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Infant removal and the lack of representation for parents

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Abstract

This paper throws a spotlight on the systemic disadvantage experienced by parents who have their children removed from their care. With data drawn from the annual reports of the Legal Aid of Western Australia, the child protection agency in Western Australia, and the Productivity Commission, the authors illustrate the disconnection between the agency's policy to reunify children once removed from their birth parents; the resources made available to support families to overcome their difficulties; and how the gap is further widened when parents without financial means and who are disempowered face legal proceedings on their own. We profile the increasing numbers of infants who are removed, the decreasing numbers of these infants who are discharged from care, and the shortfall of grants of legal aid that are provided to parents when they go to court. For this group of parents, permanent loss of their children is a reality. The aim of the paper is to capture the extent to which there is a fundamental blemish on the principles of due process and fairness, and once statutory processes are triggered, the best interests of the child and the support of parents are contingent, with poverty being the key mediating factor.

Introduction

In this paper we throw a spotlight on the issue of legal representation and advocacy for parents when they face child protection proceedings in the Children's Court, and their access to review and appeal mechanisms for decisions made about their children once they are removed and placed in care. We locate the discussion within the Western Australian context and its permanency planning policy to illustrate the consequences for vulnerable parents who find themselves navigating the statutory child protection system on their own. The consequences of the permanency planning policy, in combination with poverty and disadvantage, are more significant for those parents whose children are removed during infancy. According to the Australian Institute of Health and Welfare (2019), in 2017–18 the rates of entry into out-of-home care were higher for younger children. There were 7.2 per 1000 infants in care compared with 2.2 per 1000 of 1–4-year-olds.

Parents who have had their children removed and have limited access to ongoing advocacy and legal representation bear the brunt of multiple layers of exclusion and the permanent loss of their children. Mackieson et al. (2019, p. 11), in their discussion about the implementation of permanency planning amendments in the child welfare legislation in Victoria, highlighted concerns in relation to 'unfettered government power' and the unfairness of disadvantaged families having to resolve complex problems within the limitations of poor resourcing of services. The correlation between poverty and child protection intervention has been made by Bilson et al. (2013) in their longitudinal study of reports, investigations and substantiations of maltreatment of children in Western Australia. These researchers found that disadvantaged and marginalised families were subjected to high degrees of surveillance, with a focus on risk and blame. Bilson (2018, 6 August), writing on his experience in the United Kingdom, made a link between poverty and child protection intervention, describing it as a 'postcode lottery'. Similarly, Gupta (2018, p. 2) found an association between poverty, coming to the notice of child protection authorities, and poorly resourced family support programmes, describing a child protection orientation as 'unforgiving approach to parents: improve quickly and within set time limits or your children will be removed and placed in care or for adoption' (p. 2). Annual reports, policy documents and the literature underpin commentary on the increasing numbers of infants removed from their birth mothers and placed in care, and consider the implications when parents have limited and almost no professional and skilled legal representation or advocacy through the court process. The purpose of this paper is to foreground the lack of legal representation for parents facing statutory intervention, many of whom are vulnerable, socially disadvantaged and traumatised by child protection proceedings. We further argue that the provision of adequate advocacy and

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legal representation is a necessary feature of a child protection system that is intended to serve the best interests of the child and provide fair and humane care to vulnerable families.

