

**Report of the Legislative Review of the
*Children and Community Services Act 2004***

October 2012

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1 INTRODUCTION

1.1 Executive summary

The *Children and Community Services Act 2004* (the Act) came into effect on 1 March 2006.¹ It provides for the protection and care of children in certain circumstances, the provision of social services, financial and other assistance and for other matters concerning the wellbeing of children, other individuals, families and communities in Western Australia. The Department for Child Protection is the agency principally assisting the Minister for Child Protection (the Minister) in the administration of the Act.

The Minister is required to carry out a periodic review of the operation and effectiveness of the Act under section 249. The Department for Child Protection (the Department) undertook this task on behalf of the Minister, assisted by a Legislative Review Reference Committee (the Reference Committee) comprising major stakeholders. This report presents the findings and recommendations of the Review, which is the first since the legislation commenced.

The Review examined the operation and effectiveness of the Act with particular reference to its objects under section 6 and provisions for the mandatory reporting of child sexual abuse under Part 4, Division 9A.

Overall, the Review found the Act to be operating effectively towards meeting its legislative objects. None of the 25 submissions to the Review reported significant legislative gaps resulting in children not being protected. Nevertheless, the Review found areas where the legislation would benefit from amending to address gaps or provide greater clarity, or where existing provisions could be strengthened. These are set out in the Review's 28 recommendations below. Unless otherwise stated, all provisions referred to in this report relate to the *Children and Community Services Act 2004*.

List of recommendations

Recommendation 1

The principles under section 9 should recognise the particular needs of children with a disability.

Recommendation 2

- (a) The Act should enable the sharing of relevant information between prescribed public authorities under section 24A and:
- "social services" funded through an agreement with the Minister under section 15;
 - their own funded agencies or those funded by any other prescribed public authority.
- (b) Protection from criminal or civil liability or breaches of codes/professional ethics should be provided when relevant information is shared in good faith.

Recommendation 3

- (a) The definition of **interested person** under section 23(1) should enable the release of information to a person who has a direct interest in the wellbeing of a person who was a child in the CEO's care and is eligible for leaving care services.

¹ Section 102 of the Act, which is the offence of leaving a child unsupervised in a car, was proclaimed earlier than the rest of the Act and became law in WA on 22 January 2005.

- (b) The definition of **relevant information** under section 23(1) should enable the release of information that is, or is likely to be, relevant to the wellbeing of a person previously in the care of the CEO who is eligible for leaving care services.
- (c) Section 23 and 24A should also include a regulation making power to enable the exchange of other types of relevant information consistent with the objects of the Act.

Recommendation 4

Section 23 should enable the Department of Corrective Services to provide the Department with any report in its possession relevant to the wellbeing of a child or class or group of children, including pre-sentence reports.

Recommendation 5

Section 28 of the Act should be amended to:

- provide that **harm**, in relation to a child, means any detrimental effect of a significant nature on the child's physical, emotional or psychological wellbeing; and
- remove the ground of psychological abuse.

Recommendation 6

- (a) Section 28 should provide that emotional abuse includes exposure to family and domestic violence.
- (b) The information sharing provisions in sections 23 and 24A should expressly enable the sharing of information relevant to the provision of services to persons experiencing family and domestic violence.

Recommendation 7

The Act should be amended to ensure that section 35(1)(b) enabling the issuing of a warrant (provisional protection and care) can still be used even though a child may be temporarily in a safe place, for example a hospital.

Recommendation 8

The Department should develop casework practice guidelines on managing the return of children under section 38(2) who are no longer in need of protection, having been taken into provisional protection and care under section 37.

Recommendation 9

Western Australia should continue to work with relevant States and Territories to address cross-jurisdictional barriers to effective child protection practice.

Recommendation 10

The Act should provide for the automatic revocation of a protection order (special guardianship) and ancillary payment order in the event that an adoption order is made in respect of the child.

Recommendation 11

Section 87(2) should provide for circumstances where:

- a carer of a child under a placement arrangement has refused, resisted or wilfully ignored a lawful requirement by an officer to hand over the child; and
- there are reasonable grounds to suspect there is an immediate or substantial risk to the wellbeing of the child.

Recommendation 12

- (a) The CEO should be required to provide each party specified in section 89(6) with a copy of a child's care plan unless the CEO considers providing a copy of a care plan to a person would pose an unacceptable risk to the safety of the child or another person mentioned in the care plan.
- (b) A person denied access to a copy of a care plan should be provided with reasons for the decision and the right to a review.

Recommendation 13

The State Administrative Tribunal should remain as the jurisdiction to review decisions of the CEO under section 94.

Recommendation 14

Section 94 should require that decisions of the State Administrative Tribunal which result in the modification of a care plan are to remain in force for a period of at least 12 months, subject to the CEO's power under section 89(4).

Recommendation 15

The Case Review Panel established under section 92 should be renamed the Care Review Panel for consistency with amendments to the Act in 2011.

Recommendation 16

Consultation should occur to examine further regulation in respect of tattooing, branding or body modification practices, including consideration of introducing a minimum age for tattooing and branding.

Recommendation 17

The definition of police officer under section 3 of the Act should be repealed.

Recommendation 18

The existing provisions for the reporting of child sexual abuse under the Act should be retained, with the exception of Country High School Hostels Authority staff being made mandated reporters of child sexual abuse as announced by the Government in response to Recommendation 3 of the Blaxell Inquiry.

Recommendation 19

Mandated reporters should be provided with further guidance on:

- persons currently required to report under the definition of teacher;
- the range of behaviours that may constitute sexual abuse of a child;
- when a mandatory report is to be made.

Recommendation 20

Agencies should continue to support appropriate reporting of all forms of child abuse and neglect through the ongoing development and implementation of operational policies, guidelines and training.

Recommendation 21

Section 145 should include a principle that protection proceedings be conducted in a way which promotes co-operation and consensus, wherever possible.

Recommendation 22

- (a) The current model for legal representation of children in protection proceedings should be maintained. An age that attracts a rebuttable presumption that a child has 'sufficient maturity and understanding' to instruct a legal representative should be introduced.
- (b) Relevant stakeholders should develop guidelines to:
 - assist practitioners and the Court in assessing a child's capacity to instruct a legal representative; and
 - provide criteria by which the presumptions about capacity can be rebutted.

Recommendation 23

Guidelines should be developed to place minimum standards and responsibilities on legal representatives acting for children in protection proceedings.

Recommendation 24

Section 148 should place an obligation on any legal representative acting on behalf of a child in protection proceedings to convey to the Court the child's wishes and views, as far as is practicable. This obligation should exist regardless of whether the child's legal representative is acting on instructions or in the best interests of that child.

Recommendation 25

A legal practitioner appointed to act on behalf of a child in protection proceedings should be known as a "child representative".

Recommendation 26

The Department should continue to work with stakeholders to establish a more streamlined system for managing cross-jurisdictional issues between the Children's Court and the Family Court.

Recommendation 27

An exemption should be provided in regulations made under section 191(4)(c) to enable children who have reached 13 years of age to be employed (or engaged in work) by a registered horse riding school where:

- written parental consent is provided; and
- the work occurs outside school hours but between the hours of 6am and 10pm.

Recommendation 28

- (a) The Act should provide for responsible parenting agreements to be an additional measure available to the CEO under section 32.
- (b) The objects of the Act should include to support and reinforce the role and responsibility of parents to exercise appropriate control over the behaviour of their children.
- (c) Additional amendments related to responsible parenting agreements should include:
 - the capacity for bilateral and/or multilateral agreements involving two or more of the three government agencies;
 - the capacity for agreements to be made with parents or other persons with day to day responsibility for a child;
 - an enhanced principle of cooperation between government agencies.

1.2 Terms of reference

This review of the Act has been carried out under section 249, which requires the Minister to:

- review the operation and effectiveness of the *Children and Community Services Act 2004* as soon as practicable after 1 January 2012;
- review the operation and effectiveness of the amendments made to the *Children and Community Services Act 2004* under the *Children and Community Services (Reporting Sexual Abuse of Children) Act 2008* (the mandatory reporting of child sexual abuse) as soon as practicable 3 years after the amendments came into effect;
- table a report in both Houses of Parliament before the end of 2012.

The **terms of reference** of the Review are to examine the operation and effectiveness of the Act with particular reference to:

- the objects of the Act set out under section 6; and
- the mandatory reporting provisions under Part 4 Division 9A.

1.3 Legislative Review Reference Committee

The Minister for Child Protection, the Hon. Robyn McSweeney MLC, requested the Department for Child Protection (the Department) to conduct the legislative review on her behalf. The Department convened a Legislative Review Reference Committee (Reference Committee) to assist in this task, with membership as follows:

Ms Kay Benham (Chairperson)	Executive Director Policy & Learning, Department for Child Protection
Ms Irina Cattalini	Chief Executive Officer, WA Council of Social Service
Mr Philip Aylward	Chief Executive, Child and Adolescent Health Service, Department of Health
Det. Supt. Graeme Castlehow	Sex Crime Division, Western Australia Police
Ms Karen Webster	Director, Curriculum & Student Services Support, Department of Education

Dr Eileen McCaffrey	Director, Management Consultancy, Public Sector Commission
Ms Cheryl Barnett	Executive Director Metropolitan Services, Department for Child Protection
Ms Jacqueline McGowan-Jones	Executive Director Aboriginal Engagement and Coordination, Department for Child Protection
Ms Tara Gupta	General Counsel, Legal Services and Legislation, Department for Child Protection

The following people also attended Reference Committee meetings as proxy members:

Ms Megan Rimes	Principal Consultant Child Protection, Department of Education - Ms Rimes replaced Ms Karen Webster as a member of the Reference Committee.
Ms Helen Creed	Policy Manager - Vulnerable People, WACOSS
Mr Mark Morrissey	Deputy Chief Executive, Child and Adolescent Health Service
A/Det. Supt Eric Smith	Sex Crime Division, Western Australia Police
Ms Anne Simpson	Statewide Services, Department of Education

Executive and research support was provided by Ms Rosemary Williamson, Senior Legislation and Policy Officer, and Ms Emily Ohayon, Legal Officer.

The role of the Reference Committee was to:

- consider written submissions made during the public consultation period;
- contribute relevant expertise to inform the Reference Committee's deliberations, including relevant policy, practice and research information;
- participate in making findings and recommendations to be included in the report to the Minister based on matters raised in submissions to the Review and relevant research materials;
- assist in reviewing interim and final drafts of the report and meet as required to achieve the above.

1.4 Review methodology

The Review commenced formally in June 2012 following an advertisement placed in the public notices section of *The West Australian* on 19 May 2012 inviting interested individuals and government and non-government organisations to make written submissions to the Review. The Chairperson also wrote to 27 stakeholders informing them of the Review and inviting written submissions. The Review was also advertised on the Department's internal webpage to provide staff with the opportunity to make submissions.

The closing date for receipt of submissions was 29 June 2012. A number of organisations requested and were granted an extension to the six week submission period to enable further consultations within the agencies or sectors they represented.

The Review established a webpage hosted by the Department's website at www.dcp.wa.gov.au, which contained the terms of reference, the objects of the Act under section 6 and the Review requirements under section 249; links to the State Law Publisher for a copy of the legislation; and a paper *2012 Review of the Children and Community*

Services Act 2004: Summary of key provisions (see Appendix 1). Email and telephone contacts were also provided for enquiries.

Submissions to the Review were to address all or part of the terms of reference and, where possible, suggest amendments for addressing issues raised in the submission. Twenty-five submissions were received (see Appendix 2).

In addition to considering written submissions, the Review sought statistical information and data analysis from the Department's Information, Research and Evaluation section within its Policy and Learning Directorate. The Policy and Learning Directorate also provided research and assistance as necessary.

Deliberations

The Reference Committee first met on 13 June 2012 and subsequently on a further six occasions to consider discussion papers, proposals and final recommendations. Each member of the Reference Committee was provided with online access to all written submissions.

In undertaking its deliberations, the Review made the distinction between the effectiveness and operation of the provisions of the Act and their implementation in policy and practice. A number of submissions to the Review assisted in identifying legislative issues with suggested amendments, while many raised a wide range of policy and practice issues beyond the scope of a legislative review.

The work undertaken by organisations and individuals in bringing these matters to the attention of the Review is acknowledged. Operational matters raised in submissions will be considered and addressed as necessary, through referral to the relevant agencies or departmental work units.

Issues identified as within scope of the Review were subject to either Reference Committee discussion or consideration through Committee papers. An underlying premise of the Review's work was that significant legislative change would only be recommended where there were compelling reasons for doing so.

2 OVERVIEW OF THE ACT

2.1 Historical context

The Act was passed by Parliament on 23 September 2004 and came into effect on 1 March 2006,² replacing child welfare laws in Western Australia that were over fifty years old. The legislation consolidated three statutes administered by the Department over the years: the *Child Welfare Act 1947*; the *Welfare and Assistance Act 1961* and the *Community Services Act 1972*.

The impetus for a new legislative framework came from several major reviews including the *Edwards Report* (1982); the *Welfare and Community Services Review in Western Australia* (1984); the *Child Sexual Abuse Task Force* (1987); and *Laws for People: The Report of the Legislative Review* (1991).

The legislation was developed over a decade through extensive consultation with a broad range of government, non-government and community stakeholders, both prior to and during

² See (n 1).

the drafting of the *Children and Community Development Bill 2003*.³ There was also considerable debate over the Bill during its passage through Parliament which resulted in a number of amendments.

Since its commencement over six years ago, the Act has been closely monitored and a number of amendments made to improve its operation and effectiveness. Amendments introducing new initiatives have also been made:

- Part 8 of the Act, which provided for child care services, was repealed and replaced by the *Child Care Services Act 2007*. The Department for Communities is the agency principally assisting the Minister in the administration of that legislation.
- The *Children and Community Services Amendment (Reporting Sexual Abuse of Children) Act 2008* introduced provisions for the mandatory reporting of child sexual abuse by certain professionals and came into effect on 1 January 2009. These provisions can be found in Part 4, Division 9A of the Act and are reviewed under Chapter 6 of this report.
- The *Children and Community Services Amendment Act 2010* came into effect on 31 January 2011 and introduced a suite of amendments including protection orders (special guardianship), body piercing prohibitions and provisions for the making of secure care arrangements for children at extreme risk (see Appendix 3 for a summary of the amendments).

3 OBJECTS AND PRINCIPLES (PART 2)

The “objects” of the Act under section 6 outline the underlying purposes of the legislation:

- (a) to promote the wellbeing of children, other individuals, families and communities; and
- (b) to acknowledge the primary role of parents, families and communities in safeguarding and promoting the wellbeing of children; and
- (c) to encourage and support parents, families and communities in carrying out that role; and
- (d) to provide for the protection and care of children in circumstances where their parents have not given, or are unlikely or unable to give, that protection and care; and
- (e) to protect children from exploitation in employment.

These objects are achieved through the operation of various provisions in the Act, with each section of the Act contributing to achieving one or more of its objects.

The principles contained in sections 7 to 10 are the foundation on which the legislation is based and underpin all the functions and powers exercised under the Act:

- Section 7 requires that the best interests of the child always be regarded as the paramount consideration when a person, the Court or the State Administrative Tribunal (SAT) performs a function or exercises a power under the Act.
- Section 8 sets out a comprehensive number of matters that must be taken into account in determining what is in a child’s best interests for the purposes of the Act.
- Section 9 contains guiding principles which must be observed in the administration of the Act.
- Section 10 establishes the important principle of child participation in the process of making decisions under the Act which are likely to have a significant impact on the child’s life. The operation of this principle should underpin departmental case practice decisions, subject to the age and level of understanding of the child concerned.

³ The title of the Bill was later changed to the *Children and Community Services Bill 2003 (WA)*.

In her submission to the Review, the Commissioner for Children and Young People endorsed the provisions under sections 8 and 9, but suggested they could be extended and strengthened, including with regard to the special needs of children with a disability. In doing so, the Commissioner acknowledged the Department's policy and practice guidance for addressing the needs of children with a disability who are in the care of the CEO, which is embedded in the Casework Practice Manual and a memorandum of understanding with the Disability Services Commission.

One of the matters to be taken into account in determining a child's best interests is: "*a child's physical, emotional, intellectual, spiritual, developmental and educational needs*" (section 8). This is thought to sufficiently address a child's disability in terms of best interest considerations. The guiding principle under section 9(h) also provides that decisions about a child should be made "*having regard to the age, characteristics, circumstances and needs of the child*". It is considered that there is scope for strengthening the guiding principles by directly foregrounding the needs of children with a disability under section 9(h).

Recommendation 1

The principles under section 9 should recognise the particular needs of children with a disability.

4 ADMINISTRATIVE MATTERS (PART 3)

This Part establishes the administrative structure and processes which enable the Chief Executive Officer of the Department (the CEO) to carry out the CEO's functions listed under section 21(1). In carrying out these functions, the CEO must have regard to certain matters including:

- (a) the need to promote the wellbeing of children, other individuals families and communities;
- (b) the need to encourage a collaborative approach between public authorities, non-government agencies and families in providing social services and responding to child abuse and neglect;
- (c) the need to promote diversity and participation in community life, giving particular consideration to certain groups identified in section 21(2)(c); and
- (d) the need to promote development and strengthening of families and communities to achieve self-reliance and provide for the care and wellbeing of their members (section 21(2)).

Powers under this Part include:

- the setting-up of a Ministerial Body, which is a body corporate;
- power for the Minister to enter into agreements on behalf of the State for the provision of social services - the Department provides substantial funding to over 400 community sector organisations ("service providers") under these provisions; and
- powers of delegation by the Minister (section 16) and the CEO (section 24).

Part 3 also contains the principle of *Cooperation and assistance* which requires the Department to endeavour to work in co-operation with public authorities, non-government agencies and service providers in performing functions under the Act (section 22). To this end, the Department has developed a number of memoranda of understanding with key partners which help in establishing cooperative working relationships.

4.1 Information sharing

Information sharing provisions are provided under sections 23 and 24A and supported by provisions in other Parts of the Act, including protections from liability, and breaches of any duty of confidentiality imposed by law or professional ethics or standards, for information which is shared in good faith (section 129).

The Review found that the information sharing provisions are generally operating effectively to support the objects of the Act. However, as referred to in several submissions,⁴ there is a need to strengthen information sharing particularly between government and non-government agencies. Given the Review's recommendations in respect of information sharing, there may be merit in creating a dedicated Part or Division of the Act if they are adopted.

Background information and current provisions

Information sharing within and across government and non-government sectors is recognised as a foundation for achieving collaborative service delivery and better outcomes for vulnerable children and families. Problems arising from inadequate information sharing in Australian child protection systems have been highlighted in Coronial Inquests and service reviews over the years, including in the *Report of the Special Commission of Inquiry into Child Protection Services in NSW (2008)* (NSW Commission). The *National Framework for Protecting Australia's Children 2009-2020* emphasises the need for improved information sharing. In Western Australia, both the Gordon Report in 2002⁵ and the Ford Review in 2007⁶ called for better collaboration and exchange of information between agencies. The Department of Indigenous Affairs submission referred to *The State Government's Action Plan for Addressing Family Violence and Child Abuse in Aboriginal Communities* (Gordon Action Plan) 2002 which identified the need to share vital information and ensure a collaborative response to child abuse in Aboriginal communities.

Since these reviews there have been significant improvements in information sharing in practice, supported by:

- staff guidance provided in the Department's online Casework Practice Manual;
- memoranda of understanding between the Department and partner agencies;
- the Department's publication *Working together for a better future for at risk children and families: A guide on information sharing for government and non-government agencies*;
- amendments to the Act in 2011 enabling information sharing to occur between public authorities prescribed under section 24A.

Current provisions

Provisions in the Act relating to information sharing include:

- enabling provisions - sections 23 and 24A;
- protection provisions under sections 23(5) and 129;
- offence provisions including:
 - section 124B, which places a requirement on certain people to report child sexual abuse;
 - sections 124F and 240 regarding the confidentiality of a "reporter's" and "notifier's" identity respectively; and

⁴ Department of the Attorney General; Department of Indigenous Affairs; Drug and Alcohol Office.

⁵ Gordon S, *Putting the Picture Together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (2002).

⁶ Ford P, *Review of the Department for Community Development*, Review Report 2007 (Ford Review).

- section 241, which relates to confidentiality of information obtained in the course of duty by a person engaged in the performance of functions under the Act or in the provision of social services under an agreement with the Minister.

Section 23

Section 23 deals with information exchange involving the Department and enables the CEO or an authorised officer of the Department to:

- disclose relevant information to a public authority, a Commonwealth agency, a corresponding authority, a service provider or an interested person; and
- request relevant information from those bodies or persons (subsections (2) and (3)).

