



Northern Territory Legal Aid Commission

SUBMISSION TO TERRITORY FAMILIES, HOUSING AND COMMUNITIES IN RELATION TO CHILD PROTECTION IN THE NORTHERN TERRITORY

December 2021

Introduction

This submission has been prepared by the Northern Territory Legal Aid Commission (**the Commission**) in response to the handing down on 25 November 2021 of the report by Judge Armitage of the *Inquest into the death of Sammy* [2021] NTLC 032 (**the Sammy inquest**). The Sammy inquest is challenging and distressing to read. At the outset of this submission, the Commission acknowledges the distress to all involved, including Sammy's family and community and the staff of Territory Families and support service providers following the events, matters and findings set out in the Sammy inquest.

While the findings of the Coroner were detailed and comprehensive, we respectfully submit that the recommendations following the report did not go far enough to address the systemic issues identified in the findings.

The purpose of this submission is to make suggestions of practical steps that could be taken and to elicit the reforms required to prevent the recurrence of tragedies such as those the subject of the Sammy inquest.

Summary of Recommendations

1. **The Commission recommends that Territory Families revisit Royal Commission Recommendations 34.8, 34.9 and 34.10, publish current progress in relation to implementing them, and recommit to implementing them.**
2. **The Commission recommends that Territory Families publish a clear statement regarding the implementation of family group conferencing.**
3. **The Commission recommends that appropriately accredited, trained and skilled child representatives be appointed in all child protection court proceedings unless parties are in attendance with their legal advocates and orders are being made by consent.**

4. **The Commission recommends that Territory Families formalise, publish and report against their policy of facilitating the attendance by parents when an In Need of Care application is before the court.**
5. **The Commission recommends that Territory Families identify and publish the measures it is taking to identify and eliminate systemic racism that directly or indirectly discriminates against Aboriginal Territorians engaged in the child protection system, in accordance with Aim 3 of the Northern Territory Aboriginal Justice Agreement Action Plan 2021 – 2022.**
6. **The Commission recommends that Territory Families review the criteria and process for assessment of kinship carers (including emergency kinship carers) and the criteria and process for allowing children to live with emergency kinship carers.**
7. **The Commission recommends that Royal Commission recommendations 37.8 and 37.10 be implemented.**
8. **The Commission recommends that Royal Commission recommendations 33.11 and 33.15 be implemented.**
9. **The Commission recommends that a forum for legal issues in the child protection system be re-established and resources dedicated to support its continuation.**

A familiar problem

The Commission has for many years agitated and advocated for measures calculated to address many of the issues that arose in the Sammy inquest. For example, in his 2016 statement to the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory (**the Royal Commission**), an officer of the Commission made the following recommendations:¹

- Mediation, family conferencing and other alternative dispute resolution should be prioritised and resourced.
- Appropriately accredited, trained and skilled child representatives should be appointed in all child protection court proceedings.
- Parents of children the subject of a Child in Need of Protection application should be effectively notified of the application, and offered assistance to travel to attend court.
- Processing of assessments for suitability of proposed kinship carers should be expedited.

The Commission now repeats and renews these recommendations.

¹ R Goldflam, *Statement* (24 November 2016)

Family Group Conferencing

In Sammy's case there is no reference to an option to use a platform for family conferencing, mediation or other alternative dispute resolution to deal with the dispute between Territory Families and Sammy's family regarding her guardianship and care. It appears that there was no attempt by Territory Families to explore such an option. Apart from a single "family meeting" in March 2011, less than a week after the removal of Sammy and her brother from their mother's care,² there appear to have been no steps taken to confer or meet with the parents before 12 July 2012, when the court ordered that the children remain in the care of the Minister until the age of 18.³ The Royal Commission recognised the crucial importance of family group conferencing in such cases, as indicated by the following recommendations:

Recommendation 34.8

Regulations be developed to provide for family group conferences, setting out who must and who may attend and how the conference may be facilitated.

We note that despite attempts at creating the model of Family Group Conferencing in the NT with an allocation of funds by the Department for its design, nothing has ever eventuated. This is out of step with other Australian jurisdictions that have established Family Group Conferencing models.

