Aboriginal Legal Rights Movement &
Aboriginal Community Leadership Reference Group

Submission
Children and Young People (Safety) Bill 2016

1 February 2017

Aboriginal Legal Rights Movement (ALRM) is making this submission in collaboration with the South Australian Aboriginal Community Leadership Reference Group (ACLRG).

The Child and Young People (Safety) Bill 2016 is one of a suite of draft legislation to ensure a robust child protection reform that is for the best interest of South Australian children and families as recommended in the Child Protection Systems Royal Commission (Nyland) Report; *"The Life They Deserve"* , and has been carefully considered by ALRM and the ACLRG.

ALRM and the ACLRG acknowledges that the safety and wellbeing of children is paramount and underpins the workings and deliberations in this jurisdiction. There is no more important area of law affecting our community than the safety and protection of children. The removal of children is a

serious matter and to do so will inevitably lead to the destruction of family and the Cultural connection to community.

The Child and Young People (Safety) Bill undermines the Cultural rights of Aboriginal children as it imposes restraint of maintaining a connection with Culture and regular contact with family and community. South Australia is bound by the United Nations Convention on the Rights of the Child which specifically sets out rights and safeguards for the well-being of Aboriginal children and their families.

The rates of Aboriginal child removals is substantial higher than non-Aboriginal children. The South Australian Court Authority statistics, show that Aboriginal children currently make up more than 50% of matters before the South Australian courts in Child Protection. State reporting on child protection indicates that approximately 40% of children in out-of-home care are Aboriginal. Aboriginal children currently make up approximately 50% of South Australian children in residential care homes.

It is important to note that according to the Australian Institute of Health and Welfare Report (2016) children who find themselves within the child protection system are 14 times more likely to also be involved in the youth justice system, while Aboriginal children are 28 times more likely to be involved in the youth justice system. More specifically the Report noted that 11.3% of our South Australian Aboriginal boys in out-of-home care were also known to the youth justice system, compared with 7.5% of non-Aboriginal boys and 6.6% of South Australian Aboriginal girls as compared to 3.3% of non- Aboriginal girls. These alarming figures of over-representation is caused by a combination of factors involving intergenerational trauma, grief and loss; family violence, substance abuse, poverty, mental health, homelessness and intellectual disability.

The Bill does not take into account the impact these factors have upon Aboriginal families.

Culturally safe and appropriate early and intensive intervention must be mandatory to ensure Aboriginal families have the opportunity to adequately address the protective concerns.

When an Aboriginal child is removed in South Australia, the parents are faced with a child protection system that is ill-equipped to deal with their complex needs.

ALRM child protection clients encounter long waiting lists for assessments and services, up to 4 months, sometimes more. Aboriginal families are further disadvantaged by the lack of Culturally competent Departmental case workers and psychologists. Further impacts are the delayed referral to services (the Department will not make a referral until a guardianship order has been granted), largely due to the lack of emergency and affordable housing and lack of Cultural service agencies to accommodate the demand.

Given the mandatory time frames for decisions concerning guardianship orders and if timely service provisions are not being implemented, the process of family reunification for Aboriginal families will continue to be undermined.

This Bill has the potential to be very negative and create a generation of children who are disengaged and alienated from the Aboriginal family and community. This will lead to an alienated generation who will be 'flip flopped' around the system and community or as has happened to people in the last century, moved into family structures away from their heritage and from their true Aboriginal identity. Fundamentally the bill preserves the status quo which means that non-Aboriginal bureaucrats have authority and Aboriginal people and community do not have control over the destiny of Aboriginal children and families who are in difficulty and need support. The Bill contains no provisions which require the Minister and Chief Executive to take responsibility to ensure the protection of Aboriginal children's Cultural, spiritual identity, development and belonging. This is a fundamental defect with the Bill.

It must also be noted that there are a number of references in the Children and Young People (Safety) Bill 2016, where the provision of a section is subject to regulations which have not as yet been either drafted or released. Without information regarding the regulations, it will be impossible to properly provide relevant comment on the provisions of the proposed Bill.