Information may be disclosed under these provisions despite any Western Australian law about secrecy or confidentiality and, if the information is disclosed in good faith, protections from criminal or civil liability and professional breaches are provided (subsections (4) and (5)).

- **Relevant information** is defined in section 23(1) as information that, in the opinion of the CEO, is or is likely to be, relevant to the wellbeing of a child or a class or group of children, or to the performance of a function under the Act.
- An **interested person** is defined as a person who, in the opinion of the CEO, has a direct interest in the wellbeing of a child or a class or group of children.

Section 24A

In response to the Ford Review⁷ findings, and in the absence of privacy legislation in Western Australia, section 24A came into effect on 31 January 2011 to remove barriers to information sharing between government agencies when dealing with matters in which the Department is not involved. Section 24A enables the CEOs of **prescribed authorities** to exchange information relevant to the wellbeing of a child or a class or group of children.⁸ The public authorities prescribed under this section (in regulation 20A of the *Children and Community Services Regulations 2006*) include WA Police, WA Health, Drug and Alcohol Office, the Departments of Education, Housing, Communities, Corrective Services and the Attorney General, and the Disability Services Commission.

Sections 23 and 24A enable agencies to share information, without consent where necessary, in the interests of the wellbeing of a child or class or group of children. (It should be noted the Department's policy and practice guidelines emphasise the importance of obtaining client consent whenever possible.) Public sector agencies are also bound by the Government's *Policy Framework and Standards for Information Sharing Between Government Agencies (2009-20)*.

Section 129

Section 129 provides protections from criminal or civil liability, and any breach of confidentiality or secrecy duties imposed by law or professional ethics/standards, to persons who give the Department certain types of information in good faith. This includes information:

- (a) about any aspect of the wellbeing of a child;
- (b) which (before a child is born) raises concerns about the child's wellbeing after the child is born; or
- (c) for the purposes of, or in connection with, a child protection investigation.

This provision operates to support the voluntary reporting of child abuse or neglect.

⁷ Ford Review (n 6).

⁸ The CEOs may delegate their powers under section 24A to an officer or employee of their respective agencies.

4.1.1 Information sharing and the non-government sector

Despite the recent gains, legislative gaps remain for the sharing of information without client consent between:

- government agencies and the non-government sector, independent of the Department's involvement in the matter;⁹ and
- between non-government organisations separate to any government agency involvement in the matter.

Multiagency responses to family and domestic violence help to illustrate why information sharing without consent can be important. Adult victims of domestic violence may decline consent for an agency to share information with another for a variety of reasons including:

- fear and safety concerns (e.g. that being seen to participate in services will escalate the perpetrator's use of violence); and
- concerns about the welfare of the perpetrator (e.g. not wanting a criminal justice response to intervene with the partner - this may be related to concerns of retribution from friends and family members).

The Department funds non-government organisations to coordinate:

- multi-agency case management of high risk family and domestic violence cases; and
- the identification and reporting of local and regional barriers to victim safety and perpetrator accountability.

These services, referred to as Family and Domestic Violence Case Management and Coordination Services (CMCS), currently operate under a *Memorandum of Understanding: Information sharing between agencies with responsibilities for preventing and responding to family and domestic violence in WA*.

The role of the non-government sector in working with government agencies to respond to family and domestic violence will be further strengthened in 2013. A new approach known as the Co-location Response Model will be introduced and will involve police, child protection and non-government *Family and Domestic Violence Coordinated Response Services* undertaking joint assessment of domestic violence cases and sharing responsibility for instigating and supporting multi-agency case management.

Specific legislation which enables relevant information to be shared in good faith, and which provides corresponding protections from liability for doing so, would provide the sector with greater certainty and confidence in responding to family and domestic violence.

Examples in other jurisdictions

Developments interstate informed the Review's deliberations on this issue. In 2009, the NSW Government introduced new information sharing laws in response to recommendations of the NSW Commission.¹⁰ Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* enables a prescribed body to request or disclose, to another prescribed body, information relating to "the safety, welfare or well-being" of a particular child or class of children if it reasonably believes that the information would assist the prescribed body:

- (a) to make any decision, assessment or plan or to initiate or conduct any investigation, or to provide any service, relating to the safety, welfare or well-being of the child or young person or class of children or young persons, or

⁹ For example, the Department of Housing sharing information with Centrecare.

¹⁰ Wood J, *Special Commission of Inquiry into Child Protection Services in NSW*, Report (November 2008), Recommendation 24.6 (NSW Commission Report).

(b) to manage any risk to the child or young person (or class of children or young persons) that might arise in the recipient's capacity as an employer or designated agency (sections 245C and 245D).

The new laws apply to government and the non-government sector. The prescribed bodies in the non-government sector include registered non-government schools; TAFEs; private health facilities; "designated" agencies or "registered" agencies; children's services; and "any other organisation the duties of which include direct responsibility for, or direct supervision of, the provision of health care, welfare, education, children's services, residential services, or law enforcement, wholly or partly to children". Information may be shared in good faith under the provisions regardless of whether consent to disclose the information has been obtained from the relevant person/s. However, as in Western Australia, practice guidelines emphasise the importance of seeking consent from children and families whenever possible according to the principles of best practice.¹¹

A similar information sharing framework in the Northern Territory came into effect on 1 July 2012 under Part 5.1A of the *Care and Protection of Children Act 2012 (NT)*. *Information sharing authorities* may share information that relates to the safety or wellbeing of a child, including information about a third person that directly or indirectly relates to the child's safety or wellbeing. Authorised information sharers include a broad range of government and non-government persons and bodies such as police officers, school principals, registered teachers, foster carers, child care services, doctors, nurses, and people in non-government organisations providing a service in connection with children. Protections are also provided against criminal or civil liability for information shared in good faith.

The legislation in NSW and the Northern Territory requires information to be disclosed upon request unless there is a reasonable belief that providing the information is not related to a child's safety or wellbeing or would not assist in making a decision, assessment or plan in relation to the child. Written reasons are required if information is not disclosed in response to a request. The information sharing legislation in both jurisdictions is generally more prescriptive than provisions under the Act.

A new model for Western Australia

Who should be able to share information?

It is proposed that the information sharing provisions in the Act be extended to enable sharing of relevant information between public authorities prescribed under section 24A and organisations with a contractual relationship with the Department under section 15. The Department funds over 400 not-for-profit services in the community services sector through an agreement with the Minister under section 15. Defined as "social services" in section 3, these services assist children, other individuals, families and communities and are bound by service agreements and contracts, and monitored for compliance with service standard requirements.

The Review also considered whether the information sharing provisions should be extended to government funded services in other sectors such as education, corrective services, health and disability services, e.g. non-government schools and private health services. Services in these sectors also have regular contact with vulnerable children, and it was noted that government policy is increasingly moving towards services being provided by the non-government sector under funding arrangements. As the Act already enables information sharing between government agencies in relevant sectors under section 24A, independent

¹¹ *Keep Them Safe Senior Officers Group (NSW), Child Wellbeing & Child Protection – NSW Interagency Guidelines*, Chapter 16A (NSW Interagency Guidelines).

of departmental involvement in a case or matter, extending provisions to include their funded services would be consistent with the Act. It is also more efficient to provide information sharing powers related to children's wellbeing under one piece of legislation rather than splintered across different Acts. There was Reference Committee consensus in support of this approach. It was noted, however, that the task of accurately identifying funded agencies for the purposes of a legislative definition may be complex and will require further consultation.

Threshold for information sharing

Sections 23 and 24A require that any information shared must, in the opinion of the relevant CEO, be, or be likely to be, relevant to "the wellbeing of a child or class or group of children". This is a relatively low threshold: for example, there is no requirement that the information be related to a child's safety or risk of harm or that its disclosure should be for specified purposes. In contrast, the thresholds for sharing information under the NSW and Northern Territory laws, which include sharing between non-government sector agencies, are much higher: there must be a *reasonable belief* on the part of the disclosing or requesting party that the information will assist in certain ways, e.g. to make a decision, assessment or plan or provide a service.

The Review supports maintaining a broad information sharing threshold in the Act in relation to these recommended changes because:

- it enables a broader range of information to be shared, which is important in the context of the non-government sector carrying out more of the functions previously done by government (e.g. assessment and treatment services);
- there are a number of checks and balances placed on government agency practice; and
- it would maintain simplicity in implementation and practice, and consistency with the existing information sharing provisions.

Information sharing between non-government services

The Review looked at whether the Act should enable non-government agencies to exchange information without client consent in cases where there is no government agency involvement. Considerations include which agencies such provisions ought to extend to and for what purposes: there is a strong argument for imposing a higher threshold on when information may be shared in such circumstances rather than the broad "child wellbeing" threshold which currently applies under the Act. It can be argued that less external scrutiny of processes and decisions in the non-government community services sector leads to greater potential for privacy concerns.

Given the potential privacy implications, it is considered that measured incremental change is required rather than a broad-sweep approach. For these reasons, there was Reference Committee consensus that these issues should be further examined as part of the next legislative review of the Act, following the bedding-down of any amendments arising from Recommendation 2 below.

Recommendation 2

- (a) *The Act should enable the sharing of relevant information between prescribed public authorities under section 24A and:*
- *"social services" funded through an agreement with the Minister under section 15;*
 - *their own funded agencies or those funded by any other prescribed public authority.*
- (b) *Protection from criminal or civil liability or breaches of codes/professional ethics should be provided when relevant information is shared in good faith.*

4.1.2 Release of relevant information

The Department of the Attorney General raised an issue with the operation of section 23 in relation to the Department disclosing to the Public Advocate or the Public Trustee information about persons previously in care, who are now adults, in order to assist them in carrying out their respective statutory functions:¹²

The reference to the ‘wellbeing of a child’ in the definition of ‘relevant information’ may unduly restrict the circumstances where the information may be disclosed to instances where the person concerned is still under the age of 18.... For instance, the Public Advocate may require information about DCP’s interventions with a family ... for the purposes of protecting a vulnerable adult with a decision-making disability. The Public Advocate may also require information about the history of person who was previously under the care of DCP which includes information obtained under the Act, to inform decisions to be made on the person’s behalf.

The difficulty is that the definitions of “relevant information” and “interested person” found in section 23(1) refer to the “wellbeing of a child”, and do not permit the exchange of information where the person in question is no longer a “child”:

- **Relevant information** is defined in section 23(1) as information that, in the opinion of the CEO, is or is likely to be, relevant to the wellbeing of a child or a class or group of children, or to the performance of a function under the Act.
- An **interested person** is defined as a person who, in the opinion of the CEO, has a direct interest in the wellbeing of a child or class or group of children.

Amendments are recommended to the definitions of *relevant information* and *interested person* in section 23 to enable the exchange of information relating to adults previously in care during the time that they are eligible for leaving care services under section 99. This section creates an obligation on the Department to ensure that young people who qualify are provided with services to assist them in transitioning out of care to independence until they reach the age of 25 years.

Gaps in the ability to share information could also arise in other circumstances including, for example:

- releasing information about persons responsible or assessed as causing significant harm to a child, if a person with an intellectual disability is at risk; or
- release of information regarding a deceased child for the purposes of managing an estate.

A regulation making power under section 23 and 24A would provide an option to include other types of relevant information (consistent with the objects of the Act) should it be necessary in the future, for example information obtained while carrying out functions under the Act which is relevant to the safety and wellbeing of a person with a disability.

Recommendation 3

- (a) *The definition of **interested person** under section 23(1) should enable the release of information to a person who has a direct interest in the wellbeing of a person who was a child in the CEO’s care and is eligible for leaving care services.*
- (b) *The definition of **relevant information** under section 23(1) should enable the release of information that is, or is likely to be, relevant to the wellbeing of a person previously in the care of the CEO who is eligible for leaving care services.*

¹² Under the *Guardianship and Administration Act 1990 (WA)* and the *Public Trustee Act 1941 (WA)*.

(c) Section 23 and 24A should also include a regulation making power to enable the exchange of other types of relevant information consistent with the objects of the Act.

4.1.3 Information regarding certain offenders

Section 23(4) enables information to be disclosed to the Department upon request despite any written law relating to secrecy or confidentiality. The Department of Corrective Services submitted to the Review that it is currently unable to provide the Department with pre-sentence reports under section 23, as requested at times. This is because sections 22(4) and 22(5) of the *Sentencing Act 1995 (WA)* place a complete prohibition on the release of pre-sentence reports in any manner, other than in accordance with those sections. This prohibition would not be characterised as “*written law related to secrecy or confidentiality*”, therefore section 23(4) of the Act does not override sections 22(4) and (5) of the *Sentencing Act 1995 (WA)*.

This position limits the Department’s capacity to assess risk to children in situations where adult or juvenile sex offenders, or those with domestic violence related offences, will be residing where children are present upon their release from custody into the community, as proposed in an initiative currently under development with the Department of Corrective Services.

The Review proposes that section 23 be strengthened to enable the Department of Corrective Services to disclose to the Department pre-sentence or other reports if considered relevant to the wellbeing of a child or class or group of children.

Recommendation 4

Section 23 should enable the Department of Corrective Services to provide the Department with any report in its possession relevant to the wellbeing of a child or class or group of children, including pre-sentence reports.

5 PROTECTION AND CARE OF CHILDREN (PART 4)

Part 4 gives the CEO the powers to provide for the protection and care of children in circumstances where their parents have not given, or are unlikely or unable to give, that protection and care. The powers include those needed to safeguard or promote children’s wellbeing; investigate suspected child abuse or neglect; apply to the Children’s Court for protection orders; make placement arrangements for children in the CEO’s care; and provide assistance for those who are leaving care.

If the Department believes a child to be in need of protection based on the criteria listed under section 28 of this Part, it may take the child into provisional protection and care¹³ and make an application to the Children’s Court for a protection order. A protection order is an order made by the Children’s Court if it finds that a child is in need of protection following an application by the Department. There are four types of protection orders in the Act

- protection order (supervision)
- protection order (time-limited)
- protection order (until 18)
- protection order (special guardianship).

¹³ This may occur with a warrant or, if a child is at immediate and substantial risk, without warrant.

At 30 June 2012, there were 3,780 children in the care of the CEO under a range of placement arrangements throughout the State. Divisions 5 and 6 of Part 4 contain provisions to support children in the CEO's care including:

- requirements for a Charter of Rights for children and young people in care (section 78);
- guidelines for the placement of children from culturally and linguistically diverse backgrounds, and Aboriginal and Torres Strait Islander children (sections 80 and 81);
- planning processes for children at all stages of their care experience from initial entry into care to leaving care (sections 88 to 95);
- review of care planning decisions by the CEO (via a case review panel) and the SAT (sections 91 to 95); and
- leaving care provisions – where a young person meets certain criteria, assistance may be given to those who are leaving the care of the CEO (sections 96 to 100).

A number of offences are found under Division 7 of this Part including failure to protect a child from harm (section 101), leaving a child unsupervised in a vehicle (section 102), tattooing or branding (section 103), and new offences introduced last year against body piercing (section 104A).

5.1 When child is in need of protection

The Review considered the operation and effectiveness of section 28 in response to a number of matters raised in submissions which are addressed below. Section 28(2) sets out the grounds on which a child in Western Australia may be found to be in need of protection. The majority of protection applications to the Children's Court are made under section 28(2)(c), under which:

"...a child is in need of protection if the child has suffered, or is likely to suffer, harm as a result of one or more of the following:

- *physical abuse;*
- *sexual abuse;*
- *emotional abuse;*
- *psychological abuse;*
- *neglect."*

"Harm, in relation to a child, means any detrimental effect of a significant nature on the child's wellbeing" (section 28(1)). The terms physical, sexual, emotional and psychological abuse are not defined: this section provides an inclusive definition of "neglect" only.

5.1.1 Emotional and psychological abuse as grounds for protection

During development of the Act, debate occurred as to whether there should be separate grounds of emotional abuse and psychological abuse, or whether the single ground of emotional abuse would be sufficient to determine if a child was in need of protection. Contemporary opinion at that time was that the harms of abuse on children's emotional and psychological/cognitive development should both be recognised in the Act. As a result, Western Australia included both emotional abuse and psychological abuse as separate grounds for a child being in need of protection.

The Department has found that providing the separate grounds of emotional and psychological abuse has not been useful, and departmental submissions to the Review¹⁴ suggested collapsing emotional and psychological abuse into one ground for finding a child in need of protection.

¹⁴ Clara Kirika, Department for Child Protection; Child Protection Policy, Policy and Learning Directorate.

Discussion

In practice, this distinction has been found to add complexity for child protection workers and families. While both emotional and psychological harm can occur to a child as a result of abuse, it is difficult to distinguish what specific acts or omissions form emotional abuse as against acts which constitute psychological abuse.

To illustrate the difficulties, witnessing family and domestic violence is increasingly recognised as a form of emotional abuse which can result in serious trauma to a child. Both emotional and psychological harm may occur as a consequence of seeing or hearing violent behaviour against a parent. This can cause as much, or greater, harm as any direct experience of physical abuse itself.

The impact of emotional harm can include:

- risk of disturbed attachment for infants with their mothers;
- poor health, poor sleeping habits, excessive crying, loss of self-esteem and extreme shyness, emotional distress, anxiety, social isolation, aggression and behavioral problems; and
- in adolescents; fear, depression, relationship problems, homelessness, health issues, and inter-generational transmission of violence.

The impacts of psychological harm include:

- trauma akin to post traumatic stress disorder;
- cognitive difficulties; and
- neuro-developmental impacts.

Over the last few years, increasing knowledge of early brain development and the impacts of extreme trauma on the developing brains of children has been widely recognised. International expert on childhood trauma, Bruce Perry, cites extensive examples of the lifelong cognitive and psychological impacts of impeded brain development as a result of trauma suffered through experiences such as witnessing family and domestic violence.¹⁵

The approach of the Australian Capital Territory is worth consideration. Section 342 of the *Children and Young People Act 2008 (ACT)* states that **abuse** means:

“...(d) *emotional abuse (including psychological abuse) if:*

- (i) *the child or young person has seen or heard the physical, sexual or psychological abuse of a person with whom the child or young person has a domestic relationship, the exposure to which has caused or is causing significant harm to the wellbeing or development of the child or young person; or*
- (ii) *if the child or young person has been put at risk of seeing or hearing abuse mentioned in subparagraph (i), the exposure to which would cause significant harm to the wellbeing or development of the child or young person; ...”*

Using only the ground of emotional abuse rather than specifying two forms of abuse, while acknowledging both emotional and psychological harm, is the recommended way forward. By removing psychological abuse from section 28(2), the complexity of differentiating these types of abuse is resolved.

¹⁵ Perry B D, ‘Child Maltreatment: The role of abuse and neglect in developmental psychopathology,’ *Textbook of Child and Adolescent Psychopathology* (2008), 93-182.

The range of harm experienced by children, including where children are exposed to domestic violence, can be acknowledged through expanding the inclusive definition of ***harm*** in section 28 to include ‘physical, psychological and emotional harm’, rather than having to identify an abusive *act* as being either emotional or psychological abuse. Benefits of this amendment would include assisting families to understand the impacts on their children of these behaviours, in a more simple and straightforward way.

Recommendation 5

Section 28 of the Act should be amended to:

- *provide that **harm**, in relation to a child, means any detrimental effect of a significant nature on the child’s physical, emotional or psychological wellbeing; and*
- *remove the ground of psychological abuse.*

5.2 Family and domestic violence

Background

Submissions from Legal Aid WA (Legal Aid) and the Commissioner for Children and Young People recommended amendments to expressly refer to family and domestic violence in the Act in recognition of the serious detrimental effects that exposure to violence within the family may have on children. These agencies proposed:

- providing a definition of family and domestic violence, consistent with those used in family law;
- amending section 8 - *Matters to be taken into account in determining the best interests of the child* to include the child’s exposure to family violence; and
- including harm from exposure to family and domestic violence as grounds for a child being in need of protection under section 28.

The submissions also referred to recent amendments to the Commonwealth *Family Law Act 1975*¹⁶ which came into effect on 7 June 2012. The Commonwealth’s amendments prioritise the safety of children in parenting matters and include definitions of family violence and exposure to family violence, with examples to further guide interpretation. These amendments “*address issues of significant community concern by strengthening the role family courts, advisers and parents in preventing harm to children while continuing to support concept of shared parental responsibility and shared care, where this is safe for children.*”¹⁷

Legal Aid notes, however, that:

“Legislative change by itself will not change the current approach to the management of family and domestic violence issues in the child protection jurisdiction. There is a need for cultural change and increased education for all professionals in the child protection system including DCP staff, judicial officers and lawyers to facilitate a shared understanding of the issues...”

Discussion

The Review considered whether the Act provides adequate protection for children exposed to family and domestic violence or whether amendments are required to better protect children.

¹⁶ Section 4AB inserted by the *Family Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth)*.

