

Children and Community Services Amendment Bill 2019

To

STANDING COMMITTEE ON LEGISLATION
LEGISLATIVE COUNCIL

Law Society Contact

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Date

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The Law Society of Western Australia

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Table of Contents

1. Introduction	2
2. Summary	2
3. The <i>Children and Community Services Amendment Bill 2019</i>	2
4. Self-determination and community participation	3
5. Proposed amendments to the Bill	5
5.1 Section 14 (clause 13 of the Bill)	5
5.2 Section 81 (clause 32 of the Bill)	6
5.3 Proposed new section 89A (clause 38 of the Bill)	8
5.4 Section 90 (clause 39 of the Bill)	8
5.5 Proposed new section 90A (proposed new clause 39A of the Bill)	8

1. Introduction

- 1.1 The Law Society of Western Australia is the peak professional association for lawyers in Western Australia. Established in 1927, the Law Society is a not-for-profit association dedicated to the representation of its members and the enhancement of the legal profession through being a respected leader and advocate on law reform, access to justice and the rule of law.
- 1.2 This submission is made in response to the *Children and Community Services Amendment Bill 2019 (WA) (Bill)*¹ and the proposed amendments to the Bill set out in Supplementary Notice Paper No 157 Issue No 3 dated 17 June 2020 (**Notice Paper**).² This submission focuses on the aspects of the Bill aimed at amending the *Children and Community Services Act 2004 (WA) (Act)* to better promote a strong connection between family, culture and community for Aboriginal and Torres Strait Islander children.

2. Summary

- 2.1 The Law Society supports the proposed amendments to the Bill set out in the Notice Paper that relate to:
- (a) section 14 of the Act (clause 13 of the Bill) regarding the principle of community participation;
 - (b) section 81 of the Act (clause 32 of the Bill) regarding consultation before the placement of an Aboriginal or Torres Strait Islander child;
 - (c) proposed new section 89A of the Act (clause 38 of the Bill) regarding cultural support plans;
 - (d) section 90 of the Act (clause 39 of the Bill) regarding the review of a care plan; and
 - (e) proposed new section 90A (proposed new clause 39A of the Bill) regarding the manner of participation by a child's family under sections 89A and 90.

3. The *Children and Community Services Amendment Bill 2019*

- 3.1 One of the purposes of the Bill is to promote a strong connection between family, culture and community for Aboriginal and Torres Strait Islander children. As stated in the Second Reading Speech of the Hon Simone McGurk MLA, Minister for Child Protection:³

The bill introduces amendments to build stronger connection to family, culture and country for Aboriginal children in care through working more closely with Aboriginal people and Aboriginal community-controlled organisations to better implement the Aboriginal child placement principle. These amendments align with recommendation 12.20 of the royal commission—that governments work towards full implementation of the Aboriginal child placement principle and a greater understanding of its intent,

¹ *Children and Community Services Amendment Bill 2019 (WA)*
<[https://www.parliament.wa.gov.au/Parliament/Bills.nsf/B283F888C69DAC85482584C0001481AA/\\$File/Bill157-2.pdf](https://www.parliament.wa.gov.au/Parliament/Bills.nsf/B283F888C69DAC85482584C0001481AA/$File/Bill157-2.pdf)>.

² Legislative Council, Parliament of Western Australia, *Supplementary Notice Paper* (No 157, Issue 3, 17 June 2020)
<[https://www.parliament.wa.gov.au/Parliament/Bills.nsf/B283F888C69DAC85482584C0001481AA/\\$File/ca.401.157.003.pdf](https://www.parliament.wa.gov.au/Parliament/Bills.nsf/B283F888C69DAC85482584C0001481AA/$File/ca.401.157.003.pdf)>.

³ Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 November 2019, 9593b-9596a (Simone McGurk, Minister for Child Protection)
<[https://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/DB9BEB7FDC8906EE482584CB00175687/\\$FILE/A40%20S1%2020191128%20p9593b-9596a.pdf](https://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/DB9BEB7FDC8906EE482584CB00175687/$FILE/A40%20S1%2020191128%20p9593b-9596a.pdf)>.

which, in broad terms, is to enhance and preserve Aboriginal children's connection to family and community, as well as a sense of identity and culture. The amendments also accord with a commitment by community services ministers in 2017 to —

... uphold all five domains of the Aboriginal ... Child Placement Principle to recognise the rights of Aboriginal and Torres Strait Islander children to be raised in their own culture and the importance and value of their family, extended family, kinship networks, culture and community.

The cornerstone elements of the principle are prevention, partnership, placement, participation and connection.

...

Before making a placement for an Aboriginal child, consultation with an Aboriginal representative organisation approved by the CEO will be required. Drawing on the cultural knowledge of approved Aboriginal representative organisations will help to identify placement options that are higher in the placement hierarchy. To this end, it is envisaged that approved Aboriginal representative organisations may be existing native title bodies or other Aboriginal community-controlled organisations that are recognised by the local community with knowledge about the child, the child's family or the child's community.

Cultural support planning is also being strengthened. Cultural support plans are already prepared for each Aboriginal and culturally and linguistically diverse child in care. However, they will become a legislative requirement and, subject to regulations, approved Aboriginal representative organisations will be offered the opportunity to participate in cultural support planning for Aboriginal children in care. Cultural support plans for Aboriginal and culturally and linguistically diverse children will also be provided to the court as part of the written proposal the department must provide in section 143 when applying for a protection order other than a special guardianship order. Written proposals outline proposed arrangements for the child's wellbeing.

- 3.2 The Bill aims to implement, among other things, the recommendations of the 2017 *Statutory Review of the Children and Community Services Act 2004 (Statutory Review)*,⁴ including recommendations relating to the principle that Aboriginal and Torres Strait Islander people have a right to participate in the protection and care of their children with as much self-determination as possible.⁵

4. Self-determination and community participation

- 4.1 The Act expressly acknowledges the importance of Aboriginal and Torres Strait Islander self-determination and community participation in decision-making processes.⁶ The Law Society supports the use of processes that give families a culturally safe space to develop solutions and meaningfully participate in making decisions for the safety and care of their children.

⁴ Department of Communities (WA), *Statutory Review of the Children and Community Services Act 2004* (November 2017)
<<https://www.dcp.wa.gov.au/ccsactreview/Documents/Statutory%20Review%20of%20the%20Children%20and%20Community%20Services%20Act%202004.pdf>> ('Statutory Review').

⁵ *Ibid*, chapter 3.

⁶ *Community and Children Services Act 2004* (WA) sections 13 and 14.
Children and Community Services Amendment Bill 2019
The Law Society of Western Australia

- 4.2 The Law Society notes the following matters raised by the Secretariat of National Aboriginal and Islander Child Care (**SNAICC**), Family Matters Western Australia (**FMWA**) and the Western Australian Aboriginal Child Protection Council (**WAACPC**) in their April 2017 joint submission to Statutory Review:⁷

As at 30 June 2016 in Western Australia, Aboriginal and Torres Strait Islander children were 17.5 times more likely to be placed in out-of-home care than non-Indigenous children. This rate is almost double the already alarming national statistic that indicates that across Australia, Aboriginal and Torres Strait Islander children are 9.8 times more likely than non-Indigenous children to be placed in out-of-home care. In Western Australia, Aboriginal and Torres Strait Islander children represented 54 per cent of all children in out-of-home care at 30 June 2016. This over-representation continues to increase annually, highlighting the need for significant and systemic change, including but not limited to legislative reform.⁸

...

[W]hat is needed to reverse current trends for Aboriginal and Torres Strait Islander children is a holistic and rights-based approach that targets early intervention, prevention, healing, and family and community strengthening initiatives. Such an approach can only be effectively progressed with recognition and respect of the cultural authority of Aboriginal and Torres Strait Islander peoples who hold the knowledge and expertise, and have the right to drive change.⁹

...