ALRM and the ACLRG strongly urges the Government not to pass the Children and Young People (Safety) Bill 2016 in the current form. The Government must properly consult with ALRM, the ACLRG , Aboriginal Communities, other Aboriginal Community Controlled Organisations, the non-government legal profession and the Judiciary of the Youth Court.

ALRM and the ACLRG seeks a commitment by the Government for a review, proper consultation and re-drafting by both a properly balanced (as outlined above) and a diverse Select Committee for the re-drafting of the Children and Young People (Safety) Bill 2016.

Chapter 2 – Guiding principles for the purposes of this Act

Part 1 - section 3 – Parliamentary declaration

The Parliament of South Australia acknowledges that outcomes for Aboriginal and Torres Strait Islander children and young people in care have traditionally been poor, and that it is unacceptable for outcomes for those children and young people to be any different to those for children and young people in care generally.

In the absence of any sound legislation that would strive to keep children safe and strengthen Aboriginal families and communities, the Parliamentary declaration and remainder of the Bill merely provides 'tick box' and tokenistic clauses specific to Aboriginal children and young people. Our fundamental criticism remains.

Part 2 – Priorities in the operations of this act

Section 6 requires special attention in light of the Cultural needs and the definition of *Harm* should include Cultural harm. It is recommended that subsection 3 be amended by adding the provision that in relation to section 6, harm includes inappropriate removal and disconnection of a child from their Culture and from their language. This would lend to the strengthening of Placement Principles.

Section 7 is criticised because it contains no provision referring to meeting the Cultural needs of children.

It is recommended that a new paragraph (e) be introduced which states:

(e) the need for their cultural identity to be acknowledged and nurtured.

Part 3 - section 10 - Aboriginal and Torres Strait Islander Child Placement Principles

Is structured in such a way similar to the generalities found in Part 3 - section 9 , and the obligation under subsection 2 to perform functions so as to give effect to the placement principles found in that section, have the effect of subordinating the Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) found in section 10.

The effect of this section is to give public officials the authority to subordinate the ATSICPP to general departmental policy found in section 9. As such the bill does nothing more than to preserve the status quo, and to maintain the disempowerment of Aboriginal families' individuals and communities.

In current form the Bill has not been drafted to ensure the true purpose and intent of the ATSICPP. For ALRM clients the ATSICPP has been applied to less than 10% of total cases. The ATSICPP is primary in National Law and Policy and acknowledges and respects the importance of family, Cultural and community connections for Aboriginal children within Child Protection systems.

Compliance and respect for the ATSICPP within the South Australian Child Protection System has been historically very poor and is completely unacceptable. The Bill misses another opportunity to ensure the ATSICPP is executed with its original intent to ensure the short and long term best interest of Aboriginal children in the Child Protections system.

ALRM and the ACLRG submit that the ATSICPP should be properly enshrined in the Bill to ensure that compliance with it is a fundamental requirement of official action with respect to Aboriginal children. The present drafting of Part 3, by section 10 (1), which subordinates the ATSICPP to section 9. A general principle which maintains the subordination of the fundamental principle to generalised statements, as such subsection 1 should be removed. This has been historically used as an excuse to justify the continued racist practice of separating Aboriginal children from their families. This subordination is perpetuated by section 10 (2)(b) which, in its expression is patronising and frankly singles out Aboriginal and Torres Strait Islander peoples for continued subordination, for that reason it is also unacceptable. ALRM and the ACLRG submit proposed section 10 (3) (a) (i) a member of the child or young person's family should be expanded with the following further words, *(as defined) by local custom and practice in the correct relationship to the child in accordance with Aboriginal or Torres Strait Islander law (lore).*

It is further submitted that that section should include, as recommended in *The Bringing Them Home report* (1997) the following requirement:

Where placement is with a non-Indigenous carer the following principles must determine the choice of carer,

1. family reunion is a primary objective,
2. continuing contact with the child's Aboriginal family, community and culture must be ensured, and
3. the carer must live in proximity to the child's Aboriginal family and community.

