



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IIC/DHvk:1454477

9 April 2018

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: john.farrell@lawcouncil.asn.au

Dear Mr Smithers,

Closing the Gap Refresh Public Discussion Paper

Thank you for your memo dated 21 December 2017 seeking the contribution of the Law Society of NSW in respect of a Law Council submission to the Council of Australian Governments on the Closing the Gap Refresh (the "Refresh"). The Law Society's response is informed by the Indigenous Issues Committee. We raise the following issues for the Law Council's consideration.

1. Justice targets

We have long advocated for justice-specific targets to be included in the Closing the Gap agenda. The Australian Law Reform Commission (ALRC) report on Indigenous Incarceration recommends that the Commonwealth Government, in consultation with state and territory governments, should develop national criminal justice targets including in respect of the rates of incarceration of Indigenous peoples, as well as in respect of violence against Indigenous peoples (recommendation 16-1). Such targets should be developed in partnership with peak Indigenous organisations. We support this recommendation.

Targets should be set at both State and Federal levels. It is useful for State Governments to set justice targets given State responsibility for the criminal justice system. This is particularly pertinent for NSW, given that in the last quarter of 2017, NSW held 3,253 Indigenous people in custody and remand.¹

The Law Society notes that in its National Justice Policy, the National Congress of Australia's First Peoples ("National Congress") attributes the enormous differences in incarceration rates between States and Territories to the differing levels of commitment to working with Indigenous peoples to reduce incarceration.

¹ NSW Bureau of Crime Statistics and Research, *Custody Statistics Jan 2016-Dec 2017*, available online: http://www.bocsar.nsw.gov.au/Pages/bocsar_custody_stats/bocsar_custody_stats.aspx

In Victoria, successive governments have committed to implementing the recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) and other measures to reduce Indigenous incarceration rates, including the long-term Aboriginal Justice Agreement, which requires public reporting on progress and is now in its third phase.² We understand that evaluations have demonstrated that the Victorian Aboriginal Justice Agreement should be considered best practice in terms of its success in providing for ongoing Aboriginal ownership of, and participation in, strategic policy development.³ We understand that the Victorian Aboriginal Justice Agreement meets the highest standards in terms of Indigenous participation, implementation, monitoring, and independent evaluation.⁴ Research has demonstrated that where States have Aboriginal Justice Agreements, Indigenous incarceration rates are below the national average.⁵

We note that the ALRC, in its report on Indigenous incarceration, recommends that Aboriginal Justice Agreements should be in place in states and territories [16-2].

At the federal level, the Law Council has advocated for setting justice-specific Closing the Gap targets.⁶ The National Congress has also advocated for Commonwealth and State governments to set justice targets,⁷ noting that there is no Closing the Gap target in relation to the justice system – either in relation to rates of incarceration or the experience of victims of crime.⁸

In its National Justice Policy, the National Congress put forward a number of recommendations in relation to that issue, including that:

The Commonwealth Government and State and Territory Governments commit to Justice Targets included in a fully-funded Safe Communities National Partnership Agreement as part of the Closing the Gap strategy. This commitment should be incorporated into the National Indigenous Reform Agreement and supported by significant improvements to data collection regarding Aboriginal and Torres Strait Islander people within the justice system.⁹

The Law Society agrees with this recommendation. The purpose of setting justice targets would be to set clear benchmarks for measuring the effectiveness of programs aimed at reducing the incarceration rates of Indigenous peoples.

Consideration of the content of justice targets should include consideration of establishing specialist Indigenous sentencing courts. We note in addition to its Aboriginal Justice Agreement, Victoria also has well-established and supported Koori sentencing courts (in the Children's, Magistrates and County Courts). The ALRC recommended that Indigenous specialist courts be established in partnership with relevant Aboriginal organisations (see recommendations 10-2 and 10-3).

² National Congress of Australia's First Peoples, *National Justice Policy*, February 2013 at 13-14, available online <http://nationalcongress.com.au/wp-content/uploads/2013/02/CongressJusticePolicy.pdf>.

