a significant decision, provide an opportunity for the Recognised Entity's participation in the decision-making

[17] The manual is available at <http://www.childsafety.qld.gov.au/practice-manual/>.

process and record the outcome of the Recognised Entity's participation. In practice consultation with the Recognised Entity is simply a "tick the box" exercise.

Other than by paying lip-service to the provisions of the Act, we have never seen evidence that the Department takes the role of the Recognised Entity seriously. We have seen numerous examples of the Department failing to notify the Recognised Entity of investigations that relate to Aboriginal or Torres Strait Islander children and failing to enter into any meaningful dialogue with them.

Consultation with Recognised Entities does not usually constitute real or meaningful consultation. Although the Recognised Entity is usually consulted in relation to cultural considerations, there is no requirement that the Recognised Entity has any cultural knowledge. In addition to this, there is no requirement that the Department consult with an entity that is specific to the child's cultural group.

Although Recognised Entities were established to provide a mechanism for consultation with indigenous communities, it has been demonstrated that this model does not constitute meaningful consultation, it does not overcome historic power imbalances, fails to provide indigenous people with capacity to provide input into decisions that affect them and does not ensure that cultural issues are taken into consideration when decisions are made about Aboriginal and Torres Strait Islander children. Furthermore, this model is not well-regarded by the community and has never been evaluated for its effectiveness.

Recommendations

We support the retention of Recognised Entities that can demonstrate documented compliance with their statutory duties and evidence of their engagement, or attempts to engage with, all of the Aboriginal and Torres Strait Islander families that the Department has made them aware of.

We also recommend the following changes to the existing model:

1. Increasing the capacity of Recognised Entities so that the staff have the skills, qualifications and knowledge that is appropriate to the function that they perform;
2. Making Recognised Entities a party to child protection proceedings that relate to Aboriginal and Torres Strait Islander children. This means that they would be required to make submissions in proceedings, would allow them to be represented and advised

by lawyers and require that they provide advice to the court that is supported by expert evidence in relation to the cultural appropriateness of the Department's decisions;[18]

3. Giving Recognised Entities decision making powers so that the Department is required to make an application to court in relation to any decision that they make that is not supported by the Recognised Entity and so that the Department is required to show evidence that the Recognised Entity has supported any decision that they have made about an Aboriginal or Torres Strait Islander children;

4. That a transparent complaint and/or review mechanism is available to Aboriginal and Torres Strait Islander peoples who believe that the Recognised Entity has not exercised due diligence in the performance of their statutory duties.

In addition to the above, we recommend a full independent evaluation of Recognised Entities to identify whether they are an effective response to the over-representation of indigenous children in the child protection system.

"Saying that my kids can go to NAIDOC is not a cultural plan."

- Comment made by a client in response to the lack of cultural planning for their child who was subject to a child protection order

SPECIAL PRINCIPLES AND PROVISIONS TO PROTECT THE CHILD'S CULTURAL RIGHTS

Special principles for the administration of the Act that relate to Aboriginal and Torres Strait Islander children are that children should be allowed to develop and maintain a connection with their family, culture, traditions, language and community and that the long-term effect of a decision on the child's identity and connection with their family and community should be taken into account.[19] These principles are reflected in a number of places in the Act.[20] Of significance, the Department is required to ensure that a child who is subject to a child protection order has contact with members of their community,[21] case planning should be conducted in a manner that is culturally appropriate for Aboriginal and Torres Strait Islander people[22] and an Elder can be involved in the case planning process.[23]

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18 This could operate in a similar manner to Separate Representatives and allow for Recognised Entities to obtain an independent cultural assessment report if they deem it to be necessary.
19 Section 5C(a) and (b) of the Act.
20 Sections 6(4)(b), 6(5), 7(1)(f), 7(1)(o), 11(3), 51D(iv) and 51L(2) of the Act.
21 Section 88 of the Act.
22 Section 51D(iv) of the Act.
23 Section 51L(2) of the Act.

The Act also contains a charter of rights for a child in care.[24] Among other things, the charter contains the right to a culturally appropriate placement,[25] the right of the child to maintain relationships with their family and community[26] and the right of the child to be consulted about and participate in decisions affecting their life.[27] The inclusion of special rights for Aboriginal and Torres Strait Islander children in the Act is an essential part of recognising that Aboriginal and Torres Strait Islander children have a right to their culture.

