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Submission to the Joint Standing Committee on the  
Commissioner for Children and Young People

**Inquiry into the Functions Exercised by the  
Commissioner for Children and Young People**

**March 2015**

## **1. About Aboriginal Family Law Services (WA)**

The Aboriginal Family Law Services (WA) (AFLS) is committed to being a leader in the provision of family violence legal services, support and education for Aboriginal and Torres Strait Islander people in Western Australia (WA) who have experienced, or, who are experiencing family and sexual violence. (**Please note:** The term Aboriginal is used herein to refer to both Aboriginal and Torres Strait Islander people wherever relevant.)

Funded by the Department of the Prime Minister and Cabinet (DPMC) under the national Family Violence Prevention Legal Service (FVPLS) Program, we are the largest FVPLS provider in Australia. The FVPLS program provides specialist legal services in the area of family violence matters. It aims to 'prevent, reduce and respond to incidents of family violence and sexual assault among Aboriginal people'.<sup>1</sup> Fourteen services are funded nationally to provide these services to 31 rural and remote locations.

Services are delivered in six regions across WA covering the West Kimberley, East Kimberley, Gascoyne, Midwest, Goldfields, and Pilbara regions. 47% of the state's Aboriginal population resides in these regions.<sup>2</sup>

Offices are located in Broome, Carnarvon, Geraldton, Kalgoorlie, Kununurra, and Port Hedland. From these locations outreach services extend to over 30 remote townships and Aboriginal communities. The corporate services office located in Perth provides strategic and management support to all regional offices including finance, human resources, administration, quality assurance and compliance functions.

## **2. Introduction**

The AFLS welcomes the opportunity to have input into the inquiry into the functions exercised by the Commissioner for Children and Young People.

The AFLS provides culturally secure legal and education services to Aboriginal people who are victims-survivors of family and domestic violence and sexual assault. The service provides support in the areas of law relating to child protection, family law, Violence Restraining Orders (VRO) and Criminal Injuries Compensation (CIC). We also provide complementary support services such as court support, case management, advocacy, community development, crisis intervention, client referrals, community legal education and delivery of healing programs.

Through the delivery of legal services and community support work we have regular and ongoing contact with community members who interact with the child protection system, including the out of home care system, as well as the community services sector.

The AFLS would be please to provide further information additional to this submission if required.

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<sup>1</sup> Access to Justice Arrangements Productivity Commission Draft Report, April 2014, p29

<sup>2</sup> Aboriginal and Torres Islander Census counts 2011 – Australian Bureau of Statistics

### 3. Background Information

The Commissioner for Children and Young People (“the Commissioner”) is a vital role charged with advocating for, promoting and monitoring the wellbeing of children and young people across WA. With independent and largely strategic responsibilities\*\*, this position provides education to children and adults alike on the rights of children to participate in decision-making; affects policy and law reform; and conducts relevant research and inquiries as required.

Section 5 of the *Commissioner for Children and Young People Act 2006* (“the Act”), describes the dimensions of care, development, education, health and safety in the definition of wellbeing of children and young people. Section 4 outlines the following principles to be followed in the implementation of the Act:

- (a) children and young people are entitled to live in a caring and nurturing environment and to be protected from harm and exploitation;
- (b) the contributions made by children and young people to the community should be recognised for their value and merit;
- (c) the views of children and young people on all matters affecting them should be given serious consideration and taken into account;
- (d) parents, families and communities have the primary role in safeguarding and promoting the wellbeing of their children and young people and should be supported in carrying out their role.

Further, according to section 20(1) of the Act, the Commissioner is required to:

- (a) give priority to, and have special regard to, the interests and needs of –
  - i. Aboriginal children and young people and Torres Strait Islander children and young people; and
  - ii. Children and young people who are vulnerable and disadvantaged for any reason.

The review of the functions exercised by the Commissioner need to be considered in the social context of Aboriginal children and their families. For many of these children and young people, issues of family violence, substance misuse, inadequate and insecure housing, financial insecurity, incarceration, intergenerational trauma and mental health concerns disrupt their daily life. Others may live away from their families in state care arrangements.