The priority responses required to address this situation are:

- *All families enjoy access to quality, culturally-safe, universal and targeted services necessary for Aboriginal and Torres Strait Islander children to thrive;*
- *Aboriginal and Torres Strait Islander people and organisations participate in and have control over decisions that affect their children;*
- *Law, policy and practice in child and family welfare are culturally safe and responsive; and*
- *Governments and services are accountable to Aboriginal and Torres Strait Islander people.¹⁰*

- 4.3 SNAICC, FMWA and WAACPC recommended, among other things, that a model of Aboriginal and Torres Strait Islander Family-Led Decision Making facilitated by Aboriginal and Torres Strait Islander organisations be provided for in legislation and be mandated to be offered to families as early as possible in their contact with child protection services, and at a range of significant decision-making points.¹¹

⁷ Secretariat of National Aboriginal and Islander Child Care, Western Australian Aboriginal Child Protection Council and Family Matters Western Australia, Submission to the Department for Child Protection and Family Support, Western Australia, *Review of the Children and Community Services Act 2004 (WA)* (April 2017) <<https://www.snaicc.org.au/wp-content/uploads/2017/04/Joint-Submission-on-the-Children-and-Community-Services-Act-2004-WA-FINAL.pdf>>.

⁸ Ibid 4.

⁹ Ibid 5.

¹⁰ Ibid 5.

¹¹ Ibid 7.

4.4 This position is consistent with identified international human rights standards,¹² including those in the United Nations Declaration on the Rights of Indigenous Peoples, which supports self-determination and Aboriginal justice models.

4.5 The Law Society supports amendments to the Act that are consistent with a model of Aboriginal and Torres Strait Islander Family-Led Decision Making.

5. Proposed amendments to the Bill

5.1 Section 14 (clause 13 of the Bill)

5.1.1 Clause 13 of the Bill proposes amendments to section 14 of the Act so that it reads as follows:

14. Principle of community participation

- (1) *A kinship group, community or Aboriginal or Torres Strait Islander representative organisation must be given, where appropriate, an opportunity and assistance to participate in decision-making processes under this Act that are likely to have a significant impact on the life of a child who is a member of, or represented by, the group, community or organisation.*
- (2) *Consideration must be given to the wishes and views of the child, taking into account the maturity and understanding of the child, and the child's parents about the participation of a group, community or organisation under subsection (1).*
- (3) *This section does not apply to a decision for an Aboriginal or Torres Strait Islander child about a placement arrangement or cultural support plan.*

5.1.2 The Notice Paper, however, sets out the following proposed wording for section 14:

14. Principle of family and community participation

- (1) *Each of the following must be given an opportunity and, where appropriate, assistance to participate in decision-making processes under this Act that are likely to have a significant impact on an Aboriginal or Torres Strait Islander child —*
 - (a) *the child's family;*
 - (b) *a community of which the child is a member;*
 - (c) *an approved Aboriginal or Torres Strait Islander representative organisation representing the child.*
- (2) *Consideration must be given to the wishes and views of the child, taking into account the maturity and understanding of the child, and the child's parents about the participation of the child's family or a community or organisation under subsection (1).*

¹² See Committee on the Rights of the Child, UN CRC.C/AUS/CO/5-6, [34(a) and (d)]; Committee on the Elimination of Racial Discrimination, UN CERD/C/AUS/CO/18-20, [25], [26(e)]; Committee on the Elimination of Discrimination against Women, UN CEDAW/C/AUS/CO/8, [51], [52(h)]; Report of the Special Rapporteur on the rights of indigenous people on her visit to Australia, Human Rights Council Thirty-sixth session, 11-29 September 2017, UN A/HRC/36/46/Add.2, [87]-[91]; Report of the Special Rapporteur on violence against women, its cause and consequences on her mission to Australia, Human Rights Council Thirty-eighth session, 18 June-6 July 2018, UN A/HRC/38/47/Add.1, [45]-[46].

