THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IIC/DHvk:1471281

9 May 2018

Committee Secretary
House of Representatives Standing Committee on Social Policy and Legal Affairs
PO Box 6021
Parliament House
Canberra ACT 2600

By email: spla.reps@aph.gov.au

Dear Committee Secretary,

Inquiry into local adoptions

The Law Society of NSW writes in respect of both terms of reference of this inquiry into local adoption. We note that the terms of reference state that in undertaking its inquiry, the House of Representatives Standing Committee on Social Policy and Legal Affairs will have regard to relevant legislative frameworks within Australia. The Law Society's Indigenous Issues and Children's Legal Issues Committee have contributed to this submission.

1. Summary of the Law Society's position

Adoption is a very significant step in the life of any child and any family. The best interests of the child, and especially any group of siblings, should always be the primary consideration. Unfortunately, we continue to see the devastating effects of separating siblings from each other and the cutting of ties with birth families. The reality is that adoption is a strong disincentive to maintenance of birth family relationships. Except with the most dysfunctional families, this is a benefit to the child.

Regard should also be had to the struggles that come with adoption and the fact that adoptions do fail. They are not as straightforward as some would like to believe.

In our view, adoption is not a culturally appropriate option for Indigenous children in NSW. Indigenous children must be placed in accordance with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles in s 13 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) ("Care Act"). In NSW there are strong examples of partnerships with Indigenous leadership that are keeping Indigenous children safe within their families. We would strongly oppose any changes that would have the effect of undermining the rights to self-determination and a child's best interests, including his/her right to culture and family.

We are of the view that in NSW for non-Indigenous children in out-of-home care, adoption is already a 'viable option' and we do not support changes to the current legislative and policy regime. Further, there are alternatives to adoption which aim to achieve stability and permanence for children in an out-of-home care environment.

2. NSW position in respect of stability and permanency

This issue has been canvassed in NSW in respect of 2013 reforms aimed at improving permanency for children in the care and protection system where there is no realistic possibility of restoration.

In 2014, changes were made to the relevant legislation in NSW to place greater emphasis on adoption for children who have been removed from the care of their parents.[1] We note that in NSW there are other legal options available to secure permanent arrangements for children, aside from adoption. These options include the transfer of parental responsibility from the child's birth parents to the Minister or another suitable person, or the making of a "guardianship order". A guardianship order is a final order that transfers all aspects of parental responsibility to the guardian until the child is 18 years old, and is an order that can be made by the Children's Court. We consider that the various ways in which permanency can also be achieved should also be acknowledged in this review.

In 2016-2017, 315 adoptions were finalised in Australia. In that year, there were 152 "known child adoptions"[2] in NSW, which we note is 75% of all known adoptions in Australia.[3] In our experience, much has been done to streamline the adoption process in NSW, including the provision of legal advice to birth parents.

We further note that in NSW the process for accreditation for adoption service providers by the Office of the Children's Guardian is rigorous and thorough.[4] We continue to support this approach going forward on the basis that it is important to ensure that that the rights of children and young people are upheld, and quality services are provided to a high standard.

3. Legislative and policy position in NSW in respect of Indigenous children

As a result of the reform process noted above, the NSW Department of Family and Community Services (FACS) reached the view that, in respect of Indigenous children in the care and protection system:

> adoption is not considered a culturally accepted practice for Aboriginal children and, as such, decisions on providing such stability, security and certainty for Aboriginal children in OOHC will only be made in accordance with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles in the Children and Young Persons (Care and Protection) Act 1998[...][5]

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[1] In 2014, s 10A was inserted into the *Children and Young Persons (Care and Protection) Act 1998* (NSW). Section 10A sets out a hierarchy of preferred placement options for children who have come into contact with the child welfare system, and places adoption above an order for parental responsibility to the Minister.

[2] Australian Government, Australian Institute of Health and Welfare, 'Adoptions in Australia 2016-17' defines known child adoptions as "adoptions of children born or permanently residing in Australia before the adoption, who have a pre-existing relationship with the adoptive parent(s)". Known child adoptions include adoptions by step-parents, relatives and carers.