Recommendation 34.9

Amend:

2. section 49 of the *Care and Protection of Children Act (NT)* so that a mediation conference must be arranged by the Chief Executive Officer if requested by a parent, the separate representative for a child or a recognised entity.
3. section 49(5) of the *Care and Protection of Children Act (NT)* to specify that the Chief Executive Officer may not appoint an employee of Territory Families to be the convenor of a mediation conference.

Recommendation 34.10

Section 129 of the *Care and Protection of Children Act (NT)* be amended to provide that a protection order directing short or long-term parental responsibility to a specified person cannot be made unless a family group conference has been held in the previous six months.

None of these Recommendations has been implemented.

The *Care and Protection of Children Amendment Bill 2019* effected important amendments to the *Care and Protection of Children Act 2007 (the Act)*, some of which, if in force at the relevant time, may have benefitted Sammy,⁴ but the Bill did not amend section 49, which

² Sammy inquest, [52]

³ Sammy inquest, [70]

⁴ Sammy's death occurred a matter of days after the amendments came into force.

indeed has never been amended since being first enacted. The Bill amended section 129, but not in the manner recommended by the Royal Commission.

Section 49 is contained in Part 2.1 Division 6 (“Mediation Conference”) of the Act, the stated purpose of which is “to ensure that, as far as possible, the wellbeing of a child is safeguarded through agreements between the parents of the child and other interested parties”. Sammy’s case tragically illustrates that without amendments such as those proposed by the Royal Commission, the promise of the Division is illusory, and its purpose will not be achieved.

Court Ordered Mediation Conferences pursuant to section 127 contained in Part 2.3 Division 3 of the Act provide for the Court to order a mediation conference before deciding an application. Specifically, the Commission submits that this form of alternative dispute resolution could have great value in this jurisdiction by providing an opportunity for parties, in a less adversarial way, to:

- Review arrangements made for the child and recommendations for future care; and
- Arrive at an agreement about the best means of safeguarding the well-being of the child; and
- Allow parents and other significant family members to actively participate and feel heard.

This section has not been operative since inception in 2007 because of the failure to enact Regulations to underpin it nor has there ever been serious consideration to fund the Court to do this.

The Commission further submits that mediation conferences promote compliance with section 12 of the Act, and the Aboriginal Placement Principle. The Sammy inquest found that “that section was largely ignored and not followed”,⁵ a disturbing finding which led to one of the two recommendations made by Judge Armitage, that the CEO of Territory Families ensure that the placement of Aboriginal children is in conformity with the Act.⁶ In our experience, the non-compliance with statutory requirements under section 12 of the Act is an ongoing and common systemic issue. It is unfortunate that no finding was made in the Sammy inquest about the underlying reason for this provision being routinely ignored, and that there has been no recommendation to address this.

The Royal Commission also adverted to the importance of accountability in relation to this issue by making the following recommendation:

Recommendation 31.1

The Northern Territory Government review periodically its compliance with the Aboriginal and Torres Strait Islander Child Placement Principle.

⁵ Sammy inquest, [39]

⁶ Sammy inquest, [104]

Recommendation 1:

The Commission recommends that Territory Families revisit Royal Commission Recommendations 34.8, 34.9 and 34.10, publish current progress in relation to implementing them, and recommit to implementing them.

The Commission notes with concern that notwithstanding the Northern Territory Government's apparently unequivocal commitments given in April 2018 to implement these recommendations within three years,⁷ these recommendations were not implemented within that timeframe, or at all. The Commission notes with further concern that in its 2020 progress report (**the 2020 Generational Change Impact Report**), the Northern Territory Government announced that "Stage 2 law reform (Relevant and appropriate changes to the *Care and Protection of Children Act*)" had been "COMPLETED".⁸ We do not have any information to refer to in relation to this and in the interests of transparency the details supporting this conclusion should be provided.

The Commission notes that according to the 2020 Generational Change Impact Report, in 2018 \$5.7 million was allocated to "work with families and introduce family group conferencing", and that family group conferencing is already a "key feature" of child protection casework and "an embedded practice" within the Signs of Safety Practice Framework. However, the Report also states that "further consideration is required to ensure the co-designed model [of family group conferencing] is relevant to current operations", and that the program is "BEHIND SCHEDULE".⁹

Recommendation 2:

The Commission recommends that Territory Families publish a clear statement regarding the implementation of family group conferencing.

