



THE LAW SOCIETY
OF NEW SOUTH WALES

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Royal Commission into Institutional Responses to Child Sexual Abuse
GOB Pox 5283
SYDNEY NSW 2001

By email: OOHC@childabuseroyalcommission.gov.au

Dear Commissioners,

Consultation paper: Institutional responses to child sexual abuse in out of home care

Thank you for the opportunity to provide comment on the Royal Commission's consultation paper on institutional responses to child sexual abuse in out of home care (OOHC) ("Consultation Paper"), and for the extension of time granted.

The Law Society's submission is focused on the experience of Aboriginal children and families in NSW. We have provided comments that relate to:

- information sharing in respect of the proper management of placements; and
- creating conditions for safer placements for children in OOHC.

We are fortunate to have received information from Aboriginal therapeutic service providers on the issues raised in this submission. While some of the information provided and submissions made are not strictly confined to legal comment, it is our view that the delivery of services to Aboriginal families should ideally take place within a therapeutic jurisprudential framework. Legal assistance service providers need the support of Aboriginal community controlled therapeutic services to properly deliver services to Aboriginal children and families in this context.

The Law Society supports the approach taken in the Consultation Paper in respect of the nine key elements of a child safe organisation,¹ particularly in respect of child-focused complaints processes; the participation and empowerment of children; and the involvement of the child's family and community.

In the experience of the Law Society's members who practice in care and protection and in family law, among other factors (including whether the child has been abused before), the more isolated a child is, the more vulnerable he or she is to exploitation. Our members have identified the following factors as critical to decreasing the vulnerability of children in OOHC to sexual abuse:

¹ Royal Commission into institutional responses to child sexual abuse in out of home care: Consultation Paper, 83-87.

- (1) Effective information flow between the government child protection agency² (and the non-government organisations to which it outsources OOHC placements) and service providers. Effective information exchange allows for better management and decision-making in respect of the placement of children; and
- (2) Ensuring that the child placed in OOHC is not isolated, and continues to have access to safe and trusted adults. In the case of Aboriginal children, the Law Society strongly supports the ongoing involvement of safe members of the child's family and community, including through the use of cultural contact plans.

1. Information sharing

It is vital that there are effective information flows between the relevant child protection authority and the various agencies involved in child protection. This is particularly true in respect of information sharing between the child protection authority and Aboriginal community controlled agencies, given the overrepresentation of Aboriginal children and families in this jurisdiction. Given that the child protection authorities and the various service providers are all concerned with achieving outcomes that are in the best interests of the child, such information flows should be multi-directional and reciprocal. We note these views are consistent with the views stated in the Consultation Paper that:

Child safe organisations observe Article 18 of [the UN Convention on the Rights of the Child], which states that parents, carers, or significant others with caring responsibilities have primary responsibility for the upbringing and development of the child in their care. This includes being informed about the organisation's operations and the child's progress, and being involved in decisions affecting the child.³

Notwithstanding the provisions of Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) ("*Care Act*"), the Law Society has been informed by a number of Aboriginal service providers⁴ that in practice in NSW, it can sometimes be difficult to obtain information from the Department of Family and Community Services ("FACS"). One example related to the Law Society is the difficulty encountered by an Aboriginal community controlled organisation in relation to simply obtaining a copy of FACS' guidelines in relation to contact.

The Law Society considers that it would assist with better management of placements into OOHC if FACS and service providers have shared expectations. The Law Society is advised by legal and non-legal service providers that if FACS has a view that there is a real chance of restoration of the child to his or her parents, then they will direct their efforts accordingly. However, if service providers are aware that FACS does not consider that there is any real chance of restoration, then service providers will adopt a different approach, including in relation to working with the child's extended family and kin in respect of parental responsibility and/or contact.

Another example provided by an Aboriginal service provider of better outcomes that can be gained by effective information sharing, is in the situation where FACS has concerns about a person being supported by a service provider (for example, to make a joinder application for parental responsibility, or some aspect of parental responsibility). If FACS has information that suggests that there are concerns about whether that person would, in fact, be a safe carer, such information should be provided to that service provider (with

² In the case of NSW, the relevant authority is the Department of Family and Community Services ("FACS").

³ Note 1, 86-87

⁴ This includes feedback from Aboriginal government staff, and staff of non-government Aboriginal community controlled services.

the appropriate caveats in respect of the reliability of the information). As noted by another Aboriginal service provider, “if Aboriginal service providers do not have enough information, we might be helping to perpetuate the hurt.”