Method

The paper integrates data from some key documents that enable a critical examination and description of the experiences of families involved with the child protection system. This paper is written from the perspective of three practitioners: a lawyer and former director of Legal Aid of Western Australia who has been acting on a *pro bono* basis for parents, and two social workers, one of whom is the director of the Family Inclusion Network of Western Australia supporting parents who are involved with the child protection system, and the other a social worker and researcher with a 30-year professional career in child protection, medical social work and a former manager of a social work department at a tertiary maternity hospital in Perth. In order to gain a policy and legislative perspective of the experiences of the parents who we were supporting, we undertook an analysis of documents, reports and data that are available in the public domain. Data about the numbers of applications for protection and care orders that were lodged and granted and how many of the parents of these children received legal aid were derived from the annual reports of the child protection agency (now called the Department of Communities, DoC), the Legal Aid of Western Australia, the Aboriginal Legal Service and the Aboriginal Family Law Services. Further documents and literature were obtained using the search words 'permanency planning and child protection' and 'legal representation for parents' AND 'child protection'. Databases for these searches were what are referred to as grey literature; these are Google, Google Scholar, government websites such as Australian Institute of Family Studies (AIFS), Australian Institute of Health and Welfare (AIHW) and National Child Protection Clearing House, and library databases such as EBSCO, JSTOR and MEDLINE. The scope of the paper is limited to exploring what supports were available to parents facing child protection proceedings in the Children's Court in Western Australia. However, we also provide some data on how many appeals were made by parents to the State Appeals Tribunal and the Care Plan Review Panel. We include data from the Productivity Commission to illustrate the relatively low expenditure on programmes that provide support to struggling families. The following section provides an overview of permanency planning and the data on infants entering and remaining in care.

Permanency planning policy

In its annual report, the Aboriginal Legal Service of Western Australia described a case of a 2-year-old child taken into care at birth and placed with non-Aboriginal foster parents in Perth. The child's parents and family lived in Broome, a distance of 2,240 kilometres away from Perth where their child was placed. The Aboriginal Legal Service represented the father of the child who, according to the DoC submission, had not met the outcomes required of him within the 12 months as stated in the Permanency Planning Policy. The magistrate presiding over this case in the Children's Court in Western Australia laid bare the fault lines created by the Permanency Planning Policy and the Department's obligation by law to uphold the best interests and safety of the child and to support and enable parents to care for their children:

> If granted, SJW [father] would have been deprived of any opportunity to ever parent his own child. The application was refused. In its judgment the Children's Court of WA [Western Australia] was highly critical of Permanency Planning and found that its strict application had 'defeated' reunification of the child with SJW. The Court remarked that, 'the child's best interests were surrendered to a policy'. . . . The Court described CPFS' efforts to identify family placement options for the child – and therefore ensure she could return to country – as 'pathetic'. Rather than make a protection order until the child turned 18, the Court made a two year time limited order with reunification of parent and child the primary objective. (Aboriginal Legal Service of WA Inc., 2016, p. 14)

The Aboriginal Legal Service included the case in its annual report to highlight the value of legal representation for parents involved in proceedings in the children's courts.

Permanency planning refers to the provision of long-term care arrangements for children in out-of-home care, the aim being to achieve life-time relationships, and a sense of belonging and stability with the underlying assumption that such an arrangement will provide the best outcomes for those children for whom reunification with their birth family is not possible (Australian Institute of Health and Welfare, 2016). Queensland, Victoria, New South Wales and South Australia have introduced legislative mechanisms to focus on strengthening permanency planning for children in out-of-home care and enabling the option for carers to be granted special guardianship orders when children are unable to be reunified with their parents (Department for Child Protection, 2018; Department of Child Safety Youth and Women, 2018; Mackieson et al., 2019).

Commonly, permanency policies state that a judgment that parents' circumstances have changed sufficiently to have their children returned is to be made within very tight timeframes. For instance, New South Wales legislation directs that permanency planning must occur at 6 months for a child less than 2 years of age and 12 months for a child over 2 years of age (New South Wales Government. Family and Community Services, 2018). In Victoria, the timeframe for reunification is set at 2 years, after which time parental responsibility is given to approved kin or non-kin carers (Department of Health and Human Services, 2019). In Western Australia, permanency planning is not mandated in legislation. The Permanency Planning Policy states that when a child under the age of 3 is removed, the timeframe for reunification is set at 12 months. The information sheet on Permanency Planning available on the child protection agency's website states:

> Decisions about whether to proceed with reunification and what is in the child's best interests must be made within 12 months for children who enter provisional protection and care at less than three years of age; and two years for all other children. (Department for Child Protection and Family Support, 2016, p. 2)