Legal representatives for the Child

The Commission has repeatedly and consistently campaigned over a lengthy period for the implementation of a program that will ensure every child subject to a care order or an application for a care order is legally represented by an independent lawyer who has been properly trained and accredited for this exacting and crucially important work. The critical role of children's lawyers in the family law system has long been established and supported.

⁷ NT Government, *Safe, Thriving and Connected* (April 2018), p. 28

⁸ NT Government, *Safe, Thriving and Connected: Generational Change for Children and Families 2020 Generational Change Impact Report* (December 2020), p. 35

⁹ NT Government, *Safe, Thriving and Connected: Generational Change for Children and Families 2020 Generational Change Impact Report* (December 2020), p. 25

It is at least as important that this occur in the child protection system. The Sammy inquest does not mention whether a child representative was even appointed before final orders were made in July 2012. In our experience, it is very rare for judicial officers to appoint a legal representative for infants or pre-verbal children. In our submission it is a flawed application of Division 6A of the Act to appoint a person to act in the best interest of the child only if the child's views and wishes can be presented to the Court. This is a very different approach that used with matters involving similar levels of complexity in the family law system.

It may be inferred that the parents were not represented, and played no part in the proceedings. In these not uncommon circumstances, the child representative is the only potential contradictor available to assist the court to assess an application, the outcome of which can be of the utmost seriousness. The Commission does not suggest a child representative should as a matter of principle or course oppose a care application. The child representative, however, is often in a unique position to not only inform the court of the wishes of a child (depending of course on the age and maturity of the child) and represent the child's best interests but to conduct their own independent review of the evidence and the circumstances of the case to advance the child's best interests and ensure all relevant material is before the court. Whilst in a perfect system the model litigant should fulfil this role, our system is not perfect. The Commission submits that placing this responsibility on Territory Families can be to the detriment of the child's best interests.

The Royal Commission made the following recommendation:

Recommendation 25.31

All legal practitioners appearing in a youth court be accredited as specialist youth justice lawyers after training in youth justice to include child and adolescent development, trauma, adolescent mental health, cognitive and communication deficits and Aboriginal cultural competence.

The Commission submits that similarly, all legal practitioners appearing in the Family Matters Division of the Local Court as child representatives be accredited after undergoing appropriate specialised training.

Recommendation 3:

The Commission recommends that appropriately accredited, trained and skilled child representatives be appointed in all child protection court proceedings unless parties are in attendance with their legal advocates and orders are being made by consent.

Notification of parents

The Sammy inquest found that:

On 9 May 2012 the mother telephoned and asked when the children's matter was in the court. She was told it was "tomorrow". She said "oh" and explained she was in a remote community. She was told that she needed to contact a lawyer and was given the phone number of Legal Aid. It appears that on that

date the case was adjourned, but a long term order, placing both children in the care of the CE until the age of 18 years was made on 12 July 2012.¹⁰

The Royal Commission made the following recommendations:

Recommendation 32.12

Territory Families ensure that any family where a child is to be removed is given all appropriate information about the reason for the removal, the steps the family must take to have the child returned, and legal advisors the family may contact in a form and language suitable for the family.

Recommendation 34.14

Amend section 104 of the Care and Protection of Children Act (NT) to require the Chief Executive Officer to take reasonable steps, commensurate to the urgency of the application, to provide notice of the application to the parents of the child.

Recommendation 34.15

Amend section 106 of the Care and Protection of Children Act (NT) to include the requirement that at the time the order is given to a parent of the child, the length and effect of the order, the right of appeal and information about how to appeal must be appropriately explained to the parent in their preferred language.

The Commission acknowledges that the 2019 amendments to the Act were substantially in accordance with these recommendations. The Commission submits, however, that more should be done to support and protect the rights of parents, who by sections 94 and 125 are designated as parties to proceedings under the Act.