Further that: No placement of an Aboriginal child is to be made except on the advice and with the recommendation of the appropriate accredited Aboriginal organisation. Where the parents or the child disagree with the recommendation of the appropriate accredited Aboriginal organisation, the court must determine the best interests of the child.

This more robust ATSICPP would realistically enable Aboriginal and Torres Strait Islander people to participate in the care and protection of their children and young people.

Part 3 section 10 subsection (5) This section will be taken not to apply to a particular Aboriginal or Torres Strait Islander child or young person if that child or young person has made an informed decision not to identify as Aboriginal or Torres Strait Islander. This completely undermines the ATSICPP as it allows for children to decide such serious matters of Cultural identity, before the child has become an adult, thus not being able to truly consider the consequences of such an important decision.

ALRM and the ACLRG are particularly concerned by this proposed provision because, whilst it refers to an "informed decision" there is no reference to the age of the child who might make much such decision and whether they are capable of making it, or of the views of the relevant Aboriginal community. There may well be rare cases where a child chooses not to identify as Aboriginal, and they could be dealt with on a case-by-case basis, but there is no need for such a broad and potentially exclusive legislative policy as this. ALRM and the ACLRG is completely opposed to this clause and should be noted that this has been regarded as highly offensive by the Aboriginal stakeholders.

Chapter 4 – Managing risks without removing child or young person from their home

Part 2 - Family Group Conferences.

This is another golden missed opportunity to the structure of Family Group Conferencing. The inclusion of an Aboriginal person or organisation is at the discretion of the co-ordinator. This provision disempowers Aboriginal communities and is inconsistent with the principle of self-determination. The stated assumption behind Chapter 4, part 2 is that the Chief Executive or the Youth Court control family conferences by appointing the coordinator and giving them discretionary powers as to participation and outcomes.

Local Aboriginal Family Conferencing process has been proven historically to produce healthy, safe and culturally appropriate interventions. ALRM and the ACLRG submits that although, (and despite Aboriginal Community advocacy), this proven process has been ignored and disregarded, our submission is that it should be specifically included in the legislation. That is to say, the legislation should specifically empower local Aboriginal Family Conferences, arising from Aboriginal communities and Aboriginal community organisations to arrange and carry out family conferences. Our organisations recommend that Section 18 (2) be amended by requiring that in all cases where a family conferences to be convened either by the court or by the Chief Executive, that those bodies be required to consult with the Aboriginal community concerned and to appoint an Aboriginal coordinator acceptable to all parties.

It is difficult to know what these procedures will be, in the absence of regulations that define the requirements for decision-making (see subsection 4). It may however be prudent to ensure that the written record of the decisions of conferences should also include a requirement for a written record of the deliberations leading to the decisions. At the very least that would have the effect of ensuring that the record disclose whether or not all parties had received natural justice.

Part 3—Case planning

Section 24—Chief Executive to prepare case plan in respect of certain children and young people.

(2) Without limiting the matters that may be included in a case plan, each case plan must include such of the following parts as may be relevant to the prescribed child or young person's circumstances:

(b) a part setting out a Cultural maintenance plan. We submit that Cultural maintenance plans as referred to in section 24 ought to be defined in the terms of the legislation. If this is not done, our Aboriginal organisations have grave fear that they will be defined out of existence or applied in a purely tokenistic manner

Having regard to the provisions of S 25 (2) it is submitted that subsection (1) should include a provision requiring the persons or bodies referred to act in good faith.

The definition of a Cultural maintenance plan should include the following mandatory provisions:

1. The case plan must reflect and be consistent with the child's Cultural support needs, having regard to the child's circumstances so as to maintain and develop the child's Aboriginal identity.
2. Encourage the child's connection to the child's Aboriginal community and Culture.
3. The Cultural needs of the child, consideration to the length of time that the child has spent in out of home care; the age of the child; the length of time that the child is expected to remain in out of home care and the extent of the child's contact with the child's Aboriginal family members.