³ F Allison & C Cunneen, "The Role of Indigenous Justice Agreements in improving legal and social outcomes for Indigenous people," *Sydney Law Review*, 32: 645-669, 2010

⁴ *Ibid.*

⁵ F Allison & C Cunneen, "Indigenous Justice Agreements," *Current Initiatives Paper 4, Indigenous Justice Clearinghouse*, June 2013, 6, available online: <https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/publications/files/initiative004.pdf>

⁶ See for example Law Council of Australia, "Law Council and Australian Bar Association welcome commitment to Indigenous justice targets" Media Release, 9 August 2013, available online http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1336--Law_Council_and_Australian_Bar_Association_welcome_commitment_to_Indigenous_justice_targets.pdf

⁷ National Justice Policy, note 2 at 4

⁸ National Justice Policy, note 2 at 11.

⁹ National Justice Policy, note 2 at 4. See also 11-12 and 14-17.

Further, improved data collection on the interaction between the Aboriginal and Torres Strait Islander people and the justice system will assist with evidence-based policy making.

2. Care and protection targets

Similarly, it is our view that the Closing the Gap agenda should include targets in respect of the number of Aboriginal and Torres Strait Islander children removed and placed into out-of-home care. In 2016, Aboriginal and Torres Strait Islander children were 9.8 times more likely to be removed by child protection authorities than non-Indigenous children.¹⁰ The number of removals is projected to triple by 2036 if no new action is taken.¹¹ Rates of removal have worsened rather than improved since the publication of the *Bringing Them Home* report over twenty years ago.¹² These statistics indicate the need for a target and coordinated strategy between Australian governments to address this growing issue.

We note the link between out-of-home care and involvement in the criminal justice system. Of the 99 Indigenous people who died in custody, and who were the subject of the Royal Commission into Aboriginal Deaths in Custody, 43 involved individuals who were separated from their families as children.¹³

More recently, the Royal Commission into the Protection and Detention of Children in the Northern Territory, as well as the recent ALRC Report into Indigenous Incarceration, specifically acknowledged the link between care and protection, juvenile detention and later adult incarceration.¹⁴

We suggest that addressing the issues around Indigenous children in out-of-home care will also assist with other targets, such as in respect of educational attainment. In this regard we refer to the NSW Ombudsman's August 2017 inquiry into behaviour management in schools. We note the alarming statistics in respect of school attendance for children in out-of-home care. The Ombudsman's inquiry found that for 295 school age children and young people who had been in out-of-home care for three or more months in 2016, 43% (128) missed 20 or more school days in 2016 for reasons other than illness. About one third (42) of these children were Aboriginal. These 128 children missed an average of 44% of the school year.¹⁵

We note the Ombudsman's view that:

"The department's [of education] lack of documented information about the OOHC status of the children we reviewed highlights the need for improved work between the department and FACS to ensure that children in OOHC are accurately identified at an early point to enable an appropriate and informed response to meeting their learning and support needs."¹⁶

¹⁰ SNAICC – National Voice for our Children, the University of Melbourne, Griffith University, and Save the Children Australia, *Family Matters Report 2017*, 28, available online <http://www.familymatters.org.au/wp-content/uploads/2017/11/Family-Matters-Report-2017.pdf>

¹¹ *Ibid.*, at 9.

¹² *Ibid.*, at the release of *Bringing Them Home* in 1997, Aboriginal and Torres Strait Islander children represented 20% of children living in out-of-home care. Today they make up approximately 36%.

¹³ See <https://www.humanrights.gov.au/timeline-history-separation-aboriginal-and-torres-strait-islander-children-their-families-text>

¹⁴ The Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory noted research demonstrating the significantly increased risk of offending for children who have been in out-of-home care, both as juveniles and as adults. See Final Report, Volume 3B, Chapter 35, 7, available online: <https://issuu.com/nroyalcommission/docs/3b-final?e=31933818/55836170> The ALRC recommended that the Commonwealth Government should establish a national inquiry into child protection laws and processes affecting Indigenous children (recommendation 15-1).

¹⁵ NSW Ombudsman, *Inquiry into behaviour management in schools*, August 2017, 46.

¹⁶ *Ibid.*, at 48.

For example, anecdotally, we understand that learning plans are often not made or maintained in respect of these children. In our members' experience, despite the obligatory nature of learning plans, the out of home care caseworker may not be in contact with schools to develop those learning plans in respect of children in out of home care.

We note further that issues in relation to children in out of home care and their educational needs have been raised previously, most notably in the Wood inquiry in 2008. The Ombudsman's view is that "It is disappointing to note the lack of progress in addressing these issues."¹⁷

The poor outcomes that result from non-attendance at school are myriad, not least of which is the fact that it is a risk factor for children in respect of entering the juvenile justice system.