ATSIWLAS supports the inclusion of the above special principles, provisions and rights in the Act. However, it is our experience that these provisions are not adhered to. Following are some examples from our case work to illustrate this point:

JAIMEE: A social assessment report prepared by a non-Indigenous person who had counselling qualifications during child protection proceedings explained the child rearing practises of an urban Aboriginal family by referring to an anthropological study of an Aboriginal community in remote Western Australia.[28]

DANIKA: Danika's children were removed from her because they had been exposed to significant domestic violence and because Danika and her partner were using drugs. The children were placed with their non-Indigenous paternal grandparents, who lived approximately 600 kilometres away. Danika came to see us because the Department had made a decision to restrict her contact with her Children so that she was not able to see them or to have any telephone contact with them. We sought a review of the decision in the Queensland Civil and Administrative Tribunal. Within a month the children had been returned to their mother. It became clear that the only reason contact had been refused was because the paternal grandparents did not like the children's mother. While in care the children did not have any contact with their Aboriginal family or community.[29]

It was also revealed that one of the children had been sexually abused while in the care of her grandparents and that the children had been taunted with racially discriminatory remarks.

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24 Schedule 1 of the Act.
25 Schedule 1(a) of the Act.
26 Schedule 1(c) of the Act.
27 Schedule 1(d) of the Act.
28 It should be emphasised that cultural evidence should be obtained from an appropriately qualified Aboriginal or Torres Strait Islander person in the form of a cultural report.
29 The child's right to their culture and their cultural safety were not given any consideration in the case planning that related to these children.

SHANAYA: We attended a family group meeting with Shanaya. A number of Aboriginal family and community members attended the meeting. The convenor of the meeting told us that she thought that it would be more appropriate if we sat in a circle away from the table. The Aboriginal people in the room remained seated at the table despite being asked several times to sit in a circle. The convenor became very frustrated when people did not comply with what she saw as a culturally appropriate adjustment to the way a family group meeting should be convened. It should be noted that the convenor did not ask the family what she could do to make the meeting culturally appropriate.

VERA: We attended a family group meeting with an Aboriginal family who saw themselves as sharing the caring responsibilities for the children that were subject to child protection orders. Ken, an older male family member told child safety that it was time that he had some time with the children for men's business. He said that he wanted to show the boys some things – including telling them about places that they shouldn't go. The child safety officer responded that if Ken could just write the names of the places down, she would pass the information on to the foster carers of the children.

Other evidence that we have seen that indicates that the special provisions within the Act are not adhered to include:

1. We have never seen a cultural plan for a child that is subject to a child protection order;
2. Case planning that occurs in relation to children that are subject to long-term guardianship orders does not necessarily involve the children's families. Although we understand the effect of a guardianship order, it is not possible to make an order that will take the cultural responsibilities for the child away from the family – the Department should continue to consult with the child's family in relation to cultural considerations regardless of the type of order that children are subjected to;
3. Departmental officers regularly engage with Aboriginal families without collaborating with the Recognised Entity and without working with Aboriginal or Torres Strait Islander child safety officers. This disregard for best practise in relation to working with Aboriginal and Torres Strait Islander families reflects the lack of commitment on the behalf of the Department to understand and respect Aboriginal and Torres Strait Islander culture;

4. Social assessment reports and independent kinship carer assessments are regularly conducted by social workers, counsellors or physiologists who have no knowledge of Aboriginal culture other than what they have read in textbooks.

It should be emphasised that the existence of a charter of rights in the Act does not ensure that children have access to their rights. The charter does not, in itself, give rise to a cause of action in court. In order for a charter to be effective, children need to have the ability to enforce their rights. The Act provides that the chief executive must ensure that all children who are subject to a child protection order are told about the charter and its effect.[30] It is difficult to see how this occurs in practice, given that the child's main contact with the Department is through their relevant child safety officer. The child safety officer manual does not instruct the officer to discuss the charter with the child or to suggest to the child that they may like to seek legal advice about their rights.[31] Children cannot enforce their rights when, in practice, children are not aware of their rights and do not obtain direct legal representation.[32]

POSITIVES!