Infants entering care

The annual reports of the child protection department (now known as the DoC and known formerly as the Department for Community Development, the Department of Child Protection, and the Department of Child Protection and Family Support) show that the number of infants entering out-of-home care has been increasing. This increase is illustrated in Figure 1. To put this increase in perspective, the number of births in Western Australia between 2007 and 2014 increased by 6% (Australian Bureau of Statistics, 2014), whereas over the same period, the number of infants taken into care increased by 28%. In this 7-year period, infant removal was at its lowest in 2009–10, and since then

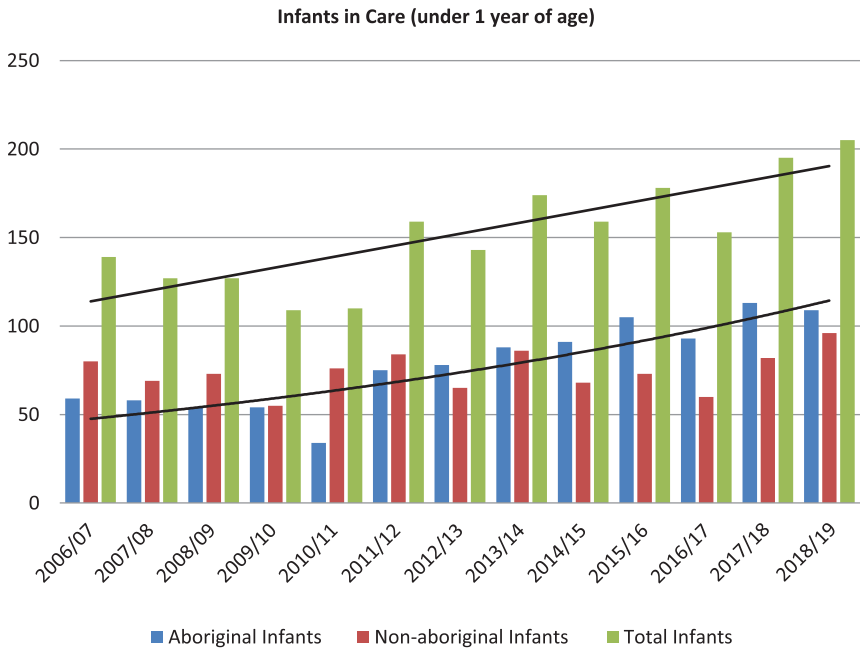

Fig. 1. Trend of infants placed in care (western Australia).

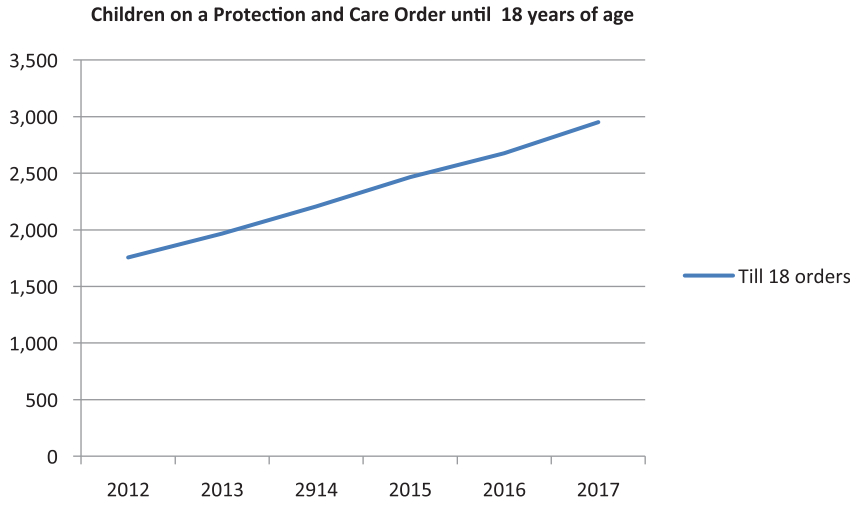

Fig. 2. Increasing trend of until-18-year order.

has increased by 38%, and the birth numbers by 3% (Harrison et al., 2015). In 2013–14, 25.4% of children entering care in Western Australia were infants, and this proportion was the highest in the country (Australian Institute of Health and Welfare, 2015).