Again, consideration of the content of care and protection targets should include consideration of initiatives that are specialised and targeted. Relevantly, we note the successful pilot Indigenous list, established at the Sydney registry of the Federal Circuit Court since September 2016. We understand 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. 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, a number of matters transferred, and 18 are still active. Only two matters proceeded to final hearing, but were settled in the course of the hearing.

We understand that the success of the pilot has been largely attributed to the fact that 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 the NSW Department of Family and Community Services (FACS) has been informed and involved in the matters on the Indigenous list, but rarely as a party.¹⁸

We further understand that the Aboriginal Family Law Pathways Network 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 the Department of Family and Community Services (FACS).

A specialised Indigenous list is a relatively inexpensive innovation. The Law Society suggests that, in addition to achieving better outcomes for Indigenous children by keeping families together, it is likely to reduce backlogs, result in higher settlement rates, and result in lasting orders. In our view, the Court should be commended for exhibiting the flexibility, commitment and far-sightedness required to support the pilot.

¹⁷ Ibid.

¹⁸ We understand that FACS has intervened in one matter, but the child involved will stay with family.

3. Empowerment of Aboriginal and Torres Strait Islander peoples and communities

The Law Society considers it significant that Indigenous delegates from all around Australia again identified as a consensus view in the Uluru Statement from the Heart, the importance of Makarrata, or treaty, to capture “our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.”¹⁹

In the absence of a formal treaty framework, the Law Society’s view is that respecting the principle of self-determination and its manifestation in practice by empowering communities and individuals, is critical.

The Closing the Gap Public Discussion Paper states that “Prosperity is about moving beyond wellbeing to flourishing and thriving. It refers to Aboriginal and Torres Strait Islander Peoples having the economic empowerment to be the decision-makers over issues that impact their lives, and to seize opportunities for themselves, their families and communities.” (p 4)

We agree with this view but suggest that empowerment must not focus simply on economic empowerment. Governments must work in true partnership with Aboriginal communities at a local level on the issues that affect Indigenous peoples. This includes the Closing the Gap agenda itself, in respect of identifying the issues that face Aboriginal communities, and how to address them.

There are many examples of successful initiatives set up in partnership with Aboriginal community leaders, such as the Indigenous list at the Federal Circuit Court discussed above, and the work undertaken by Maranguka and Just Reinvest in Bourke, NSW. We attach a submission made by the Law Society to a NSW inquiry into service coordination in communities with high social needs providing more information in this regard.

We understand that the key elements underpinning the success of the work of Maranguka and Just Reinvest are as follows:

- The governance structures are built from the ground up, and include a tribal style council, and a cross-sector leadership group comprising of leadership from the relevant government agencies, NGOs and the philanthropic sector;
- Community capacity building is being carried out by community, for community, and empowerment of individuals is taking place at a pace that suits each person. We understand that there is a clear plan for community engagement, and a pact was made that no one would be left behind;
- The community is holding itself accountable by putting in place independent oversight and scrutiny mechanisms;
- An evidence-based, adaptive approach has been taken to trialling initiatives, rather than recycling approaches that simply have not worked in the past;
- The community is identifying its own needs, and identifying solutions to those needs. In our view, this is the key to successful co-designed programs;
- The community has access to a Minister within the NSW Government who is acting as a champion and a solutions-broker.

The Chair of Maranguka has noted that all levels of government should be implementing a Closing the Gap framework, including local government. The Law Society agrees with this view.

¹⁹ Uluru Statement from the Heart, available online:
https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF

We note also the work and approach taken by the Empowered Communities strategic reform agenda. We suggest that the vision of Empowered Communities should inform the approach of the Closing the Gap agenda:

Fulfilling our vision would see us achieve the objective of Closing the Gap in the life experiences of Indigenous and non-Indigenous Australians across key indicators. However, our agenda is more than just material wellbeing. We are not content to achieve social and economic development but lose our identities, languages or cultures—we do not want assimilation.