The out of home care system is in crisis nationally, with symptoms being experienced across Australia including burgeoning numbers of children – particularly Aboriginal children – entering care. We believe that understanding and addressing the root causes of the issues, and not merely the symptoms is critical in order to bring about changes that are positive and sustainable in the long term.

In the experience of AFLS, family and domestic violence is the key driver behind the overrepresentation of Aboriginal children and young people in out of home care. While there is limited data from WA to support this claim, the recent evidence from the Victorian Taskforce 1000 project – a review of the cases of the thousand or more Aboriginal children

in care – has found that “well over ninety per cent of Aboriginal children entering care” have done so due to family violence.<sup>3</sup>

Statistically Aboriginal women fare much worse compared to non-Aboriginal women in relation to the prevalence and impact of family and domestic violence:

- Aboriginal women experience domestic violence more often and more severely than their non-Aboriginal counterparts do.
- There is a higher use of restraining orders compared to the non-Aboriginal population, with a higher level of violence in these situations.
- Aboriginal women are statistically more prone to hospitalization and death as a result of family and domestic violence (38 times and 10 times respectively).<sup>4</sup>

In Western Australia, family and domestic violence incidents reported to the police have increased over the 5-year period from 2008 on average by almost 43%. All regions had an increase of greater than 30%. The region with the largest increase is the Kimberley, showing a 5-year increase of 79% in Domestic Violence Incident Reports (DVIR) that have been completed by police. These figures do not specify ethnicity, an issue raised separately in this submission. However, it is relevant to note that while Aboriginal people make up 3.1% of the Western Australian population, the Kimberley population is closer to 50%.<sup>5</sup> It is reasonable to question how many of the reports made in the Kimberley relate to Aboriginal victims of family and domestic violence.

In that same 5-year span, hospitalizations related to family and domestic violence have increased for men and women by an average of almost 46%. Homicides have doubled. The number of perpetrators charged with assault and sexual assault has decreased by 19% and 29% respectively. The number of perpetrators charged with breaches of a restraining order, including police orders has increased by 45%.

Further ramifications of family and domestic violence on Aboriginal women and communities are visible through other indicators:

- Aboriginal people are overrepresented in the child protection system with Aboriginal children making up 51.5% of children in out of home care in WA.<sup>6</sup>
- The percentage of Aboriginal compared to non-Aboriginal children in care by region (including metro) in WA varies from 20% (Peel) to 100% (East Kimberley).<sup>7</sup>
- Aboriginal people are overrepresented in the prison system, comprising 39.6% of the total prison population, with the adult female prisoner population at 53%.<sup>8</sup>

Whatever we say about the prevalence and impact of domestic violence in Australia, it is important to note that an estimated 90% goes unreported.<sup>9</sup> A 2005 report stated that in the last 12 months only 5% of women who had experienced violence from a current partner had

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<sup>3</sup> Koorie Kids: Growing Strong in their Culture, A Plan for Aboriginal Children in Out of Home Care, October 2014 Update, p 3

<sup>4</sup> Family Violence Prevention Legal Services – Research and Needs Analysis Report, 16 July 2013, Nous Group

<sup>5</sup> Western Australia's Family and Domestic Violence Prevention Strategy to 2022: Achievement Report to 2013

<sup>6</sup> Department for Child Protection and Family Support, November 2104

<sup>7</sup> Department for Child Protection and Family Support, November 2104

<sup>8</sup> Weekly Offender Statistics Report 26 June 2014, Department of Corrective Services

<sup>9</sup> Murray, S and Powell, S (2011) Domestic Violence Australian Public Policy, p59

reported the last incident to police.<sup>10</sup> Further, underestimations may be due to reporting barriers unique to Aboriginal victims-survivors and failures to identify or record Aboriginality of the victim's.