5.1.3 The Law Society supports the proposed wording of section 14 as set out in the Notice Paper for the following reasons:

- (a) The wording proposed in the Notice Paper more accurately reflects Recommendation 16 of the Statutory Review, which states:¹³

Section 14 should be amended to provide that in performing a function under the Act, a person, court or tribunal must observe the principle that an Aboriginal child's family, community or representative organisation is entitled to and should be given opportunities and, where appropriate, assistance to participate in decision-making processes under the Act that are likely to have a significant impact on the life of a child. In observing this principle the views of the child and the child's parent or parents must be considered.

In line with Recommendation 16, the wording proposed in the Notice Paper provides that the relevant persons “be given an opportunity and, where appropriate, assistance to participate in decision-making processes”.

- (b) The wording proposed in the Notice Paper replaces the undefined term “kinship group” with the term “family”, which is a defined term in the Bill and includes a child’s relatives “under customary law or tradition of the child’s community”.
- (c) The wording proposed in the Bill includes a new subsection 14(3) which expressly excludes decisions about the placement of children and cultural care plans from the principle of community participation. This exclusion was not recommended by the Statutory Review. According to the Explanatory Memorandum of the Bill, the exclusion in subsection 14(3) applies because of the specific provisions in section 81 requiring consultation with certain organisations.¹⁴ However, section 14 provides a guiding principle for those carrying out the administration of the Act and there is no reason why section 14 is not able to co-exist with and complement specific enabling provisions like section 81. Otherwise, the proposed addition of subsection 14(3) significantly limits the scope for application of the participation principle. The placement of children in protection is central to the operation of the Act. Placement decisions will assume even more importance if the amendments related to permanency planning included in the Bill are passed.

5.2 Section 81 (clause 32 of the Bill)

5.2.1 Clause 32 of the Bill proposes amended wording for section 81 of the Act. The Notice Paper sets out further proposed amendments, which are marked up as follows:

81. Consultation before placement of Aboriginal or Torres Strait Islander child

- (1) *Before making a placement arrangement in respect of an Aboriginal or Torres Strait Islander child, the CEO must consult with each of the following —*

- (a) *~~the child's family; an Aboriginal person or Torres Strait Islander who is a member of the child's family;~~*

¹³ Statutory Review (n 4) 56.

¹⁴ Explanatory Memorandum, *Children and Community Services Amendment Bill 2019* (WA) 6
<[https://www.parliament.wa.gov.au/Parliament/Bills.nsf/B283F888C69DAC85482584C0001481AA/\\$File/EM%2B-%2BCHILDREN%2BAND%2BCOMMUNITY%2BSERVICES%2BAMENDMENT%2BBILL%2B2019.pdf](https://www.parliament.wa.gov.au/Parliament/Bills.nsf/B283F888C69DAC85482584C0001481AA/$File/EM%2B-%2BCHILDREN%2BAND%2BCOMMUNITY%2BSERVICES%2BAMENDMENT%2BBILL%2B2019.pdf)>.
Children and Community Services Amendment Bill 2019
The Law Society of Western Australia

- (b) *subject to the regulations, an approved Aboriginal or Torres Strait Islander representative organisation;*
- (c) *an officer who is an Aboriginal person or Torres Strait Islander who, in the opinion of the CEO, has relevant knowledge of the child, the child's family or the child's community.*

(1A) For the purposes of subsection (1)(a), the consultation with the child's family is to be by way of a meeting —

(a) convened by an approved Aboriginal or Torres Strait Islander representative organisation; and

(b) attended by —

- (i) to the extent practicable, the child, the child's parents and other members of the child's family; and
- (ii) an officer referred to in subsection (1)(c).