¹⁷ Explanatory Memorandum to the *Family legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth)*.

Current Department responses to family and domestic violence

The Department recognises the strong link between child protection and family and domestic violence, and the significant detrimental impact family and domestic violence has on the wellbeing of children and adults.

*“Children growing up in violent homes experience ongoing and pervasive fear, worry, confusion, self-blame and exposure to multiple insidious forms of violence and abuse. The impact on children can be devastating, affecting all aspects of health and wellbeing from conception through to adulthood. It includes (but is not limited to) insecure attachment to the primary care-giver, high rates of emotional distress, presence of trauma symptoms and social and behavioural issues (Osofsky, 1999; Perry 2007).”*¹⁸

The 2002 *Report of the Protecting Victoria’s Vulnerable Children Inquiry* (the Cummins Report) also notes that witnessing family violence in itself amounts to child abuse, a view that is only fairly recent in the academic literature.¹⁹

The Department has a central role in protecting children exposed to family and domestic violence and promoting and participating in coordinated inter-agency responses to support child and adult victim safety and perpetrator accountability. Child protection workers’ responses to family and domestic violence are supported by dedicated family and domestic violence practice guidance including the *Family and Domestic Violence Background Paper*, *Family and Domestic Violence Policy*, Casework Practice Manual entries (*Chapter 14: Family and Domestic Violence*) and a range of supplementary tools and resources. The practice guidance was developed following a comprehensive review of existing policy and procedures during 2011. Implementation involves professional education and training for child protection workers as well as a monitoring and evaluation framework to support continuous improvement.

These initiatives, introduced by the Department in July this year, will make a substantial contribution towards addressing some of the issues raised in Legal Aid’s submission about the need for cultural change and better professional education. Nevertheless, it was agreed that referring to exposure to family and domestic violence in section 28 would send a clear message and promote public awareness about the importance of protecting children from exposure to family violence.

Legislation in other jurisdictions

Family and domestic violence is incorporated in differing ways into child protection legislation in several other jurisdictions. The legislation in NSW and Tasmania includes exposure to family or domestic violence in definitions of a child being “*at risk of harm*”²⁰ (or “*at risk*”²¹) and in NSW, serious developmental impairment or serious psychological harm as a consequence of a child’s domestic environment are grounds for a care order.²² The Northern Territory includes a child witnessing violence between the child’s parents at home as an example of how “*harm*” may be caused to a child,²³ while Queensland’s approach is to include “*promoting and helping in developing coordinated response to allegations of harm to children and responses to domestic violence*” as one of the CEO’s functions under the Act.²⁴

¹⁸ Department for Child Protection, *Family and Domestic Violence Background Paper* (2012).

¹⁹ Cummins P et al, *Report of the Protecting Victoria’s Vulnerable Children Inquiry (2012)* (Cummins Inquiry), 35.

²⁰ *Children and Young Person’s (Care and Protection) Act 1998* (NSW), s23.

²¹ *Children, Young Persons and their Families Act 1997* (TAS), s4.

²² *Children and Young Person’s (Care and Protection) Act 1998* (NSW), s71.

²³ *Care and Protection of Children Act* (NT), s15.

²⁴ *Child Protection Act 1999* (QLD), s7.

Including family and domestic violence as a grounds for protection

As previously outlined, section 28(2)(c) provides that:

“...a child is in need of protection if the child has suffered, or is likely to suffer, **harm** as a result of one or more of the following:

- *physical abuse;*
- *sexual abuse;*
- *emotional abuse;*
- *psychological abuse;*
- *neglect.”*
- “Harm, in relation to a child, means any detrimental effect of a significant nature on the child’s wellbeing” (s.28(1)).

The threshold for finding that a child is in need of protection is whether, as a result of any of the abuse a child has experienced, the harm suffered or likely to be suffered by the child is harm of a significant nature (referred to in practice as *significant harm*).

The Review does not support family and domestic violence becoming its own discrete category in the definition of child in need of protection as this would introduce a conceptually different ‘level’ of criteria which is inconsistent with the way in which section 28(2)(c) currently operates: namely, it would introduce a *type* of behaviour which is, in itself, a form of *emotional* or *psychological* abuse.

A more appropriate amendment would be to provide a definition of emotional abuse in section 28 which provides that emotional abuse includes a child’s exposure to family and domestic violence. This would make explicit the nexus between child protection and family and domestic violence. It is important to note that the threshold for finding a child to be in need of protection as a result of emotional abuse would continue to be that the child has suffered or is likely to suffer significant harm as a result of the abuse experienced.

Other amendments considered

The Review also considered including specific reference to family and domestic violence in the factors to be taken into account in determining the best interests of the child (section 8) and the principles that must be observed in the administration of the Act (section 9):

- Principle 9(c) provides that “*every child should be cared for and protected from harm*”.
- Principle 9(d) sets-out the categorical principle that “*every child should live in an environment free from violence*”.
- Principle 9(e) provides that “*every child should have stable, secure and safe relationships and living arrangements*”.

The provisions in sections 8 and 9 are strong and considered appropriate. If adopted, the Review’s recommendation below, that exposure to family and domestic violence be included as a form of emotional abuse, will provide a clear recognition in the Act of this behaviour as a child protection issue.

Another option for strengthening coordinated responses to family and domestic violence is to amend the Act to expressly enable the exchange of information relevant to the provision of services to persons experiencing family and domestic violence. This would require amendments to the current information sharing provisions under sections 23 and 24A of the Act. If adopted, the additional information sharing amendments recommended by the Review should also include these amendments.

Recommendation 6

- (a) Section 28 should provide that emotional abuse includes exposure to family and domestic violence.*
- (b) The information sharing provisions in sections 23 and 24A should expressly enable the sharing of information relevant to the provision of services to persons experiencing family and domestic violence.*

5.3 Access to a child for the purposes of investigation

In their submission to the Review, the WA Police requested consideration be given to:

- police officers becoming authorised officers for the purpose of exercising powers under section 33 of the Act; and
- expanding the nominated places where a child can be accessed and/or interviewed under that section.

The rationale given was that sometimes it is not operationally viable for police to interview a child at the nominated location (hospital, school or child care centre). For example, in regional or remote WA, the location might be a park or near a water place.

Background

Section 33 enables an authorised officer of the Department – usually a child protection worker - to have access to a child at a school, hospital or place where a child care service is provided for the purposes of an investigation to ascertain whether a child is in need of protection. The Act requires an authorised officer to notify the person in charge at the location before exercising the power in section 33. Schools, hospitals and child care services are specifically identified in the legislation because they employ persons responsible for the care of children while at those facilities.

The Department's policy is that, wherever possible when undertaking an assessment, including a child protection investigation, the parent/s of the child should be informed of the nature of the allegation, the Department's need to sight or examine and interview the child and the process involved in an assessment. Parental consent should be sought as early as possible in the assessment process. This recognises parents' rights and responsibilities for their children.

If a child protection worker believes, on reasonable grounds, that it is in the child's best interests for the worker to have access to the child without first informing a parent or, if informing the parents before accessing the child is likely to jeopardise the assessment, the Department can exercise powers under section 33 to access the child at the specified places or seek a warrant (access) under section 34.

Discussion

It was intended that this provision be strictly limited to authorised officers of the Department and reputable known places in which children commonly spend time – that is, a school, child care service or hospital. Parental consent should be sought if it is considered more appropriate to interview a child at a place other than a school, hospital or child care centre. If access to a child is denied by a parent, or if the authorised officer believes that access will be denied or is unable to gain access, an application can be made for a warrant (access) under section 34. It was not intended that the Department be able to remove a child to another place for the purposes of ascertaining if the child is in need of protection. If such action is required, other sections of the Act enable this to occur.

If a police officer suspects on reasonable grounds that there is an immediate and substantial risk to the child's wellbeing, he or she is empowered to remove a child using section 37, with or without involving an authorised officer of the Department or seeking parental consent.

For these reasons, the Department is of the view that section 33 is operating as intended and that forensic interviews for child protection purposes should not be conducted by police without an authorised officer from the Department. After hours departmental responses are available either through country districts or the Crisis Care Unit in the metropolitan area. It is unlikely police would need to interview a child or arrange a medical examination in a child protection matter without the involvement of authorised officers from the Department.

5.4 Provisional protection and care

5.4.1 Limitations in applying section 35 in certain circumstances

Section 35(1)(b) of the Act enables an authorised officer who believes that a child is in need of protection to apply to a judge or magistrate for a warrant (provisional protection and care) if the officer –

- (a) *is unable to find the child;*
- (b) *believes that leaving the child at the place where the child is living poses an unacceptable risk to the child's wellbeing; or*
- (c) *believes that if a parent of the child or other person becomes aware of a proposed protection application in respect of the child, the child will be moved from the place where the child is living and the officer will be unable to find the child.*

The Department's Legal Practice Services has experienced difficulties in using section 35(1)(b) in situations where a child's need for protection is not directly related to the place where the child is living. This arises, for example, in circumstances where the Department assesses a newborn as is in need of protection, given all the circumstances of the case, but at the time a warrant is required under section 35(1), the place where the infant is "living" (ie. the maternity ward of a hospital) is not related to the risk to the child's wellbeing.

Recommendation 7

The Act should be amended to ensure that section 35(1)(b) enabling the issuing of a warrant (provisional protection and care) can still be used even though the child may be temporarily in a safe place, for example a hospital.

5.4.2 Placing a child without court sanction – section 38

Section 37 of the Act enables a child protection worker or police officer to take a child into provisional protection and care, without a warrant, if the officer suspects on reasonable grounds that there is an immediate and substantial risk to the child's wellbeing. This section can be used whether or not a child is already the subject of protection proceedings.

Section 38 establishes the actions the Department must take after a child has been brought into provisional protection and care under section 37. In cases where children are not already the subject of protection proceedings in the Children's Court, and the CEO decides that a protection application is no longer necessary for whatever reason, section 38(2) requires that the child be returned to or placed in the care of:

- (a) a parent,
- (b) a person who was providing day-to-day care of the child at time the child was taken into care or,
- (c) with the consent of a parent, any other person.

This must occur as soon as practicable, but not more than two working days after having taken the child into provisional protection and care. If the child is not returned or placed within this timeframe, section 38(4) requires the Department to have made a protection application.

Issue

Several submissions to the Review²⁵ expressed reservations that this power enables the Department to remove a child from one parent and place the child with another parent or person without having to file a protection application. The Department's Legal Practice Services submitted that this:

"...allows the Department to change the living arrangements of a child without any oversight by a Court... and to place the child with "any other person" with the "consent" of a parent of the child. There are no checks and balances in place to ensure that such a power is not abused and that such "consent" is properly informed and willingly given."

It was recommended the provision at least be reviewed from a policy perspective. The Western Australian Council of Social Service (WACOSS) also submitted that:

"...the CCS Act should require that any decision to bring a child or young person into care is immediately reviewed by the Children's Court."

Discussion

The need for a section 37 intervention arises in circumstances where a child is found to be in immediate need of protection and there is neither the time nor opportunity for an officer to obtain a warrant under section 35 of the Act to bring the child into provisional protection and care.

Section 38(2) recognises that in some instances, further investigation following this action clarifies that the child can be safely returned to the care of his or her parent/s (or another person) and is no longer in need of protective intervention. Lodging a protection application in the Children's Court would be unnecessary in these circumstances given that the child would not meet the threshold for being in need of protection under section 28. An example of this kind of situation would be where a child has been left in the care of a babysitter who has subsequently left the child unattended. Another may involve a police officer finding a young child at premises where no responsible adult is caring for the child.

Section 38(2) was intended to provide the CEO with flexibility to place the child with a parent or other suitable person with the consent of a parent. It was not intended to operate as a means for the Department to make a determination about which parent is the appropriate carer for a child.

It is understood that the use of sections 37 and 38(2) to move a child from one parent to another may be becoming more common in practice. There are a number of practice issues which need to be addressed to ensure these provisions are not used for purposes other than those for which they were intended, and that the process accounts for parents' existing care arrangements wherever possible. It is particularly important, for example, to establish who has parental responsibility for the child, whether any Family Court orders exist in respect of

²⁵ Clara Kirika, DCP; Legal Practice Services, DCP; WACOSS; Women's and Newborn Service, Department of Health.

the child and whether a parent has a violence restraining order against another parent or a history of family or domestic violence. As noted by Legal Practice Services, the process for obtaining a parent's consent also requires careful management in practice. Practice guidelines should be developed to address these issues.

Practice issues notwithstanding, the Review considers the provisions in sections 37 and 38(2) are necessary and operating effectively as a tool for protecting children in circumstances where obtaining a warrant under section 35 is not feasible or possible. Regarding court oversight of these cases, given that a child brought into provisional protection and care this way is no longer in need of protection, having been returned to the safe care of a parent, it is difficult to envisage what type of court proceeding this could be and the legal purpose of such a "post event" proceeding.

Recommendation 8

The Department should develop casework practice guidelines on managing the return of children under section 38(2) who are no longer in need of protection, having been taken into provisional protection and care under section 37.

5.5 Cross border project

The jurisdictional borders in the central desert region of the Northern Territory, Western Australia and South Australia can present barriers to effective child protection practice. Issues identified by child protection practitioners and managers working in the cross border region include:

- The importance of child protection workers making timely decisions and taking appropriate actions 'on the spot'. Currently, an authorised child protection worker in one State or Territory cannot exercise authority in another. However, distances, road or weather conditions may mean that Western Australian child protection workers, for example, are better placed to undertake an urgent child protection investigation in the cross border region of South Australia or the Northern Territory, being located closer to the border than workers in the other jurisdictions.
- Time lags can occur in following the established *Interstate Child Protection Protocols*. Whilst the protocols outline the time frames within which States are to respond to requests, resources may affect the priority with which the 'receiving State' can respond. In addition, where a 'sending State' notifies a 'receiving State' of a child under concern, the State receiving the notification may not receive enough detail in time to locate the family, particularly given the high mobility of families in the region.
- Greater sharing of knowledge about carers and carer assessment criteria could potentially offer increased carer options in this region.
- Issues relating to the transfer of child protection orders including the compatibility of orders and timing of the transfer of orders.

As part of the second three-year action plan of the *National Framework for Protecting Australia's Children (2012-2015)*, a project has commenced to investigate ways to streamline practices and laws in Western Australia, South Australia and the Northern Territory to enable effective delivery of child protection services to the communities in the cross-border region.

The Commonwealth Government, through the Department of Families, Housing, Community Services and Indigenous Affairs, has contracted the Australian Catholic University to progress this project in collaboration with the relevant States. An options paper will be developed to inform how ‘authority to act’ can occur, including any recommendations for policy and/or legislative changes.

Recommendation 9

Western Australia should continue to work with relevant States and Territories to address cross-jurisdictional barriers to effective child protection practice.

5.6 Protection orders

5.6.1 Protection order (supervision)

Submissions to the Review from the Department of Health Women’s and Newborn Service, Legal Aid and the Department’s Legal Practice Services raised issues about the use of protection orders (supervision) provided for under sections 47 to 53. Known colloquially as supervision orders, the issues raised include whether they are sufficiently used by the Department; whether they are used as a mechanism for making decisions about the placement or parental responsibility of the child with a specific parent; and whether enforcement provisions would be beneficial.

Background

When the Act was developed, supervision orders were introduced to provide an additional opportunity for the Department to work with families to create safety for children, but where parental responsibility remained with the parent. These types of orders had been used in other jurisdictions, primarily Victoria,²⁶ where the Children’s Court had determined that a child was in need of care and protection but there was capacity to work with the parents for the child to remain in their care (usually with conditions imposed by the Court). The supervision order was seen to provide an alternative to the ‘all or nothing’ approach of removing children from their parents care or simply closing the case.

Discussion

Despite the comparatively low number of supervision orders Western Australia makes compared to other States,²⁷ the Department is satisfied with the current use of this type of order. The Review considers that there are only a small number of cases when a family (of a child assessed as being in need of protection) is able to demonstrate sufficient ongoing safety to warrant the use of a supervision order.

Currently, the Department engages in preventative work (safety plans agreed by families) through the use of Signs of Safety planning meetings or negotiated placement arrangements. Where informal arrangements and assistance have been ineffective, and a child is considered to be in need of care and protection, the appropriateness of a supervision order will be considered.

Notably, the development of child-centred family support (CCFS) teams within the Department may lead to an increase in the number of supervision orders that are applied for. CCFS is provided where a safety and wellbeing assessment has identified concerns for a child but there is potential for the child to remain in the care of his or her family with a safety

²⁶ *Children, Youth and Families Act 2005 (Vic)*.

²⁷ For comparative statistics between jurisdictions, see *Australian Government Productivity Commission, Report on Services 2012 (2012)*, Table 15A.7.

plan in place. CCFS offers interventions with families which are rigorous, supportive and focused on the child's safety and wellbeing.

The submissions also raised concerns in relation to the enforceability of the conditions under a supervision order. Non-compliance with the conditions of a supervision order is likely to result in the Department applying to the Court to revoke and replace the existing order with a protection order that confers parental responsibility on the Department. The family's non-compliance with a supervision order can be brought to the attention of the Court during these proceedings.

It was also suggested that amendments should enable supervision orders to be made in favour of one parent over another. Section 50(3) provides that a supervision order must not include a condition about:

- (a) *the person or persons with whom the child is to live, unless the condition relates to the child living with a parent of the child specified in the order; or*
- (b) *who is to have responsibility for the day to day care welfare and development of the child.*

These sections are intended to operate as a safeguard to ensure that supervision orders cannot be used as a 'back door' approach to removing a child from a person who has parental responsibility for that child. If this could occur, supervision orders could, in effect, be used to determine a child's custodial parent, which was never the intention. Issues raised in respect of the relationship between Children's Court and Family Court proceedings and orders are referred to in section 7.3 of this Report.

The Review considers that supervision orders are useful in situations where although a child is in need of care and protection, the Department is of the view that the ongoing safety of the child can be maintained without assuming parental responsibility for the child. Whether or not an application for a supervision order is appropriate should be determined on a case-by-case basis, in accordance with relevant policy and practice considerations.

5.6.2 Protection orders (special guardianship)

Protection orders (special guardianship) (referred to as special guardianship orders in this Report) were introduced on 31 January 2011,²⁸ replacing provisions for protection orders (enduring parental responsibility) (EPRs). If granted, a special guardianship order transfers parental responsibility for the child to the carer until the child reaches 18 years of age, giving the carer "*all the duties, powers, responsibilities and authority that, by law, birth parents have for their own children*".²⁹

A key difference between a special guardianship order and the previous EPR orders is that an application for a special guardianship order can be initiated either by the CEO or a carer who has had the continuous care of a child under a placement arrangement for two years or more. Previously, only the CEO could apply for this type of order. Consistent with the Department's focus on permanency planning for children in care, the number of special guardianship orders has increased. Since the amendments came into effect, 192 protection orders (special guardianship) have been applied for and 166 had been granted as at 4 October 2012. All the applications have been made by the Department to date.

²⁸ *Children and Community Services Act 2004 (WA) (CSS Act) Part 3.*

²⁹ See definition of parental responsibility under section 3 of the Act.

Maintaining child's name, cultural and community connections

It has been suggested that consideration be given to amending the special guardianship provisions to include a child's right to maintain their name, identity, cultural background and links with his or her community.³⁰

The Department has become aware that some carers granted parental responsibilities for a child under a special guardianship order have sought a change of name for the child through an application to the Registrar of Births, Deaths and Marriages, without the consent of the child's birth parent. This has raised particular discussion about the impact of a name change on Aboriginal children for whom, under principles contained in both the Act and the *Adoption Act 1994*, special care should be taken around preserving family and cultural identity connections.

Discussion

Section 8(1)(j) requires the following principle to be taken into account in determining, for the purposes of the Act, what is in a child's best interests:

- *the child's cultural, ethnic or religious identity (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal people or Torres Strait Islanders).*

Section 9(i) enshrines the principle that decisions about a child should be consistent with cultural, ethnic and religious values and traditions relevant to the child. The Aboriginal and Torres Strait Islander principle under section 12 also provides that if a child cannot be placed with a member of their family or another Aboriginal or Torres Strait Islander person, they should be placed with a person who is capable of promoting the child's ongoing affiliation with the child's culture (s.12(d)).

Section 61(4) and (5) of the special guardianship provisions require the Court to have regard to the following when assessing the suitability of a proposed special guardian for children who are Aboriginal or Torres Strait Islanders or from a culturally or linguistically diverse background:

- the Aboriginal and Torres Strait Islander principle under section 12; and
- guidelines established under section 80 for the placement of children from culturally and linguistically diverse backgrounds. This section requires the guidelines to address "*the need to preserve and enhance a child's cultural, ethnic and religious identity.*"

The intent of a special guardianship order is to give parental responsibility to a carer of the child, with all the "*duties, powers, responsibilities and authority that, by law, birth parents have for their own children.*"³¹ The Act specifically only allows conditions in respect of contact under these orders (section 63). The imposition of further restrictions or limitations on the exercise of their parental responsibility could deter carers from becoming special guardians. Also, it is unclear how such requirements could be enforced.

