

Submission

SECOND CALL FOR SUBMISSIONS- RESPONSES TO FEBRUARY 2013
DISCUSSION PAPER
Queensland Child Protection Commission of Inquiry

*A Submission of the
Queensland Law Society*

20 March 2013

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Chapter 3 – Reducing demand on the tertiary system

- **Question 4**

What mechanisms or tools should be used to assist professionals in deciding when to report concerns about children? Should there be uniform criteria and key concepts?

We suggest that if the Commission recommends retaining a range of mandatory notifiers, these people or agencies should be identified in a single piece of legislation – the *Child Protection Act 1999* ('the Act').

Chapter 5 - Working with children in care

- **Question 10**

At what point should the focus shift from parental rehabilitation and family preservation as the preferred goal to the placement of a child in a stable alternative arrangement?

Based on the experience of our members, we would suggest that rather than determine a single preferred goal, in many cases parallel planning is the child focused response. The Society is unaware of any empirical evidence to suggest that the current legislative test is not appropriate.

- **Question 11**

Should the Child Protection Act be amended to include new provisions prescribing the services to be provided to a family by the chief executive before moving to longer-term alternative placements?

The Society has addresses this issue through comments made in our first submission to the Commission on page 9. Specifically, the submission states:

Long-term guardianship of a child can be granted under s 59(6) of the Act. The Society considers that the grounds for making a long-term guardianship order should place a positive obligation on the Department to demonstrate that they have made reasonable efforts to work with the family to address the child protection issues, where practically possible. In fact, the Department has issued a Practice Resource dealing with 'long-term guardianship – assessment factors'.¹ Among the factors discussed, it is evident that efforts should be made to work with the family to resolve the child's protection and care needs in a timely way. We consider that the Department should demonstrate through the provision of evidence that reasonable efforts have been made to adhere to this Practice Resource. We consider this will discourage circumstances where a lack of robust and appropriately targeted casework means conditions for reunification are not achieved.

It may be prudent to enshrine this obligation in legislation. We consider that this would be particularly relevant in terms of addressing the overrepresentation of A & TSI children in the child protection system.

¹ Department of Communities, Child Safety Services and Disability Services, Practice Resource, Long-term guardianship assessment factors, found at: <http://www.communities.qld.gov.au/resources/childsafety/practice-manual/practice-resource-ltg-assessment-factors.pdf>

The Society considers that the most effective way to ensure appropriate considerations are made before moving to long-term alternative placements is to create a legislative requirement for the court to determine that sufficient efforts have been made by the Department to assist the parents to address the child protection concerns, prior to applying for a long-term order. Given the disparate range of needs with which families may come to the tertiary child protection system, we suggest that the issues could not be properly addressed via an inclusive list of specific services prescribed in legislation.

• **Question 12**

What are the barriers to the granting of long-term guardianship to people other than the chief executive?

The Society considers that there may be several issues that could contribute to barriers to the granting of long-term guardianship to people other than the chief executive:

- Inappropriate levels of funding and support available to those 'guardianship carers'. The Society opines that carers may not be prepared to request or agree to the Department bringing applications for them to be long-term guardians without the assurance of assistance. This may be an issue for the Commission to explore further;
- Inadequate oversight due to reduced frequency of case planning required under the Act. Case planning and review for children subject to this type of guardianship order is only required to take place yearly, whereas for children subject to other orders this takes place every 6 months. The implications of this reduced oversight may be an issue for the Commission to explore further;
- Lack of support for guardianship carers to make contact arrangements for children in their care to spend time with their biological family. We consider that this could be addressed by a legislative requirement for Department to facilitate/support and monitor contact approved by them;
- Lack of support for siblings of children placed with guardianship carers to maintain sibling relationships and contact. Our members are aware of situations where the Department considers it is unable to facilitate sibling contact for children whose siblings are placed with guardianship carers, as the guardianship carers are unwilling to support this. We consider that this could be resolved by a legislative provision allowing the Court to attach contact directions to a child protection order;
- Disparity of resources and funding for young people transitioning from the care of guardianship carers, compared to other young people transitioning from out-of-home care. Our members report finding it difficult to determine the difference in resources available to young people and their guardianship carers. This could be resolved by clear policy statements by Department, made publicly available, that set out the similarities and differences in financial support for carers with different types of orders; and
- The Court can only grant long-term guardianship to carers who are not family members, if the carer is nominated by the Department for this (under s61(f)(ii) of the Act). This can create a barrier for young people or their families to seek long term guardianship orders to carers, where the Department has not made an assessment or the assessment is negative. A possible solution would be to create a specific power on adjournment for the Court to direct the Department to assess the suitability of a carer who is proposed by a party to be a guardianship carer. Additionally, we consider that the provision empowering the court on an adjournment to direct that an independent assessment be obtained in appropriate circumstances would be beneficial.

- **Question 13**

Should adoption, or some other more permanent placement option, be more readily available to enhance placement stability for children in long-term care?