Our clients tell us about the importance of Aboriginal and Torres Strait Islander peoples being involved in child protection intervention. One woman has commented that having an Aboriginal tribunal member during a QCAT hearing made her feel like someone at least understood where she was coming from. Other women commented that having Aboriginal departmental staff is essential.

The involvement of Aboriginal and Torres Strait Islander peoples in the child protection system is essential to cultural safety.[33]

Recommendations

ATSIWLAS believes that the special provisions of the Act that relate to Aboriginal and Torres Strait Islander children should be retained and strengthened. We believe that the Act should be amended to provide Aboriginal and Torres Strait Islander families with a cause of action when the Department fails to adhere to the special provisions of the Act.

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30 Section 74(4)(a) of the *Child Protection Act 1999* (Qld).

31 The manual is available at <http://www.childsafety.qld.gov.au/practice-manual/>.

32 In 2007 Legal Aid Queensland reported that while direct representation of children in Queensland in Child Protection matters was usually provided through a grant of aid, their data included that they had only three finalised files.

33 Cultural safety is an environment where we are spiritually, socially and emotionally safe, as well as physically safe. When we are culturally safe there is no challenge or denial of our identity, of who they are and what they need. (See Professor Mary Ann Bin-Sallik, Cultural Safety: Let's name it!, *The Australian Journal of Indigenous Education,* Volume 32, 2003.

ATSIWLAS also recommends the following measures to improve the cultural competency of the child protection system:

1. The charter of rights should include the right to be placed in accordance with the child placement principle and the right to a cultural maintenance plan which should include consideration of issues such as family preservation, family reunification and connection with extended family and community of the cultural group that the child originates from and should ensure access to Aboriginal and Torres Strait Islander placement support workers and services.[34] The Act should provide a mechanism for children to enforce their rights, child safety officers should inform children that they are able to seek legal advice and representation and legal services for children should ensure that they provide a culturally competent service in a culturally safe environment.[35] These services should be properly promoted so that children are aware of the services and should be delivered in a way that makes them accessible to children.

2. All departmental staff should be required to attend regular and ongoing cultural competency training. This training should be relevant to the Aboriginal or Torres Strait Islander peoples who live in the area that the office exists in;

3. That a definition of a person who is 'suitably qualified' to prepare a social assessment report be included in the Act or regulations. When the proceedings relate to Aboriginal or Torres Strait Islander children a person who is 'suitably qualified' should be able to demonstrate knowledge of relevant Aboriginal and Torres Strait Islander child rearing practises with a preference for the report writer to be an Aboriginal or Torres Strait Islander person. The parents should have an opportunity to make submissions in relation to who would be a suitable report writer for the separate representative to brief. As previously mentioned, cultural expert evidence should also be obtained in proceedings by the Recognised Entity. A suitably qualified Aboriginal or Torres Strait Islander person should be briefed by the Recognised Entity to provide this evidence.

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[34] See Higgins, Bromfield, and Richardson, Submission on: Development of a Charter of Rights for children and young people in care: A discussion paper Advocate for Children in Care, Victorian Department of Human Services, National Child Protection Clearinghouse Australian Institute of Family Studies, August 2005. <http://www.aifs.gov.au/nch/pubs/submissions/viccharterrights/viccharterrights.pdf>.

[35] This means, for example, that when delivering legal services to Aboriginal and Torres Strait Islander children Legal Aid Queensland should be ensuring that they work closely with Aboriginal and Torres Strait Islander colleagues. Alternatively, legal services for Aboriginal and Torres Strait Islander children should be delivered by an Aboriginal and Torres Strait Islander organisation.

THE DEFINITION OF 'PARENT'

The application of culturally-blind concepts amount to a further example of the discrimination that is inherent in the child protection system. The Act does not have the flexibility to cater for Aboriginal and Torres Strait Islander child rearing practises. We have found the definition of parent to be particularly problematic.