We know that our best chance of preserving our heritage is through obtaining the strength that successful development provides. By taking this path, we strive for a future in which our people retain their languages and succeed in the broader Australian culture—moving with confidence between both worlds.²⁰

The importance of appropriately enabling Government support for Indigenous-led capacity building cannot be underestimated:

When we started Empowered Communities we identified the need for our local work to be connected and cemented with supportive structural changes to government systems and practices. We know that however hard we work in our regions to build capacity, self-reliance, aspiration, opportunity, increased choice and ensure that identities, languages and cultures are not lost, we will never cross the finish line without complementary structural change and real influence in decision making about our lives and development.²¹

One measure of a government's commitment to community empowerment is assessing how the service delivery to Aboriginal communities is designed and funded. In our view, funding of service delivery to Aboriginal communities should prioritise partnerships with local Aboriginal leadership, and should prioritise funding of Aboriginal controlled community organisations that may be already providing local solutions to local issues. The Law Society expressed serious concerns in respect of the Indigenous Advancement Strategy (IAS) in 2015, and we attach our submission to that inquiry.

We continue to hold the view that it may be a false economy to shift the funding model from high quality community service provision targeted towards Indigenous peoples, to a generalist model that prioritises cost efficiency rather than culturally based expertise. We understand that the outcome of the IAS has generally been to disadvantage smaller or medium sized Aboriginal-controlled organisations. We note the report in *The Australian* that two thirds of the organisations that received funding under the IAS in 2015 are non-Indigenous organisations.²² The funded recipients include the Northern Territory Government, various Government Departments including the Departments of Health and Ageing; Education and Training; Sport and Recreation; Justice and Attorney-General, and the Department for Correctional Services.²³ The Committee understands that Shire Councils were among the list of successful organisations, as well as universities, and other already well-funded non-government organisations such as the Australian Rugby Union.²⁴

²⁰ Empowered Communities, *Our Vision*, available online: <http://empoweredcommunities.org.au/vision.aspx>

²¹ Empowered Communities, "Statement on Constitutional Recognition for the First Nations of Australia," 31 July 2017, available online: <http://empoweredcommunities.org.au/media/empowered-communities-statement-on-constitutional-recognition-254590.aspx>

²² Natasha Robinson, "Indigenous Advancement Strategy funding revealed," 24 March 2015, *The Australian*, available online: <http://www.theaustralian.com.au/national-affairs/indigenous/indigenous-advancement-strategy-funding-revealed/story-fn9hm1pm-1227277037488> (accessed 14 April 2015).

²³ The list of organisations recommended for funding under the IAS grant funding round is available at the Department of Prime Minister and Cabinet website:

https://www.pmc.gov.au/sites/default/files/publications/ias_grant_funding_recommended_orgs.pdf.

²⁴ *Ibid.*

We remain concerned that this outcome undermines community-based management structures, and is inconsistent with community empowerment and the human rights principles of self-determination.²⁵

We note again the findings of the NSW Ombudsman on the issue of effective funding models for Aboriginal organisations in the Ombudsman's Special Report to Parliament, *Addressing Aboriginal disadvantage: the need to do things differently*²⁶ ("Report"). The Report's findings were informed by extensive consultation with thousands of Aboriginal people, as well as hundreds of agencies and organisations responsible for service provision. The Report is also supported by a decade of work by the Ombudsman on these issues.²⁷

We recommend consideration of the findings and recommendations of the Report, which in the Law Society's view, supports a transparent funding model that is underpinned by the principle of self-determination, and which establishes true partnerships. The Report noted that in NSW "substantial government investments have "yielded dismally poor returns to date"..."²⁸ and that in order to change this, the reform process must make Aboriginal affairs core business for all agencies, where change is driven from the centre of government. Further, the reform process must involve a true partnership between government and Aboriginal leaders. The Report also noted that:

government must work with Aboriginal leaders in developing strategies to facilitate greater participation by Aboriginal people in successful economic endeavours.²⁹

The Law Society's view is that while the Report examines the NSW Government's Aboriginal affairs strategy, its findings and recommendations are likely to be applicable nationally.

Further, since the Law Society's submissions on the IAS, the Australian National Audit Office (ANAO) has assessed "whether the Department of the Prime Minister and Cabinet has effectively established and implemented the Indigenous Advancement Strategy to achieve the outcomes desired by government."³⁰ The ANAO reached the conclusion that, for a number of reasons, the IAS does not achieve the outcomes desired by government. In particular, the ANAO's report noted:

The department's grants administration processes fell short of the standard required to effectively manage a billion dollars of Commonwealth resources. The basis by which projects were recommended to the Minister was not clear and, as a result, limited assurance is available that the projects funded support the department's desired outcomes. Further, the department did not:

- assess applications in a manner that was consistent with the guidelines and the department's public statements;
- meet some of its obligations under the *Commonwealth Grants Rules and Guidelines*;
- keep records of key decisions; or

²⁵ Articles 3 and 4, *Declaration on the Rights of Indigenous Peoples* and Article 1, *International Covenant on Civil and Political Rights*.