The Review considers the existing provisions in the legislation adequately reflect the special considerations to be taken into account by the Department and the Court in respect of special guardianship orders. There is also an argument to be made in favour of Gillick Competent³² children being able to change their name if they wish. There are many

³⁰ Submitted by the Commissioner for Children and Young People.

³¹ As defined under section 3 - *Parental responsibility*.

³² The Gillick principle provides that a minor is capable of giving informed consent when he or she "achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed". If these criteria are satisfied then the child is considered to be "Gillick Competent". The child's competence is viewed as being an emerging one. As such, the parent's authority decreases in proportion to the growth of the child's competence.

examples where children in care under a protection order prefer to adopt the name of their carers for various reasons, including those relating to a wish to “belong” as a member of the carer’s family or a desire to distance themselves from a very abusive parent.

Adoption from special guardianship

On occasion, children in the CEO’s care under a protection order (special guardianship) are adopted by their special guardians. When a child becomes the subject of an adoption order in the Family Court, the Act is silent on the status of the special guardianship order. Currently, to ensure the child is not subject to two orders concurrently when this occurs, the Department applies to the Children’s Court for the special guardianship order to be revoked. Revocation of the special guardianship order is also important in order to revoke any special payments the Court may have ordered the Department to pay a special guardian as part of the order. To remove this anomaly and improve efficiency in administering this aspect of the Act, an amendment should be made providing for the automatic revocation of a special guardianship order when the child becomes the subject of an adoption order in the Family Court.

Recommendation 10

The Act should provide for the automatic revocation of a protection order (special guardianship) and ancillary payment order in the event that an adoption order is made in respect of the child.

5.7 Children in the CEO’s care

5.7.1 Authority to apprehend a child in care without warrant

In its submission to the Review, the Department’s Legal Practice Services identified a gap whereby the powers under section 87 to apprehend a child without warrant do not cover circumstances where a child is at immediate or substantial risk in the care of a person with whom the CEO has placed the child.

Section 87 provides authorised officers and police officers with powers to enter and search premises to apprehend a child in the CEO’s care, without a warrant, if the officer suspects on reasonable grounds that:

- (a) the child is absent, or has been taken, without lawful authority from a placement arrangement; and
- (b) there is an immediate or substantial risk to the wellbeing of the child or a significant likelihood that unless apprehended immediately an officer will not be able to find the child.

A “placement arrangement” is an arrangement the CEO makes under section 79 for the placement of a child with:

- approved individual foster carers or other individuals such as relative carers;
- funded out-of-home care services in the non-government sector such as Wanslea or Parkerville Children and Youth Care Inc.; or
- residential facilities operated by the Department.

These powers are used when children run away or are unlawfully removed from a placement arrangement and there is considered to be an immediate or substantial risk to their wellbeing.

Discussion

Provisions under section 84 already enable an authorised officer to require a carer, parent or any other person to hand over a child. Failure to comply with this requirement carries a penalty of imprisonment or a fine. If a person refuses to comply, the officer may apply to a judge or magistrate for a warrant (apprehension) under section 85 to retrieve the child.

There are circumstances, however, where a person caring for a child under a placement arrangement may refuse, resist or wilfully ignore a lawful requirement to hand over a child (which in many instances, may be the child's parent). In these circumstances, where there are reasonable grounds to suspect there is an immediate or substantial risk to the wellbeing of a child, it is appropriate for authorised officers of the Department and police officers to have powers to enter and search premises in order to apprehend the child without warrant.

Recommendation 11

Section 87(2) should provide for circumstances where:

- *a carer of a child under a placement arrangement has refused, resisted or wilfully ignored a lawful requirement by an officer to hand over the child; and*
- *there are reasonable grounds to suspect there is an immediate or substantial risk to the wellbeing of the child.*

5.8 Secure care

In May 2011 the Kath French Secure Care Centre (the Centre) in Stoneville became operational as a secure care facility, having been established under amendments to the Act made in 2011.³³ The Centre provides short term, time-limited crisis stabilisation for children and young people in the CEO's care who are at immediate and substantial risk of causing significant harm to themselves or others, where there is no other suitable way to manage that risk and ensure they receive the care they need (section 88C).

Depending on whether the child is under a protection order or in provisional protection and care, the CEO and/or the Children's Court must be satisfied the strict admission criteria are met before making or ordering a secure care arrangement for a child. The Act includes provisions regarding the length of time a child may spend in secure care; the care planning required; and the capacity for the relevant parties, including the child, to apply for a CEO 'reconsideration' or 'review' of a secure care decision or subsequently an external review by the SAT. There is also provision for independent external monitoring of a secure care facility (and other "residential facilities" operated by the Department or its funded agencies) through the appointment of an assessor under section 125A.

The Commissioner for Children and Young People suggested more detail could be added to the secure care provisions for assessors. The legislative provisions under section 125A provide assessors with very broad powers. They enable an assessor to visit a secure care facility at any time and:

- enter and inspect the facility;
- inquire into its operation and management;
- inquire into the wellbeing of any child in the facility;
- see and talk with any child;
- inspect any document relating to the facility or any child in the facility.

³³ The amendments were made under the *Children and Community Services Amendment Act 2011 (WA)* and came into effect on 31 January 2011. Most of the secure care provisions are found under sections 88A to 88J, 125A and 125B and 134A.

Children in the secure care facility, their parents or other relatives can also request an assessor visit the Centre to see and talk with the child (section 125A(4A)).

The Department has closely monitored the Centre's operations since it was established. In April 2012, an evaluation of caseworker experiences in making referrals to the Centre reported an overwhelming finding that the experience of placing a child/young person in secure care had been positive for both the young person and the caseworker. A further evaluation will be conducted following its second year of operation. As the Centre has been operational for only 18 months (since 31 May 2011), in the absence of a compelling need to amend the provisions at this stage, it is considered appropriate to review the provisions more closely in the next legislative review which is due in 2017.

5.9 Care planning

Identifying and meeting the needs of children in the CEO's care is one of the Department's core responsibilities, governed by legislative provisions setting out the various care planning requirements to be met. Section 89 requires that all children in the CEO's care have a care plan prepared and implemented as soon practicable after coming into care. A **care plan** is a written plan which:

- (a) identifies the needs of the child;
- (b) outlines steps or measure to be taken to address those needs; and
- (c) sets out decisions about the care of the child....

The decisions "about the care of the child" which must be included in a care plan include decisions about the child's placement arrangements; secure care decisions specified in section 88G; and decisions about contact arrangements between the child and his or her family or others of significance to the child (s.89(1)). Care plans must be reviewed at regular intervals (not exceeding 12 months), and persons who are aggrieved by a care planning decision, including the child or child's parent, can apply to have the CEO review the decision (via the Case Review Panel) or, subsequently, for an external review by the SAT.³⁴

The Review received submissions recommending legislative changes aimed at further prescribing the Act's care planning requirements. For example, in addition to the existing child participation principle under section 10, the Commissioner for Children and Young People suggested a requirement in section 86 for the participation of a child in the preparation of his or her care plan; that the Departments of Health and Education, in conjunction with the Department, be required to develop, implement and annually review health and education plans for children in care; and that reviews of care plans for children under two years of age be required at least six monthly. (Legal Aid suggested care plan reviews for all children occur six monthly and, where possible, more often for children under two years of age.) WACOSS and CREATE suggested consideration be given to improving the 'leaving care planning' requirements for young people transitioning out of the care system.

As with other areas of practice, the legislation provides the framework within which the Department's *Care Planning Policy 2012* and care planning casework practice guidelines operate. The current legislative framework in respect of care planning is considered to be sound. The Review took the view that overly prescriptive provisions which set out processes or requirements in detail may be counterproductive and should be avoided.

³⁴ CCS Act 2004 (n 30) ss.90(1); 93; 94.

In November 2011 the Ombudsman reported on the administration of the care planning provisions under the Act and made a number of recommendations to improve care planning practice and compliance monitoring.³⁵ The Department acted quickly and implemented the recommendations.

The following care planning matters raised in submissions were considered more closely by the Review:

- Distribution of care plans.
- Jurisdiction for reviews of CEO care planning decisions
- Maintaining a SAT review decision for 12 months.

5.9.1 Distribution of care plans

Section 89(6) requires that copies of care plans or modified care plans be provided to:

- the child;
- each parent of the child;
- any carer of the child; and
- any other person considered by the CEO to have a direct and significant interest in the wellbeing of the child.

Staff of the Department have raised concerns, including in a submission to the Review, that the distribution of care plans to all the parties specified in section 89(6) may not be in the best interests of the child and may pose a risk to the child's safety or wellbeing.

Discussion

The Review considered legislative and non-legislative options for addressing this issue.

Non-legislative option

Rather than requiring a legislative remedy, the content requirements of a care plan under section 89(1) are broad enough and provide sufficient flexibility for the exercise of professional judgement in writing-up care plans. The provisions therefore already allow for safety concerns that may arise through the disclosure of certain information to be taken into account, to ensure that child or family safety is not compromised by the contents of the plan being made available to others. The problem with this approach is that care plans can become overly general and lack specific detail. Implementation would need to be supported through training and Casework Practice Manual guidance to help staff achieve a balance to ensure care plans remain meaningful.

Legislative options

An important consideration in discussions about restricting a person's right of access to a care plan, or specific information in the plan, is the parties' right of review of a *care planning decision* provided under sections 93 and 94 of the Act. Persons who must be given a copy of a care plan are entitled to apply to the CEO for a review of a care planning decision (section 93), and subsequently to the SAT if they are unhappy with the CEO's decision (section 94). Withholding care planning information from a person would effectively deny his or her ability to have a care planning decision reviewed unless expressly provided for under amendments. Options considered were:

1. enabling a care plan to be either redacted or further edited; and/or
2. the selective distribution of a care plan;

in circumstances where a child's safety or wellbeing may otherwise be compromised.

³⁵ Ombudsman Western Australia, *Planning for children in care: An Ombudsman's own motion investigation into the administration of the care planning provisions of the Children and Community Services Act 2004*, (November 2011).

1. *Editing* - Redacting a document refers to the obscuring or removal of sensitive information from a document prior to publication or release (e.g. names or other information likely to identify a person or their whereabouts).

The Review does not support enabling the editing of care plans to the extent that different 'versions' of a care plan may be in circulation according to who they were written for. It was thought this would give rise to a layer of complexity and could prove administratively burdensome. Issues to be considered would include who would be given the discretion/responsibility for deciding how the care plan should be edited and for whom; and how the parties' review rights would be dealt with - they would need to be told that certain information had been excluded and why.

The Review considered there may be merit in enabling care plans to be redacted, where necessary, by obscuring sensitive information that may place a person's safety at risk. However, on balance it was considered that a redacted document could prove to be highly inflammatory, causing further complications in certain circumstances.

2. *Selective distribution* - A review of corresponding provisions interstate revealed that some jurisdictions provide for discretion in the distribution of care plans (but not editing). For example, in the Northern Territory, the CEO must provide copies of a care plan to certain persons, but is not required to do so if the CEO considers it to be inappropriate or impracticable, having regard to:
 - the wishes of the child;
 - any risk of harm to the child; and
 - any other matters the CEO considers relevant.³⁶

These provisions are very broad – in effect a copy can be withheld for any reason the CEO considers relevant, but in making that decision the CEO must consider the child's wishes and any risk of harm.

The Review considered that the intentions of section 89 should be upheld in practice to ensure that care plans are routinely provided to all parties specified. Where necessary, therefore, care plans should be written-up in such a way that a child's safety and wellbeing is not compromised.

Nevertheless, it was also agreed there should be legislative flexibility for cases where this is not possible. The CEO should have discretion to withhold a care plan from a party, but only if providing the plan would pose an unacceptable risk to the safety of the child or person mentioned in the plan. In such cases, persons denied access should be notified of their right to have that decision reviewed by the CEO (via the Case Review Panel) and the SAT. The Review Committee arrived at this position in appreciation of the complexities of withholding information about a child from a parent or significant other, notwithstanding there being a right of external review by the SAT.

Recommendation 12

- (a) *The CEO should be required to provide each party specified in section 89(6) with a copy of a child's care plan unless the CEO considers providing a copy of a care plan to a person would pose an unacceptable risk to the safety of the child or another person mentioned in the care plan.*
- (b) *A person denied access to a copy of a care plan should be provided with reasons for the decision and the right to a review.*

³⁶ *Care and Protection of Children Act 2012 (NT)*, s73.

5.9.2 Jurisdiction for reviews of CEO care planning decisions

As previously referred to in section 5.9.1, a person aggrieved by a care planning decision can seek an internal review conducted by the CEO via the Case Review Panel.³⁷ If subsequently unhappy with the CEO's decision on review under section 93(6), the person can then apply to the SAT for a review of that decision.³⁸ The Department of the Attorney General and Legal Aid recommended that section 94 be amended so that the Children's Court, instead of the SAT, conducts the external review of care planning decisions.

Discussion

At the time the Act was drafted, consideration was given to which was the appropriate body to conduct the external review of care planning decisions. In line with the model used in Victoria,³⁹ the SAT was considered preferable to the Children's Court. The SAT is able to include members with a range of expertise, including psychologists and social workers. Additionally, it was thought that conferring this jurisdiction on the Children's Court could, in effect, result in the Children's Court assuming an ongoing case management role in respect of parental responsibility functions.

In 2011, the report of the *Family Justice Review* in the United Kingdom strongly opposed the Court, which made the protection order, reviewing care plans because it may result in the Court assuming the parental responsibility of the local authorities.⁴⁰ The report noted that the Court's role is to determine who should have parental responsibility rather than how that parental responsibility is exercised.⁴¹ The recent Cummins Inquiry in Victoria re-affirmed that the Victorian Civil and Administrative Tribunal is the appropriate body for external administrative reviews of care planning decisions.⁴²

The Department of the Attorney General submitted that where the Department adopts an approach in a child's care plan that is inconsistent with the current protection order he or she is under, a merits review of the care plan gives rise to arguments as to whether the current protection order should be modified or varied. The Review accepts that varying orders should not be in the jurisdiction of the SAT, and notes the decision of Justice Chaney in *DH and Department for Child Protection [2011] WASAT 146* that:

- it is within the scope of the SAT's jurisdiction to undertake a review of a care plan;
- the care planning process needs to be approached having regard to the nature of the protection order in force;
- questions of permanency or reunification are matters for the Children's Court; and
- contact arrangements, as outlined in the care plan, should not pre-empt the outcome of a Children's Court decision in respect of a protection order for a child.⁴³

Where the Children's Court grants a protection order (time-limited), the Department should be working towards re-unification within the time allocated, and the contact arrangements in the child's care plan should reflect this. Conversely, the granting of a protection order (until-18) implies that the Court does not believe reunification is a realistic option.

³⁷ CCS Act (n 30) s93.

³⁸ Ibid s94.

³⁹ *Children, Youth and Families Act 2005 (Vic)*, s118.

⁴⁰ Ministry of Justice (UK), *Family Justice Review*, Final Report (November 2011), 3.17.

⁴¹ Ibid 3.13.

⁴² Cummins Inquiry (n 21) 15.3.4.

⁴³ *DH and Department for Child Protection [2011] WASAT 146*, 1-3.

If a child is under a protection order (time-limited) and the Department decides that reunification is no longer appropriate, the correct procedure is to make an application to the Children's Court for the order to be revoked and replaced. Only when the Children's Court replaces the existing order should the Department amend the contact arrangements in the care plan to reflect the change of focus from reunification to long-term placement in care, unless a change of circumstances requires this to occur earlier.

The Department has recently revised policy and practice guidelines to ensure that care plans reflect permanency and reunifications decisions, but do not determine them.⁴⁴ Provided a care plan is not the source of a permanency or reunification decision, it is the opinion of the Review that the SAT is still the appropriate body for the external review of care plans under section 94 of the Act.

Recommendation 13

The State Administrative Tribunal should remain as the jurisdiction to review decisions of the CEO under section 94.

5.9.3 Maintaining a SAT review decision for 12 months

The Department of the Attorney General recommended consideration be given to extending the duration of a care plan, or suspending the obligation of the CEO to make a fresh care plan, until 12 months after a SAT decision on a care plan review.

Discussion

In practice, the Department formally reviews care plans at least every 12 months in accordance with the requirements of section 90(1). In cases where an external review application to the SAT occurs and takes a number of months to finalise, any change implemented in a care plan as a result of the SAT review may be in place only for a relatively short period before another annual departmental review of the care plan is required.

If a care planning decision made by the Department can be in effect for a period of 12 months, it is considered the same should apply for a care planning determination by the SAT. The Review therefore suggests that a SAT decision which results in the modification of a care plan should remain in force for 12 months, unless there is a change in circumstances requiring further modification of that decision by the Department.

Recommendation 14

Section 94 should require that decisions of the State Administrative Tribunal which result in the modification of a care plan are to remain in force for a period of at least 12 months, subject to the CEO's power under section 89(4).

5.9.4 Case Review Panel

The CEO has established a Case Review Panel under section 92 to assist in the review of care planning decisions for children in care. A care planning decision is a decision set out in the care plan all children in the care of the CEO must have. Prior to an amendment which

⁴⁴ Department for Child Protection, *Permanency Planning Policy 2012*; Department for Child Protection, *Reunification Policy 2012*; Department for Child Protection, *Contact Policy 2012*; Department for Child Protection, *Casework Practice Manual - Chapter 10: Planning for Children in Care*.

came into effect on 31 January 2011,⁴⁵ care planning decisions in this part of the Act were referred to as case planning decisions. The amendment was made to help avoid confusion between the term “case plan” (which is commonly used by officers of the Department to refer to general plans for families with whom the Department works) and a decision made in a “care plan”, which is reviewable by the Case Review Panel. For consistency, the Review recommends renaming the Case Review Panel the *Care Review Panel*.

Recommendation 15

The Case Review Panel established under section 92 should be renamed the Care Review Panel for consistency with amendments to the Act in 2011.

5.10 Tattooing, branding and body modification of a child

The State Solicitor’s Office suggested that a minimum age restriction should apply in relation to the tattooing or branding of a child irrespective of parental consent. The Department’s Child Protection Policy Unit also recommended that a new offence be created to prohibit a person from performing body modification procedures such as scarification, tongue splitting and beading for children under 18 years of age.

Background

Section 103 requires that written parental consent must be provided before a person may tattoo or brand a child under the age of 18 years. A breach of this provision may result in a fine of up to \$12,000 and imprisonment for one year.

New provisions came into effect in 2011⁴⁶ which introduced a complete prohibition on intimate body piercings for children under the age of 18, irrespective of parental consent. Children under the age of 18 years are permitted to have other forms of body piercing provided they have written parental consent. However, parental consent is not required for ear piercings provided the child is 16 years or over (see section 104A).

Apart from body tattooing, branding and body piercing, other forms of body modification have emerged as matters of concern including scarification, beading of the skin and tongue splitting. There are currently no provisions in the Act regarding body modifications of this type upon a child.

Discussion

A report to consider whether there should be an age restriction on piercing, branding or other forms of body modification was prepared for the Department in 2003.⁴⁷ Following extensive community consultation, no consensus could be reached on the appropriate age restrictions that should apply in relation to the tattooing, branding, piercing or body modification of children and young people.⁴⁸

The permanent nature of tattooing, branding and body modification provides additional justification for prohibiting a person from performing such procedures on children, who may not possess sufficient maturity to understand the long-term consequences of their decision, or whose parents may not be aware of the risks associated with them. The risks include infections, unwanted scarring, the body rejecting foreign materials and functional impairment

⁴⁵ *Children and Community Services Amendment Act 2010 (WA)*, s12.

⁴⁶ *Children and Community Services Amendment Act 2010 (WA)*, s67.

⁴⁷ Dutry D, *Community Consultation on Body Piercing and Tattooing*, Final Report (2003).

⁴⁸ *Ibid* 32.

(tongue splitting). However, there are also cultural reasons why the introduction of prohibitions or restrictions may be problematic. For example, some communities may perform scarification as part of a cultural practice. Arguably, prohibitions or age restrictions may also force the industry underground thereby going unchecked.

Variation in the relevant legislation of the other States and Territories reflects the complexity of the issues relating to restricting or prohibiting tattooing, branding and body modification.⁴⁹ Given the complex and emotive nature of the relevant issues, it would be prudent to further consult with interested parties prior to making any legislative change.

Recommendation 16

Consultation should occur to examine further regulation in respect of tattooing, branding or body modification practices, including consideration of introducing a minimum age for tattooing and branding.