In terms of the proposal for adoption, the Society considers that more evidence may be needed to demonstrate that adoption of children removed from their families due to child protection concerns will have the effect of “increasing emotional security for the child and ensuring stability and continuity for transition to adult life”, as proposed in the Discussion Paper.

The Society also considers that the Commission should provide more information on the type of model for adoption that may be proposed. This will assist in making a considered evaluation of whether the option would enhance placement stability in long-term care.

The types of issues that the Society suggests would be important to consider when evaluating adoption would be:

- What benefit accrues to children or carers from an adoption order that would not accrue from the existing order granting long-term guardianship to a carer? We consider that the Commission should investigate why more use is not made of long-term guardianship orders to carers, and address these barriers, rather than attempting to create a new type of order. We also consider that there may be succession implications that would need to be examined, along with any appropriate amendments to the *Succession Act 1981*;
- What are the rates of notification received and child protection orders made in relation to children and young people who are adopted, and what is the relevance of this data to the Commission’s consideration of adoption as an appropriate response in circumstances where permanent out of home care is needed?;
- If adoption orders were proposed, consideration would need to be given to similar issues as have been raised in relation to our discussion herein regarding the long-term guardianship to carers. Particularly, consideration would need to be given to having directions regarding ongoing parent and sibling contact that attach to adoption orders and could be brought back before the Court that made the order where needed; and
- To allow us to respond in more detail on this significant matter, we request that the Commission set out for comment its proposed framework for the increased use of adoption orders in practice.

- **Question 14**

What are the potential benefits or disadvantages of the proposed multidisciplinary casework team approach?

The Society has no specific comments on the proposal for a multidisciplinary casework team approach; however we note that this model appears similar to the approach used by Evolve and departmental stakeholder groups.

We refer to and reiterate comments in our previous submissions which highlight the need for young people to have independent advocates throughout the child protection system. For example, in order to address all legal needs of children in care we suggested the following at page 37 of our submission:

The Society is aware of some situations where children have a right to commence civil proceedings for damages arising from incidents that have occurred prior to entering care or whilst they were in the care of the State. Our members report that material disclosed by the Department or filed in proceedings not infrequently contains information suggesting a child in care may need advice in relation to victim of crime compensation, negligence claims (including against the Department), and other

matters. In our view, there is a lack of adequate mechanisms, or clarity in relation to such mechanisms, to ensure that young people in the care of the State have access to legal advice and information for these kinds of matters. It appears to our members that there is no systematic way within the Department of identifying and flagging these issues as they arise. We acknowledge the complexities involved, particularly where young people may need to obtain advice about a matter many years after the incident occurred. We consider that identifying these matters is an essential obligation of the Department to children in their care. It is crucial to ensure that the Department can obtain legal advice on the situation at the earliest possible opportunity and arrange for independent advice to be obtained on behalf of the child at an appropriate time given the child's age and the nature of the matter. Young people in care traditionally access legal advice from Legal Aid Queensland and community legal centres, but our members report that these organisations are inadequately resourced to respond to these particular legal needs.

We consider that a viable option for addressing this problem would be the development of a legal needs passport for a child in care. This would be similar to the health passport for a child in care which is retained and updated with new matters and details of action taken over the child's time in care, to then be provided to the child upon exiting care along with the appropriate referrals and support for advice. We consider that the Inquiry should investigate this potential option. This may also require collaboration between the Department and legal service providers (Legal Aid Queensland, community legal centres, and private firms) to develop the necessary casework tools and to ensure that Departmental staff are adequately trained and supported to implement this.

The Society considers that a multidisciplinary approach to casework presents an opportunity to put in place mechanisms such as a legal needs passport to ensure that the legal needs of a child are identified and addressed.

- **Question 15**

Would a separation of investigative teams from casework teams facilitate improvement in case work? If so, how can this separation be implemented in a cost-effective way?

Whilst the Society has no comment on the model proposed in the Discussion Paper, we consider that further clarification is needed on how a separation will be implemented effectively. It appears that the following issues remain unclear:

- The extent to which confidentiality of information between investigative and casework teams would be protected;
- How will sharing of information be facilitated with separate structures e.g. - information obtained by teams may still need to be considered/assessed by the investigative and assessment teams;
- Where children and families have built positive relationships with investigative workers, does the proposed model provide flexibility in the timing and length of the transition to a casework team; and
- Where there is an ongoing Court proceeding, does the proposed model provide for the investigation team to remain the applicant for the order, or does the responsibility for the Court proceeding also transition to the casework team (and how will this impact on the development of rapport)?

- **Question 16**

How could case workers be supported to implement the child placement principle in a more systematic way?

The Society notes that one important issue is that there appears to be a lack of available culturally appropriate placements. Therefore, this is perhaps an issue which needs to be addressed in order for case workers to be able to implement the child placement principle in a more systematic way. The Society is not aware of any changes to the legislative arrangements that would resolve problems such as this.