Chapter 5 - Children and Young People at risk

ALRM and the ACLRG has given heavy consideration to this section for children taken into care under the guardianship of Chief Executive rather than that of the Minister. The Minister is accountable to Parliament over individual acted guardianship. Public servants are universally protected by the Carey's liability principles which makes the department or the government responsible for their torts and errors even for their malicious abuses of power not stand for the

principle that taking the guardianship of child is a political act for which there should be political responsibility adhering in the Minister not to a public servant. Currently under the existing legislation any application to remove children for a 12 month period or a longer term is made on behalf of the Minister.

Significant concern to this change is for the Chief Executive, an unelected official, to have unfettered discretion to the decision making concerning Aboriginal children.

The Children and Young People (Safety) Bill 2016 is lacking any definition or legislative provisions in relation to the Minister who is to be responsible for the child protection portfolio and the powers of the Minister in this area. At present any application to remove children for a 12 month Order or a Long Term Order is made on behalf of the Minister. It is unclear whether this will continue under the Bill.

Chapter 6 – Court orders relating to children and young people

Part 1 – Orders that may be made by the court

Sections 49 – 51 is inclusive concerning the rules of evidence, standard of proof and onus of the objector who would be required to prove their case. Section (51) of the Children and Young People (Safety) Bill 2016, extraordinarily provides that where the Department seeks an order under this Bill and a person objects to the making of the order by the Court, the onus is upon the person to prove to the Court that the order should not be made. This is of considerable concern and it is vehemently opposed. The usual legal position is that where a party makes an application to the court seeking an order, then the legal onus is upon that party i.e. the applicant to demonstrate that the order should be made in the interest of justice. It is inappropriate to reverse the onus of proof in the matters addressed by the Children and Young People (Safety) Bill 2016 having regard to the following:

- The disproportionate position of power and responsibility that the State holds in comparison to the individual. Both in terms of the capacity to be ability to understand complex legal

proceedings, represent themselves in legal proceedings and to gather evidence and bring evidence before the Court;

- Most parents and family members in this jurisdiction are left unrepresented when the matter reaches the trial stage (a lot of parents are hamstrung due to legal aid constraints). In the circumstances it is not reasonable to expect that they would know what is expected to legally discharge such a burden;
- Parents involved are often socially disadvantaged, possessing an intellectual deficit and or may be suffering from other issues, including mental health, substance abuse and family violence predominantly mothers suffering from trauma - issues which would further exacerbate their disadvantage associated with bearing the onus of proof; and
- The majority of child protection cases have significant cultural barriers and language difficulties that further limits a self-litigant's capacity and prejudice them.

This provision would also have the effect of reversing the onus of proof in those cases where there are representatives of children seeking to oppose the order sought by the Department.

The difficulties with respect to social dislocation and impaired health are frequently exacerbated factors within our Aboriginal community and, as already noted, more than 50% of the cases before the Youth Court involve children from the Aboriginal community.

It must be stipulated that the Onus of Proof should be on the Minister/Chief Executive to substantiate the grounds for removal.

Chapter 7 Children and Young people in care

Part 2 – Children and young people in Chief Executive's custody or guardianship

Section 69 refers to the role of the Child Representative and the wording of the Act does not accord with Justice Nyland's recommendations that while the Child Representative should act in accordance with the child's instructions, Justice Nyland recommended he or she should supplement this with his or her own view of the child's best interests.

Sections 54 and 55, of the Children and Young People (Safety) Bill 2016 are inconsistent with the principles of the Independent Children's Lawyer that have been developed in other jurisdictions.

The development of the role of the Independent Children's Lawyer has been considered and developed to give effect to the UNCROC and are outlined in section 68LA of the Family Law Act.