The financial burden of family and domestic violence to the Australian community is well documented and estimated at \$13.6 billion in 2008-09.<sup>11</sup> This is expected to rise and includes direct and indirect costs such as, the "direct costs to employers from absenteeism, staff turnover and lost productivity; the indirect costs are defined as employer tax share of public sector costs in the provision of services to victims and perpetrators of domestic violence; direct and opportunity costs to victims, perpetrators, family and friends; and the shared impact of domestic violence on the wider community, including inter-generational costs."<sup>12</sup>

For the Aboriginal community the prevalence and impact of family and domestic violence is understood in terms of loss of connection to family, culture and self. The removal of children from their families – mostly for emotional abuse and neglect for Aboriginal and Torres Strait Islander children in WA – continues. It is important to note that recent figures provided by the Department for Child Protection and Family Support to our service state that only 4% of Aboriginal children are removed from their family due to substantiated sexual abuse notifications.

In 2014, the number of Aboriginal and Torres Strait Islander children in out of home care reached 51.5%, although they make up only 5% of the general population of children aged 0-17 years.<sup>13</sup> Despite the Child Placement Principle being legislated, around 43% of these children are not in placements considered to be culturally appropriate.<sup>14</sup> These children are at particular risk of this disconnection given they are not being raised in a context saturated in expressions of their culture.

The development of a sense of belonging and self may be severely compromised when raised out of one's own family. The circumstances of the removal, the quantity and quality of ongoing contact with parents and the ability to adapt to the new living situation will impact on the child's development. The child's ability to meet "normal" milestones will be challenged and almost certainly impaired by the trauma of the removal and any consequent placement shift – as well as from the predisposing circumstances of abuse and trauma. Traumas associated with removal from family can include individual, cultural, community, family and economic.<sup>15</sup>

"The absence of ongoing support can lead not only to poor outcomes in existing cases, but can contribute to an inter-generational perpetuation of the dynamics that lead to child removal."<sup>16</sup>

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<sup>10</sup> Aboriginal Affairs NSW (2005) Two Ways Together Report, Department of Premier and Cabinet

<sup>11</sup> The National Council to Reduce Violence against Women and their Children (2009) The Cost of Violence Against Women and Their Children, Commonwealth of Australia, p 4

<sup>12</sup> Laing, L and Bobic, N (2002) Economic costs of domestic violence

<sup>13</sup> SNAICC (2014) Family Matters: Kids safe in culture, not in care, Western Australian Issues Paper, p 5-6

<sup>14</sup> SNAICC (2014) Family Matters: Kids safe in culture, not in care, Western Australian Issues Paper, p 12

<sup>15</sup> SNAICC (2014) Family Matters: Kids safe in culture, not in care, Western Australian Issues Paper, p 13

<sup>16</sup> Allison, F, Schwartz, M, Cuneen, C (2014) Indigenous Legal Needs Project WA, James Cook University p 188

Childhood trauma and the resultant impact on development can lead to poorer outcomes in adulthood across all spheres – relationships, education, health (physical, cultural, spiritual), employment, and economic independence. Creating the conditions whereby trauma can be healed for those who have already experienced family and domestic violence is crucial to preventing violence for the next generations. A focus of resources and sustained effort now is fundamental to breaking the cycle of violence, which leads to negative life outcomes experienced by so many Aboriginal men, women and children.

#### **4. Response to Terms of Reference:**

- i. The manner in which the Commissioner’s proposed child abuse complaints support function should operate; and**

When considering the manner in which the Commissioners proposed child abuse complaints support function should operate, recommendations 12-16 from the Review of the

commissioner for Children and Young People Act 2006 (“the Review”) were considered. These are as follows:

**Recommendation 12**

The Commissioner should be given appropriate powers under the Act to provide a child abuse complaints support function that consists of:

- education and outreach programs for children and young people about how to disclose any child abuse that occurs while they are in the care of a government agency or service provider
- receiving complaints from children and young people, or adults acting in good faith on their behalf, about abuse alleged to have occurred in a government agency or service provider
- referring such complaints to the relevant investigative authority/s
- providing information and referrals to children and young people in relation to the support services available for victims of child abuse and their families
- monitoring the way in which government agencies deal with complaints of child abuse referred by the Commissioner or otherwise received by them.

The Commissioner should not have a role in investigating the substance of individual complaints that are received.

**Recommendation 13**

That the Commissioner’s jurisdiction in undertaking the child abuse complaints support function extend to ‘government agencies’ and ‘service providers’ as those terms are currently defined in the Act.