- **Question 17**

What alternative out-of-home care models could be considered for older children with complex and high needs?

The Society has considered the evidence of a number of different stakeholders on the issue of adoption of a therapeutic secure care model for the child protection system.

We note the evidence of police officer Mr Peter Waugh.

It appears from the course of Mr Waugh's comments that secure care is suggested as a solution to reduce the call-outs of police to facilities and to deter breaches of facilities' rules, even while acknowledging that many occasions do not involve matters of criminality. We question whether secure care is the appropriate way to respond to these concerns. The Society has provided information to you in our submission on page 33 regarding the work of the Committee of Stakeholders to address the very same issues of reducing police call-outs and appropriate behaviour management. We consider that these should continue to be the subject of consideration by all stakeholders involved to determine the most appropriate and balanced approach to addressing these issues. The Society questions whether a secure care model, which would severely affect the rights and liberties of young people who have not broken the law, is the most appropriate response to the issues explored in Mr Waugh's evidence.

Particularly, the Society questions why an order is required to address difficult or socially undesirable behaviour specifically of children and young people, when no such order exists for adults. We suggest that the evidence led in Commission hearings points to the need for better placement matching and more flexible and responsive placements that meet children and young people's care and protection needs, rather than the need for an order allowing for the detention of young people in care specifically.

The Society has also considered the submission of the Royal Australian & New Zealand College of Psychiatrists in relation to secure residential care at pages 22-24. In particular the submission states:

Therapeutic management of such young people requires long-term placements (12 to 24 months or more) in a therapeutic facility where their emotional, psychological and educational/learning needs can be met through the establishment of relationships with highly skilled and supported care staff and their externalising behaviours (such as aggression) can be safely contained and managed. Due to their lack of insight and absconding behaviour, these facilities must be secure. Currently, the only framework in Queensland for secure detention is the criminal justice system and incarceration in Youth Detention Centres. Young people can only access this when they have a significant criminal history, so are far down the criminal trajectory and change is difficult to achieve.

We recommend that the inquiry consider alternative models for these young people for example the "secure children's home" model that is used in the United Kingdom. Such models provide secure therapeutic facilities for such young people where they can receive the therapeutic help that they need before they are on a trajectory towards long-term incarceration in the adult prison system. The criteria for secure children's home placements are in relation to the child's risk and welfare, not their offending; and the aim is explicitly therapeutic.

The submission does not point to any empirical evidence to demonstrate that the United Kingdom "secure children's home" model is providing better outcomes for young people than residential care facilities. The Society requests further information on how this model has been evaluated. The Society is also particularly concerned about the proposal which could see older young people subjected to secure care arrangements for long periods of time (12-24 months or more). Whilst we understand the benefits that therapeutic interventions may bring, these long time periods will be a significant intrusion into a young person's rights in a situation where the young person is not detained for criminal or mental health reasons- but solely as a response to the child's risk and welfare needs.

The Society considers that the Commission should be cautious in considering whether to adopt a secure care model. After having considered the evidence presented, the Society does not consider that an adequate case has been made out for the adoption of a secure care model in Queensland. Mechanisms already exist for detaining children and young people under the *Mental Health Act 2000* and it is unclear from the evidence before the Commission why this mechanism is inadequate for responding to young people in care who are unwell, and if it is, why flaws in the existing system cannot be identified and addressed.

The evidence presented does not explore why the available mechanisms through the youth justice and mental health systems is considered to be inadequate for this group of children specifically. Further, there appears to be a lack of evidence to demonstrate that a secure model will in fact result in better outcomes for this group of children. We consider that further information is necessary before this option can be considered.

The Society also notes that, undoubtedly, there will be significant cost consequences if a secure care model is to be recommended. The Society considers that a costs/benefit analysis should be investigated to determine whether this option is viable. Empirical evidence showing that secure care models, currently in operation in various states in Australia and overseas, are economically and therapeutically effective would be essential for the Commission to investigate.

However, if the Commission will be recommending this as an option for reform, the Society considers that substantial protections must be built in to ensure a model which best protects the rights of children. We consider that the following issues would be important for the Commission to consider:

- Applications should be made and considered by the Supreme Court of Queensland, to ensure a high level of judicial oversight on applications (we understand this is how the jurisdiction operates in New South Wales);
- There must be a clearly articulated purpose and timeframe for contained treatment outlined in an application, and a statutory limit on the number of days which a young person can be placed in the facility (for example, in Victoria the period must not exceed 21 days and in exceptional circumstances can be extended for one further period not exceeding 21 days²);

² Section 173, *Children, Youth and Families Act 2005 (Vic)*

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- There should be clearly defined criteria for when the applicant can bring the application;
 - Reflecting on the historical abuse of care and control orders, it should be clearly provided for in legislation that patterns of sexual behaviour cannot be a basis for a secure care order;
 - The applicant must be able to demonstrate that all alternatives to secure care have been considered and where appropriate attempted, before the secure care application is made;
 - Young people and their families must be given access to legal representation;
 - Young people and their families must be involved in the decision making process and in the plans for treatment;
 - Culturally appropriate placements and treatment must be available for Aboriginal and Torres Strait Islander young people;
 - Culturally appropriate placements and treatment must be available for culturally and linguistically diverse young people;
 - Complaint and review mechanisms must be in place for the young person and his or her family;
 - External independent assessors should be legislated for to inspect and oversee the management of these orders; and
 - An age restriction should be in place to ensure only older children can be subject to an order (e.g. - only young people aged 15 to 18 years of age).