Recommendation 69 of the Nyland Report and agrees that in circumstances where a child is not manipulated by a parent and able to provide proper instructions to a legal practitioner, the legal practitioner should act in accordance with those instructions and be able to supplement, to the extent necessary, with further submissions in the best interest of the child.

Sections of the Children and Young People (Safety) Bill 2016, relating to the legal representation of children in proceedings be consistent with the notion of independence, much like those guidelines used within the Family Law Act for Independent Children's Lawyers.

It is recommended that a child who is unable to provide instructions the child representative must act on a best interest's basis.

Further recommendations to ensure the safety of Aboriginal children.

The purpose of this Bill is to keep children safe. In doing so, the Bill also has a responsibility to ensure the Human Rights of Aboriginal children, families and communities is protected and supported by addressing the social and economic disadvantages that underlie the contemporary removal of Aboriginal Children.

The Bill states self-determination for Aboriginal children, families and communities in a very limited scope. The Bill requires a need to set Principles for Aboriginal children and families that respects the intent and is a practical process to allow self-determination, which should include, but not limited to:

1. Aboriginal Communities are free to formulate and negotiate an agreement on measure, best suited to their individual needs concerning children, young people and families.
2. Every Aboriginal Community is entitled to adequate funding and other resources to enable it to support and provide for families and children to ensure that the removal of children is the option of last resort.
3. The United Nations Declaration on the Rights of Indigenous Peoples and the Convention on the Rights of Children is to be built into all legislation, policy and practice to ensure the safety, social and emotional wellbeing of Aboriginal children.

The Bill should further look to the *Bringing Them Home* report (1997) and establish a minimum standard of treatment for all Aboriginal children and that a framework is developed for the accreditation of all organisations for the purpose of performing functions prescribed by the standards.

The Bill should include provisions and principles similar to that of other jurisdictions to include; The Minister and/or Chief Executive should endeavour to assist the Aboriginal community to establish its own programmes for preventing or reducing the incidence of abuse or neglect of children within the Aboriginal community.

Best interest of the child

Acting in the best interest of the child and determining what is in the child's best interest was regularly noted in the Nyland Report as a key factor. However, the Children and Young People (Safety) Bill 2016 fails to identify 'acting in the best interests of the child' as the paramount consideration or guiding principle in the interpretation and application of the Bill.

All new legislation and amendments to existing legislation under the Children's Rights and Child Protection Agenda should be by reference to the primary obligation of all persons and bodies dealing with children to act in accordance with their obligations under Article 3.1 of the United Nations Convention on the Rights of the Child (UNCROC) which specifies that:

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

The Children and Young People (Safety) Bill 2016 falls short of incorporating the principles contained in the UNCROC as the foundation for all of the principles and provisions in relation to children's protection.

The Family Law Act 1975 (Cth), acting in the child's best interests is the paramount consideration of the Court. How a court is to determine what is in a child's best interests is enshrined within section 60CC of the Family Law Act and can provide a model which could be incorporated in to the Children and Young People (Safety) Bill 2016.

Within the current legislation Children's Protection Act (1993), there is a requirement that the child's connection with their biological family be maintained, and this was modified to a concept of 'best connection' with the biological family. The concept of connection to the biological family by the child be included in the Children and Young People (Safety) Bill 2016.

Permanency and the endless cycle of intergenerational trauma

The Children and Young People (Safety) Bill, incorrectly places the focus firmly upon the permanent removal of children who tragically come before the child protection system coupled with greater legal rights given to foster carers and other person guardians (OPGS).

Most alarmingly the Bill will increased decision-making rights for carers, including the right to be heard in court and the removal of barriers for carers seeking guardianship. This will not always

bode well for Aboriginal families and children wanting to maintain their Cultural connections. We hold a sense of foreboding for the future as the Children and Young People (Safety) Bill 2016 focus upon permanent removal, we fear will be reminiscent of the period of 'Stolen Generation'.

Despite the assertions to help with the 'connections with kin' and that family will be maintained and promoted whenever it is in the child's best interests, this aim will not be achieved within the Children and Young People (Safety) Bill.