We note that the Consultation Paper recognises that the Senate Community Affairs References Committee’s Inquiry into OOHC identified that “one of the key challenges for [Indigenous] families with children in care is the need to establish positive and constructive relationships with child protection authorities.”⁵

We submit that an approach that prioritises information sharing with Aboriginal support services, particularly in respect of FACS’ expectations in respect of the child’s placement, would likely be a better use of the resources of FACS and of both legal and non-legal service providers. Aboriginal service providers are often best placed to identify safe and appropriate adults in a particular child’s family and community, as well as other protective factors for that child.

The Law Society notes that s 12 of the *Care Act* provides for Aboriginal and Torres Strait Islander participation in decision making about children:

Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Minister, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under this Act that concern their children and young persons.

Better information exchange, which appears to require a shift in FACS practice (whether on an institutional level, or at a caseworker level, or both), is likely to improve both (1) outcomes for the child; and (2) the relationship between FACS and the Aboriginal community, which has long been fraught with historical distrust.

2. Addressing risk factors while the child is placed in OOHC

The Law Society understands that, in general terms, FACS seeks to support the stability of OOHC placements, and to avoid parental or other disruption as far as possible, and this approach is informed by the best interests of the child. While the Law Society does not take issue with this approach in principle, we are concerned about its application in practice as it may inadvertently lead to the isolation of a child in placements.

The Law Society is advised that there can be a different dynamic for children in foster care, than for children in kinship care. In the experience of our members, children placed in foster care may be more isolated as they not have access to the usual supports available to children who are placed in their own family and community.⁶ For example, in order to avoid disruption of the placement by parents, children are not able to tell their parents where they go to school. We note also that changing placements may also isolate children further, and increase the vulnerability of children to abuse. This is

⁵ Note 1, 87

⁶ We note the data limitations identified by the Royal Commission in the Consultation Paper, but note that the Consultation Paper states that AIHW data indicates that the highest number of reports of sexual abuse came from foster care settings (39% of the total number of reports), but where this is proportional to the number of foster care placements (41% of the total number of placements). The data indicates that while only 5% of children in OOHC were in residential care, a greatly disproportionate number of sexual abuse reports related to that setting (33% of reports). We note that while 49% of children are placed in kinship or relative care, relatively fewer reports of sexual abuse were received pertaining to that setting (20% of the total number of reports) (Consultation Paper, 28). We acknowledge that without further information, it may be difficult to draw definitive conclusions on whether this data is more reflective of reporting rates than the relative safety of the different types of OOHC placement.

particularly so given that the child's entire set of circumstances may change, including, in particular, schools. This is recognised in the Consultation Paper, which states that:

Generally, each placement change results in a change of school, loss of relationships with teachers and peers, interrupted curriculum content and missed learning opportunities. Children in OOHC may miss these learning or relationship bonding opportunities, nor not have the opportunity to fully engage in them.⁷

In our view, there are two key mechanisms necessary to address a child's vulnerability to abuse while in OOHC.

First, it is critical that regular, child-focused reviews of how placements are proceeding take place. Children should be empowered to participate and to disclose circumstances of concern. In this respect, the Law Society supports the strategies identified in the Consultation Paper, in particular providing relevant and appropriate information and education for both children and for carers.⁸

Second, and in support of building on and strengthening protective factors while the child is placed in OOHC, where possible and appropriate, children should continue to have access to safe adults, including within their family and community. The experience of Law Society members is consistent with the findings of the Royal Commission that:

In the OOHC context, it is well recognised that family and community involvement, including connection with family, is critical if children in OOHC are to achieve positive outcomes. This is particularly so for children from Aboriginal and Torres Strait Islander backgrounds and communities.

The Law Society has long advocated for the use of cultural contact plans for Aboriginal and Torres Strait Islander children.⁹ We note that a principle underpinning the Wood Inquiry into child protection services in NSW was that:

All Aboriginal children and young people in out-of-home care should be connected to their family and their community, while addressing their social, emotional and cultural needs.¹⁰

In our experience, cultural connection is vital for an Indigenous child's resilience. Children have a right to enjoy their own culture and to use their own language (Article 27, *International Covenant on Civil and Political Rights*, Article 30, *Convention on the Rights of the Child*).¹¹

⁷ Note 1, 94

⁸ Note 1, 98-99

⁹ See for instance the Law Society of NSW submission No. 28 to the NSW Legislative Council General Purpose standing Committee No. 3, Parliament of NSW, *Reparations for Stolen Generations*, 19 October 2015, <<https://www.parliament.nsw.gov.au/committees/DBAssets/InquirySubmission/Summary/40985/0028%20Law%20Society%20of%20NSW.pdf>>

¹⁰ James Wood, 2009, *Report of the Special Commission of Inquiry into child protection services in NSW*, NSW Department of Premier and Cabinet, at v, <<http://apo.org.au/node/2851>>