The Act includes two definitions of 'parent.'[36] At the beginning of the Act parent is defined broadly to include anyone caring in an on-going way for the child.[37] The definition includes a person who is considered to be a parent according to Aboriginal or Torres Strait Islander culture.[38] In other parts of the Act 'parent' is limited to biological parents or others who by law have parental responsibility for the child.[39] A person only has parental responsibility for a child if they are the biological parent of a child or if there is an order in place that provides that a person has parental responsibility for a child.[40]

The consequence of including two definitions of parent in the Act is that an Aboriginal or Torres Strait Islander primary caregiver who is not a biological parent can be held to be a parent for the purpose of establishing that a child is in need of protection,[41] while they are not considered to be a parent for the purpose of responding to child protection proceedings.

Accordingly, the Department can apply for a child protection order on the basis of allegations of, for example neglect by a non-biological parent primary caregiver, and the respondent to the application will be the biological parent.

In order for a non-biological primary caregiver to participate in child protection proceedings they must apply to the court to be involved in proceedings as a non-party.[42] However, even if this application is made and accepted, the person will not then assume the same position as a respondent to the proceedings. A non-party can make submissions in the proceedings and may be given permission to view relevant documents.[43] However, in all other ways they continue to be excluded from the proceedings. They are not readily able to participate in court ordered conferences and they are not served with documents or provided with information that relates to the proceedings.

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36 Section 11 of the Act contains an expansive definition of parent while sections 23, 37, 51AA, 51F, 52, 205, define 'parent' in a restricted way.

37 Explanatory Notes, page 12.

38 See sections 11(3) and 11(4) of the Act.

39 Explanatory Notes, page 19.

40 Family Law Act 1975 (Cth).

41 Section 10 of the Act provides that a child is in need of protection if they have suffered harm, are suffering harm, or are at unacceptable risk of suffering harm and they does not have a parent able and willing to protect the child from the harm.

42 Section 113 of the Act.

43 Ibid.

A focus on biological parents ignores the reality that, in Aboriginal and Torres Strait Islander communities, child rearing responsibilities are often held and discharged by a broader range of people. By defining parent restrictively in the parts of the Act that relate to child protection proceedings and participation in case planning when a child is subject to a child protection order, the current system fails to demonstrate or apply an understanding of Aboriginal and Torres Strait Islander peoples, families and culture.

A consistent broad definition of parent that includes a person who is considered to be a parent according to Aboriginal or Torres Strait Islander culture would allow:

1. Extended family members who are performing the role of primary caregiver to respond to allegations that are made against them during child protection proceedings;
2. Extended family members who are performing the role of primary caregiver to show that they are a 'parent' who is willing and able to protect the child from harm.

Recommendations

The Act should be amended so that either:

1. A consistent definition of parent, which includes a person who is considered to be a parent according to Aboriginal or Torres Strait Islander culture, is used throughout the Act; or
2. There is provision for a person who is considered to be a parent according to Aboriginal or Torres Strait Islander culture to apply to be joined as a party and treated as a parent for the purpose of child protection proceedings.

Adequate and efficient resources and front-line staffing

The high turnover rate and burn-out of front-line child safety officers is well documented. This clearly impacts on the likelihood of Aboriginal and Torres Strait Islander women engaging with child protection staff productively.

The effect of inadequate or ineffective front-line staff is that our clients regularly experience difficulties in relation to the following:

1. In some cases there is no child safety officer assigned to the case;
2. In numerous cases no case plan is developed;
3. Family Group Meetings are not always held in compliance with the Act;

4. Notices in relation to contact and placement decisions are not provided to parents, although this is required by the Act;[44]
5. Child safety officers have no knowledge of the history of the case or experience working with the family;
6. Child safety officers are not available to respond to parent's telephone calls and regularly do not return telephone calls;
7. Child safety officers are overwhelmed and stressed and can at times interact with parents in a disrespectful way;
8. Child safety officers do not have the time to develop the trust that is required to properly engage with Aboriginal and Torres Strait Islander women.

Recommendations

ATSIWLAS believes that holistic and family focused case-planning and service delivery is in the best interest of Aboriginal and Torres Strait Islander children. Rather than the best interest of the child concept being interpreted so as to isolate the child's needs from the needs of their family, our view is that the interests of the child are inextricably linked to the interests, well-being and health of the child's family.

The most important element of successful case planning for Aboriginal and Torres Strait Islander families is establishing a relationship of trust between the caseworker and the family.