Chapter 6 - Young people leaving care

- **Question 18**

To what extent should young people continue to be provided with support on leaving the care system?

The Society would like to make a brief comment here regarding research showing a link between homelessness and young people leaving care.³ The basis of this comment is that our members observe in criminal law practice the connections between young people having a care experience, homelessness, and having contact with the criminal justice system. This has been confirmed in research showing the link between child maltreatment and juvenile offending.⁴ We suggest research and evidence regarding the outcomes for young people transitioning from care should be considered when assessing support needs of young people leaving the care system.

We also note that the following has been stated in Judy Cashmore's paper, 'The Link Between Child Maltreatment and Adolescent Offending: Systems Neglect of Adolescents' in 2011:

The final transition that young people in care make - leaving care - may also make them vulnerable to involvement in the criminal justice system, and if it occurs after the age of 18, they are then subject to the adult rather than the juvenile justice system (Taylor, 2006). US and Canadian research as well as several English and Irish studies have indicated that care leavers are over-represented in the criminal justice system (Courtney & Dworsky, 2006; Cusick & Courtney, 2007; Jonson-Reid & Barth, 2000a; Kelleher, Kelleher, & Corbett, 2000; Taylor, 2006). A recent Australian report (McDowall, 2011) has also indicated that a large proportion of young people leaving

³ Australia's Homeless Youth report, National Youth Commission, 2008 found at: <http://www.abc.net.au/tv/oasis/report/report.htm>

⁴ 'Juvenile offending trajectories : pathways from child maltreatment to juvenile offending, and police cautioning in Queensland', 2005, Susan Dennison, Anna Stewart and Emily Hurren, found at: <http://www.criminologyresearchcouncil.gov.au/reports/200304-35.pdf>; 'The Link Between Child Maltreatment and Adolescent Offending: Systems Neglect of Adolescents', 2011, Judy Cashmore found at: <http://www.aifs.gov.au/institute/pubs/fm2011/fm89/fm89d.html>

care (60%) are doing so without a leaving care plan and with inadequate support in terms of accommodation, employment prospects and sources of social and emotional support. The lack of formal support and supportive relationships at an age when most of their same-age peers not in care are still living at home leaves these young people vulnerable to homelessness, unemployment, mental health issues, and drug and alcohol abuse problems, and there is a greater likelihood that they will commit offences, partly at least for survival purposes (Taylor, 2006).⁵

We submit that this highlights the need for additional support, and prioritisation of young people exiting the care system in accessing government services- whether the age for exiting care is raised or not.

Chapter 7 - Addressing the over-representation of Aboriginal and Torres Strait Islander children

- **Questions 21-25**

The Society refers to and reiterates our comments in our previous submission regarding the importance of having Aboriginal and Torres Strait Islander families and communities as central participants in decision-making and in any reforms proposed.

Chapter 8 - Workforce development

- **Question 26**

Should child safety officers be required to hold tertiary qualifications in social work, psychology or human services?

The Society has commented on page 28 of our first submission that additional support is required for departmental officers by being able to access early legal advice:

Early and ongoing legal advice for the Department. As highlighted by the Victorian Cummins Inquiry Report, child safety officers often are tasked with preparing legal documents. We consider that if the appropriate early legal advice and litigation support is obtained this will enhance the quality of documents, resulting in the parties and the court being better informed, child safety officers having more time to devote to casework tasks, and ultimately producing better outcomes for children and young people.

The Society reiterates these comments in the context of this question.

In relation to the qualifications of child safety officers generally, the Society notes that when child safety officers are required to give evidence on behalf of the Department, the weight given to their evidence may be affected by their qualifications.

⁵ 'The Link Between Child Maltreatment and Adolescent Offending: Systems Neglect of Adolescents', 2011, Judy Cashmore found at: <http://www.aifs.gov.au/institute/pubs/fm2011/fm89/fm89d.html>

Chapter 9 - Oversight and complaints mechanisms

- **Question 32**

Are the department's oversight mechanisms – performance reporting, monitoring and complaints handling – sufficient and robust to provide accountability and public confidence? If not, why not?

Previous reforms introducing legislative structure for family group meetings and case planning have enhanced processes within the Department. Regrettably, there is little accountability when commitments made by the Department in case planning are not met, except where the matter is currently before the Children's Court.