6 MANDATORY REPORTING OF CHILD SEXUAL ABUSE

6.1 Background and legislative provisions

In Western Australia, the mandatory reporting of child sexual abuse by doctors, nurses, midwives, teachers and police officers was introduced on 1 January 2009 following a decades-long professional and public debate about its efficacy. These provisions are contained in Part 4, Division 9A. Under section 124B, the relevant professionals are required to report to the Department⁵⁰ a belief, formed on reasonable grounds in the course of their work (paid or unpaid), that a child:

- (i) has been the subject of sexual abuse which occurred on or after commencement day ("commencement day" was 1 January 2009); or
- (ii) is the subject of ongoing sexual abuse.

The Review is required to examine the operation and effectiveness of the mandatory reporting provisions under the Act.⁵¹

Mandated reporters have an obligation to report child sexual abuse. In 2011-2012, the Department received 17,148 child protection notifications, including 2,013 mandatory reports made directly to the Mandatory Reporting Service.⁵² The Mandatory Reporting Service was established within the Department's Crisis Care Unit to receive and process reports on behalf of the CEO of the Department. Once a mandatory report is received, if determined that further assessment of parental protectiveness is required, the report is referred to the relevant District for further inquiry and a child protection investigation if necessary. Districts investigate mandatory reports in the same way they investigate any other report of concern for a child, with priority given to high risk cases and all cases involving children under

⁴⁹ There are no legislative provisions in Tasmania and Northern Territory. NSW and the ACT require written parental consent to tattoo a child under 18 years of age; *Children and Young Person (care and Protection) Act 1998* (NSW) s230; *Children and Young People Act 2008* (ACT) s877. South Australia, Queensland and Victoria have completely banned the tattooing or branding of a child under 18 years; *Summary Offences Act 1953* (SA) s21A; *Summary Offences Act 2005* (QLD) s19(1); *Summary Offences Act 1966* (Vic) s42.

⁵⁰ Or to a person or class of persons approved by the CEO. The CEO has approved the following classes of person to receive mandatory reports on his behalf:

- the Officer in Charge and Operations Manager of the WA Police Child Abuse Squad;
- the Officer-in-Charge of the WA Police Child Assessment and Interview;
- a Principal of a State Government or Catholic school.

⁵¹ As amended by the *Children and Community Services Amendment (Reporting of Sexual Abuse of Children) Act 2008*.

⁵² Department for Child Protection, *Annual Report 2011-2012* (2012).

five years. Section 124D requires that the Department provides WA Police with a copy of each mandatory report received.

Other partner agencies assisting the Department to implement the legislation are the Department of Education, Department of Health, the Catholic Education Office WA, Association of Independent Schools WA (AISWA) and the Department of Education Services. To support the operational policy and procedures required to comply with the legislation, the Department developed memoranda of understanding with WA Police, the Department of Education, Department of Health, and the Catholic Education Office WA.⁵³ These agencies also play an important role in delivering professional development training to mandated reporters in partnership with the Department.

The State Solicitor's Office took the lead role in the drafting process for the *Children and Community Services Amendment (Reporting Sexual Abuse of Children) Bill 2007*, with input from relevant stakeholders. At the time, Western Australia was able to draw upon the experience of other jurisdictions where broad-based mandatory reporting models had resulted in overwhelmed and unresponsive child protection systems.⁵⁴ In developing the legislation, and during its passage through Parliament, there was considerable debate on a number of issues including whether and to what extent to define child sexual abuse, the range of professional groups who should be required to report and what the threshold for making a report should be.

The State Government provided total funding of \$68 million over four years for the introduction of mandatory reporting of child sexual abuse. Of this, the Department for Child Protection, as the lead agency responsible for implementing the legislation, received \$43.9 million. This enabled 53 additional child protection workers to be employed, and an additional 17.5 permanent staff for the operation of the Mandatory Reporting Service. The Department receives recurrent annual funding of approximately \$12 million for receiving and responding to mandatory reports of child sexual abuse.

6.2 Review considerations

When reviewing the mandatory reporting provisions, the Review took into account submissions received, legislative provisions in other Australian jurisdictions, the available data and research on mandatory reporting in both Western Australia and internationally, and resource considerations.

Fifteen submissions on mandatory reporting were received. Those submitted by the mandatory reporting partner agencies recommended amendments aimed at clarifying the current legislative requirements. While also making suggestions for broadening the range of persons required to report child sexual abuse, little supporting evidence was available. These issues are addressed in the sections that follow. General comments provided in other submissions suggested that:

- the current provisions be maintained;
- consideration be given to ways of strengthening the provisions to encourage reporting and protecting persons who make reports;

⁵³ The Department also has a memorandum of understanding with the Sexual Assault Referral Centre.

⁵⁴ Relevant reports available at that time included:

- Harries M, and Clare M, *Report for the Western Australian Child Protection Council, Mandatory Reporting of Child Abuse: Evidence and Options* (July 2002),
- Vardon C, *The territory as parent: review of the safety of children in care in the Act and of ACT child protection management* (2004).
- Queensland Crime and Misconduct Commission, *Protecting Children: An Inquiry into abuse of children in foster care, Report* (2004).

- lack of publicly available data has limited the ability to analyse whether mandatory reporting of child sexual abuse has made a difference to children's wellbeing and safety;
- decisions to extend or wind back existing mandatory reporting provisions should consider the potential benefits and challenges.

6.3 Persons required to report

The original decision to confine the child sexual abuse mandatory reporting requirements in Western Australia to doctors, nurses, midwives, teachers and police officers was made on the basis of the clinical assessment role/skills of the health sector professionals, and teachers and police officers being important points of initial contact and support to children who may disclose sexual abuse. The careful targeting of these professionals was a way of avoiding the mistakes of other jurisdictions which swamped their child protection systems with unsubstantiated cases potentially putting actual child victims at risk.

Submissions to the Review suggested extending the reporting requirements beyond these professionals. The arguments put for broadening the scope of mandated reporters were generally brief, based on the levels of contact certain occupational groups may have with children and young people, and those where relationships were considered more likely than others to elicit disclosures of sexual abuse or provide opportunity for forming a belief that abuse is occurring.

Suggestions for extending the categories of reporters focussed particularly on the education sector including music or language tutors, TAFE or vocational education and training lecturers and others in direct contact with students. The Department of Education Services, for example, argued:

School staff with potentially closer and more trusting relationships with students who are therefore possibly more likely to receive a disclosure or observe a change in behaviour include chaplains, special education assistants, boarding managers and school psychologists. More broadly there are other education sector staff upon whom the mandatory reporting obligation ought to rest ...for example, hostel staff employed at the nine residential colleges operated by the Country High Schools Hostels Authority.

Submissions from WA Police and the Departments of Education and Corrective Services varied as to who could be included, ranging from school psychologists, hostels and other boarding school staff. The Department of Corrective Services referred to the work of youth justice officers employed to administer the *Young Offenders Act 1994* and other youth justice services who work with vulnerable young people and families, many of whom are likely to be disengaged from mainstream services and unable or unwilling to access staff in the occupations currently required to report. These proposals were the subject of considerable discussion.

6.3.1 Deliberations

The questions below were considered against the backdrop of a) Western Australia's current child protection reporting system b) the available data and current research on the effectiveness of mandatory reporting and c) the submissions:

- Are there compelling reasons to broaden the requirements to specific groups or professionals in order to better protect children?
- If so, on what basis should decisions about who to include be made?
- What would be the implications of expanding the reporter categories?

The Reference Committee gave extensive consideration to these issues, and was also mindful of the *Special Inquiry into allegations of sexual abuse at St. Andrew's Hostel in Katanning* being conducted by the Hon. Peter Blaxell (Blaxell Inquiry).⁵⁵ This Inquiry examined the conduct and response of relevant public officials and government agencies in relation to repeated allegations of sexual abuse at St. Andrew's Hostel and related organisations between 1975 and 1990.

Following deliberations, the Reference Committee confirmed its support for the existing arrangements for the reporting of child sexual abuse, including persons required to report under the legislation, and for the continued improvement of policy and training regarding the reporting of abuse, in preference to expanding categories of mandated reporters.

6.3.2 Western Australia's current reporting system

As outlined in the Blaxell Inquiry,⁵⁶ there has been a very substantial shift in the societal response to child sexual abuse since the events at St Andrew's Hostel during the 1970s and 1980s, where reports of abuse went ignored by officials and community members alike, resulting in the sustained and systematic sexual abuse of students at the hostel. There is significantly increased awareness and reporting of child sexual abuse and improved systems for responding to abuse at a legislative, policy and service delivery level. Many of these reforms were driven by the State Government's Child Sexual Abuse Task Force in 1987.

In practice, all relevant government agencies and many non-government and community organisations now have robust child protection policies and guidelines requiring staff to report concerns and/or allegations of child abuse and neglect. Western Australia's current child abuse reporting system is supported by:

- legislation which protects persons who voluntarily report any form of child abuse and neglect (referred to in the Act as "notifiers") from criminal or civil liability or breach of professional codes or standards (s.129), and which enables information to be shared in the best interests of a child or children's wellbeing (s.23 and 24A);
- extensive casework practice guidelines⁵⁷ under which the Department responds in the same manner to concerns about children, whether they be from mandated or voluntary reporters;
- memoranda of understanding between the Department and partner agencies to improve coordinated service delivery and ensure that staff are aware of their professional duties in responding to child sexual abuse and other forms of child abuse or neglect; and
- professional training and community education.

6.3.3 Data and current research on the effectiveness of mandatory reporting

Proponents of mandatory reporting argue that it brings more cases of child abuse to attention than would otherwise occur.⁵⁸ It is likely that the ongoing training delivered by agencies has increased awareness among mandatory reporters of child sexual abuse, and child abuse and neglect more broadly, including the vital role these professionals and others play in the child protection system.

In all countries and states where mandatory reporting has been introduced, a significant increase in reports of suspected child abuse has been associated with increased awareness

⁵⁵ Blaxell P, *St Andrew's Hostel Katanning: How the System and Society Failed our Children, A Special Inquiry into the response of government agencies and officials to allegations of sexual abuse (2012)* tabled in the Western Australian Parliament on 19 September 2012 (Blaxell Report).

⁵⁶ Ibid Chapter 19.

⁵⁷ Available on line at <http://manuals.dcp.wa.gov.au/manuals/cpm/Pages/default.aspx>

⁵⁸ Mathews B P and Bross D C, 'Mandated reporting is still a policy with reason: empirical evidence and philosophical grounds, (2008) *Child Abuse and Neglect* 32(5), 511-516.

among the wider public and mandated reporters. Direct comparisons between the different mandatory reporting models cannot be made, however, because of the differing legislative and policy environments, together with differences in the range of mandated reporters and the types of abuse that must be reported. The Cummins Inquiry also noted the limitations on evaluating the effectiveness of mandatory reporting:

To date, there has been no comprehensive cross jurisdictional study of the performance of mandatory reporting schemes in Australian jurisdictions. Despite attempts by academics to gauge the performance of the mandatory reporting schemes in various Australian jurisdictions, including whether it has led to over-reporting, these have proven difficult due to a lack of qualitative and quantitative data, varying statutory definitions and categories of abuse and neglect, changes to recording and disposition practices over time, and different data reporting practices (Mathews, in Freeman 2011 in press, pp.14-15).⁵⁹

To address this deficit, the *Second 3 year action plan (2012-2015) of the National Framework for Protecting Australia's Children 2009 – 2020* has committed to "Research mandatory reporting schemes in each jurisdiction to identify elements that enhance their success."⁶⁰ Western Australia will contribute to this research, which is anticipated to be completed by the end of 2015.

The data available in Western Australia provides an overview of activities and outcomes resulting from mandatory reporting. The Mandatory Reporting Service records all the reports it receives, whether mandatory or non-mandatory reports.

- A "non-mandatory report" is a report that is either not related to child sexual abuse, does not meet the legislative threshold for a mandatory report to be made or was made by a person who was not a mandated reporter under section 124B.⁶¹
- One mandatory report can relate to one or more children.

During 2010-11, 2,285 reports were recorded by the Mandatory Reporting Service. Of these, 1,997 (87%) were mandatory reports and 288 (13%) were non-mandatory reports. Of the 1,997 mandatory reports, 1,448 reports (involving 2,101 children) required further action through "initial inquiries".

- Of the 2,101 children who were the subject of an initial inquiry, 803 children required further investigation through a safety and wellbeing assessment. At the time the data was extracted for reporting purposes, 615 of these assessments had been finalised: 30% were substantiated and 70% unsubstantiated.
- The overall substantiation rate for all categories of child abuse and neglect by all reporters (mandatory and non-mandatory) was 30%.

During 2011-12, 2,013 reports were recorded by the Mandatory Reporting Service. Of these, 1,728 (85%) were mandatory reports and 285 (15%) were non-mandatory reports. Of the 1,728 mandatory reports recorded, 1,191 reports (involving 1,898 children) required further action through initial inquiries (see Table 1 in Appendix 4).

- Police officers made the most mandatory reports (772), followed by teachers (448) and doctors (339). Teachers made the most non-mandatory reports (90) followed by doctors (83) and police (39).

⁵⁹ Cummins Inquiry (n 21) 345.

⁶⁰ Department of Families, Housing, Community Services and Indigenous Affairs, *Protecting Children is Everyone's Business: A national Framework for Protecting Australia's Children 2009-2020 – Second three-year action plan 2012-2015* (2012).

⁶¹ Non-mandatory reports are referred to the Department's District offices for further action.

- Of the 1,898 children who were the subject of an initial inquiry, 1,391 children required further investigation through a safety and wellbeing assessment (see Table 2 in Appendix 4 for a further breakdown). At the time the data was extracted for reporting purposes, 1,094 of these assessments had been finalised: 23% were substantiated and 77% were unsubstantiated.⁶²
- The overall substantiation rate for all categories of child abuse and neglect by all reporters (mandatory and non-mandatory) was 31%.⁶³

It is evident from the data that mandatory reporting of child sexual abuse has increased the number of reports/notifications to the Department and the number of investigations for child sexual abuse, but not the rate of substantiation:

- In the 2008 calendar year, before mandatory reporting came into effect, 1,677 sexual abuse notifications were received: 64% (1,067) proceeded to investigation of which 33% (350) were substantiated.
- In the 2011 calendar year, 3,674 sexual abuse reports and notifications were received; 68% (2,500) proceeded to investigation and 24% of these were substantiated (596).

The increase in reporting between 2008 and 2011 can be attributed to a number of factors including a 10% increase in the population of children aged 0 – 17 years since 2006, which rose from 481,846 in 2006 to 529,484 in 2011.⁶⁴ The number of mandated reporters would also have increased since 2009.

Closer examination of the Department's data shows that while a slightly greater proportion of sexual abuse notifications are made by mandated reporters than voluntary reporters (53% of sexual abuse notifications in 2011-12 came via the Mandatory Reporting Service, while 47% were made directly to the Department's Districts by voluntary reporters):

- mandatory reports are no more likely to proceed to a child protection investigation than non-mandatory reports (the same proportion of reports - 77% - from mandated and non-mandated reports respectively, proceeded to investigation in 2011-12); and
- mandatory reports are no more likely to be substantiated than reports of child sexual abuse from voluntary reporters ("notifiers").⁶⁵

The Western Australia data indicates that even with the current limited scope of mandated reporters a high proportion of reports are unsubstantiated (77% in 2011-12). This reflects the experience in other jurisdictions where many reports received are unsubstantiated when investigated. Expanding the categories of mandated reporters would result in greater volumes of reports including non-mandated reports, unsubstantiated reports or reports involving a level of harm to the child such that a protection response is unwarranted. There is a concern that the increase in reports resulting from extending mandatory reporting would have an adverse impact on the timeliness with which safety and wellbeing assessments across all types of abuse and neglect can be completed which would result in children being unprotected.

In a statement to the current Queensland Child Protection Commission of Inquiry, Professor Bob Lonne from the School of Public Health and Social Work, Queensland University of Technology, raises persistent concerns about mandatory reporting:

61. To my mind, the abolishment or major amendment of mandatory reporting would go a long way to reducing the enormous and unsustainable demand pressure on the statutory system. I understand the political context with relation to these measures

⁶² Department for Child Protection, *Summary Mandatory Reporting Information* (as at June 2012).

⁶³ Department for Child Protection, *Annual Report 2011-2012* (2012).

⁶⁴ See Australian Bureau of Statistics Census data for 2006 and 2011.

⁶⁵ Information provided by Information, Research and Evaluation, Department for Child Protection

but an historical analysis of the notification data shows that these legislative and policy measures have directly led to an overburdened and overwhelmed system (Harries & Clare 2002; Melton 2005).

62. Perhaps, more importantly, these measures have redirected the system away from helping people as the first response to instead making investigation of risk of harm as the primary intervention... [The] Wood Inquiry in NSW led to an alteration of the legislation to replace a deeply problematic system of receiving child protection notifications to instead reshape the benchmarks and shift practice away from investigation toward the provision of help and support. The AIHW report (2012) evidences the dramatic impacts on notification numbers from these changed arrangements.⁶⁶

In order to cope with increasing referrals, in 2010 New South Wales raised its legislative threshold for mandatory reporting of abuse from “risk of harm” to “risk of significant harm”.⁶⁷

The existing capacity to prescribe further education sector personnel as mandated reporters under the definition of “teacher” in 124A is noted, including lecturers involved in delivering vocational education and training courses for high school students, and music or language tutors.⁶⁸ The Review also notes that under the *Education and Care Services National Regulations 2012*, which came into effect on 1 August 2012, approximately 500 early childhood teachers will be appointed to child care services between 1 January 2014 and 1 January 2016, and become mandated reporters by virtue of a requirement for their registration under the *Western Australian College of Teaching Act 2004*.

In summary, with the limited data available, the Review is unable to determine with certainty the extent to which the mandatory reporting provisions are effective in providing greater levels of protection to children in Western Australia than voluntary reporting of child sexual abuse.

It is clear, however, that one of the most important investments for enhancing the protection of children is promoting a community standard that:

- child protection is a shared responsibility and,
- when an individual becomes aware of a child’s abuse or neglect, the matter should be reported to the relevant authorities regardless of whether or not there is a legal obligation to do so.

This should occur through continued commitment to multi-agency training, community education and awareness-raising and strengthening the existing collaborative arrangements between the responsible authorities.

Conclusion

The Reference Committee came to a view that, in light of the above, the availability of limited data and lack of empirical evidence, and in view of plans for national research on mandatory reporting, there should be no expansion of the categories of mandated reporters at this point in time. In doing so, the Reference Committee noted the Government’s response to the Blaxell Inquiry, the report of which was tabled in Parliament on 19 September 2012.

⁶⁶ Statement made on 16 August 2012 and available at <http://www.childprotectioninquiry.qld.gov.au/hearings/witnesses-and-statements>

⁶⁷ Section 27, *Children and Young Persons (Care and Protection) Act 1998 No 157*.

⁶⁸ Under paragraphs (c) and (d) of the definition of “teacher” in section 124A of the Act.

6.4 What should be reported

The term “sexual abuse” under section 124A:

“...includes sexual behaviour in circumstances where:

- (a) the child is the subject of bribery, coercion, a threat, exploitation or violence; or
- (b) the child has less power than another person involved in the behaviour; or
- (c) there is a significant disparity in the developmental function or maturity of the child and another person involved in the behaviour.”

Submissions addressing this issue recommended this provision be reviewed or amended to include additional categories of behaviour considered to constitute sexual abuse. The additional categories suggested included female genital mutilation, male circumcision without medical supervision, forced or arranged marriages for children and young people under 18 years and grooming behaviours such as exposure to sexual acts or pornography.

The Department of Education submitted that:

“The terms ‘sexual abuse’ and ‘sexual behaviour’ require clarification. For instance there is no reference to:

- *grooming through exposure to sexual acts or pornographic material;*
- *forced or arranged marriages for children under 16; or*
- *a statement regarding female genital mutilation.”*

WA Police suggested the term sexual abuse should include all sex offences against children contained in the *Criminal Code*, including sexual contact between young people who are close in age. They also recommended that:

“a special criterion for mandatory reporting of female genital mutilation be included in the legislation, irrespective of whether it is classified as sexual or physical abuse by the Department.”

In support of greater clarification the Association of Independent Schools WA, for example, noted that:

“The training provided to mandatory reporters focuses on the three categories provided in the Act. However, AISWA is concerned that mandatory reporters are not being provided with sufficient information on the Act to assist them in identifying possible child sexual abuse. ...teachers may not be reporting in all circumstances in which they are required.”

Discussion

The inclusive definition of *sexual abuse* provided in the legislation focuses on situations considered to:

- be abusive;
- include an element of coercion or an imbalance of power in the relationship;
- include significant disparity in the developmental functionality or maturity of the child and other person involved.