One a relationship exists between the caseworker and the family case planning can commence.

Programs developed to assist Aboriginal and Torres Strait Islander families should include the following:

- Building on existing family strengths;
- Intensive home-based support services;
- Community education to engender support for family preservation;
- Recruitment and training of indigenous staff;
- Fostering cooperation among multiple service providers;
- Effective coordination between various agencies at a given site;
- Secure long-term funding;

[44] Section s87(3) and 86(2) of the Act.

- Longer program timeframes;
- Reunification work;
- Attempts to minimise the impact of placements, where placement is unavoidable.[45]

Decision making processes

Potentially linked to lack of or inefficient use of resources, is the arbitrary nature of Departmental decision-making. The Department regularly makes decisions in relation to contact arrangements, placements and kinship care assessments without providing reasons.

The Act clearly requires a notice in writing to be provided in relation to decisions to restrict or impose conditions on contact arrangements and in relation to the placement of children.[46]

The Act provides that if no response is received to a kinship carer application within 90 days of it being lodged the application is deemed to have been refused.[47]

In almost every case that ATSIWLAS has assisted with, no notices have been provided. When this occurs we usually write to the Department requesting that a notice be provided to our office. Usually this request goes unanswered. We will then write to the Department asking again for a notice and stating that if no notice is provided we will make an application to the Queensland Civil and Administrative Tribunal ("QCAT") without a written notice.

Sometimes the Department will provide us with a written notice of their decision. Decisions in relation to contact are often made on the basis of availability of resources. In our experience the Department is unable to accommodate contact arrangements that respond to the reality that many women are restricted by competing demands on their time (for example to attend medical and other appointments), the needs of children who remain in their care, and limited finances. In our experience the Department refuses to accommodate:

1. Contact with parents on weekends;
2. Contact that enables mothers to continue to breastfeed their children;
3. Contact that includes extended family members;
4. Contact in the parent's home.

Examples of poorly made contact decisions include:

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45 Libesman T. Child Welfare Approaches for indigenous communities: International perspectives. National Child Protection Clearinghouse Issues no.20, Autumn 2004: Australian Institute of Family Studies at 29.

46 Section s87(3) and 86(2) of the Act

47 Section 143 of the Act.

1. Allowing parents to have one unsupervised and one supervised contact with their children each week with no clear justification as to why one of the contacts needed to be supervised while the other did not;
2. Not allowing parents to have any telephone contact with their children because the foster carers were not able to accommodate the request;
3. Arranging contact at a location that was inaccessible to a mother who had two children under the age of 2 in her care;
4. Refusing to increase the amount of contact a parent was having with her child when the remaining child protection concern was a lack of attachment between the child and the parent.

We have assisted numerous women to make applications to QCAT to have a decision that has been made by the Department reviewed. Usually once an application and a date is set for a stay hearing in QCAT the Department will review their decision and make a reasonable decision that is accepted by our client. Accordingly, often the utility of QCAT is the threat of having poorly made decisions exposed. Clearly, if decisions were made with the requisite care and consideration in the first instance, significant resources on behalf of the Department, legal services and QCAT would be saved.

STRUCTURED DECISION MAKING

Structured Decision Making is a tool that is used by the Department to assess families and to assist with the decision making process. The screening criteria that is used in this tool is only accessible to Child Safety Services staff. The screening criteria within the Structured Decision Making tool may be culturally-blind. This means that, although we doubt Aboriginality is identified as a risk factor, factors that may be characteristic of Aboriginal and/or Torres Strait Islander families may be identified as risk factors – meaning that Aboriginal and Torres Strait Islander children will be assessed as being more likely to be at risk of harm than non-Indigenous children simply by virtue of their Indigenous status.

We understand that the Structured Decision Making tool was developed in the United States and that the criteria that is used within the system has been derived from social science research.

We note that the Department began using Structured Decision Making in 2005. We also note that there has been a steady increase in the representation of indigenous children in the child protection system.