We refer to comments made in our previous submission regarding our concerns with the limited number of decisions that can be reviewed at page 19:

The Society is also concerned that as there are a limited number of reviewable decisions allowable by QCAT under the Child Protection Act 1999 and the Adoption of Children Act 1964, there is reduced accountability for persons making decisions about children and young people. The Society notes with concern that there are relatively few applications for review in QCAT. This demonstrates a considerable disparity with the number of children the subject of child protection orders, the number of reviewable decisions being made and the large numbers of complaints that are made to the Commission for Children, Young People and Child Guardian. Our members also anecdotally report that there are very few instances of children participating in QCAT, as compared to the former Children Services Tribunal. We are unaware of why this might be the case and consider that this may be a matter for the Inquiry to investigate.

We consider that expansion of review mechanisms available should be considered.

- **Question 34**

Are the external oversight mechanisms – community visitors, the Commission for Children and Young People and Child Guardian, the child death review process and the Ombudsman – operating effectively? If not, what changes would be appropriate?

The Commission for Children and Young People and Child Guardian has the power to apply for review of reviewable decisions (s370, *Commission for Children and Young People and Child Guardian Act 2000*). The Children's Commissioner provided evidence on 23 August 2012 that they have never exercised this power. The Commission may wish to identify the barriers and solutions to this.

In this context, where there has been a request for action to the Department to act under s14 of the Act, and the Department decides to refuse the request, we consider that the Department should be required to notify the person making the request of the power to seek review by the Children's Commission, providing the Children's Commission contact details.

- **Question 35**

Does the collection of oversight mechanisms of the child protection system provide accountability and transparency to generate public confidence?

On pages 42-44 of our previous submission, we have detailed the lack of statistical information on various aspects of the child protection system. We consider that the Commission should consider recommendations to strengthen public accountability through the provision of recording and publishing statistical information.

As stated in our previous submission at page 45, the Society considers that the publication of clear information regarding the resolution of complaints will contribute to greater accountability and transparency:

The Society notes the CCYPCG receives complaints about areas of concern, however there appears to be little publication or reporting in how complaints are resolved. The Society considers that this would be of assistance for both the community and the sector generally and will assist in keeping children out of the system. Publicly accessible information about the resolution of complaints will in our view promote confidence in the effectiveness of the Commission as an oversight mechanism.

Chapter 10 - Courts and tribunals

• **Question 37**

Should a judge-led case management process be established for child protection proceedings? If so, what should be the key features of such a regime?

The Society supports the development of a judge-led case management process for child protection proceedings. Item 8 (pages 27-30) of our previous submission is dedicated to providing suggestions for enhanced case management court processes. From this, we reiterate that we have called for the following key features of case management:

- Development of a body of practice directions and case management processes to deal with operational issues;
- Legislative reform to enhance case management for court ordered conferences;
- An approach that would allow an opportunity in the early stages to either avoid proceedings through a mediated outcome or resolve proceedings very early and then would also allow another opportunity to resolve the matter when all evidence has been filed with the court;
- An approach that is child-inclusive and provides meaningful opportunities for alternative dispute resolution;
- Enhancement of the inquisitorial role of the Childrens Court, which would underpin a proactive case management approach

• **Question 38**

Should the number of dedicated specialist Childrens Court magistrates be increased? If so, where should they be located?

In our previous submission, the Society has supported expanding the existing specialist structure (page 39 onwards). The Society considers that statistical information could be used to determine where the most need would be for more specialist magistrates. For example, the 2011/2012 Magistrates Court Annual report indicates that the following jurisdictions appear to have high numbers of child protection applications made:

- Beenleigh (10.75% of state total child protection applications)
- Brisbane (12.21% of state total child protection applications)
- Cairns (8.29% of state total child protection applications)
- Ipswich (7.97% of state total child protection applications)
- Southport (7.81% of state total child protection applications)⁶

⁶ Magistrates Court Annual Report 2011/2012, Appendix 4, page 46, found at:
http://www.courts.qld.gov.au/_data/assets/pdf_file/0003/167934/mc-ar-2011-2012.pdf

We consider that the Commission is well placed to investigate jurisdictions which appear to have urgent need for increased court resourcing and make recommendations for the appointment of specialist magistrates accordingly. We would support careful consideration being given to these matters, to ensure that resources are not inappropriately removed from other areas of the Court system to support this proposal. Given Queensland's geography, it appears to the Society that consideration could be given to providing for any additional specialist magistrates appointed to undertake circuits dealing with children's matters.

- **Question 39**

What sort of expert advice should the Childrens Court have access to, and in what kinds of decisions should the court be seeking advice?

The Society suggests on page 19 of our previous submission that, where child protection court proceedings are on foot, applications in QCAT should be transferred to the court so that there is one decision-maker for the matter. To achieve this, it is appropriate for experts from a range of professional disciplines to be available to the court. The Society suggests that these experts should be available to the court more generally in child protection proceedings.