ALRM and the ACLRG seeks clarification as to what exact Government resources will be committed to scoping extended Aboriginal family placements earlier and what legal mechanisms will be put into place to help Aboriginal families and children.

The Government has indicated that 'new carer relationship managers' will be employed by the Department for Child Protection to help carers to navigate the department and provide support dealing with government processes and procedures. Again we see no improvements, additional resources or additional supports for those struggling Aboriginal families.

The Government has focused upon 'mainstreaming' services and providing services in a generic way. The concern is that specific measures under the Bill simply ignore the unique needs, Cultural issues and alarming levels and nature of Aboriginal child removal, particularly given that Aboriginal children make up around 50% of the children coming before the child protection court system.

To date there is nothing that has been addressed that would negate another era reminiscent of the 'stolen generation'. It would appear that the mainstreamed services will be predominantly 'church based' and does not recognise the Aboriginal communities inherent mistrust and the past trauma caused by historical church based child removal.

Longitudinal studies with respect to Guardianship Orders shows that many of the children placed in long term guardianship have devastating outcomes and will return to the court system, either via the criminal justice system or through the Youth Court where guardianship children are before the

Court having their own children removed. Thus causing an endless cycle of intergenerational trauma.

Under the current system we are told there are not enough foster care placements and rotational care options. However, options such as motel accommodation and commercial care is not an ideal care arrangement for any child.

ARLM and the ACLRG accepts there will always be cases where children must be removed because of the grave risk of injury, neglect or danger to their health and welfare to an Aboriginal child.

However much more needs to be done by the Government to implement strategies to strengthen families and to return children to their families wherever possible.

More Widely

ALRM and the ACLRG urges the State Government to undertake the following:

- Make family preservation and not permanent removal as the primary focus of child protection.
- Place the child as the central focus of all planning and strategy decisions, but also consider the preservation of Aboriginal family and communities as a high priority.
- The Aboriginal Community take a lead in early intervention strategies with respect of Aboriginal Children who make up 50% of matters before the courts in Child Protection.
- Provide adequate resources and funding and provide more options for early intervention 'wrap around' services and supports for Aboriginal families.
- Provide adequate resources and funding domestic and family violence support services for Aboriginal families.

- Provide adequate funding and resources to peak South Australian Aboriginal organisations to provide those wrap around services and supports to the SA Aboriginal Community with respect of child protection.
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Finally…

The Bill does not demonstrate a new approach for the safety of Aboriginal children and does not acknowledge the unique nature of Aboriginal children and the very large volume of Aboriginal Children being removed in South Australia. Insufficient attention has been placed to ensure cultural rights are preserved for Aboriginal children.

There is no new, or strengthened clauses for Aboriginal children in the Bill. In fact, the Bill waters down the legislative powers and regulations for Aboriginal children and families.

The ATSICPP was developed in the recognition of the devastating effects of forced separation of Aboriginal children from family, community and culture. There are significant concerns regarding the draft legislation and the implementation of the ATSICPP

While acknowledging the safety of children is paramount, the best interests of Aboriginal children will be for the child to remain either in the care of their parents or family members with proper supports, or for child to have a significant and meaningful contact or time spent with the child's parents or family members, rather than the destruction of these familiar connections. The destruction of such sacred bonds between Aboriginal parent and child is a common outcome of Long Term Orders made within this jurisdiction.

To date the reforms do not properly reflect the specific Cultural issues and needs of the Aboriginal community.

Despite all the Royal Commissions and Inquiries into Aboriginal people that has resulted in over 400 recommendations, most which have been largely ignored; Once again the opportunity to build safer, stronger futures for Aboriginal children and families will be lost if this Bill is not heavily rewritten, to ensure Aboriginal children and young people are safe, loved, cared for and protected; and that they will be given every opportunity to reach their full potential. This Bill in its current form will do nothing but further disadvantage and displace yet another generation of Aboriginal children.

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