[3] Australian Government, Australian Institute of Health and Welfare, 'Adoptions in Australia 2016-17' https://www.aihw.gov.au/getmedia/4b533699-e466-42aa-b65c-9815aeaa82df/aihw-cws-61.pdf.aspx?inline=true, 28.

[4] Office of the Children's Guardian, 'NSW Child Safe Standards for Permanent Care' (November 2015), https://www.kidsguardian.nsw.gov.au/ArticleDocuments/449/ChildSafeStandards_PermanentCare.pdf.aspx?Embed=Y, 2.

[5] NSW Department of Family and Community Services, *Safe Home for Life: Report on the outcomes of public consultation on the child protection legislative reforms discussion paper 2012,* November 2013, 2.

We understand that this continues to be the view held by FACS and out of home care providers.[6]

Within the care and protection system, it is a principle to be applied in the administration of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) ("Care Act") that Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young persons with as much self-determination as is possible (s 11 of the Care Act).

Further, Indigenous 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 (s 12 of the Care Act).

While, as a policy position, it is recognised in NSW that adoption of Indigenous children is not culturally appropriate, adoption of Indigenous children in NSW is permitted by the *Adoption Act 2000* (NSW) ("Adoption Act"). However, the *Adoption Act* provides that an adoption of an Indigenous child is not to occur unless the Secretary is satisfied that an adoption order is preferable, and in the child's best interests, to any other order which could be taken by law (s 36 of the *Adoption Act*). The Adoption Act also provides placement principles that must be applied in respect of Aboriginal children (s 35) and Torres Strait Islander children (s 39). The Adoption Act requires that reasonable inquiries be made to determine whether a child to be placed for adoption is Aboriginal (s 34(1)) or Torres Strait Islander (s 38(1)).

It is also significant that the Adoption Act requires Indigenous participation in decision making in respect of the placement of an Aboriginal child (s 33), (including with a local, community based and relevant Aboriginal organisation (s 33(2)) and in respect of a Torres Strait Islander child (s 37).

4. Enabling Aboriginal participation and self-determination

One example of Aboriginal community participation within the care and protection system are the *Guiding principles for strengthening the participation of local Aboriginal community in child protection decision making* developed by the New England FACS District Office, Grandmothers Against Removal and the NSW Ombudsman.[7] These guiding principles are to inform collaboration and cooperation between FACS offices across NSW and Aboriginal communities on child protection matters, in particular through Local Advisory Groups (LAGs). The LAGs are intended to be a platform "for the Aboriginal community to have input into child protection and out-of-home care service delivery and help to ensure compliance with the Aboriginal placement principles."[8]

Outside of the care and protection system, another example of Aboriginal self-determination and participation in ensuring the safety and well-being of Indigenous children is the Indigenous list at the Sydney registry of the Federal Circuit Court. This initiative seeks to improve access to the family law jurisdiction for Indigenous families. In our view, this

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[6] See for example, the view of Barnados Australia that it "acknowledge[s] that adoption is culturally inappropriate for Aboriginal children": http://www.barnardos.org.au/what-we-do/indigenous-children/

[7] See https://www.facs.nsw.gov.au/reforms/children,-young-people-and-families/guiding-principles-for-strengthening-the-participation-of-local-aboriginal-community-in-child-protection-decision-making for more information.

[8] Ibid.

initiative demonstrates that Indigenous families can and should be the first port of call in respect of providing for the safety and welfare of their children.

The pilot Indigenous list was established at the Sydney registry of the Federal Circuit Court in September 2016. From September 2016 to December 2017, we understand that there were 38 matters listed, and, remarkably, there have been no applicant drop outs. As at December 2017, of the 38 matters listed, 16 have been finalised, and 18 are still active. Two matters were transferred to the Family Court, one matter transferred to the Newcastle registry and one matter had proceedings in the Children's Court. Only two matters proceeded to final hearing but were settled in the course of the hearing.