This approach was adopted in preference to specifying behaviours or activities that may constitute sexual abuse. There can be pitfalls in providing an overly prescriptive definition in the legislation, as it can raise more questions about what should be included in the definition and, more importantly, may inadvertently exclude behaviours or circumstances that ought to be included. It is noteworthy that most other jurisdictions provide even less guidance on the meaning of sexual abuse within their mandatory reporting legislation.⁶⁹

⁶⁹ Legislation in NSW and the Northern Territory being the exceptions.

Mandatory reporters should possess a sound understanding of what may constitute child sexual abuse and what they are therefore obliged to report. Professional development training for reporters is therefore critical.

Linking sexual abuse to sexual offences

In suggesting that sexual offences against children defined in the *Criminal Code* be included in the definition of child sexual abuse, WA Police raised particular concerns about sexual relationships between young people in regional and remote communities:

“Some mandatory reporting professionals in regional WA explained that they would not submit a mandatory report for sexual penetration occurring to a 13 year old child if they believed the other party was only a few years older”.

The WA *Criminal Code* criminalises sexual offences by and against children, particularly those under 13 years of age and between 13 and under 16 years. There is recognition, however, at least in Western societies, that some children under 16 years of age engage in sexual activity. For example:

- It is not an offence to prescribe contraception to children under 16.
- School places are available for young people who are pregnant and for young mothers wishing to complete high school.
- Explorative behaviour between children can fit within a spectrum of normal childhood development.

During drafting of the existing mandatory provisions consideration was given to a range of arguments presented by relevant stakeholders both in support of and against aligning the reporting of sexual abuse to conduct which constitutes an offence. These arguments included:

- If Parliament has decreed that certain conduct involving children constitutes a sexual offence it must also constitute child abuse.
- There are strong community expectations that professionals will report conduct which constitutes a criminal offence.
- It is not appropriate to require professionals to make judgement calls as to whether or not a child requires protection as a result of sexual activity. The recipient of the report has the option of deciding whether to take action.
- The scope of sexual abuse in mandatory reporting legislation in most other jurisdictions (e.g. Victoria, NSW, Queensland) is not linked to sexual offences in the *Criminal Code*, but rather to the grounds for child protection.
- Children may be less likely to seek medical or other assistance if all underage sexual activity must be reported: the *Gillick Principle*⁷⁰ recognises the emerging and varied capacities of young people to make decisions concerning their own welfare.
- Police are unlikely to prosecute adolescents who engage in sexual activity with each other, as it is unlikely to be in the public interest to do so.
- The intent of the legislation is to protect children, not to criminalise behaviours with peers or to stigmatise them. The legislation should be concerned with identifying children in need of protection services rather than drawing-in concerns for children based on morality or social behaviour.

The current inclusive definition of “sexual abuse” therefore seeks to place the mandatory reporting of child sexual abuse in a child protection rather than criminal justice context. As the arguments above still hold relevance, the Reference Committee considered this approach to be appropriate.

⁷⁰ See (n 34).

The Review shares the concerns of WA Police about the incidence of sexual activity occurring between children under 13 years of age. Questions of when sexual behaviour between similar aged children is abusive and when the behaviour is an indicator of possible abusive environments or experiences were raised. These complex issues cannot be solved through legislation - a cross-sector approach is required to effectively address them. The Review suggests there are interagency forums such as the Child Safety Directors' Group which could further consider this issue.

In relation to female genital mutilation (or female 'circumcision'), the Review shares the concerns expressed by WA Police and other agencies about this practice, which is considered by the Department to be a form of physical rather than sexual abuse. Female genital mutilation can cause permanent damage to the reproductive organs and has lifelong physical and psychological health implications for the individual, including impaired sexual functioning that may occur as a result. In the absence of a mandatory reporting requirement for female genital mutilation, WA Health has issued operational directives to its staff requiring the reporting of instances of the practice and situations in which girls are at risk. The Review notes the first prosecution under section 306 of the *Criminal Code (WA)* is currently underway.

With the exception of the Northern Territory, other States and Territories also view this practice as a form of physical abuse/harm/injury. Female genital mutilation is not a discrete category for mandatory reporting in other jurisdictions, although it is required to be reported as a form of physical abuse in accordance with the scope of their mandatory reporting legislation.

The Review considered whether a special criteria in the Act for the reporting of female genital mutilation could act as a deterrent to clinicians who may be performing the procedure in WA; deliver a clear message that female genital mutilation is not acceptable and is a child protection issue; and identify girls at risk of having the procedure so that preventive actions can be taken. It was thought this was unlikely/unnecessary, however, given that the Act enables the voluntary reporting of female genital mutilation and it is already an offence under section 306 of the *Criminal Code*.

In relation to forced marriages, it is noted that an amendment to the *Commonwealth Criminal Code* is currently being considered by the Federal Parliament, part of which will prohibit forced marriages. If passed, the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012* would criminalise forced marriage. The Bill takes into account that young people in particular are at risk in relation to forced marriage and recognises that "young people may be coerced, threatened or deceived into consenting to marriage."⁷¹

In summary, while submissions to the Review called for more clarification about what should be reported as child sexual abuse, this is considered best addressed through further development of training and guidance materials for mandatory reporters rather than legislative amendments.

In 2008 a Mandatory Reporting Training Professional Education Working Group⁷² was established in preparation for commencement of the provisions in January 2009. The interagency group continues to meet six weekly and conducts an active programme of metropolitan and regional information sessions for mandated reporters. Fifty-four information

⁷¹<http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/Second%20Quarter/30-May-2012---New-laws-to-crack-down-on-forced-marriage,-people-trafficking,-slavery-and-organ-trafficking.aspx>, accessed 9 August 2012

⁷²Membership includes the Department, WA Police, Department of Education, Department of Health, the Catholic Education Office, the Association of Independent Schools and the Department of Education Services.

sessions were delivered to over 880 mandated reporters during 2011-12. The individual agencies also provide training, policy and practice guidelines on the mandatory reporting requirements. This forum facilitates collaboration on the training messages and strategies used to keep mandated reporters informed of their legislative obligations.

6.5 The threshold for making a report

The legislation requires mandated professionals to report child sexual abuse in the following circumstances:

- if a person who is a mandated reporter believes on reasonable grounds that a child has been the subject of sexual abuse on or after commencement day (1 January 2009), or is the subject of ongoing sexual abuse; and
- if the person forms the belief in the course of the person's work (whether paid or unpaid) as a doctor, nurse, midwife, police officer or teacher – section 124B(1).

Submissions⁷³ called for clarification on what 'forming a belief on reasonable grounds' means, with some suggesting this be provided in the legislation. WA Police, for example, consider the Act should either clarify what the grounds for forming a belief are, or consideration should be given to lowering the threshold from 'belief' to 'suspicion'. The Department of Education Services and AISWA also raised the issue of what evidence may be required to form a belief:

"Based on the events occurring in schools, in a few cases belief is not being established until concrete evidence has been obtained, potentially jeopardising further investigation through DCP and Police. The opposite also occurs in schools, where reporters have not submitted a mandatory report when one probably should have been." (AISWA).

Discussion

The mandatory reporting schemes in each State and Territory differ significantly in scope and reporting thresholds. In general terms, however, the following thresholds for reporting child abuse apply: Victoria, the ACT and the Northern Territory require reporters to form a "belief" on reasonable grounds that abuse is occurring; NSW and South Australia require reporters to have a "suspicion" on reasonable grounds; and Tasmania requires a reporter to "believe or suspect" on reasonable grounds, or know, that a child has been or is being abused. Queensland's mandatory reporting requirements are covered under several pieces of legislation and the terminology used to determine thresholds differs. For example in the *Child Protection Act 1999* a person is required to report "harm or suspected harm" but the *Public Health Act 2005* requires reports where a doctor, or registered nurse becomes aware, or "reasonably suspects" abuse.

The legislative thresholds in the majority of mandatory reporting schemes require individual judgement to be made. Requiring reporters to form a belief rather than a mere suspicion is a higher threshold, and any lowering of this would undoubtedly result in increased reporting. The Cummins Inquiry noted observations of the NSW Wood Inquiry when recently considering the grounds for mandatory reporting in Victoria:

*"The Wood Inquiry observed that lower thresholds for reporting can precipitously trigger a statutory intervention in a child and child's family life that is, in and of itself, a serious matter."*⁷⁴

⁷³ AISWA, CEOWA, Department of Education Services and WA Police.

⁷⁴ Cummins Inquiry (n 21) 348.

This general observation sits alongside the potential resource implications of increased reporting. For these reasons the Review considers the current threshold for reporting on a “reasonable belief” to be appropriate.

In relation to providing further legislative guidance on the grounds for forming a belief, the Review notes that section 186 of Victoria’s *Children, Youth and Families Act 2005* defines “grounds for belief” as (a) a matter of which a person has become aware; and (b) any opinions based on those matters. While an amendment of this nature could be made, its educative value would be questionable. The Review regards this issue as more a training than legislative one. If further work is required to assist mandated reporters in this regard, it is recommended training materials be reviewed by the Mandatory Reporting Training Professional Education Working Group previously referred to.

6.6 Confidentiality provisions

Submissions reported concern about the number of exceptions under section 124F(2) which enable a reporter’s identity to be disclosed for certain purposes set out in paragraphs (a) to (k). AISWA submitted:

“the most common question asked at training concerns the confidentiality of the reporter’s identity. The fear that teachers have about this issue is well founded on reading s.124F. In its current form this section gives Police and DPP wide latitude to disclose the reporter’s identity ‘for the purpose of, or in connection with an investigation...or the conduct of a prosecution...”.

It was also reported that trainers are aware of practices involving the routine disclosure of identifying information about reporters during investigations or prosecutions of child sexual abuse.⁷⁵ It was suggested that these concerns may be undermining trainers’ and reporters’ confidence in the laws.

Discussion

Section 124F prohibits a person who becomes aware of a reporter’s identity, during the course of duty, from disclosing “identifying information” about the reporter to another person unless the disclosure is permitted in any of the circumstances set out under subsection (2) of that section. “*Identifying information*” includes information that is likely to lead to the identification of the report or from which the identity of the reporter could be deduced (s.124A). The circumstances in which identifying information about a reporter may be disclosed include:

- for the purpose of or in connection with performing a function under the Act;
- disclosures to or by a police officer for the investigation of a suspected offence or prosecution of an offence in relation to the child; and
- disclosures by an officer of the Department for the purposes of protection proceedings or proceedings under family law legislation.

These provisions mirror those under section 240 of the Act which provide for the protection of a “notifier’s” identity. A “notifier” is any person other than a mandatory reporter who in good faith provides the Department with information that raises concerns about a child. The circumstances under which the disclosure of a notifier’s identity is permitted under section 240 were broadened at the same time as the mandatory reporting amendments came into effect. The broader range of exceptions were considered necessary for both sections 124F and 240 to enable the Department to properly carry out its functions, particularly during the course of protection proceedings where the disclosure of a reporter’s identity may be required to protect a child.

⁷⁵ AISWA; Catholic Education Office.

Conclusion

The concerns raised in relation to confidentiality of reporters' and notifiers' identities are acknowledged. However, the legislation needs to balance the rights of reporters and notifiers to confidentiality, with the protection and wellbeing of children, whose best interests are at the heart of the Act and the child protection system, and the need for related authorities to be able to properly carry out their functions. It is noted that the Department is currently liaising with WA Police and the Director or Public Prosecutions to ensure the confidentiality provisions are properly complied with to protect reporter and notifier identities in all but the most necessary of circumstances.

6.7 Terms used

6.7.1 Police

Section 3 of the Act currently defines "police officer" as having the meaning given in section 3 of the *Protective Custody Act 2000*. The Review notes that this definition has been made redundant by amendments under the *Police Amendment Act 2008* which removed definitions of police officer from various WA statutes in favour of a reliance on the definition provided in the *Interpretation Act 1984*. Advice from WA Police indicates that these changes have not changed the scope of the police officers who hold powers or obligations under the Act. In view of these developments there is no need for the Act to contain its own definition of police officer.

6.7.2 Teacher

Some submissions suggested the definition of "teacher" provided under section 124A is overly complex and resulting in confusion as to which teacher groups have reporting obligations. "Teachers" with current reporting obligations under the Act are:

Paragraph (a) - "provisionally registered" or registered teachers, and persons with "limited authority to teach" under the *WA College of Teaching Act 2004*;

Paragraph (b) - teaching staff appointed to a community kindergarten; and

Paragraph (e) - teachers of detainees in youth detention centres.

Paragraphs (c) and (d) of the definition of teacher refer to:

- (c) persons who provide instructions in a course mentioned in specified sections of the *School Education Act 1999*, who are prescribed in regulations; and
- (d) persons who instruct or supervise students participating in an activity which is part of certain school educational programmes under an arrangement mentioned in section 24(1) of the *School Education Act 1999* who are prescribed in regulations.

The Department of Education Services correctly observed that regulations have not yet been made under these paragraphs and argued there is potential for further complexity should regulations be contemplated in the future.

The Review acknowledges the definition of teacher is not easily accessible to the lay person. It does, however, accurately capture the specific groups intended for the purposes of the mandatory reporting requirements. If mandatory reporting was to be extended within the education sector in the future, beyond the current groups in the definition, there could be opportunity for a simpler definition to be provided.

Confusion about the persons required to report as a "teacher" is concerning. However, it is incumbent upon the relevant government agencies to ensure that publications and training materials on the mandatory reporting requirements are clear and based on informed

interpretation of the provisions. This position was supported by the Reference Committee following discussion.

Recommendation 17

The definition of police officer under section 3 should be repealed.

Recommendation 18

The existing provisions for the reporting of child sexual abuse under the Act should be retained, with the exception of Country High School Hostels Authority staff being made mandated reporters of child sexual abuse as announced by the Government in response to Recommendation 3 of the Blaxell Inquiry.

Recommendation 19

Mandated reporters should be provided with further guidance on:

- *persons currently required to report under the definition of teacher;*
- *the range of behaviours that may constitute sexual abuse of a child; and*
- *how and when a report is to be made.*

Recommendation 20

Agencies should continue to support appropriate reporting of all forms of child abuse and neglect through the ongoing development and implementation of operational policies, guidelines and training.

7 PROTECTION PROCEEDINGS

7.1 Promoting the use of conference based processes in the Children's Court

There is significant research that recognises the benefits of using conferencing-based approaches to decision-making in child protection matters to create positive working relationships between the Department, parents and other professionals and to encourage participation of children.⁷⁶ Several recent reports have recommended less adversarial processes for child protection matters.⁷⁷

In 2008, the Department implemented the Signs of Safety framework, which continues to assist child protection workers to work more collaboratively with children, their families and relevant service providers. In June 2011, an independent evaluation of the Signs of Safety Pilot assessed the effectiveness of the framework's use in lawyer assisted pre-birth meetings and court ordered pre-hearing conferences.⁷⁸ As noted in Legal Aid's submission: *"the independent evaluation of the Signs of Safety Pilot identified that:*

- *Families are attending, engaging and feeling supported and heard;*
- *Families perceived the meetings and conferences are proceeding in a procedurally fair manner;*

⁷⁶ See for example Chapter 12 NSW Commission Report (n 10); Legal Aid Queensland *Policy Evaluation Report on Family Group Meetings* (2007) "A step in the right direction"; *An Evaluation of the "Strengthening Families" Frame Work within Child Protection* West Berkshire Council (2006).

⁷⁷ See for example NSW Commission Report (n 10); Victorian Ombudsman *Own Motion Investigation into the Department of Human Service Child Protection Program* (November 2009); *Cummins Inquiry* (n24) recommendation 60.

⁷⁸ Howieson J and Legal Aid WA, *Pilot of Signs of Safety Lawyer-assisted Conferences and Meetings, Final Evaluation Report* (June 2011).

- *There is a high level of appreciation for inter professional collaboration;*
- *Professionals perceive an improvement in their ability to work in a team and share decision making with other professionals;*
- *The role of lawyers is valuable in ensuring families perception of procedural fairness and for reality checking, option generation and support...*

In light of the positive outcomes related to the Signs of Safety Pilot, Legal Aid's submission recommended a conferencing based approach to protection applications, where practicable to do so. The Family Inclusion Network of WA and Women's Law Centre of WA also expressed a preference for a less adversarial approach to protection proceedings.

Although the context is different, it is worth noting that Part IIIB of the *Family Law Act 1975 (Cth)* encourages the Family Court to promote less adversarial approaches in the resolution of family law matters.

In performing the functions of the Act, the CEO must have regard to the need to encourage a collaborative approach between public authorities, non-government agencies and families in the provision of services and in responding to child abuse and neglect.⁷⁹ The Signs of Safety framework reflects the implementation of this obligation in practice. In protection proceedings, it is largely for the Court to determine its own practice and procedure within certain legislative parameters. Currently, section 136(1) provides the Court with the discretion to "at any time in the course of child protection proceedings make an order referring the application the subject of those proceedings to a conference." However, to encourage the use of section 136(1), and further the progress towards a less formal approach to addressing child protection concerns, the Review recommends the inclusion of a principle in section 145 that supports the use of less formal collaborative strategies in protection proceedings.

Recommendation 21

Section 145 should include a principle that protection proceedings should be conducted in a way which promotes co-operation and consensus, wherever possible.

7.2 Legal representation of children

7.2.1 Basis of separate legal representation of children in protection proceedings

Background

Section 148(2) allows the Court to order that a child have separate legal representation in protection proceedings where it appears that "the child ought to have separate legal representation". If the Court determines that a child "has sufficient maturity and understanding" to instruct a legal representative and the child wishes to do so, the child's separate legal representative will act on instructions (referred to as "direct representation").⁸⁰ In all other circumstances, a separate legal representative appointed to a child will act in accordance with the best interests of the child (referred to as "best interests' representation").⁸¹

⁷⁹ *CCS Act (n 30) s21(2)(b)*.

⁸⁰ *CCS Act (n 30) s148(4)*; Child protection legislation in Victoria and South Australia is similar to Western Australia. If the Court appoints a separate legal representative to a child, that representative is required to act on instructions: unless the child is not capable of instructing (SA); or if the child is mature enough to instruct (VIC). *Children's Protection Act 1993 (SA)* section 48(2), and *Children, Youth and Families Act 2005 (Vic)* section 524, respectively.

⁸¹ *CCS Act (n 30) s148(4)*.

Section 148 was included in the Act to reflect the recommendations in the *Report of the Committee on Legal Representation for Children in Care and Protection Proceedings 1996 (WA)*. The current approach to legal representation of children in protection proceedings is consistent with the legislation in NSW, the recommendations of the Cummins Inquiry and the Victorian Law Reform Commission report.⁸² The right of a child who possesses sufficient maturity and understanding to instruct his or her representative is also consistent with Articles 9 and 12 of the *United Nations Convention on the Right of the Child 1991 (UNCROC)*.

Issue

Legal Aid submitted to the Review that there is a lack of consistency in court practice when assessing a child's capacity to instruct a legal representative, and suggested this reflects a lack of guidance for the Court in applying these sections. The Department's Legal Practice Services also submitted that section 148 needs review.

Discussion

Seventy-six percent of children who entered the care of the CEO in 2011-2012 were under the age of 10 years.⁸³ Clearly not all children entering care will have sufficient maturity and understanding to instruct a legal representative, and others may not want to. In practice, it is understood that some Magistrates are directing legal representatives to act on the instructions of children as young as 7 or 8 years of age.

The introduction of an age which attracts a rebuttable presumption would act as a general guide for Magistrates assessing whether or not a child has sufficient maturity and understanding for the purposes of section 148.⁸⁴ The Review acknowledges that various factors other than age will affect a child's maturity and understanding, including development of cognitive ability, trauma experienced and the levels of anxiety or stress a child may be experiencing in facing the court process.⁸⁵ For this reason, the introduction of a rebuttable presumption should be coupled with the development of guidelines to assist the Court and lawyers acting as a child's representative to determine whether the child is capable of giving instructions and provide criteria by which a presumption about capacity can be rebutted.

Guidelines around assessing a child's capacity to instruct a legal representative in protection proceedings would:

- contribute to more consistent decision-making by the Courts;
- create clear steps outlining what is required to refute a presumption of capacity (or lack of capacity); and
- reduce the incidence of lawyers who commence acting as direct representatives, and subsequently act as a best interests' representative.

Determining the appropriate age to implement a rebuttable presumption of capacity is not straightforward. In 2007, NSW changed the age at which a child is presumed to have capacity from 10 to 12 years old. The NSW Government stated that this change occurred as a consequence of:

"child development evidence that most 10 and 11 year olds are incapable of understanding the legal ramifications of their instructions, and the intricacies of legal

⁸² Cummins Inquiry (n 21) 15.3.8; Victorian Law Reform Commission, *Protection Applications in the Children's Court*, Final Report, No. 19 (June 2010) [proposals 2.16 and 2.17].