(2) *If it is not practicable, for reasons of urgency or otherwise, to consult as required under subsection (1) before making a placement arrangement, the consultation must take place as soon as practicable after the placement arrangement is made.*

5.2.2 The Law Society supports the proposed amendments to section 81 as set out in the Notice Paper for the following reasons:

- (a) The insertion of the words “each of” makes it clear that subparagraphs 81(1)(a), (b) and (c) are to be read conjunctively and the CEO has an obligation to consult with each of those categories of people or organisations.
- (b) The amendment of subparagraph 81(1)(a) to require consultation with “the child's family” as opposed to only one member of the child's family is consistent with the comments made in the Statutory Review that:

During community consultations with Aboriginal people the importance of consulting members of the child's family and kinship network in relation to where children should be placed was emphasised. This was seen as fundamental to supporting self-determination and participation in decision-making and a gap in the current consultation requirements.¹⁵

...

Consultation with family should become a separate requirement under section 81. This reflects current practice and majority feedback, particularly from community consultations. Linking the meaning of family to the definition of relative in section 3 of the Act will also provide for consultation with a broad range of people within an Aboriginal child's extended family and kinship network [emphasis added].¹⁶

- (c) The insertion of new subsection 81(1A) effectively provides that the obligation to consult with the child's family can be fulfilled by engaging in an Aboriginal and Torres Strait Islander Family-Led Decision Making process whereby family members are given an opportunity to meet and participate in the decision-making process should they wish to do so. This is consistent with the participation principle under section 14. Such a process is also less onerous than requiring consultation with each member of the child's extended family.

¹⁵ Statutory Review (n 4) 46.

¹⁶ Statutory Review (n 4) 47.

5.3 Proposed new section 89A (clause 38 of the Bill)

5.3.1 Clause 38 of the Bill proposes the insertion of a new section 89A. The Notice Paper sets out proposed amendments, which are marked up as follows:

89A. Cultural support plan

- (1) *A cultural support plan for a child is a plan that contains arrangements for developing and maintaining the child's connection with the culture and traditions of the child's family or community.*
- (2) *The child's family and, subjectSubject to the regulations, an approved Aboriginal or Torres Strait Islander representative organisation are to~~is to~~ be given an opportunity and, where appropriate, assistance to participate in the preparation of a cultural support plan for an Aboriginal or Torres Strait Islander child.*

5.3.2 The Law Society supports these proposed amendments, which are consistent with the participation principle under section 14.

5.4 Section 90 (clause 39 of the Bill)

5.4.1 Clause 38 of the Bill proposes the insertion of a new subsection 90(2A). The Notice Paper sets out proposed amendments, which are marked up as follows:

90. Review of care plan

...

- (2A) *In the course of the review of a care plan for an Aboriginal or Torres Strait Islander child, the CEO must give the child's family and, subject to the regulations, give an approved Aboriginal or Torres Strait Islander representative organisation an opportunity and, where appropriate, assistance to participate in the review of the cultural support plan for the child.*

5.4.2 The Law Society supports these proposed amendments, which are consistent with the participation principle under section 14.

5.5 Proposed new section 90A (proposed new clause 39A of the Bill)

5.5.1 The Notice Paper sets out the following proposed wording for a new section 90A:

90A. Manner of participation by child's family under s. 89A and 90

For the purposes of sections 89A(2) and 90(2A), the opportunity for the child's family to participate is to be given by way of a meeting —

- (a) *convened by an approved Aboriginal or Torres Strait Islander representative organisation; and*
- (b) *attended by —*
 - (i) *to the extent practicable, the child, the child's parents and other members of the child's family; and*
 - (ii) *an officer who is an Aboriginal person or Torres Strait Islander who, in the opinion of the CEO, has relevant knowledge of the child, the child's family or the child's community.*

5.5.2 The Law Society supports the inclusion of this new section for the same reasons it supports the inclusion of subsection 81(1A) discussed at paragraph 5.5.2(c) above.

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Nicholas van Hattem
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