²⁶ NSW Ombudsman, *Addressing Aboriginal disadvantage: the need to do things differently*, A Special Report to Parliament under s 31 of the Ombudsman Act 1974, October 2011, available online:

https://www.ombo.nsw.gov.au/data/assets/pdf_file/0012/3342/SR_Aboriginal-disadvantage-report.pdf

²⁷ *Ibid.*, at 2.

²⁸ *Ibid.*, at 5.

²⁹ *Ibid.*

³⁰ Australian National Audit Office, *Indigenous Advancement Strategy Performance Audit Report*, 3 February 2017, available online: <https://www.anao.gov.au/work/performance-audit/indigenous-advancement-strategy>

- establish performance targets for all funded projects.³¹

Further, the ANAO found that:

3.26 The department intended that the regional network would partner with Indigenous communities to design and deliver local solutions to local problems. The regional network contributed local knowledge to the funding round through the determination of a need score and participation on the committee. The regional network was also responsible for negotiating funding agreements once the Minister had approved funding. However, the extent to which the regional network could adopt a partnership model during the administration of the grant funding round was limited because of the short timeframes involved in the application, assessment and negotiation process. The department advised the ANAO that, given the time constraints, a partnership approach was unrealistic during the grant funding round.

[...]

3.28 Stakeholder feedback provided to the ANAO indicated that community involvement in the Indigenous Advancement Strategy was limited. Thirteen submissions expressed a concern that local solutions were not supported, indicated that there was a lack of consultation with Indigenous communities and nine stated that there was still a top-down approach to service delivery. When the ANAO asked applicants what changes they would like to see, the two most common responses were greater partnership and collaboration with Indigenous communities to design solutions (40 applicants) and a bottom up approach to service delivery (31 applicants). [footnotes deleted]³²

It appears that the Government has accepted the ANAO's recommendations.

In response to the Royal Commission into the Protection and Detention of Children in the Northern Territory, the Government acknowledged that the issue is not a lack of funding, rather, it is the lack of coordination and understanding of how that money is spent and what outcomes are being achieved.³³ The Government acknowledged also that this issue is relevant not just to the NT but to the Commonwealth. In its response, the Government stated that "We have committed \$53 million to implement a whole-of-government research and evaluation strategy for policies and programs affecting Indigenous Australians, including the IAS."³⁴

Given the above, we suggest that the Closing the Gap agenda explicitly adopt an approach that is empowers Indigenous communities, and is consistent with the principles of self-determination. Such an approach would include the recognition of Aboriginal community strengths by requiring consultation and "partnership with Indigenous communities to design and deliver local solutions to local problems", and to require the prioritising the funding of service delivery by organisations with local and culturally sound expertise.

³¹ Ibid.

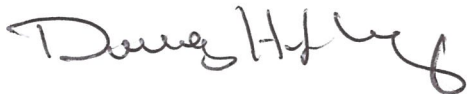
³² Ibid.

³³ Joint media release of the Prime Minister, Minister for Social Services and Minister for Indigenous Affairs, "Commonwealth Government response to the Royal Commission into the Protection and Detention of Children in the Northern Territory", 8 February 2018, available online: <https://us7.campaign-archive.com/?e=c73e365cec&u=07a26784b130ffd1109d7eef5&id=846660b64e>

³⁴ Ibid.

Thank you for the opportunity to provide comments. 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,

A handwritten signature in black ink, appearing to read "Doug Humphreys". The signature is written in a cursive, flowing style.

Doug Humphreys OAM
President



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IIC/FLC/JEvk:1041093

24 August 2015

Mr Stewart Smith
The Director
Standing Committee on Social Issues
Parliament House, Macquarie St
Sydney NSW 2000

By email: socialissues@parliament.nsw.gov.au

Dear Mr Smith,

Inquiry into service coordination in communities with high social needs

I write on behalf of the Law Society of NSW.