Formerly, Territory Families would arrange for parents, including those living in remote communities, to be brought to court, so that they could appear at the mention of a care application for their child. An important consequence of this practice was that at court, parents would in the usual course of events engage with a legal aid service, receive legal advice and have the opportunity to participate and actively contribute to reunification and care planning, with the assistance of a legal advocate. Not all parents oppose the making of a care order, and in some cases, parents actively support the making of such an order and use this opportunity to work with Territory Families and/or their lawyer to ensure their voice is included in reunification and care planning. However, where there is a real dispute between the CEO and a parent, the step of providing legal assistance to a parent can be of crucial importance in determining the process, progress and ultimate outcome of a care application.

¹⁰ Sammy inquest, [66]. A footnote to this passage states that the Department conceded that it should not have sought a Long Term Protection Order at that time.

Recommendation 4:

The Commission recommends that Territory Families formalise, publish and report against their policy of facilitating the attendance by parents when an In Need of Care application is before the court.

Kinship care assessments

The Sammy inquest records in detail the delays and hurdles that over a period of two years impeded and ultimately defeated the attempts by various members of Sammy's family to have her returned to their care.¹¹

In relation to this issue, Armitage LCJ made the following observations:

Sammy was removed from her parents at the age of 10 months and it took the next one year, 7 months and 26 days to find that the two paternal aunts being assessed were unsuitable. That was a very lengthy period of time at a very critical stage of her development. A good part of the reasons for delay seems to have been the time taken to deal with the various hurdles that family were required to overcome: criminal history checks, Ochre cards, housing and referees.¹²

The Commission submits that the inescapable inference to be drawn from this disturbing account is that the delays and hurdles are the product of a system in which racism is embedded.

The Northern Territory Government has recently acknowledged this problem and pledged to address it by entering into the Aboriginal Justice Agreement:

Improving services requires identifying and eliminating systemic racism and discrimination within both government agencies and contracted non-government service providers... Evidence of systemic racism is sometimes met by denial, minimisation and deflection of responsibility.¹³

Sammy's inquest illustrates that denial, minimisation and deflection of responsibility for systemic failures continues:

¹¹ Sammy inquest, [52] to [79]

¹² Sammy inquest, [84]

¹³ Department of the Attorney-General and Justice, *Northern Territory Aboriginal Justice Agreement 2021 – 2027* (2021), p. 21

However, in the written submissions received from Territory Families on 14 October 2021, there appeared to be an effort on the part of the Department to minimise [the Department's concessions that it had failed to comply with the Aboriginal placement principle]. That seems curious given that Sammy was never placed with her family, community or an Aboriginal carer.¹⁴

The Sammy inquest does not refer in any detail to the steps considered, proposed, committed to or taken by Territory Families to reflect on Sammy's death, to identify the issues that contributed to her death, or to improve child protection practices so as to address those issues. There are no findings that any such steps were taken.

The Royal Commission made several recommendations which, if fully implemented, would help to identify and eliminate the systemic racism that led to the delays and hurdles faced by Sammy's family in achieving re-unification, including the following.

Recommendation 37.1

The internal oversight processes in Territory Families be responsive, transparent and timely and be staffed with highly skilled people who have the capacity to undertake investigative work of a high quality.

Recommendation 32.1

Territory Families review the Structured Decision Making tools to ensure they are appropriate to the Northern Territory.

Recommendation 32.10

Territory Families:

- review the caseworker workforce requirements
- redesign recruitment strategies
- develop in-service and optional training
- develop fixed caseworker to file ratios taking into account the complexity of the child and family, issues of remoteness and other relevant considerations, and develop cultural awareness and competence training in consultation with Aboriginal controlled organisations.

Recommendation 33.6

Territory Families create at least two senior positions, to be filled by Aboriginal people, in the Out of Home Care unit, with responsibility for:

- increasing the number of Aboriginal foster and kinship carers
- overseeing training on kinship and kinship care decision-making
- reviewing decisions relating to kinship care, including carer assessments and failure to place children with identified kin, and

¹⁴ Sammy inquest, [43]

- reporting annually on aspects of kinship care, including the number of Aboriginal children placed in or outside kinship care.