There may be scope for expert advice to be sought for contained issues in which a Magistrate may consider that advice would assist. For example, if interim orders regarding contact and placement are in dispute, an expert report may assist in resolving the matter. However, we suggest that the complex nature of child protection matters are such that a wide range of expertise to inform decision-making is required, and perhaps matters could revert to the court to decide when it is appropriate to enlist this expert advice. The Society considers that it may be useful for guidelines to be developed that would assist the exercise of this discretion. These guidelines could provide assistance to judicial decision-makers in a similar way to our proposal that non-exhaustive guidance could assist with consistency and strengthen utilisation of the appointment of separate representatives (discussed at page 21 of our previous submission).

Should a report be required to assist the Court with expert advice, we also consider that an issue which may need to be clarified is which party would be responsible for taking the lead in briefing report writers in this situation. It appears that this is a matter that could appropriately be left to the discretion of the Court in individual matters.

- **Question 40**

Should certain applications for child protection orders (such as those seeking guardianship or, at the very least, long-term guardianship until a child is 18) be elevated for consideration by a Childrens Court judge or a Justice of the Supreme Court of Queensland?

As noted in the Discussion Paper, the Society's previous submission stated:

The Society has also considered whether any applications for child protection orders should be heard by the Childrens Court of Queensland convened by a judge. Given the seriousness and significance of these orders for children and their families, perhaps there would be some benefit in these decisions lying with the higher jurisdiction. We note that a provision allowing for this would be comparable to s 77, Youth Justice Act 1992 where a Magistrate is to refrain from exercising its jurisdiction to determine an indictable offence unless it is satisfied that the charge can be adequately dealt with summarily by the court. Also s 39, Federal Magistrates Act 1999 and Rule 8.02, Federal Magistrates Court Rules 2001 provide for the factors to be considered when transferring a matter from the Federal Magistrates Court to the Federal Court or the Family Court. We consider that there should be capacity for a Magistrate to determine that a particular application is so complex and serious that it should instead be heard by a judge. This could occur by application of a

party to the proceedings, or on the Magistrate's own motion. We note that any legislative provision allowing for this determination may benefit from a non-exhaustive set of criteria to guide the use of this discretion. For example, such a set of criteria might refer to the length and intrusiveness of the application.

Clearly, the Society agrees that long-term guardianship applications should be elevated to a higher jurisdiction. The Society has briefly considered whether these types of applications should go to the Childrens Court of Queensland or the Supreme Court of Queensland at first instance. The Society considers that the Childrens Court would provide a more accessible and cost-effective forum for these applications to be decided in. Also, it is likely that the judges hearing these decisions will be experienced in dealing with these matters given the Childrens Court's jurisdiction to hear child protection appeals and youth justice matters. However, the Society would not object if it is considered that these applications should be heard by the Supreme Court.

- **Question 41**

What, if any, changes should be made to the family group meeting process to ensure that it is an effective mechanism for encouraging children, young people and families to participate in decision-making?

The Society considers that increased funding for legal practitioners would greatly assist in encouraging children, young people and families to participate in decision-making in family group meetings. We reiterate the comments we have made in our first submission at page 17:

First, we consider that there should be funding available for family group meetings regardless of whether court proceedings are on foot. Our members understand that Legal Aid Queensland currently only allows funding for legal representation at one family group meeting per child per year. This is insufficient considering that case plans are reviewed every 3 or 6 months. If legal representation was available at these meetings, matters would be less likely to come back to court. Where matters did return to court, the issues in dispute would be significantly narrowed which would reduce the length of time matters remain before the court as part of an application to extend or revoke and vary orders. Therefore, in the long run we consider that it would be a cost effective measure to allow for funding for all family group meetings, regardless of whether court proceedings are on foot or not.

We also consider, as stated at page 22 of our previous submission, that separate representatives meeting or consulting with a child prior to each substantive event in child protection proceedings (including family group meetings) enhances the views of the child being heard.

- **Question 42**

What, if any, changes should be made to court-ordered conferences to ensure that this is an effective mechanism for discussing possible settlement in child protection litigation?

The Society reiterates our comments in our first submission regarding the need for a case management approach to court-ordered conferences. In particular, our position is as follows:

The Society considers that the case management of court ordered conferences can be enhanced. Whilst the Childrens Court Rules 1997 contain various guidelines, Item 2 of this submission highlights some deficiencies of these Rules. In our view, there is a need for a stronger legislative framework to enhance the effectiveness of court ordered conferences:

- *Clarity on the model and timing of court ordered conferences in the process;*

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- *Consideration of the need for full and current disclosure of the Department's case prior to the court ordered conference;*
 - *Consideration of an early court ordered conference to identify and narrow the legal issues involved. Early court ordered conferences would provide a useful forum for parties to assist the court by identifying and agreeing where possible on the application of case management issues identified above to the particular case. This could also potentially prepare parties for the interim hearing on contact and custody issues. However, the Inquiry may also wish to consider the impact that this might have on family group meetings; and*
 - *Consideration of a pre-trial court ordered conference, later in the litigation process, to narrow the legal issues prior to the final hearing.*