I understand that the Standing Committee on Social Issues ("Standing Committee") has been asked to inquire into, and report on, service coordination in communities with high social needs. The terms of reference include consideration of:

- (a) the extent to which government and non-government service providers are identifying the needs of clients and providing a coordinated response which ensures access to services both within and outside of their particular area of responsibility;
- (b) barriers to the effective coordination of services, including lack of client awareness of services and any legislative provisions such as privacy law;
- (c) consideration of initiatives such as the Dubbo Minister's Action Group and best practice models for the coordination of services; and
- (d) any other related matter.

Preliminary comments

The Criminal Law and Juvenile Justice Committees have had the opportunity to consider the submission of Legal Aid NSW, and endorse that submission.

The Rural Issues Committee provides the following brief comments in relation to terms of reference (a) and (c).

In respect of term of reference (a), the Rural Issues Committee notes that the Law and Justice Foundation of NSW ("Foundation") conducts research and publishes a range of reports identifying the legal needs of socially and economically disadvantaged people. The Foundation has recently published reports on the legal needs and service delivery of the Far South East region of New South Wales which may be of assistance to the Inquiry.¹ Further, the Committee notes that the Foundation's report on Reshaping Legal Assistance Services

¹ Ramsey, S & Macourt, D, 2013, *Legal needs overview of the Far South East region of New South Wales*, Law and Justice Foundation of NSW, Sydney, accessed at: <http://www.lawfoundation.net.au/ljf/app/&id=9010E40A586C7714CA257BE90013DE70> on 4 August 2015.

Further, "[t]he rate of Aboriginal and Torres Strait Islander children placed in out-of-home care has steadily increased since 2009, from 44.8 to 57.1 per 1,000 children."⁶

The IIC acknowledges that there are children in unsafe situations where their removal is warranted. However, in the IIC's experience, children may be unnecessarily removed from family and kin through a combination of factors that can adversely affect the outcomes for both Aboriginal children and their families when proceedings are brought in the Children's Court without meaningful early intervention. These are explained in more detail below.

2. Contact and cultural connection

While the IIC's primary focus remains the safety and best interests of children, the IIC submits that if a child is removed from his or her parents, maintaining family and cultural connection must be part of the consideration of whether an action is in fact in the best interests of the child. Securing better outcomes for Indigenous children and families must meaningfully provide for cultural contact.

The IIC notes that a principle underpinning the Wood Inquiry 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.⁷

In the IIC's experience, cultural connection is vital for an Indigenous child's resilience. The Committee 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. The IIC notes that some out-of-home-care providers recruit Indigenous people to run internal "cultural contact programs." In the IIC's view, this arrangement is neither culturally safe nor sufficient as culture is nurtured within culturally appropriate, lived experiences.

Cultural contact must be provided for a significant and substantial time with the purpose of establishing a meaningful relationship with parents, family and community; beyond the establishment of identification. The IIC notes that structured and positive engagement can assist to establish a positive cultural connection, and nurture the understanding in children that culture is a positive aspect of their lives and something they should feel proud of.

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*).⁸

⁶ Ibid.

⁷ Wood, J, 2009, *Report of the Special Commission of Inquiry into child protection services in NSW*, NSW Department of Premier and Cabinet, at v, available online: <http://apo.org.au/node/2851> (accessed 5 November 2014).

⁸ 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 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*.

CHARACTERISTIC	CHILD PROTECTION SYSTEM
Framing the problem of child abuse	The need to protect child from harm
Entry to services	Single entry point; report or notification by third party
Basis of government intervention and services provided	Legalistic, investigatory in order to formulate child safety plans
Place of services	Separated from family support services
Coverage	Resources are concentrated on families where risks of (re-)abuse are high and immediate
Service approach	Standardised procedures; rigid timelines
State-parent relationship	Adversarial
Role of the legal system	Adversarial; formal; evidence-based
Out-of-home care	Mainly involuntary

Table 1. Characteristics of the 'child protection' orientation to child protection¹¹

Seeing these general features of a child protection system may help to explain the currently poor low levels of engagement with early intervention services.

While useful and effective early intervention schemes exist, access to these programs for Aboriginal families may be restricted in a number of ways.

For example, the New Parent and Infant Network¹² ("Newpin") is one preventative and therapeutic program that works intensively with parents and families facing potential or actual child removal. In the IIC's experience, this has been a very effective program. Previously, other organisations were able to make referrals to Newpin.