¹¹ Article 27 of the *International Covenant on Civil and Political Rights* states:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 30 of the *Convention on the Rights of the Child* states:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in

The Law Society holds the strong view that cultural contact plans should be made as part of court-ordered arrangements, and children should have meaningful contact with their families, and families from their own Indigenous nations. Cultural contact must be provided for a significant and substantial time with the purpose of establishing a meaningful relationship with parents, family, community and culture; beyond the establishment of identification.¹² As noted previously, in our view, a child who has real and meaningful family and community connections, and who has the opportunity to grow up strong in culture, is less likely to be isolated. This is likely to mean that the child is less vulnerable to exploitation.

We note that there are two programs in NSW that can assist Indigenous children and families in respect of building and maintaining family connection after orders have been made.

First, the Law Society understands that Legal Aid NSW has established a Care Alternative Dispute Resolution Program for parties seeking contact after final orders have been made, or seeking to vary a contact order by agreement pursuant to s 86A of the *Care Act*.

The model is non-litigation focused, and invites parties to come to an agreement about arrangements for children. There is a focus on ensuring the voices of the children will be heard in these matters. To this end, Legal Aid provides representation for all children who are subject of the contact dispute. Legal assistance is also available for parties attending subject to means testing and a "significant disadvantage" test.

The Law Society considers that this program offers the potential for establishing detailed contact arrangements and cultural contact, which would ideally be expressed as appropriate orders. The benefit of this program may be the flexibility to revisit contact orders as the child gets older and as parents develop greater parenting capacity.

Second, the Law Society understands that FACS recently provided for training to be delivered to approximately 300 case workers, on "family finding" techniques.¹³ We understand that the training was provided by Mr Kevin Campbell, who developed the model and who has provided similar training in a large number of jurisdictions in Canada and in the USA.¹⁴ The model assists case workers to search the child's extended family network to locate safe family members, using tracing techniques employed by the International Committee of the Red Cross to locate kin for those displaced by war in Rwanda. The use of this model is predicated on a number of factors, including the

community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

See also Articles 11, 12 and 31 of the *UN Declaration of the Rights of Indigenous Peoples*.

¹² The facilitation of cultural contact should prioritise the needs of the child and their family, rather than those of the OOHC service provider. For instance, if the only available time for contact (which may need to be supervised by an OOHC service) is during the weekend, OOHC service providers should provide the appropriate service.

¹³ NSW Government Family & Community Services, "Family trees to provide home for kids in care", 9 April 2016 <http://www.facs.nsw.gov.au/about_us/news/family-trees-to-provide-home-for-kids-in-care> and Megan Drapalski, "Family finding model from the US helps track relatives previously unknown," *The Daily Telegraph*, 9 April 2016 <<http://www.dailytelegraph.com.au/news/family-finding-model-from-the-us-helps-track-relatives-previously-unknown/news-story/b310cd60f502e0342f4b0178da1c0294>>

¹⁴ National Institute for Permanent Family Connectedness, Seneca Family of Agencies, *Kevin Campbell biography*, <<http://familyfinding.org/trainings/trainer-bios/kevin.html>>

recognition that the "single factor most closely associated with positive outcomes for children is meaningful, lifelong connections to family."¹⁵

The *Family Finding* model:

seeks to build or maintain the youth's Lifetime Family Support network for all youth who are disconnected or at risk of disconnection through placement outside of their home or community. The process identifies relatives and other supportive adults, estranged from or unknown to the child, especially those who are willing to become permanent connections for him/her. Upon completion of the process, youth have a range of commitments from adults who are able to provide permanency, sustainable relationships within a kinship system, and support in the transition to adulthood and beyond. Keeping safety at the forefront and using a family-driven process, families are empowered to formulate highly realistic and sustainable plans to meet the long-term needs of children and youth. Child outcomes may include increased reunification rates, improved well-being, and placement stability, transition out of the child welfare system, decreased re-entry rates, and stronger sense of belonging for children.¹⁶

The Law Society commends FACS for engaging with this program, and recommends that it continue to pursue this model.

Thank you again for the opportunity to provide comments. Questions may be directed to Vicky Kuek, Principal Policy Lawyer, on victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely,



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President

¹⁵ Government of Ontario Family & Children's Services of the Waterloo Region, *Family Finding*, <<https://www.facswaterloo.org/helpingfamilies/family-finding>>

¹⁶ National Institute for Permanent Family Connectedness, Seneca Family of Agencies, *More about Family Finding*, <<http://www.familyfinding.org/moreaboutfamilyfinding.html>>