Recommendation 37.2

The Chief Executive Officer of Territory Families give effect to the provisions of sections 294-298 of the Care and Protection of Children Act (NT) by establishing a review team or teams to oversee the departmental operations of Chapter 2 and monitor the quality of the services.

Recommendation 5:

The Commission recommends that Territory Families identify and publish the measures it is taking to identify and eliminate systemic racism that directly or indirectly discriminates against Aboriginal Territorians engaged in the child protection system, in accordance with Aim 3 of the Northern Territory Aboriginal Justice Agreement Action Plan 2021 – 2022.

Currently, Territory Families advises that the timeframe to conduct an assessment of suitability of proposed kinship carers takes at least 12 weeks. Although that is a considerably shorter period than occurred in Sammy’s case, the Commission does not accept that it is a realistic timeframe but notes this is a frequently cited reason to comply with the current requirements that Working with Children clearances for every adult member of a household be obtained. The Commission submits, however, that these requirements are unnecessarily stringent, and, as a consequence, cause avoidable harm. The Commission further submits that this 12-week time frame drastically underestimates the actual time currently taken to conduct these assessments. Possible reasons for this include the fact that Territory Families refuse to conduct kinship assessments concurrently and will not commence any other aspect of the kinship assessment checks until assessment of the first proposed carer has been completed.

Recommendation 6:

The Commission recommends that Territory Families review the criteria and process for assessment of kinship carers (including emergency kinship carers) and the criteria and process for allowing children to live with emergency kinship carers.

Trauma assessment and treatment

The Sammy inquest recommends that all children in out of home care be assessed for trauma, and, where indicated, be provided with trauma treatment.¹⁵ For its part, the Royal Commission recommended that:

Recommendation 33.11

¹⁵ Sammy inquest, [105]

The Northern Territory Government develop and establish a professional stream of foster care, to respond to the targeted therapeutic needs of children, and to care for children with complex needs.

Recommendation 33.15

Territory Families improve access for children and young people in out of home care to effective rehabilitation and counselling services including the prevention and treatment of substance abuse.

Recommendation 7:

The Commission recommends that Royal Commission recommendations 33.11 and 33.15 be implemented.

Response to the inquest

The Sammy inquest exposes a litany of systemic failures, poor decisions, unsatisfactory delays and ineffective practices. It also provides an opportunity to address these issues and achieve substantial enhancements to the child protection system. However, a stronger institutional framework is required to ensure that there is accountability to the findings. The Commission is concerned that the Sammy inquest will, like so many other reports into the Northern Territory child protection system, be shelved and, in due course, be forgotten.

The Royal Commission made the following recommendations:

Recommendation 37.8

Amend Part 3.3 of the Care and Protection of Children Act (NT) to require the Commission for Children and Young People in conjunction with the Child Death Review and Prevention Committee to monitor Territory Families' implementation of coronial recommendations relating to children who died while in out of home care.

Recommendation 37.10

In light of recommendations the Commission has made in relation to the Office of the Children's Commissioner, the Children's Commissioner Act (NT) be amended to provide that the Children's Commissioner is the Convenor of the Child Death Review and Prevention Committee with statutory responsibility for its operations, with the Child Death Review and Prevention Committee adopting a more comprehensive and regular process for reporting on its monitoring of the implementation of recommendations.

Neither of these recommendations has been implemented.

Recommendation 8:

The Commission recommends that Royal Commission recommendations 37.8 and 37.10 be implemented.

Formerly, Territory Families convened a forum with legal and other service providers to discuss child protection issues. In addition, the Commission and other NGOs were represented on the now defunct Legislative Amendment Advisory Committee. Participation in these groups was at times challenging and frustrating for both government and non-government participants. Nevertheless, they provided an important means of strengthening collaboration, information-sharing, policy development and accountability across the spectrum of stakeholders involved in the child protection system.

Recommendation 9:

The Commission recommends that a forum for legal issues in the child protection system be re-established and resources dedicated to support its continuation.

Conclusion

As indicated at the outset, the Commission makes this submission with the continued hope that it will help elicit the reforms required to prevent the recurrence of tragedies such as those the subject of the Sammy inquest.

Should it be of assistance, the Commission would be grateful to provide further information on our recommendations.