However, due to a change in funding arrangements, FACS is now the only referral agency. In the IIC's experience, FACS generally will not make a referral until children have already been removed. The IIC considers that this approach is counter-intuitive on a number of levels. Referrals should be made to therapeutic, early intervention programs before removal in order to prevent removal. Further, given the historical relationship of distrust between Aboriginal people and FACS, the effectiveness of this service is, in the IIC's view, significantly reduced by removing the ability of Aboriginal-community controlled organisations to make referrals.

4. Opportunities to improve outcomes

4.1. Better involvement of Aboriginal services in both Children's Court and Family Court proceedings

As noted above, there is a historical relationship of distrust between Aboriginal people and FACS, and its associated agencies. This will be difficult to resolve, and in the IIC's view, better outcomes for Aboriginal people will result if they are serviced by agencies outside of FACS. Funding Aboriginal services to operate as out-of-home-care providers may create divisive mistrust in Aboriginal communities.

In the IIC's view, there should be more Aboriginal-specific services available particularly at the early intervention stage, and more pathways to engagement with therapeutic services without the involvement of FACS. Aboriginal parents and families should be connected by FACS with Aboriginal-controlled organisations, or organisations that are partnered with Aboriginal-controlled organisations. Aboriginal parents should be supported by an intensive

¹¹ Table adapted from Rhys Price Robertson, Leah Bromfield and Alistar Lamont, 2014, 'International approaches to child protection. What can Australia Learn?', CFCA Paper No. 23, p.4 <https://aifs.gov.au/cfca/sites/default/files/publication-documents/cfca-paper23.pdf>, last accessed 15 May 2015)

¹² See <http://www.newpin.org.au/>

proceedings. The IIC acknowledges that there are practicalities associated with FACS advising extended family and kin members of access to the family law jurisdiction which may need to be considered more closely. Given the relationship of distrust and fear that can exist between FACS and the Aboriginal community, the IIC suggests consideration will need to be given to processes to assist FACS to meaningfully provide this information. The IIC suggests that FACS would be assisted by developing relationships that would allow genuine engagement with Aboriginal organisations. These relationships would assist FACS with, among other things, identifying relevant family and kin members, particularly in regional areas.

If a Children's Court Magistrate has already made a decision about placing the child, the Magistrate could then make directions that contact be decided by family court pathways.

The IIC notes the view of the Chief Justice of the Family Court and the Chief Federal Magistrate (as he was then), that:

In child protection proceedings where contact between parents arises as an incidental matter it is difficult to see an objection in principle to this being determined in a state child protection court. Once a child protection issue has been determined however, the state court's jurisdiction in what is otherwise a federal family law issue should cease.¹⁴

If parties can agree on contact arrangements, FACS does not need to be further involved unless the child is actually at risk. The IIC considers this arrangement to be useful particularly as children get older (and as parenting capacity may improve), family law pathways provide good potential for reviewing the continued appropriateness of arrangements. As noted previously, the IIC's view is that contact should be commensurate with risk. However, in its experience, due to its different perspective, the contact orders made in the Children's Court are likely to be minimal and only for the purposes of establishing identity. For this reason, Family Courts are more likely to make adequate contact arrangements.

The IIC suggests that, if the parties consent, the matter could be transferred to the Family Court for the making of contact orders.

B. Maranguka and justice reinvestment

The IIC notes the work currently being undertaken in Bourke to develop and implement a community-owned model of service coordination and realignment. The IIC brings this example to the attention of the Standing Committee for the purpose of noting that there is currently service coordination work underway that is community owned, and has the potential to reduce offending and create a safer community in what is currently a community with high social needs.

The IIC understands that Maranguka is an Aboriginal owned and run community organisation in Bourke, set up to be a best practice model. It does not seek to replace existing services or organisations, but rather to act as a hub for individuals and service providers. The IIC understands also that Maranguka facilitates assistance where required. The Maranguka proposal is founded on "overturning society's historical deficit-based approach that views Aboriginal people as 'the problem', rather than as people 'having a problem'."¹⁵

¹⁴ D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010 as cited in Australian Law Reform Commission, *Family Violence – A National Response*, October 2010, ALRC Report 114, available online: http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114_WholeReport.pdf (accessed 10 July 2015). The report is referred to hereafter as "ALRC Family Violence Report".