We also note our comments regarding the need for funding after a court ordered conference has been held:

Second, our members report that there is a lack of funding available for matters after a court ordered conference has been held in a court proceeding. It is important to highlight that in our members' experience, parties are not required to file up to date material with the court in preparation for a court ordered conference. Generally, filing dates are only set when a matter is listed for hearing after a conference and dates are often shortly before the hearing itself. Therefore, it appears that when Legal Aid Queensland is considering the merit of funding a party immediately following a court ordered conference, the funding decisions are based on out of date or incomplete material.

Parties do not always have the benefit of legal representation after the conference, due to the constraints of legal aid funding. This may make it very difficult for unrepresented parties to consider additional matters raised on the evidence in the lead up to a final hearing. In our view, if funding was continued after this point, often issues that have been raised during a conference may be further developed and resolutions reached. Further legal advice may in fact resolve contentious matters by consent, instead of proceeding to hearing, especially if there was consideration to having a second conference.

We consider that enhanced funding will greatly assist in ensuring that court ordered conferences are an effective mechanism for resolving matters.

- **Question 43**

What, if any, changes should be made to the compulsory conference process to ensure that it is an effective dispute resolution process in the Queensland Civil and Administrative Tribunal proceedings?

The Society has provided some feedback regarding the compulsory conference process in our previous submission at page 24:

- *It is the experience of our members that generally, the Department will provide lengthy reasons for decision in response to a QCAT application by a parent or child. However, these reasons are often not received until shortly before the compulsory mediation. A delay in obtaining reasons can place vulnerable clients at further disadvantage, as there is a limited amount of time to consider what is often voluminous or complex material. These clients are also expected to be ready to respond to those reasons during a compulsory conference, despite the short time frames;*
- *Our members' experience is that Compulsory Conferences often yield mixed results, perhaps because of the challenges inherent in managing the power imbalance between the Department and the applicant in an alternative dispute*

resolution setting, particularly where not all parties are granted legal representation.

The Society considers that the granting of legal representation to all parties in a compulsory conference will greatly enhance the effectiveness of the process. We consider that legal representation is particularly important for child protection proceedings, in order to provide a greater focus on addressing the inherent power imbalance between the Department and the applicant in this setting.

The Society also considers that earlier filing by Department will greatly assist parents and children to prepare for the compulsory conference.

The Society has recently made fulsome submissions to the Department of Justice and Attorney-General regarding the review of the *Queensland Civil and Administrative Tribunal Act 2009*. We reproduce the relevant sections regarding children's issues at QCAT for your information:

Legal representation for children and parents at QCAT

The Society recognises that s43(2)(b)(i) of the Act allows for the representation of children. In the experience of our members, however, this legal assistance does not always appear to be accessible to young people when placed in the child protection system and working with Child Safety Services. We consider that practical support for children to consistently contact and access legal representation will greatly enhance of the objective of s29 of the Act.

Members of the Society have reported that the views of children and young people are not adequately addressed during Tribunal conferences and proceedings. There is an inherent power imbalance between a young person and representatives of Child Safety Services, due to the vulnerability of the young person. It has also been the experience of our members that parents who are challenging decisions of Child Safety Services are often in a weak negotiating position when unrepresented and as a result may feel pressured to withdraw their challenge.

We consider that both children and parents in this jurisdiction should be recognised as vulnerable parties, as they are challenging decisions of a well-resourced and well represented government department. Also, considering the significance of the decisions being considered, the vast majority of these matters should be viewed as complex enough to require legal representation for the parties.

Lack of structure in the child protection jurisdiction

The Society also notes that there appears to be a lack of structure in this jurisdiction. For example, directions hearings are not set regularly for these proceedings. In our view, directions hearings and guidance from the Tribunal is essential to ensure that matters are dealt with efficiently.

Our members report that there have been situations involving concurrent proceedings in the Childrens Court of Queensland and QCAT, and a decision is made in QCAT without the knowledge of the Childrens Courts or other parties in those proceedings. Whilst there is a court proceeding concerning an application for a child protection order, we suggest that applications in QCAT should be transferred to the court to be heard concurrently. If such an approach were to be adopted, we also consider that if applications are made in the 'wrong' jurisdiction, there should be no formality needed to transfer this to the appropriate jurisdiction. We are mindful of the need to avoid creating barriers for people, and to ensure that there is a single decision-maker for a single family.

Practice Direction on Hybrid Hearings

The Society has also recently considered Practice Direction No 1 of 2012 issued by QCAT dealing with hybrid hearings. There appears to be no clarification as to whether this practice direction is intended to apply for children's matters. We highlight the principle that, when dealing with children's matters in QCAT, the best interests of the child must be considered (s99C(a), Child Protection Act 1999). In our view, it may be difficult to reconcile this principle with a hybrid hearing, where a Member may destroy the proposed decision, made in the child's best interests and based on evidence heard, where an agreement has been reached by the parties. An agreement reached by the parties may not always be in the best interests of the child involved. This is of particular concern where evidence has already been heard and the Member has come to a decision.