Recommendations

We make the following recommendations in relation to the Department's decision making process:

1. All decisions in relation to contact, placement and kinship carer assessments should be provided in writing and should be supported by reasons and clear instructions in relation to review processes;
2. All decisions in relation to kinship carer applications and assessments should be provided in writing and should be supported by reasons and clear instructions in relation to the review processes;
3. Proposed decisions should be reviewed by legal officers within the Department prior to being finalised and provided to parents or affected persons;
4. The screening criteria used within the Structured Decision Making tool should be available to the public. The criteria and the social science research that the criteria is based on should be evaluated to establish whether the criteria has the effect of making Aboriginal and Torres Strait Islander children more likely to be assessed as at risk of harm. This evaluation should be made available to the public.

Court processes

Material filed by the Department in proceedings

The affidavit material that is filed by the Department in child protection proceedings is usually of a poor quality. We have regularly see errors in Departmental material including in relation to the names of the parties and factual inaccuracies.

The Department regularly includes information in their affidavit material that is very distressing for our clients. For example, the Department will include details of the parents own interactions with the Department as a child. As previously noted, the Department uses a Structured Decision Making tool which identifies factors that elevate the likelihood of children being at risk of harm. Although the screening criteria that is used in the tool is not available to the public, we understand that according to the tool one of the factors that will elevate the likelihood of a child being assessed as at risk of harm is that the child's parent was the subject of child protection intervention when they were a child. We question the utility of including this information in the Department's affidavit material.

Recommendations

Affidavit material should be reviewed by legal officers in the Department before it is filed in proceedings.

If the Department believes that parents who have been cared for by the Department as children are more likely to harm or neglect their children, rather than use this information against parents, the Department could consider:

1. Reflecting on why children who are cared for by the Department do not grow up with the skills to become protective and capable parents;
2. Developing a program that provides primary prevention support to people who were subject to child protection intervention as children.

Our solutions

Through our work we have seen that the reasons why some women have trouble caring for their children are complex. Often drug and alcohol use is associated with issues of grief and loss and mental health issues. Often mental health issues are associated with being impacted by violence and abuse – both as adults and as children. Often women who stay in violent relationships do so because they do not have a strong sense of their own self-worth. We also note that the intervention of the Department is traumatic for our clients and that often the intervention exacerbates the child protection concerns.

Through our family support service we develop case plans for women to assist them to access the services that they need. In contrast to the punitive model adopted by the Department, we “walk with” our women and support them through the process.

In addition to providing family support services we regularly represent women in court when the Department’s intervention or decisions are unjustified.

By providing legal services and family support services together we believe that we are providing a holistic and culturally appropriate service. It should be emphasised that our family support service is delivered by an Aboriginal women who has counselling and health science qualifications. It should also be emphasised that our organisation is an Aboriginal corporation and that it is managed and directed by Aboriginal and Torres Strait Islander women. Accordingly, we consider our service provision to be culturally appropriate.

As outlined at the beginning of our submission, we operate our service with very limited resources. In addition to providing child protection associated services we provide women with legal and support services in relation to all areas of civil law including domestic violence, family law, debt, discrimination and victims of crime compensation. To deliver our services

we leverage the support of volunteers and pro bono assistance from lawyers and barristers. We also prioritise assisting clients with matters where another service cannot appropriately provide legal representation.

In response to our observation that many of the services provided to our clients are not delivered in an integrated way and that legal services are not accessed at the beginning of child protection intervention we have developed a project that includes:

1. A collaborative referral pathway with a recognised entity where the recognised entity connects families to our legal services as soon as child safety services become involved in families;
2. The establishment of a child protection outreach clinic to be established in collaboration with a health service;
3. The use of a student legal clinic from the University of Queensland to assist with the additional case load that will be generated from the above activities.

We have done the initial scoping and consultation to establish the above project. We are now in the process of seeking funding for our pilot as we will need to employ a solicitor to coordinate the project.

We currently do not have the capacity to respond to all of the requests for assistance that we receive. We would benefit from additional funding to employ two additional lawyers and two additional family support workers to deliver child protection related legal services for Aboriginal and Torres Strait Islander women.

Other ideas

There are many other things that will contribute to the improvement of the child protection system. These include:

1. Treating families with the respect that should be afforded to all humans. This should include providing parents with access to toilets and access to water at child safety service centres;[48]
2. Consulting with families prior to family group meetings to see whether there are extended family or community members who should be involved in case planning and also to ascertain whether changes could be made to make the process more comfortable for the participants;

[48] For example, currently at the Stones Corner Child Safety Service Centre there are not toilets available for parents or visitors. Instead, people are directed to ask the café next door to use their toilet.