The Law Society understands that crucial to the success of this initiative is a true and committed partnership between Indigenous leadership, Indigenous services, legal assistance providers and the Court. The legal framework is supported by comprehensive, culturally safe (and therefore more effective), wrap-around therapeutic support. Indigenous community services identify and assess appropriate matters for diversion to the Court.

Legal service providers, including the Family Law Early Intervention Unit of Legal Aid NSW provides timely legal assistance to parties, supported by Indigenous community workers. Indigenous community services attend the otherwise closed Court so that seamless and effective referrals can be made for assistance, including housing, drug and alcohol, mental health and other therapeutic assistance.

We understand that FACS has been informed and involved in some of the matters on the Indigenous list, but rarely as a party.[9]

We further understand that the Aboriginal Family Law Pathways Network (an Aboriginal controlled initiative) has, over a number of years, put a significant amount of effort into educating Indigenous community members in NSW about the option of proactively seeking protective family law orders for children prior to the involvement of FACS.

5. Conclusion

The Law Society would strongly oppose any change to the current legislative and policy status quo in NSW in respect of the adoption of children, and particularly in relation to Indigenous children. Our position is that the legislative and policy principles that apply in NSW are appropriate and these principles should inform guiding principles for any national code or framework for local adoptions within Australia. We would oppose any change that would have the effect of undermining Indigenous self-determination. In our view, consideration of an Indigenous child's best interests must respect their rights to culture[10] and to family.[11]

In respect of Indigenous children, initiatives such as a specialised Indigenous list to improve access to justice in the family law system for Indigenous people is a relatively inexpensive innovation. In our view, it is far preferable to invest resources into supporting Indigenous families and kin to stay together, than to look to adoptions of Indigenous children by non-Indigenous families as a "solution."

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[9] We understand that FACS has intervened in one matter, but the child involved will stay with family.

[10] Articles 30 and 31 of the United Nations Convention on the Rights of the Child. See also section 60CC(3)(h) of the *Family Law Act 1975* (Cth).

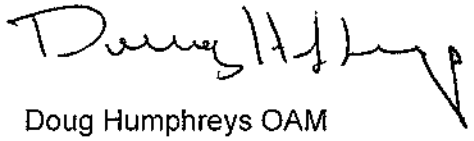
[11] Articles 8 and 16 of the United Nations Convention on the Rights of the Child. See also section 60CC of the *Family Law Act 1975* (Cth).

If the Government does intend to develop guidelines for a national framework or code for local adoptions, the Law Society seeks the opportunity to be consulted on the drafting of those guidelines. At a minimum, and in addition to the comments made above in respect of Indigenous children, we would suggest that the following would need to be considered in developing these guidelines:

1. The best interests of the child, both in childhood and later in life, should remain the paramount consideration in any action taken with respect to their adoption;
2. Any guidelines should recognise the importance of open adoption;
3. How to properly obtain and consider the views of children through due diligence;
4. How to support children participating in decisions that affect their lives through providing children with sufficient information to make informed decisions;
5. An emphasis on preparing for adoptions through comprehensive, tangible and age-appropriate life story work for children;
6. Procedural fairness for birth parents including around how consent is obtained and ensuring parents have the right to be heard;[12]
7. The importance of cultural planning more generally for all children who are placed with proposed adoptive parents who are not of the same cultural background;
8. Guidance around the importance of post-adoption support including counselling and intermediary support to assist with contact with birth relatives.

Thank you for the opportunity to make submissions. Questions at first instance may be directed to Vicky Kuek, Principal Policy Lawyer, at victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely,



Doug Humphreys OAM
President

[12] The Law Society strongly opposes moves by state and/or federal government to provide for or support additional grounds for dispensing with parental consent or limiting a parent's right to be advised of an adoption; see further comments on pages 18 to 20 of the Law Society's submission dated 1 December 2017 on the Department of Family and Community Services' Discussion Paper 'Shaping a Better Child Protection Future'.