⁸³ Department for Child Protection, *Annual Report 2011-2012* (2012).

⁸⁴ Similar to the position in NSW where children 12 years or older are presumed to have the capacity to instruct a lawyer, whilst child children under the age of 12 are presumed to be incapable of instructing; *Children and Young Persons (Care and Protection) Act 1998 (NSW)* s99B.

⁸⁵ Cummins Inquiry (n 21) 15.3.1.

procedure in care matters and the various legal, procedural and jurisdictional issues that may arise.”⁸⁶

The Cummins Inquiry recommends the benchmark for capacity should be 10 years of age because it is broadly consistent with other States and Victoria’s criminal jurisdiction.⁸⁷ The age of criminal responsibility in Western Australia is also 10 years.

Recommendation 22

(a) The current model for legal representation of children in protection proceedings should be maintained. An age that attracts a rebuttable presumption that a child has ‘sufficient maturity and understanding’ to instruct a legal representative should be introduced.

(b) Relevant stakeholders should develop guidelines to:

- assist practitioners and the Court in assessing a child’s capacity to instruct a legal representative; and*
- provide criteria by which the presumptions about capacity can be rebutted.*

7.2.2 Prescribing the roles and responsibilities of a child’s legal representative

Ensuring that a child understands the basis of his or her legal representation is a critical step in representing a child. This is especially the case in circumstances where the model of representation is not consistent with the expectation of the child.⁸⁸ Section 10 sets out the principle of child participation. It is suggested this section could be used as a basis for developing guidelines for practitioners. Outlining the roles and responsibilities of a separate legal representative acting on behalf of a child would:

- assist practitioners to understand the intricacies of representing some of the most vulnerable children in the State; and
- promote consistent and quality representation of all children in protection proceedings.

Further, once a child is assessed as having ‘sufficient maturity and understanding’ to instruct their legal representative, they should have the opportunity to make an informed decision about the basis on which they wish to be represented.

Recommendation 23

Guidelines should be developed to place minimum standards and responsibilities on legal representatives acting for children in protection proceedings.

7.2.3 Conveying the views of a child to the Court

Legal Aid proposes the Act create an obligation on the legal representative of a child to ensure that the Court is informed of any views the child has in relation to the matters in issue. Including an express provision in the Act that ensures the Court is informed of the child’s views would bring Western Australia in line with the other States and Territories,⁸⁹

⁸⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 October 2006 (Reba Meagher, Minister for Community Services).

⁸⁷ Cummins Inquiry (n 21).

⁸⁸ See page 332 of Cashmore J & Bussey K, *Perceptions of Children and Lawyers in Care and Protection Proceedings*, *International Journal of Law and The Family* 8 (1994), 319 – 336, “Most Children, including the younger children, expected their lawyer to represent their views in court, either as an advocate for their case or as an interpreter, expressing their views more effectively than they could.”

⁸⁹ With the exception of Victoria, all other states and territories in Australia require the views and/or wishes of a child, to be put before the Court, irrespective of the basis of that child’s representation; *Children and Young Persons (Care and*

as well as strengthening compliance with Article 12 of the *UNCROC*. Article 12 requires State Parties to give due weight to a child's views in accordance with their age and maturity and to that end enable a child to be heard in judicial and administrative proceedings affecting the child.

Recommendation 24

Section 148 should place an obligation on any legal representative acting on behalf of a child in protection proceedings to convey to the Court the child's wishes and views, as far as is practicable. This obligation should exist regardless of whether the child's legal representative is acting on instructions or in the best interests of that child.

7.2.4 Terms used

A child representative appointed to act in the Children's Court may act on a different basis to an 'independent children's lawyer' in the Family Court (WA and Cth).⁹⁰ To assist families and professionals to understand there may be differences in the way children are represented in these jurisdictions, the Act should use the term child representative.

Recommendation 25

A legal practitioner appointed to act on behalf of a child in protection proceedings should be known as a "child representative".

7.3 Streamlining conduct of concurrent proceedings in the Family Court and Children's Court

Legal Aid's submission recommended streamlining the conduct of concurrent proceedings in the Family Court and Children's Court, and allowing the Children's Court to make interim "live with" or "spend time with" orders pending the Family Court's decision on parenting orders.

The jurisdictions of the Children's Court and the Family Court intersect in a number of cases involving the wellbeing of children. For example, the Department may commence protection proceedings, but subsequently discover a member of the family who is willing and able to care for the child. In these circumstances, the responsible adult may be referred to the Family Court to make an application for a parenting order.⁹¹ Concurrent or duplicate proceedings in these cases:

- may create delays in the resolution of child welfare issues;
- are costly and stressful for families;
- sometimes require victims of violence to re-tell their story multiple times; and
- are an ineffective use of court resources.⁹²

Protection) Act 1998 (NSW) s99D(b); Care and Protection of Children Act 2012 (NT) s146(6)(b); Child Protection Act 1999 (Qld) s110(3)(b); Children's Protection Act 1993 (SA) s48(3); Children, Young Persons and Their Families Act 1997 (Tas) s56; Court Procedure Act 2004 (ACT) s74E(2). In Victoria the Children, Youth and Families Act 2005 (VIC), s254(11)(b) provides that where a lawyer is representing a child based on a best interests' model, to the extent that it is practicable, must communicate to the Court the instructions given, or the wishes expressed, by the child.

⁹⁰ *Family Court Act 1997 (WA) s165; Family Law Act 1975 (Cth) s68LA.*

⁹¹ For a case example see *MJL v CEO of Department for Child Protection*[2010] WASCA 69.

⁹² Australian Law Reform Commission & New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, Final Report 2010 [19.32 – 19.43].

Cross-jurisdictional issues are further complicated by limitations on the exchange of information between key parties. This issue is less prominent in Western Australia than other States due to:

- the implementation of a memorandum of understanding between Legal Aid, the Family Court and the Department in 2007;
- the Department's decision to locate a senior child protection worker at the Family Court in 2008.⁹³

The Review acknowledges that there is substantial justification for streamlining the processes between the two courts. However, as noted by Legal Aid:

"The stakeholders in Western Australia are currently consulting with each other to better integrate the management of child welfare issues in family law and child protection in Western Australia, including the exploration of the option of unification of the child welfare jurisdictions of the Family Court and the Children's Court."

The Family Court of WA has commissioned a report, currently being prepared, to address the relevant issues and make recommendations on these matters in consultation with stakeholders.

Legal Aid's submission also suggests the Act be amended to enable the Children's Court to make interim 'live with' and 'spend time with' orders. As illustrated by the facts in some cases,⁹⁴ some Magistrates in the Children's Court are of the opinion that the Act already provides them with the authority to grant interim 'live with' and 'spend time with' orders. In any event, this issue is likely to be addressed in discussions in relation to streamlining the procedures of both courts in cross-jurisdictional child welfare issues. The Review agrees that it may be appropriate for the Children's Court to be able make interim "live with" and "spend time with" orders. These types of orders may potentially contribute to bridging the gap where proceedings are originally commenced in the Children's Court, but are subsequently referred to the Family Court.

Recommendation 26

The Department should continue to work with stakeholders to establish a more streamlined system for managing cross-jurisdictional issues between the Children's Court and the Family Court.

8 EMPLOYMENT OF CHILDREN (PART 11)

The Department's Child Protection Policy unit recommended that an exemption be made in regulations under section 191(4)(c) to allow children aged 13 years or above to engage in work at registered horse riding schools.

Background

The Act places prohibitions on the employment of children under the age of 15 years in a business, trade or occupation carried on for profit (section 190). A number of exceptions to this prohibition are provided, for example those allowing children less than 15 years of age to work in a shop or restaurant between certain hours and with the written permission of a parent.

⁹³ Barnett C, The role of the Department for Child Protection in the Family Court of Western Australia, speech delivered to National Child Inclusive Practice Forum [Perth] 22 November 2010.

⁹⁴ See *MJL* (n 98).

Currently, the Act does not allow children to work at horse riding schools, whether for payment or on a voluntary basis. It is customary within horse riding schools to enable children to volunteer or receive free riding lessons in lieu of working in the stables, as children often appreciate the extra exposure to horses.

The Department of Commerce has successfully prosecuted a local horse riding school (Avonlea Farm Riding) for employing a child under 15 years of age in breach of the Act. Following the prosecution, the owner of the horse riding school wrote to the Minister for Child Protection questioning the legislation and requesting that the issue be reviewed.

Laws elsewhere in Australia do not rule out work of this nature. The ACT and Victorian employment of children legislation uses the idea of children undertaking “light work” as a focus, rather than prohibiting all work and providing exceptions. Light work is defined in section 793(b) of the *Children and Young People Regulation 2009 (ACT)* and section 5 of the *Child Employment Act 2003 (Vic)*.

Discussion

A number of pros and cons, outlined below, were considered in assessing the appropriateness of an exemption in regulations to allow children aged 13 years and above to work in registered riding schools, between 6am and 10pm and with the written permission of a parent of the child.

Children aged between 13 years and less than 15 years have been granted exemptions under section 191(4) to undertake delivery work and to work in a shop, other retail outlet or restaurant. The rationale is that they generally have the capacity to comply with safe work practices and the maturity to work independently without parental supervision.

Registered riding schools have a range of safety measures in place including appropriate safety riding equipment, horses with easy-going temperaments that are suitable for being around children, training provided on dealing with horses safely, appropriate levels of insurance cover and the requirement for adult workers to have a Working with Children Check.

Parents who allow their children to be around horses are aware of the risks and the appropriate measures for mitigating them. Parents must take responsibility for allowing their children to participate in this type of workplace, just as other parents give permission for children to work in places where there may be inherent dangers – for example, the hot oil used in making chips at fast food outlets.

Overall, it is considered reasonable for children who have reached 13 years of age to undertake work or activities at registered horse riding schools (for the reasons stated above).

Recommendation 27

An exemption should be provided in regulations made under section 191(4)(c) to enable children who have reached 13 years of age to be employed (or engaged in work) by a registered horse riding school where:

- *written parental consent is provided; and*
- *the work occurs outside school hours but between the hours of 6am and 10pm.*

9 OTHER ISSUES

9.1 Parental Support and Responsibility Act 2008

Background

Introduced by the Gallop Government in 2005, the *Parental Support and Responsibility Act 2008* (PSR Act) came into effect on 28 March 2009. The objects of the PSR Act are to:

- (a) *acknowledge and support the primary role of parents in safeguarding and promoting the wellbeing of children; and*
- (b) *support and reinforce the role and responsibility of parents to exercise appropriate control over the behaviour of their children* (section 5(1)).

The PSR Act aims to achieve these objects by enabling an authorised officer of the Department for Child Protection, Department of Education or Department of Corrective Services to enter into a responsible parenting agreement (agreement) with a parent to assist the parent to better manage the behaviour of his or her child. In the event a parent does not comply with or refuses to enter into an agreement, an authorised officer may apply to the Children's Court for a responsible parenting order (order) to require the parent to attend counselling or take certain other measures in relation to the child.

Discussion

The PSR Act has had limited success in achieving its aims in that no orders have been applied for by the relevant government agencies. Reasons for under-use of the legislation include overly prescriptive information sharing provisions as well as previous reluctance to use agreements by parents and workers because they had been seen as a pathway to punitive orders. The PSR Act is also limited in that it applies only in relation to young people under 15 years of age, and agreements can only be made with 'parents at law'. There is also some discomfort with pursuing court orders where agreements fail or parents refuse their uptake, rather than providing support to families experiencing difficulty with their children's behaviour – even if that demonstrates lack of parental obligation.

The Review provides an opportunity to achieve a more effective legislative framework in responding to responsible parenting issues. It is proposed the Act be amended to enable the making of agreements. This would require repeal of the PSR Act and provide an opportunity to remove the current age restriction to enable supports to be provided to families through agreements. It would also enable the strengthened information sharing provisions of the Act to be used, providing for greater coordination and cooperation around information sharing between government and non-government agencies. Other amendments could include:

- a new object of the Act, transferred from the PSR Act: To support and reinforce the role and responsibility of parents to exercise appropriate control over the behaviour of their children;
- an agreement being made not only with parents, but also available to a responsible person, with whom the child lives and who has day to day care of the child; and
- provision for bilateral and multi-lateral agreements involving two or all three of the Departments of Child Protection, Education and Corrective Services, to facilitate a joint agency (cooperative) response to families;
- broader powers of delegation for CEOs, to provide greater flexibility for managing agreements in the education sector than is currently available under the PSR Act; and
- use of the existing information sharing provisions under section 24A of the Act, which enable prescribed public authorities to share information relevant to the wellbeing of a child or class or group of children.

This reform would align agreements more comfortably with the Department's objects and functions under the Act, resulting in greater clarity of roles between its parent support and child protection roles.

Recommendation 28

- (a) The Act should provide for responsible parenting agreements to be an additional measure available to the CEO under section 32.*
- (b) The objects of the Act should include to support and reinforce the role and responsibility of parents to exercise appropriate control over the behaviour of their children.*
- (c) Additional amendments related to responsible parenting agreements should include:*
 - the capacity for bilateral and/or multilateral agreements involving two or more of the three government agencies;*
 - the capacity for agreements to be made with parents or other persons with day to day responsibility for a child;*
 - an enhanced principle of cooperation between government agencies.*

Appendix 1 - 2012 Review of the *Children and Community Services Act 2004*: Summary of key provisions

Legislative review

Section 249 of the *Children and Community Services Act 2004* (the Act) requires the Hon. Robyn McSweeney MLC, Minister for Child Protection, to carry out a statutory review of the Act during 2012. The review must include a review of provisions for the mandatory reporting of child sexual abuse by certain professionals which have now been in operation for 3 years. The Department for Child Protection (the Department) is undertaking the review on the Minister's behalf, with the assistance of a Legislative Review Reference Committee which includes representatives from key government stakeholders and the community services sector.

This paper provides a brief overview of the Act to assist individuals and organisations who may be interested in making a written submission to the review.

For a comprehensive overview of the Department's activities and performance indicators, including supporting statistics, readers are also referred to the Department's Annual Report 2010/2011 which is available on the Department's website under "Resources" at www.dcp.wa.gov.au.

The **terms of reference** of the review are to examine the operation and effectiveness of the Act with particular reference to:

- the objects of the Act set-out under section 6; and
- the mandatory reporting provisions under Part 4 Division 9A.

The "objects" of an Act outline the underlying purposes of the legislation. The objects of the Act under section 6 are:

- (a) *to promote the wellbeing of children, other individuals, families and communities; and*
- (b) *to acknowledge the primary role of parents, families and communities in safeguarding and promoting the wellbeing of children; and*
- (c) *to encourage and support parents, families and communities in carrying out that role; and*
- (d) *to provide for the protection and care of children in circumstances where their parents have not given, or are unlikely or unable to give, that protection and care; and*
- (e) *to protect children from exploitation in employment.*

These objects are achieved through the operation of the various provisions in the Act. Each section of the Act contributes to achieving one or more of the objects. For example, the sections of the Act that most directly relate to providing "*for the protection and care of children in circumstances where their parents have not given, or are unlikely or unable to give, that protection and care*" are found in Part 4. However, these sections are supported by the requirements in many other Parts of the Act, such as the *Principle of child participation* in section 10, the *Aboriginal and Torres Strait Islander Child Placement Principle* under section 12 and the *Confidentiality provisions* contained in Part 10 of the Act which work to support the reporting of child abuse.

Background

The Act was passed by Parliament on 23 September 2004 and came into effect on 1 March 2006,¹ replacing child welfare laws in Western Australia that were over fifty years old. The Department for Child Protection is the agency principally assisting the Minister for Child Protection in the administration of the Act.

¹ Section 102 of the Act, which is the serious offence of leaving a child unsupervised in a car, was proclaimed earlier than the rest of the Act and became law in WA on 22 January 2005.

The Act was developed following extensive consultation with a broad range of government, non-government and community stakeholders, both prior to and during the drafting of the Bill.² There was also considerable debate about the Bill during its passage through Parliament, which resulted in a number of amendments being made. The Bill and the debate recorded in Hansard can be accessed on the Parliament's website at www.parliament.wa.gov.au.

Since its commencement six years ago, the Act has been closely monitored and a number of substantive and operational amendments have been made to improve its effectiveness. Amendments introducing new initiatives have also been made, for example the introduction of mandatory reporting of child sexual abuse in 2009, and in 2011, the establishment of a secure care facility for children and young people at extreme risk.

These amendments were made under the following legislation:

- The *Children and Community Services Amendment (Reporting Sexual Abuse of Children) Act 2008* introduced provisions for the mandatory reporting of child sexual abuse by certain professionals and came into effect on 1 January 2009. These can be found in Part 4, Division 9A of the Act, and information about how the provisions are implemented can be accessed at the Department's mandatory reporting website under "Resources" www.mandatoryreporting.dcp.wa.gov.au.
- The *Children and Community Services Amendment Act 2010* came into effect on 31 January 2011 and introduced a suite of amendments including protection orders (special guardianship), body piercing prohibitions and provisions for the making of secure care arrangements for children at high risk. A summary of these amendments can be accessed on the Department's website under "Latest Information" at www.dcp.wa.gov.au.

Summary of the Act

The Act now contains 10 parts. Part 8, which provided for child care services, was repealed in 2007 when responsibility for assisting the Minister in the administration of child care services was transferred to the Department for Communities.

Part 1 - Preliminary

Part 1 includes the title of the Act and definitions of many of the terms it uses.

Part 2 – Objects and principles

This Part sets out the "objects" of the Act under section 6, and the principles which must be observed in its administration. The principles under sections 7 to 14 are the foundation on which the legislation is based - they underpin all the functions and powers which are exercised under the Act. The best interests of the child must always be regarded as the paramount consideration.

Part 3 – Administrative matters

Part 3 contains some of the key provisions intended to achieve the objects of:

- (a) *promoting the wellbeing of children, other individuals, families and communities;*
- (b) *acknowledging the primary role of parents, families and communities in safeguarding and promoting the wellbeing of children; and*
- (c) *encouraging and supporting parents, families and communities in carrying out that role.*

² The title of the original bill was the *Children and Community Development Bill 2003*.

Part 3 establishes the administrative structure and processes which enable the CEO to carry out the functions listed under section 21(1). In carrying out these functions, the CEO must have regard to certain things including:

- the need to promote the wellbeing of children, other individuals families and communities;
- the need to encourage a collaborative approach between public authorities, non-government agencies and families in providing social services and responding to child abuse and neglect;
- the need to promote diversity and participation in community life, giving particular consideration to certain groups identified in section 21(2)(c); and
- the need to promote development and strengthening of families and communities to achieve self-reliance and provide for the care and wellbeing of their members (section 21(2)).

Powers under this Part include:

- the setting-up of a Ministerial Body, which is a body corporate;
- power for the Minister to enter into agreements on behalf of the State for the provision of social services - the Department provides substantial funding to community sector organisations (service providers) under these provisions; and
- powers of delegation by the Minister (section 16) and the CEO (section 24).

Part 3 also contains the principle of *Cooperation and assistance* which requires the Department to endeavour to work in cooperation with public authorities, non-government agencies and service providers in performing functions under the Act (section 22). To this end, the Department has developed a number of memoranda of understanding with key partners which help in establishing cooperative working relationships.

Important sharing of information provisions are included under Part 3 and provide the foundation for much of the collaborative work carried out by the Department together with partner agencies. The provisions enable sharing of relevant information:

- between the Department and individuals and agencies (section 23); and,
- between prescribed public authorities, where the information is relevant to the wellbeing of a child or class or group of children (section 24A). Section 24A was introduced under the *Children and Community Services Amendment Act 2010* and came into effect on 31 January 2011. A number of public authorities have been prescribed under regulation 20A of the *Children and Community Services Regulations 2005* for the purposes of section 24A and have delegated authority under this section within their agencies to enhance information sharing in the best interest of children.

The Act provides protection from liability for information shared in good faith under these sections, and also from breaches of any duty of confidentiality imposed by law or any professional ethics or standards.

Part 4 – Protection and care of children

Part 4 is the largest part of the Act. It gives the CEO powers to provide for the protection and care of children in circumstances where their parents have not given, or are unlikely or unable to give, that protection and care. The powers include those needed to safeguard or promote children's wellbeing; investigate suspected child abuse; apply to the Children's Court for protection orders; make placement arrangements for children in the CEO's care; and provide assistance for those who are leaving care.