3. Establishing facilities that can accommodate mothers and babies where the mother is seeking to keep their baby in their care while undertaking a rehabilitation program in relation to drug or alcohol misuse;
4. Improved visibility of the Department's understanding and appreciation of Aboriginal and Torres Strait Islander child rearing practises;
5. Establishing an Aboriginal and Torres Strait Islander Children's Guardian within the Commission for Children and Young People and the Adult Guardian with a mandate to provide independent oversight and resolution of issues for Aboriginal and Torres Strait Islander children and young people in the child protection system. This person should be an Aboriginal or Torres Strait Islander person from Queensland.

Additional information

We have encouraged a small number of Aboriginal women to give evidence to the Commission. We have submitted witness statements of behalf of these women.

We believe that it is essential for the Commission to hear from as many Aboriginal and Torres Strait Islander women as possible. ATSIWLAS is willing to assist the Commission to hear from more Aboriginal and Torres Strait Islander women if required.

Our Principal Solicitor is also willing to give evidence to the Inquiry by speaking to our submission.

Annexure

CRYSTAL: Crystal was a 19 year old woman - she was pregnant, homeless and struggling with drug and alcohol dependencies. Crystal had a youth worker who was supporting her to participate in a rehabilitation program and was also assisting her to find accommodation. Crystal's partner was in prison and she had little family support. Crystal had been subjected to significant domestic violence.

Crystal was under the care of the Department until she was 18. Her sister had died while in the care of the Department.

When Crystal came to see us the Department was seeking a court assessment order. The Department's concerns were in relation to homelessness and drug use. We obtained a 3 day adjournment of the application and arranged accommodation for Crystal and her baby at a facility that provided supported accommodation for mothers and babies.

During the hearing of the application we provided evidence to the court of the accommodation that we had secured and the support services that Crystal was engaged in. The court assessment order was made because the accommodation did not offer 24 hour supervision.

The only facility that accommodates mothers and babies at provides 24 hour supervision in Brisbane has 8 beds, does not accept mothers with drug problems and can only accept referrals from the Department.

As a result of the order the baby was placed with a non-indigenous foster carer. The mother was not provided with a notice that detailed the placement decision. The mother remained homeless, eventually disengaged with services and the Department obtained a 2 year custody order in relation to the baby.

NICOLE: Nicole contacted our service after her 12 day old baby boy was taken from her in hospital by child safety services. Nicole had been diagnosed with schizophrenia. There was medical evidence that even with the assistance of medication Nicole would not be able to care for her son. Nicole planned to move in with her mother so that her mother could assist her with the care of her baby.

The Department placed the baby with non-indigenous foster carers and sought a 2 year custody order – promising Nicole that they would work toward re-unification if "she got better."

JOANNE: Jo-Anne's three children, aged 8, 6 and 2 years were removed and placed with carers in a remote area approximately 1000km from Jo-Anne. Jo-Anne contacted our service

because the Department had told her that she was not able to have any contact with her children. Jo-Anne was also very concerned about the suitability of the children's placement. Among other concerns, the children had been placed with a family who expressed racism towards Aboriginal peoples.

The children were eventually moved and placed with non-Indigenous carers where seven adults resided. The female carer was at work five days per week. The children disclosed incidents of sexual abuse to their grandmother perpetrated by an adult living in this household.

Within a few months the children were returned to their mother.

DARLENE: At 18 years old, Darlene gave birth to a baby girl who was three months premature. Although the hospital indicated that Darlene was able to care for her new-born baby, the Department sought the removal of the baby at discharge, claiming Darlene was unfit to care for her.

The child protection concerns were that Darlene was young, had been subjected to domestic violence and the Department believed that she was living with her mother who was a drug user. The Department's affidavit material included information about a syringe being sighted in Darlene's home. The Department failed to ask what the syringe was for and it was eventually established that the syringe was used to administer the baby's medication.