O'Donnell et al. (2019, p. 88), in their paper about the high proportion of Aboriginal infants being removed, used national AIHW data to show that admissions into care for Aboriginal infants are 10 times the rate for non-Aboriginal infants, and these infants are less likely to be discharged from care. The chart illustrates the continuing upward trend (Department of Communities, 2018a, 2018b). This paper does not focus exclusively on Aboriginal children, but it is worth noting that, in a recent newspaper article, Ms Dawn Wallam, chief executive of Yorganup, an Aboriginal child placement agency, pointed out that Aboriginal children represent 55% of children in care in Western Australia and the number of children in care is 'far greater than the statistics of the stolen generation' (Pilat, 2019, 25 January).

A recent report by SNAICC (2019, p. 64) indicated that at 17.8 times the rate, Western Australia had the highest overrepresentation of Aboriginal and Torres Strait Islander children in care, at the same time as 'investing the least per capita in intensive family support [and] investing comparatively little in other family support services' (p. 64).

Remaining in care

Once children are removed, and when reunification is not being considered as an option or is considered to have failed, the child protection agency (DoC) applies for a Protection and Care order until the child reaches 18 years of age, which enables carers to apply for special guardianship orders. The trend of increasing numbers of children on 18-year orders recently emerged in the Western Australian Parliament in response to a question from an Opposition MP (Parliament of Western Australia, 2017, 5 December, p6561b–6562a). The statistics in response, quoted by an MP representing the government, is illustrated in Figure 2 and shows that the numbers of children on an 18-year order have nearly doubled over the past 6 years. This provoked Hon. Alison Xamon to ask about the numbers of children whose orders were

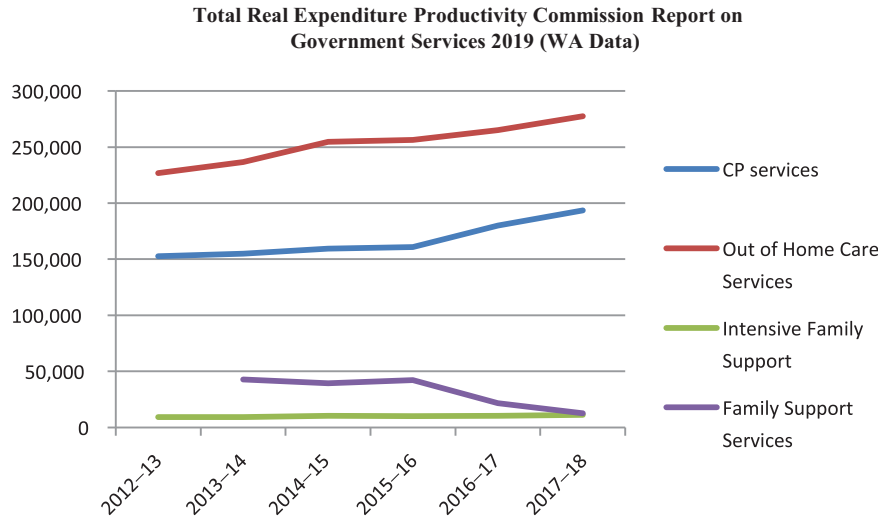

Fig. 3. Expenditure support versus statutory interventions (western Australia).

revoked, which revealed that in 2016/17 just 9 of the 1191 children aged under 4 years who were in care had their orders revoked (Department for Child Protection and Family Support, 2017). This data supports the observation made by the magistrate, mentioned at the beginning of this paper, that there is a default to long-term orders, and infants (children under 1 year) are most likely to be subject to long-term orders and not reunified with their birth parents (Aboriginal Legal Service of WA Inc., 2016).