If the Department believes a child to be in need of protection based on the criteria listed under section 28 of this Part, it may take the child into provisional protection and care³ and make an application to the Children's Court for a protection order. A protection order is an order made by the Children's Court if it finds that a child is in need of protection following an application by the Department. There are four types of protection orders in the Act (see Division 3):

- protection order (supervision)
- protection order (time-limited)
- protection order (until 18)
- protection order (special guardianship).

Protection orders (special guardianship) were introduced on 31 January 2011⁴, replacing provisions for protection orders (enduring parental responsibility). An application for a protection order (special guardianship) can be initiated either by the CEO or a carer who has had the continuous care of a child under a placement arrangement for two years or more. If granted, the order transfers parental responsibility for the child to the carer until the child reaches 18 years of age, giving the carer all the duties, powers, responsibilities and authority that, by law, birth parents have for their own children. Since the amendments came into effect, 147 protection orders (special guardianship) have been applied for and 124 have been granted. All the applications have been made by the Department to date (figures reported as at 25 May 2012).

At 30 June 2011, there were 3,519 children in the care of the CEO under a range of placement arrangements throughout the State. Divisions 5 and 6 of Part 4 contain provisions to support children in the CEO's care including:

- requirements for a Charter of Rights for children and young people in care (section 78);
- guidelines for the placement of children from culturally and linguistically diverse backgrounds, and Aboriginal and Torres Strait Islander children (sections 80 and 81);
- planning processes for children at all stages of their care experience from initial entry into care to leaving care (sections 88 to 95)
- review of care planning decisions by a case review panel and the State Administrative Tribunal (sections 91 to 95); and
- leaving care provisions – where a young person meets certain criteria, assistance may be given to those who are leaving the care of the CEO (sections 96 to 100).

A number of offences are found under Division 7 of this Part including failure to protect a child from harm (section 101), leaving a child unsupervised in a vehicle (section 102), tattooing or branding (section 103), and new offences introduced last year against body piercing⁵ (section 104A).

Part 4 also includes two significant initiatives introduced by amendments in 2009 and 2011: the mandatory reporting requirements under Division 9A for certain professionals to report child sexual abuse to the Department; and provisions enabling the making of secure care arrangements for children at extreme risk.

Mandatory reporting

The mandatory reporting provisions in Division 9A of this Part require doctors, nurses, midwives, teachers and police officers to report to the Department a belief on reasonable grounds, formed in the course of their paid or unpaid work, that a child or young person has been or continues to be the subject of sexual abuse. The confidentiality of a mandatory reporter's identity is protected except under certain circumstances set out in section 124F.

³ This may occur with a warrant or, if a child is at immediate and substantial risk, without warrant.

⁴ Under the *Children and Community Services Amendment Act 2010*.

⁵ *Ibid.*

People who make reports in good faith are protected from liability for breaches of any employment related duty of confidentiality, professional ethics or standards, as provided for in section 129 of the Act. Since 1 January 2009, the Department's Mandatory Reporting Service has received 5,910 mandatory reports. On completion of a safety and wellbeing assessment by the Department, only 642 cases of sexual abuse were substantiated (figures reported with a snapshot date of 17 May 2012).

Secure care arrangements

In accordance with amendments introduced under the *Children and Community Services Amendment Act 2010*, the Kath French Centre in Stoneville became operational as a secure care facility in May 2011. The Centre began receiving young people placed under a secure care arrangement for up to 21 days (or a further period up to 21 in exceptional circumstances). Since commencement, 33 children have been placed in secure care under a secure care arrangement (figures reported as at 16 May 2012).

A facility of this type was recommended by the 2007 Ford Review⁶ to meet the needs of a small group of young people who present a substantial and immediate risk of causing significant harm to themselves or others, where there is no other way to manage that risk and ensure that they receive the care that they need. The majority of the secure care provisions can be found in sections 88A to 88J of the Act. They provide a high threshold for admission to secure care. The Act provides safeguards which:

- require court orders for children under the provisional protection and care of the CEO;
- enable applications to be made to the State Administrative Tribunal for a review of the secure care arrangements of children who are in the CEO's care under a protection order (time limited) or protection order (until 18); and
- allow for the appointment of an assessor with powers which include being able to enter and inspect the facility and talk to children and young people in the facility (see section 125A).

Part 5 – Protection proceedings

Part 5 deals with requirements and procedures in relation to protection proceedings in the Children's Court. It includes provisions for interim orders, orders for determining parentage, pre-hearing conferences, reports to court, proposals about arrangements for children and procedural matters including legal representation of children.

Part 6 – Transfer of child protection orders and proceedings

This part implements a national agreement between the governments of Western Australia, other Australian States and Territories and New Zealand for the efficient transfer of child protection orders and proceedings for children who move between these jurisdictions.

Part 7 – Employment of children

This Part contains provisions aimed at ensuring that children are protected from exploitation in employment. It is intended to provide a balance between the benefits of children participating in the work force and the imperative that their education not be compromised or that they not be harmed in any way. Restrictions are placed on the employment of children under the age of 15 years except in relation to a family business, entertainment, or in the making of an advertisement. In addition, the CEO is given broad powers to ensure that no child is employed in a situation that is likely to be harmful to the wellbeing of the child. A provision is also included to prohibit the employment of a child to perform in an indecent manner.

⁶ Ford Review (n 6).

These powers were extended last year⁷ to allow the CEO to prohibit or impose limitations on the current or future employment of children in a particular business or place, rather than just in relation to a particular child. Under the new powers, a notice may be issued to an employer if the CEO is of the opinion that the wellbeing of child employees is likely to be jeopardised because of the nature of the business or place or the nature of the work carried out there.

Part 8 – Child Care Services

This Part was repealed in 2007 by the *Child Care Services Act 2007*. The Department for Communities is now the agency with responsibility for assisting the Minister for Child Protection in the administration of child care services in Western Australia.

Part 9 – Provision of financial or other assistance

This part replaced the *Welfare and Assistance Act 1961* and enables the Department to provide financial and other assistance to individuals and families, including assistance to families for funeral costs.

Part 10 – Confidentiality provisions

This Part of the Act provides for the protection of an individual's privacy while at the same time balancing the need to share information to ensure the wellbeing of children. A person who in good faith provides information to Department regarding concerns for a child is referred to as a "notifier". Notifiers' details must not be disclosed except in specified circumstances such as by a departmental officer for the purposes of protection proceedings in relation to a child (see section 240).

Part 10 also includes restrictions on the publication of certain identifying information or material to protect the identity of children who are or have been the subject of an investigation, protection application or protection order.

Part 11 – Other matters

Since 30 June 2009,⁸ section 242A of this Part has also required the Department to notify the State Ombudsman of investigable child deaths and provide information in relation to the death. Under this Part the Minister must review the operation and effectiveness of the Act, and there are offences for obstructing or hindering a person from performing a function of the Act, for impersonating an officer and for giving false information.

⁷ Section 194A, inserted by the *Children and Community Services Amendment Bill 2010*, came into effect on 31 January 2011.

⁸ Resulting from amendments to the Act made by section 32 of the *Parliamentary Commissioner Amendment Act 2009*

Appendix 2 - List of submissions

1. Aboriginal Legal Service of Western Australia (Inc.)
2. Alliance for Children at Risk
3. Association of Independent Schools of WA (Inc.)
4. Catholic Education Office of Western Australia
5. Clara Kirika, Department for Child Protection
6. Child Protection Policy, Department for Child Protection
7. Commissioner for Children and Young People Western Australia
8. CREATE Foundation
9. Crisis Care Mandatory Reporting, Department for Child Protection
10. Department of the Attorney General
11. Department for Communities
12. Department of Corrective Services
13. Department of Education
14. Department of Education Services
15. Department of Health
16. Department of Indigenous Affairs
17. Dr George O'Neil
18. Drug and Alcohol Office
19. Family Inclusion Network of WA Inc. & Women's Law Centre of WA Inc.
20. Law Reform Commission of Western Australia
21. Legal Aid Western Australia
22. Legal Practice Services, Department for Child Protection
23. State Solicitor's Office
24. Western Australian Council of Social Service Inc.
25. Western Australia Police

Appendix 3 – Summary of key amendments to the *Children and Community Services Act 2004* which came into effect on 1 January 2009

Background

Amendments to the *Children and Community Services Act 2004* (the Act) came into effect on 31 January 2011. The Department for Child Protection (the Department) administers the Act. This information sheet provides a brief overview of the key features of the amendments.

Protection Orders (Special Guardianship)

A new guiding principle ensures planning occurs as soon as possible to promote long-term stability for children who have been removed from their families [new section 9(ha)]. This principle emphasises the need for timely consideration as to whether a child can be reunified with their birth family or whether long-term out-of-home care options need to be considered.

The amendments introduce new protection orders (special guardianship) to replace existing protection orders (enduring parental responsibility). Protection orders (special guardianship) provide a long term care option for children under the parental responsibility of the Chief Executive Officer (CEO) of the Department who are unable to return to the care of their parents [amended sections 60-66].

A protection order (special guardianship) transfers parental responsibility to the child's carer, to the exclusion of any other person including the CEO, until the child reaches 18 years. The order may include conditions about contact between the child and the child's parent(s) or other significant persons.

Significantly, the amendments allow carers to apply directly to the Children's Court for a protection order (special guardianship). Carers are eligible to apply if a child has been in their care and the subject of a protection order (until 18) or protection order (time limited) for at least two years before the application is made.

Secure care

New provisions became operational for the secure care of children and young people in Western Australia [new sections 88A - 88J]. The aim of secure care is to provide safe, short term crisis stabilisation for children and young people in the care of the CEO who meet strict admission criteria. Children and young people aged 12 years or over may be admitted to the secure care centre if they are:

- at immediate and substantial risk of causing significant harm to themselves or others, and
- there is no other suitable way to manage that risk and ensure they receive the care they need.

The two admission pathways for a child to enter the secure care centre are:

- an "administrative admission", made by the CEO of the Department, for children who are under the CEO's parental responsibility through a protection order (until 18) or protection order (time limited); or
- a judicial order, made by the Children's Court on application by the CEO, for children who are under the provisional protection and care of the CEO. If necessary, the CEO may admit a child prior to seeking a judicial order, but such admissions must be followed up within two working days by application for a judicial order and for a protection order if one is not already underway.

The CEO or Children's Court must be satisfied that the above admission criteria are met. The Act, as amended, includes requirements on admission criteria for secure care, care planning and periods of admission. The amendments also provide capacity for children and relevant parties to apply for 'reconsideration' or 'review' of secure care decisions.

Placement of Aboriginal and Torres Strait Islander children

The principle regarding placement of Aboriginal and Torres Strait Islander children was reinforced to ensure that the best interests of the child remain paramount when the principle is applied [s.12]. This amendment ensures that Aboriginal or Torres Strait Islander children are placed in the best possible placement arrangement. Placement decisions will continue to have regard to the order of priority to be considered in placing the child and the need to maintain the child's cultural identity and connections.

The Aboriginal and Torres Strait Islander placement consultation provisions have been amended [s.81]. This ensures consultation regarding placement decisions occurs with an officer from the Department who is an Aboriginal person or Torres Strait Islander, or with an Aboriginal person or Torres Strait Islander or an agency with relevant knowledge of the child, the child's family or the child's community.

Children in the care of the CEO – day to day care

An amendment has been made to the Act to clarify that, in respect of children under the provisional protection and care of the CEO, the CEO has responsibility for the day to day care, welfare and development of the child to the exclusion of any other person [s.29].

Authorised officer may request the hand-over of a child under placement arrangement

The Act, as amended, extends the powers of an authorised officer to be able to request the hand-over of a child under a placement arrangement from a parent or any other person, not just from a carer as previously provided [s.84]. The penalty for failing to comply with this requirement is a fine of \$12,000 and imprisonment for one year.

CEO's powers to consent

The Act enables officers from the Department (as delegated by the CEO) to provide written consents in relation to a child in care, where parental consent is required or customarily sought [s.127]. The amendments clarify the ability of officers from the Department to provide consents which incorporate a waiver of legal liability. For example, a waiver of the liability of a sporting organisation in respect of a child's sporting activity.

Parentage testing orders

New provisions introduced enable the Children's Court to make orders for determination of parentage, similar to those used under family law legislation. This may be necessary in circumstances where the parentage of child, who is the subject of protection proceedings, is in question [new sections 136A – 136I].

Delegation

Under new provisions, the CEO is able to delegate a power or duty of the CEO to a service provider as well as to "an officer of the Department for Child Protection or another individual" [s.24]. This supports streamlined case management by service providers with particular delegated functions in respect of a specific child.

Cooperation between agencies

The Act requires the Department to endeavour to work in cooperation with public authorities, non-government agencies and service providers [s.22]. The amendments strengthen this cooperation to ensure that a child's needs are met in a timely manner to improve services for children and young people in care. If the Department considers a public authority or service provider can assist in the performance of functions under the Act, the Department may request the assistance of the public authority or service provider, specifying the assistance that is sought. Public authorities or service providers must endeavour to comply with a request for assistance from the Department promptly. Assistance includes the provision of advice, facilities and services.

Exchange of information with Commonwealth agencies

An amendment to the Act confirms the ability for the Department to exchange information with Commonwealth agencies [s.23]. This is consistent with Commonwealth/State Government initiatives, such as the income management scheme currently in operation in Western Australia.

Exchange of information between prescribed public authorities

Currently the Act provides for the exchange of relevant information relating to the wellbeing of a child or class or group of children between the Department and a public authority, service provider or an interested person [s.23]. The amendments allow for the exchange of relevant information between prescribed public authorities, provided the information is relevant to the wellbeing of a child or a class or group of children [new section 24A]. Persons disclosing information in good faith under these new provisions are protected from liability as are those who share information with the Department under section 23 of the Act.

These provisions facilitate effective cooperation between key state government agencies on child protection matters, including joint case planning and decision-making.

The following agencies are prescribed public authorities:

- WA Health (Department of Health, Metropolitan Health Services, WA Country Health Service, Peel Health Service)
- Drug and Alcohol Office
- Mental Health Commission
- WA Police Service
- Department of Education
- Department of Housing
- Department for Communities
- Department of Corrective Services
- Department of Education Services
- Department of the Attorney General
- Disability Services Commission
- Department of Indigenous Affairs.

Concerns about the wellbeing of a child before the child is born

New provisions strengthen the Department's capacity to respond to concerns about the wellbeing of a child before the child is born [new sections 33A and 33B]. The Department may make inquiries to determine whether action should be taken to safeguard and promote the child's wellbeing after the child is born. Where the Department determines that action is required, it must do one or more of the following:

- provide, or arrange for the provision of, social services to the pregnant woman;
- work in collaboration with the woman and/or other agencies to develop a plan to address the child's needs once it is born; and

- ensure that an authorised officer from the Department carries out an investigation to assess the likelihood of the child being in need of protection after being born.

The provisions do not give the Department the power to direct the woman as to her pregnancy or any aspect of it.

Body piercing

Under new provisions of the Act, intimate body piercing is prohibited for people less than 18 years of age, irrespective of parental consent [new section 104A]. Other forms of body piercing are prohibited for people less than 18 years of age, unless written parental consent is provided. The only exclusion is for children aged 16 years or over, who are able to have their ears pierced without their parent(s)' consent.

Employment of children

The amendments to the Act provide the Department with more power to protect children in the workplace [new section 194A and amended s.195]. The Department may issue a notice to an employer or prospective employer prohibiting or imposing limitations on the employment of children in a particular business or place, where the Department is of the opinion that the wellbeing of the children is likely to be jeopardised because of the nature of the business or place or the nature of the work carried out there. Previously, a notice could be issued only in relation to a particular child.

Contents of a mandatory report of child sexual abuse

Provisions regarding the contents of a mandatory report of child sexual abuse were transferred from regulation 9A of the *Children and Community Services Regulations 2006* into the Act [s.124C]. This amendment does not alter the requirement that a mandatory report include, if or to the extent that it is known to the reporter, certain information about any person alleged to be responsible for the sexual abuse being reported, specifically the person's name, contact details and relationship to the child.

Appendix 4 – Mandatory reporting data 2011-2012

TABLE 1 - Data for 1 July 2011 to 30 June 2012

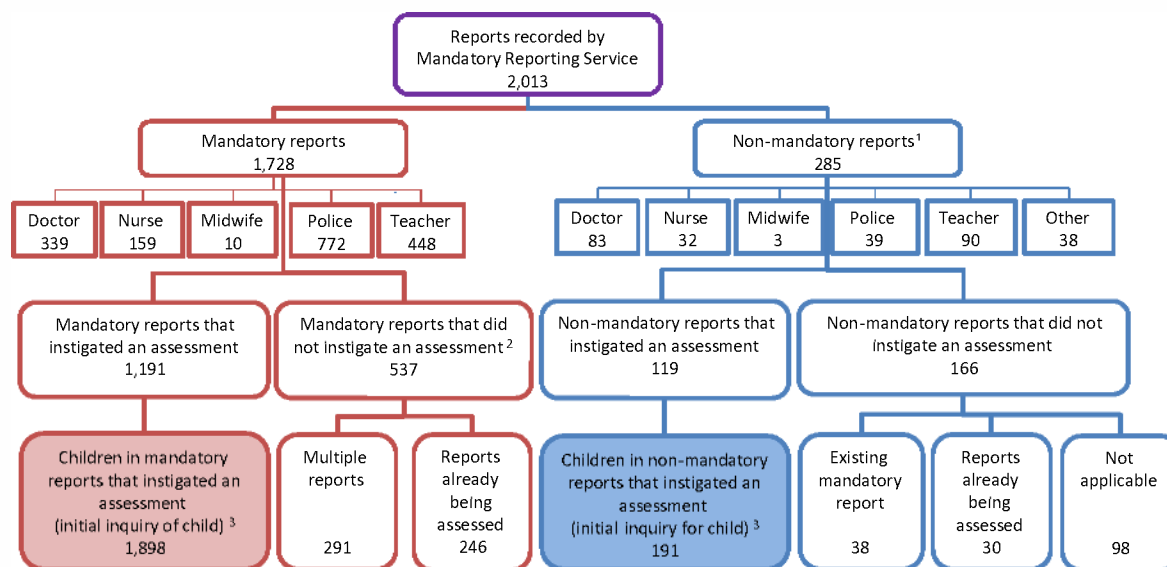
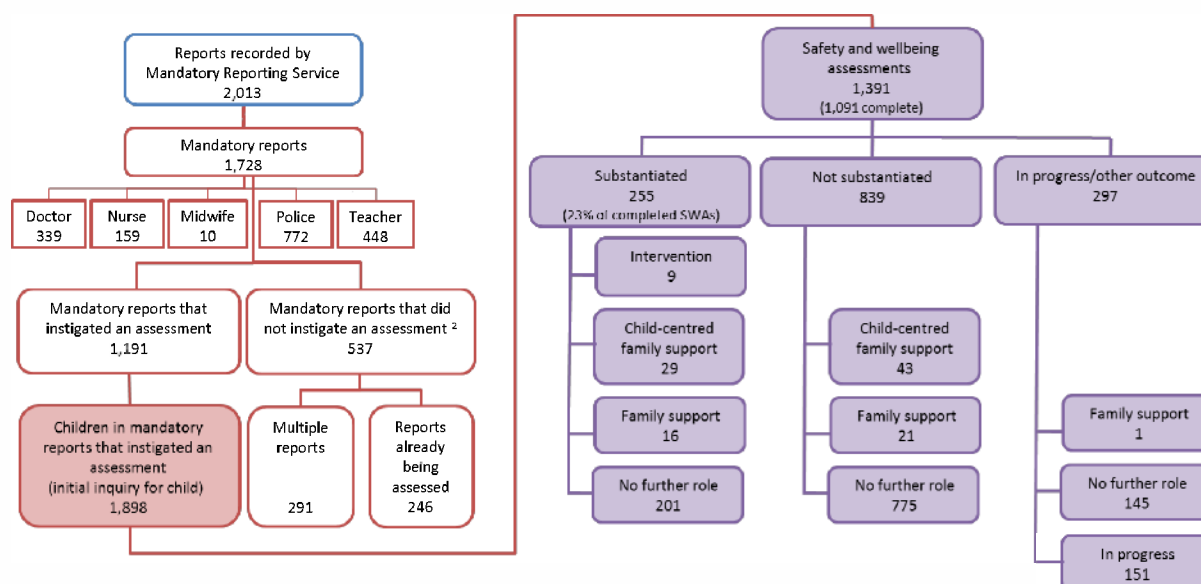


TABLE 2 - Mandatory reporting and substantiation rates 1 July 2011- 30 June 2012



1. A "non-mandatory report" is a report that is either not related to child sexual abuse, does not meet the legislative threshold for a mandatory report to be made or was made by a person who was not a mandated reporter under section 124B.

2. Mandatory reports that did not instigate an assessment relate to reports where the same child/ren and incident is being assessed as a result of a previous mandatory report or some other notification.

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