At the first mention of the Department's application for a 2 year custody order we contested the application for custody on an interim basis. The Department produced evidence to show that the foster carers – a non-Indigenous professional couple would be better suited to the care of the baby than Darlene. Darlene retained custody of her baby.

PHYLLIS: Grandmother Phyllis had been caring for her disabled grandson for 15 years since his birth. Phyllis, who had a hearing impairment, was struggling with the demands of her intellectually disabled grandson and needed respite. She contacted the Department to see if this could be arranged. The Department assisted Phyllis to access services so that her grandson could spend time in respite, to give Phyllis the break she needed. After a short period Phyllis asked for her grandson to be returned to her. The Department refused and said that they were seeking a custody order so that her grandson would stay in the residential care facility. The main child protection concern was the emotional damage Phyllis' 'relinquishment' of her grandson might cause. They also claimed that he was at risk of homelessness.

Despite Phyllis trying to explain she only wanted some regular time out, child safety continued to seek the order.

At the first mention of the matter we contested the Department's application for an interim custody order. Phyllis' grandson was then returned to her care. During the period of adjournment the Department did not contact Phyllis or visit her to see how her grandson was. At the second mention of the matter we asked the Court to dismiss the Department's application because they had failed to file any material that supported an application for a child protection order. The court dismissed the Department's application.

Departmental officers followed Phyllis home and asked her to sign an intervention with parental agreement.

JACQUELINE: Jacqueline sought our assistance in relation to applications that had been made by the Department for custody of her five children. The children had been removed 2 years prior and had been subject to custody orders since that time. Jacqueline had in her possession applications but no supporting affidavits. Upon investigation it became clear that the Department had not filed any supporting affidavits. Upon further investigation it became clear that there had been no child safety officer responsible for the case for most of the duration of the previous order.

CAITLYN: Caitlyn had been in an extremely violent relationship – her partner had fractured her cheek bone, stalked her and locked her in a caravan after beating her. Eventually Caitlyn's partner kidnapped their children. Despite seeking the assistance of the police, lawyers and her partner's family, Caitlyn was unable to contact her children.

18 months later, Caitlyn contacted ATSIWLAS upon discovering that her former partner's sister was now caring for the children after being placed there by the Department. Caitlyn was never contacted by child safety services before or after the children were placed in the sister's care. Child safety made no investigation to determine whether Caitlyn was able to care for the children.

Caitlyn repeatedly requested that the Department place the children back into her care. The Department's response was to advise Caitlyn that it could organise some contact between Caitlyn and her children. The Department allowed Caitlyn one contact visit per week. The Department provided no adequate reasons for placing the restrictions on Caitlyn's contact with her children.

CAROL: Carol was young, homeless, using drugs and had been in a very violent relationship. The only part of the case plan that related to the child that was removed from her care to her presenting needs was for the child safety officer to assist her to apply for housing and to provide her with a list of substance abuse services. No referral to intensive family or housing support was made.

Carol was to have supervised contact at a child safety service centre. No extended family members were allowed to visit. On one occasion, Crystal arrived late and was told the baby had been taken home, but witnessed the child being brought down to a car after she had left and was waiting outside.

CLARICE: Clarice's five children were removed. She lived in Brisbane but the children were relocated to Bundaberg. Clarice struggled to maintain physical contact with her children, not only because of the distance, but because of the hurdles created for Clarice by child safety. On several occasions, when Clarice was able to make the trip to Bundaberg, the children were not there, the child safety officer had not organised the visit and had then failed to notify Clarice prior to her arrival in Bundaberg.

Clarice sought weekend visits so that her daughter who resided with her could travel with her and not miss school. The Department refused to offer weekend visits – they said that they could not supervise weekend contact.

PAT: Our service was contacted by a maternal grandmother over her concern that her daughter's children, currently in care, were not maintaining relationships with their extended Aboriginal family. Pat had previously cared for the children but could no longer do so because of her poor health.

The oldest three children from this family had been removed from their parents while the youngest child remained with his mother. The oldest child was placed with his maternal aunty and the two other siblings were placed with non-Indigenous carers. Sibling contact was very limited.

Family members were not provided the opportunity to maintain regular contact with the children. The children were not supported to maintain cultural practices. The children were denied an opportunity to attend cultural activities, including a family member's funeral.