Disadvantage and expenditure decisions compound the risk of permanent loss

What emerged from the latest report of the Productivity Commission (2018) confirms the observation made by SNAICC – the peak body for Aboriginal and Torres Strait Islander children and families. The disproportionately low expenditure on support services compounds the risk for parents who come into contact with the child protection system in Western Australia, the risk being that they will lose their children permanently. Figure 3 is based on a Productivity Commission report and illustrates the very low spending on family support services. The rest of the expenditure goes to responses to notifications, assessments, the process of seeking an order, and costs associated with out-of-home care placement. In a snapshot of the issues affecting Aboriginal and Torres Strait Islander children, SNAICC (2018) gave the Western Australian agency a rating of 'very poor' for the provision of universal and targeted services and culturally safe and responsive systems, and 'poor' for participation, control, self-determination and accountability.

In the submission to the child protection agency regarding out-of-home care reforms and the proposed Permanency Planning Policy, the Western Australian Commissioner for Children and Young People (Pettit, 2016) made an observation that children who are removed come from families that experience long-term, complex, entrenched problems associated with poverty, structural disadvantage and intergenerational trauma. The Commissioner made the point that 'the state and its agencies should be held accountable and reasonable efforts should be made to support families and assist them to address their issues'. Quoting Article 4 of the UN Convention of the Rights of the Child, the Commissioner said that each agency 'should demonstrate how it has made reasonable efforts to provide services that will help families remedy the conditions that led to the children coming into care. In essence the burden of proof should be with the State' (Pettit, 2016, p. 5).

What happens once a child is removed: is it fair?

In this section we illustrate the shortfall in the provision of legal representation using data from the annual reports of the Legal Aid of Western Australia, the Aboriginal Family Law Services, and other community legal centres. Parents are able to obtain a duty lawyer service at the Children's Court. The provision of Legal Aid of Western Australia, if the applicants pass a merit test, is for a limited period of time, usually 4–5 hours. As a result, parents do not have representation for the whole cycle of legal proceedings and, if they oppose the order sought by the DoC and wish to proceed to trial, parents have to represent themselves. Some mothers who have had to represent themselves have said that the magistrates are kind and helpful (personal communication, 2019).

In 2010–11, there were 1221 applications for protection orders lodged in the Children's Court, and only 40% (496) of the respondents to these applications received legal aid (Department for Child Protection, 2012; Legal Aid of Western Australia, 2011). In 2016–17, there were 1404 applications for orders made in the children's court; 668 received assistance from Legal Aid, and when legal assistance from community legal centres and the Aboriginal Family Law Services are included, just 64% of respondents received legal assistance (Aboriginal Legal Service of WA Inc., 2016, 2017; Department for Child Protection and Family Support, 2017; Legal Aid of Western Australia, 2018; Women's Law Center, 2017). The most recent annual report of Legal Aid Western Australia (2019) opened its description of grants to parents in child protection matters with the following statement, underscoring the uncertainty with words such as *re-introduced* and *could*:

> Over the financial year, Legal Aid WA [of Western Australia] re-introduced grants of aid for families in the protection and care list at the Children's Court. From January 1st 2019 all respondent parents who met our means test could receive a grant of aid. (p. 19)

The limited legal aid funding available for child protection matters has been observed in other jurisdictions, such as the Australian Capital Territory and Queensland (Thomson et al., 2017; Walsh & Douglas, 2012).

Table 1. Numbers of applications by family members to review decisions made by the child protection agency

	2015/16	2016/17	2017/18	2018/19
Care Plan Review Panel	42	30	23	16
State Appeals Tribunal	3	5	15	6

Once an order has been granted by the Children's Court for a child to be taken into care, there are two further avenues of appeal, the State Appeals Tribunal (SAT) and the Care Plan Review Panel (Children and Community Services Act 2004). A care plan must be conducted every 12 months, and care plans include decisions about the needs of the child, placement arrangements and contact with family. The Care Review Panel is an independent panel established to review care planning decisions made about children in care and is required by the Children and Community Services Act 2004. The application for a review must be made within 14 days of the receipt of the care plan (Department of Communities, 2019). As can be seen in Table 1, data from the annual reports indicate that only a small number of families make an application to the Care Plan Review and, of those, more than half withdrew their applications because they did not meet the criteria. The legislation also allows for a person aggrieved by a decision made by the Department to make an application to the SAT for a review of that decision. The application must be made within 28 days of the decision. Similarly, the annual reports of SAT illustrate that most parents do not access this option (State Administrative Tribunal, 2018, 2019).