The Society is also concerned that there was no consultation with legal stakeholders before the introduction of this Practice Direction. We note that in other jurisdictions, such as the Supreme Court of Queensland, an opportunity is often provided to legal stakeholders to review and comment on the operational impact that a practice direction may have on the profession. We consider that it is important to ensure legal practitioners are prepared for the introduction of directions regarding matters in a particular court or tribunal.

Limited number of reviewable decisions at QCAT

The Society is also concerned that as there is a limited number of reviewable decisions allowable by QCAT under the Child Protection Act 1999 and the Adoption of Children Act 1964, there is reduced accountability for persons making decisions about children and young people. The Society notes with concern that there are relatively few applications for review by parents, children and carers in QCAT. This demonstrates a considerable disparity with the number of children the subject of child protection orders, the number of reviewable decisions being made and the large numbers of complaints that are made to the Commission for Children, Young People and Child Guardian. Our members also anecdotally report that there are very few instances of children participating in QCAT, as compared to the former Children Services Tribunal. This is supported by the recently published discussion paper by the Queensland Child Protection Commission on Inquiry that provides in the year 2011-12, only 4 applications for review were made by children/young people [page 272].

In terms of applications to review a decision, the QCAT Annual Report provides some statistics. We note that the 2010/2011 Report does not contain specific statistics on child protection, but there are some relevant statistics in relation to the Human Rights Division. In our view, it is important for government agencies, including QCAT, to provide detailed statistics to the public on child protection matters, particularly in relation to review matters.

Aboriginal and Torres Strait Islander families

The Society also notes that we support the view that the tribunal dealing with an Aboriginal and Torres Strait Islander family should be constituted by someone who is of Aboriginal and Torres Strait Islander background or otherwise has appropriate cultural experience. We note with support s99H, Child Protection Act 1999 which requires tribunal proceedings involving an Aboriginal and Torres Strait Islander child to include a member who is Aboriginal or Torres Strait Islander and s183(6)(b), QCAT Act 2009, which emphasises that there is a need for Aboriginal and Torres Strait Islander members to be appointed. We also note that the power to appoint an expert is provided for in s110, QCAT Act 2009. We consider that the proportion of Aboriginal and Torres Strait Islander membership/expertise on the tribunal should appropriately

reflect a commitment to reduce the overrepresentation of Aboriginal and Torres Strait Islander children in the child protection system.

The Society considers that the Commission should explore strategies for promoting young people's participation on this type of decision making about their lives, which is consistent with the Charter of Rights for a Child in Care.

- **Question 44**

Should the Childrens Court be empowered to deal with review applications about placement and contact instead of the Queensland Civil and Administrative Tribunal, and without reference to the tribunal where there are ongoing proceedings in the Childrens Court to which the review decision relates?

As highlighted in the Discussion Paper, the Society agrees that the Childrens Court should be empowered to deal with review applications about placement and contact instead of QCAT, particularly where there are ongoing proceedings in the Childrens Court to which the review decision relates.

- **Question 45**

What other changes do you think are needed to improve the effectiveness of the court and tribunal processes in child protection matters?

The Society notes that a number of issues are still being considered by the Commission in relation to court and tribunal processes. Our preliminary comments on some of the matters raised are:

- *Does the process of coming to a settlement agreement need further legislative clarification, for example should there be legislative recognition of 'consent' orders?*

The Society notes that the child protection jurisdiction is a 'best interests' jurisdiction under s59 of the Act. Therefore, we consider that the court should remain required to determine whether an order to which the parties consent is in the best interests of the child, and is consistent with s59. We request further information on this issue so that we can provide some further substantive comment around this.

This is an issue of significant importance because of the unequal bargaining power between parties to proceedings and the fact that many parents and young people are not legally represented, particularly at the point when orders are being negotiated.

- *Is there adequate funding for and appropriately competent legal representation for all parties involved in child protection matters, including parents, children and departmental officers?*

At pages 15-17 of our previous submission, we highlighted the lack of funding for legal representation for parties, particularly parents and children. We reiterate those comments for your consideration.

Although it should be unnecessary given the Charter of Rights for a Child in Care, it may assist negotiation and resolution of matters if the parties were able to seek that the Court make directions regarding matters such as contact when making a child protection order on a final basis. We refer in this context to our comments regarding contact directions in relation to long-term guardianship and adoption orders.

- **Question 46**

Where in the child protection system can savings or efficiencies be identified?

The Society does not have comments on this issue, but does note Legal Aid funding should not be considered as an area where savings can be made. In fact, Legal Aid funding is an area which we consider should be further enhanced.