**Recommendation 14**

That the Commissioner’s jurisdiction in providing the complaints support function supplement and not duplicate the role of other relevant agencies in receiving and referring disclosures of alleged physical, sexual, emotional, or psychological abuse and neglect.

**Recommendation 15**

That the Act be amended to provide a specific power for the Commissioner to refer complaints received in the course of performing his or her functions to the relevant investigative or other government agency.

**Recommendation 16**

That the Act be amended to protect persons from civil and criminal liability when raising concerns with the Commissioner, in good faith, about the wellbeing of a child or young person.

The AFLS understands that under the current role of the Commissioner, she is unable to investigate or be involved with complaints in relation to a particular children or young person. Rather her role is to provide information about support services, referral to such services or to investigate in a general manner a matter impacting on the wellbeing of children and young people, brought about through a matter concerning a particular child or young person.

The proposed change to include a child abuse complaints support function is a positive step towards meeting the recommendation of the Blaxell Inquiry Report for a “one stop shop” for child abuse complaints. We agree that this terminology is less than adequate and concur with the use of the “child focused complaints support” term used in the Review.

The Blaxell Inquiry Report highlights a number of factors that a number of decades past the material time, is still crucial in understanding how child abuse, and other abuse such as family violence, continues to be perpetrated. Victims as well as systems remain silent about what is happening for a variety of reasons – whether they are threatened with harm either

physical or reputational, people react by not disclosing what is happening to them or those they know.

Closed systems such as families and small communities – residential facilities, schools and towns are also examples of this – act to protect perpetrators if there are not ways for victims to communicate outward. Isolating their victims is one of the primary ways a perpetrator protects their behaviour.

Education is a vital role for the Commissioner in the complaint support function. Letting children and young people know that they have another avenue to use to make a complaint, and that they are believed is imperative. This is even more important in regional areas where geographical isolation is a further barrier to disclosing abuse.

A combination of approaches may be required such as the appointment of local Aboriginal community controlled organisations to act as regular providers of education services about the complaints function as technological and paper based resources may not be sufficient. The AFLS is aware of a remote community that gets limited mobile phone and internet coverage and has one public phone that is frequently out of service for extended periods. Children and young people in this and similar communities across WA would benefit from face to face education sessions about the Commissioner's complaints function. Indeed, they would also benefit from an option to make their complaint face to face.

Receiving complaints is a valid role within the context of the recommended complaint support function of the Commissioner. There needs to be caution drawn here however on the difference between receiving complaints and receiving a disclosure of abuse from a child or young person. We would posit that it would be outside the remit if the Commissioner to be trained in forensic child protection and as such she would need to have in place robust policies and procedures for her staff around how to handle complaints.

The next step is the referral to the relevant agency for the forensic interviews and investigation such the Department for Child Protection and Family Support and the WA Police. The contamination of evidence is a prime consideration in child abuse cases and training for the Commissioner's department would be crucial to ensure her work does not compromise future prosecution and therapeutic processes.

The Western Australian Aboriginal Advisory Council comments are noted in the Review about the need for the complaint function to be culturally appropriate for Aboriginal children and young people. It pointed toward involving Aboriginal people in the development of the service, involving "Aboriginal experts" and ensuring regional and remote areas are accessed.<sup>17</sup>

The AFLS agrees with the Western Australian Aboriginal Advisory Council's submission. In short, *nothing about us without us*. For this child focused complaints support function to be relevant to Aboriginal children and young people in needs to have meaningful involvement in the design process from Aboriginal people. People who know how to engage children and young people and encourage them to talk about their difficult experiences. And most of all, to make sure there are supports in place when they have disclosed.

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<sup>17</sup> Review of the Commissioner for Children and Young People Act 2006, May 2013, Public Sector Commission, p 93



It is a frequent mistake by mainstream services to enter communities – particularly regional and remote communities – offer much needed services, stay for a short period of time, and then leave. Locals are left feeling more vulnerable and betrayed by services who promised something they could not deliver.

We recommend the Commissioner put in place a long term and sustainable plan – in consultation and partnership with communities – so that communities can rely on her office to be an advocate and complaints support body for children and young people.