With 5379 children in care in 2018/19, is one to assume that the overwhelming majority of families are satisfied and accepting of decisions made about their children? Perhaps not. The literature suggests that parents are likely to be disempowered and traumatised by their experiences with child protection workers and the process (Harrison et al., 2015; Marquis, 2017; Mermania et al., 2015; Novacs et al., 2006; Ross et al., 2017). In a report based on interviews with parents in Newcastle, New South Wales, titled, 'No voice, no opinion, nothing', Ross et al. (2017) described how the court experience was frightening, demeaning and dehumanising, suggesting commonalities in the way parents in other jurisdictions, and over time, have experienced their interaction with child protection: 'It's like a David and Goliath battle, you against them' (p. 2).

Discussion

More than a decade ago, Harries (2008), in a project about the experiences of parents and families whose children were taken into care, recorded that parents felt demeaned, marginalised and had minimal information and access to legal or personal advocacy. In 2008, the parents' advice to others who had lost their children through statutory intervention was to get legal help:

> they need to get serious legal advice, because I personally think that [the Department] run with the fact that they have the upper hand on the knowledge . . . but not knowing my rights was the biggest thing, because you feel hopeless. Even though you can't do anything and you are in the wrong, but just knowing your rights is some form of hope that things can get better. (p. 33)

Similar findings were described in a recent study conducted in Western Australia for the Commissioner for Children and Young People. Marquis (2017) interviewed mothers who had lost their children to care and were hoping for reunification. These mothers described themselves as voiceless and feeling ambushed. These mothers echoed the same confidence expressed by mothers in the Harries study – that legal help and advocacy and the courts are the best way to hold the DoC accountable.

Hansen and Ainsworth (2009), writing from the parents' perspective, draw on human rights and social justice principles to argue that effective and humane practice needs the voice of the parents to be heard. Miller (2015), a principal lawyer with Legal Aid Queensland's Children and Young People Team, argued for the establishment of a child protection law specialist accreditation programme in law schools for competent and committed lawyers to be practising in child protection. He quoted the Commissioner who headed the Queensland Child Protection Commission of Inquiry (Carmody, 2013):

> Child protection law by its nature is intrusive . . . Many families involved in court or tribunal processes have one or more characteristics of social disadvantage or vulnerability . . . Such disadvantage is compounded by the absence of good legal representation in what can be an adversarial process. (Miller, 2015, p. 27)

It is arguable that in spite of the commitment in the Permanency Planning policy that reunification with the parents is the first priority and that there is an obligation to provide support to parents to address the issues that led to their children being removed from their care, the reality is that they are more likely to lose their children permanently (Department for Child Protection and Family Support, 2014). A commonly held principle in matters that go before a court is that of procedural fairness, which in child protection matters seem to have been sidelined. Procedural fairness has been described as having four key components: (1) voice – having one's viewpoint heard; (2) neutrality – unbiased decision-makers and transparency of process; (3) respectful treatment – individuals are treated with dignity; (4) trustworthy authorities – the view that the authority is benevolent, caring and genuinely trying to help (Masson, 2012; Thomson et al., 2017; Venables & Healy, 2017; Walsh & Douglas, 2012).

A similar point was made by a story in *The Canberra Times* on 2 June 2019. Mr Robinson, the family law director of Robinson and McGuiness, described the child protection agency in the Australian Capital Territory (ACT) as 'harshly adversarial' and had this to say: 'The parents involved in these cases are usually not people that have a great deal of financial means'.

Mr Robinson said:

> There is a disconnect between the money that's invested in prosecuting the case on behalf of the director-general compared to the legal resources made available to the parties and the child representative.
>
> The reason this jars is because the principles of the Act are directed towards supporting children remaining with their families, where it [sic] is safe for that to happen. He said if the government worked in accordance with those principles by being proactive rather than reactive, it would save many cases of children being removed in emergency action that turns into a 'litigation vortex'. (LeLievre, 2019, 2 June)

In a paper reporting on the views of 46 stakeholders about the quality of and access to legal representation in care proceedings in the ACT, Thomson et al. (2017) found that most stakeholders (judicial officers, legal practitioners, senior executives and frontline workers of the child protection agency, the foster care agency and other support workers) pointed to the power imbalance in proceedings as a reason for providing access to representation for parents. In an illustration of this power imbalance and poor resourcing of legal aid agencies, lawyers speak of advising parents that: 'if

the department tells you to jump–ask how high?' (personal communication, 2019). Venables and Healy (2017), in a study based in Queensland, explored practitioners' thoughts on how to demonstrate procedural fairness to parents while working within guidelines regarding intervention with parental agreement. They found that a procedurally fair approach by practitioners depended on whether they had time to work with families as well as the emotional reactions and cognitive capacity of parents. The motivation to work within a procedural fairness lens was also affected by imposed expectations, i.e., external pressure such as compliance with formal department documents, as well as professional and personal motivations. In other words, it is not a given that child protection workers would embed the principles of procedural fairness in their interactions with parents.

In addition to the social justice and human rights lens, recent research points to benefits to the families and the state of providing skilled and high-quality advocacy to parents. Courtney and Hook (2012) evaluated the impact of a programme of enhanced parental legal representation on the timing of permanency outcomes for 12,104 children who entered court-supervised out-of-home care in Washington state for the first time between 2004 and 2007. These researchers found that 'high-quality' legal representation resulted in children staying in care for shorter periods, speeded up reunification and, when reunification was not possible, it speeded the move to permanent care. Similarly, Thornton and Gwin (2012) point to the potential cost savings due to expedited permanency and less time spent in care, more personally tailored case plans and increase in visitation. Masson (2012), in a study involving lawyers who represented parents in child protection proceedings, reported that lawyers saw themselves as keeping parents engaged in proceedings, wished to work towards placement with parents, but also saw success in decisions to place children with relatives and arrangements that would allow parental contact. In an evaluation of a child protection clinic in a Midwestern law school in the United States, Haight et al. (2015) compared outcomes between parents represented by law students with those represented by fully licenced district attorneys, and found no difference in outcomes for parents. These researchers concluded that staff who provided strong legal counsel were those who build a positive relationship with the families and possessed personal characteristics to enable them to provide legal representation to parents.

Conclusion

There is no data currently available that describes the experiences of parents throughout the lifecycle of their interactions with the child protection agency, their access to legal representation and advocacy, and the outcomes for themselves and the children. A further systematic review of literature needs to be undertaken to inform the design of an in-depth field-based and multi-method research, which we suggest is required to explore the potential for trigger points in the interaction between vulnerable families and the child protection system that might evoke a procedurally fair response. Based on the data so far, we suggest that until casework, service delivery and professionals involved in child protection work embrace a sustainable, tangible, skilled, relational and empathic framework of care with adequate resources to mitigate the structural and material deficits that have a negative impact on parenting, external and judicial oversight on decision-making remains necessary.

The Commissioner for Children and Young People (2018), in an Issues Paper about parents' rights to participate, linked relationships between caseworkers and families and reunification, adding a human rights dimension to the argument:

Article 9 of the Convention states:

> Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine . . . In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known . . . .Recognition of the rights of parents to participate in child protection decision making is also consistent with the autonomy and protection of the family unit upheld by the International Covenant on Civil and Political Rights. (p. 4)

This paper suggests that governments' systemic and practice decisions currently work against the needs of parents to fair, transparent and accessible forms of review of child protection decision-making and services. We suggest that, while relationships that embed an understanding of the impact of poverty on parenting and provide resources to remedy profound material deficits are necessary, it is not sufficient. Once matters proceed to court, what seems to be absent is the principle forwarded by Walsh and Douglas (2012, p. 183), that all parents facing child protection proceedings be provided with advocacy and legal representation because 'the termination of their parental responsibilities may be considered to be comparable in gravity to other forms of state intervention including deprivation of liberty'. In addition, the lives of children, their parents, siblings, grandparents and other extended family are irrevocably altered.

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