The AFLS agrees with Premier Barnett's instruction to the Joint Standing Committee that "the receipt of complaints of child abuse through diverse means, including those that involve the use of technology commonly used by young people".<sup>18</sup> Every avenue should be open for children and young people to access to express their concerns for any maltreatment they may be experiencing.

The Review makes the point that there are already a number of investigative bodies in place and that adding an investigative function to the Commissioner's role would potentially duplicate the role of these bodies. This organisation agrees with this point. Further suggestion that this should be allowed in exceptional circumstances is problematic for similar reasons as well as the potential for workload issues.<sup>19</sup>

Regular visits to government and non-government residential facilities such as out of home care units are recommended. Visits with children in foster care arrangements are more difficult given they are residing in private homes. Attendance at events such as NAIDOC and Reconciliation Day will provide exposure to the Aboriginal communities across the state in order to provide children and young people, their families and carers an opportunity to find out about the expanded functions.

Clearly, another lesson from the Blaxell Inquiry was the value in an independent body to receive complaints of child abuse. Where complaints were being directed to the Board members of the St Andrew's Hostel, the Board members seemed unable to address these complaints effectively for various reasons. Even when a child disclosed abuse to his child protection case worker the response was for him to be expelled for behavioural problems. There was no investigation into his claims of abuse by the child protection agency.<sup>20</sup> An independent body, with no economic or reputational investment in the government employee or institution related to a complaint is more likely to investigate without restriction.

A monitoring function is welcomed by this organisation given the knowledge it has of Aboriginal people's reluctance to use some government department's complaints mechanisms because of a perceived lack of fairness. The Commissioner using this function at her discretion has the potential to counteract this perception and address lack of procedural fairness and other related issues where they exist.

The AFLS supports recommendation 13 in that the child abuse complaints support function extends to 'government agencies' and 'service providers' as those terms are currently

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<sup>18</sup> Review of the Commissioner for Children and Young People Act 2006, May 2013, Public Sector Commission, p 74

<sup>19</sup> Review of the Commissioner for Children and Young People Act 2006, May 2013, Public Sector Commission, p 86

<sup>20</sup> Blaxell, P (2012) St Andrews Hostel Katanning : How the system and society failed our children, p 100

defined in the Act. Upholding the staff of funded agencies to the same standards of government agencies is another step to ensuring safer organisations for children and young people.

The AFLS supports recommendations 13-16 however has no specific comments to make in regards to these.

**ii. The impact the proposed child abuse complaints support function may have on the Commissioner's existing functions.**

In our experience, building an organisational culture that encourages feedback from its service users is fraught with challenges. Staff can be concerned that this will encourage people to make complaints about them and that this can only be a negative experience. Staff may be concerned about extra administrative burdens and other similar short-term negative consequences.

Although the AFLS deals predominantly with adult clientele we commend the development of the "Are you listening: Guidelines for making complaints systems accessible and responsive to children and young people" by the Commissioner. The involvement of children and young people in program design and development is key to success and should be encouraged.

The further advantage to such a system is encouraging children and young people to voice their opinions on the service they are receiving and on decisions that affect their life. The hope of course is that this will encourage them to voice their concerns when others may be abusing them or treating them in ways in which they are not comfortable. Having a child friendly, sustainable and reliable system in place capable of receiving such concerns could add value to existing complaints mechanisms.

There has been some concern of the impact of additional child abuse complaint support functions on existing functions of the Commissioner. These include workload issues, blurring of role and fit of complaints function in current scope. The AFLS believe that the Commissioner is capable of overcoming these concerns, primarily with support from the State government with the additional funding that is required to ensure there are adequate resources to meet the demands of the expanded functions.

We envisage the Commissioner will undertake a review of its current staffing structure as receiving complaints of child abuse will require staff with a specialist skill set. Staff will need skills in receiving complaints of abuse and also in supporting children and young people through the referral process.

The Commissioner will need to have in place clear referral pathways to investigative bodies namely to the Department of Child Protection and Family Support and WA Police. This will ensure complaints are handled in a timely manner.

Relationships with other support services such as legal services assisting victims of crimes such as the AFLS, or specialist therapeutic services for those requiring counselling will also be crucial. Knowledge of culturally secure services for Aboriginal children and young people will be important, and advocating for these services where they do not exist may be necessary.

The existing functions of advocacy, promotion, monitoring, reporting and consultation continue to be primary roles of the Commissioner. Influencing policy, government and services is fundamental to ensuring the interests of children and young people are represented and promoted. However the Commissioner may require commensurate increases in resources as new child abuse complaints mechanisms increase the workload of the office.

The Commissioner should continue to monitor complaints as required under the Act, including complaints of child abuse which it refers for investigation to relevant agencies. The ability to follow up with complaints to government agencies for outcomes and trends will allow for some transparency and accountability for victims in the complaints system.

### **Cultural security**

“Aboriginal Law is stable and enduring. It comes from our ancestors and no individual person has the right to change it without careful consideration of other Law People. Law also tells us about our norms, beliefs, expectations and rules for everyday living. However, unlike western laws which are codified in legislation, Aboriginal Law resides in Law People and Elders. So Law People and Elders, or their nominated representatives, need to have input into policy and practice. This is the proper way of including Aboriginal Law and Culture perspectives.”<sup>21</sup>

It is important for the success of the complaints function with Aboriginal communities for the process implemented to be culturally secure. Tapping into existing consultation networks, particularly those including children and young people, the Commissioner can develop marketing and complaints procedures which do not alienate Aboriginal children and young people. Furthermore, these same procedures will be user friendly for the parents, family and caregivers of these children and young people.

There has been considerable debate over the need for an Aboriginal specific Deputy Commissioner to be appointed since the position was proposed in recommendation 145 in the Gordon Inquiry Report in 2002.<sup>22</sup> The AFLS supports a structure that dedicates its focus to the needs of Aboriginal children and young people such as an additional principal Commissioner similar to that currently employed in Victoria.

This role would be complementary to the Commissioner’s work and improve exposure within the Aboriginal community. There are a number of issues facing Aboriginal children and young people which require specific attention such as overrepresentation in out of home care and child protection, poor health and education outcomes, family violence, poverty, homelessness, cultural disconnection, intergenerational trauma, offending behaviours, and other related issues.

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<sup>21</sup> Victoria Hovane (2014) Our story to tell: Aboriginal perspectives on domestic and family violence, ANROWS Footprints, Issue 01 January 2015, p 14

<sup>22</sup> Gordon, Hallahan, K, Henry, D (2002) Putting the picture together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities, Department of Premier and Cabinet, Western Australia

The impact of working from a culturally secure approach will be that engagement with Aboriginal children and young people will improve. Gains made from recent consultations with Aboriginal Children and young people, and using Aboriginal Ambassadors for Children and Young People and advisory committees, the Commissioner may be able to maximise on some of the opportunities available to her currently to engage the Aboriginal communities.

This work is supported by the legislation requirement to prioritise work with Aboriginal children and young people. It is also underpinned by the Commissioner's strategic plan and Reconciliation Action Plan 2013-15 which states "consultation with aboriginal [sic] children and young people, their families, carers and organisations that work with them plays a strong role in all of the Commissioner's work".

### **Summary of recommendations**

1. The Commissioner to partner with Aboriginal community controlled organisations particularly in regional and remote WA to provide regular education to children and young people about the child abuse complaint support function.
2. The Commissioner to have in place robust policies and procedures for her staff around how to handle child abuse complaints.
3. The Commissioner to implement a *nothing about us without us* approach to design and development to complaint mechanism for Aboriginal children and young people.
4. The complaints mechanism should allow for diverse means of access for children and young people so that anyone can access it regardless of their financial and material capacity, and be sustainable and reliable.
5. The Commissioner will maintain a schedule of regular visits to government and non-government residential facilities such as out of home care units and education facilities.
6. The Commissioner will continue to promote accessible and responsive complaints systems in government agencies.
7. The Commissioner will ensure her staff are equipped to receive complaints of child abuse from children and young people and manage complainants in the immediate aftermath.
8. The Commissioner to advocate for appointment of Co-Commissioner for Aboriginal children and young people to bring focus to issues specific to this cohort.

**Mary Cowley**  
**Chief Executive Officer**