¹⁵ Graeme Gibson, "We are not just passing through" *Griffith Review*, Edition 44: Cultural Solutions



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IndgIssuesJEvk:953872

24 April 2015

Senate Finance and Public Administration Committees
PO Box 6100
Parliament House
Canberra ACT 2600

By email: fpa.sen@aph.gov.au

Dear Committee Secretariat,

Inquiry: Commonwealth Indigenous Advancement Strategy tendering processes

I write on behalf of the Indigenous Issues Committee of the Law Society of NSW ("Committee"). The Committee represents the Law Society on Indigenous issues as they relate to the legal needs of people in NSW and includes experts drawn from the ranks of the Law Society's membership.

The Committee understands that the Senate Committee has been tasked with inquiring into the impact on service quality, efficiency and sustainability of the Commonwealth Indigenous Advancement Strategy ("IAS") tendering processes overseen by the Department of the Prime Minister and Cabinet. The Committee writes in respect of the terms of reference at "q".

There are two aspects to the Committee's concerns about the IAS process. First, the Committee notes the concerns expressed by community organisations about the lack of transparency and certainty afforded in the tendering process. Secondly, the Committee is concerned that, if the integrity of the process has in fact been affected, then there may be adverse impacts on the effectiveness of services provided to Indigenous peoples. The Committee is concerned that impacts in the areas of health and education for Indigenous peoples may then have flow-on effects in the criminal justice and care and protection systems. The Committee notes that the *2002 National Aboriginal and Torres Strait Islander Social Survey* found that:

Indigenous people who had ever been charged by police (35%) were around twice as likely to be unemployed as the rest of the Indigenous population. In 2002, 21% of males and 19% of females who had ever been charged were unemployed compared with 12% of males and 9% of females in the remainder of the Indigenous population. Similarly, those ever charged were more likely to have ceased formal schooling before Year 10, although the difference primarily occurred among males. Of Indigenous males aged 15 years or over, 42% of those who had ever been charged had ceased formal schooling before Year 10 compared with 32% of other Indigenous males (tables 19 and 11).¹

¹ Australian Bureau of Statistics, "National Aboriginal and Torres Strait Islander Social Survey, 2002", available online: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4714.0Main+Features12002> (accessed 14 April 2015). While these findings are dated, the Committee's view is that the trends remain the same.

The Committee is concerned that these outcomes would be inconsistent with the aims of the *Close the Gap* agenda,² and the Committee's concerns are addressed below in greater detail.

The Committee notes that community organisations have expressed concerns about the lack of transparency and certainty in the IAS tendering process. For example, the Committee understands that there was scant information available about the criteria applied to assessing funding applications, and that no grievance process was available while the tendering process was underway. There was therefore no opportunity for bidding organisations to have their concerns addressed and in a timely manner.

The Committee is also concerned that the outcome of the IAS process has provided for minimal security in the long-term viability of community organisations (particularly Aboriginal-controlled community organisations), which erodes the ability of organisations to make and implement long term strategies.

One example of these concerns is the funding outcome for the Family Violence Prevention Legal Services ("FVPLS"). The FVPLS provides vital frontline specialist and culturally safe legal assistance, and support to Aboriginal and Torres Strait Islander people. These services are a crucial element of the legal assistance system, particularly given that family violence has implications for Indigenous peoples in increasing incarceration rates; as well as the over-representation of children in the care and protection jurisdiction.

The Committee understands that prior to the IAS process there were 31 FVPLS in rural and remote locations around Australia,³ however across Australia, only 14 services received IAS funding.⁴ In many cases the successful FVPLS bids received funding only for 12 months. The Committee notes the view of the National Association of Community Legal Centres that:

Short term funding makes planning and delivering effective services difficult and erodes local community confidence. The FVPLS have had to allocate significant resources away from frontline service delivery to participate in the administratively demanding competitive tendering process of the IAS, that will now need to be repeated in less than 12 months time. This is inefficient and oppressive on busy service providers in this critical and specialist area.⁵

Further, the Committee notes the report in *The Australian* that two thirds of the organisations that received funding under the IAS are non-Indigenous organisations.⁶ The funded recipients include the Northern Territory Government, various Government Departments including the Departments of Health and Ageing; Education and Training; Sport and Recreation; Justice and Attorney-General, and the Department for Correctional

² Council of Australian Governments, *Closing the Gap in Indigenous Disadvantage*, available online: https://www.coag.gov.au/closing_the_gap_in_indigenous_disadvantage (accessed 21 April 2015).

³ According to the National Family Violence Prevention Legal Services website, there were 31 services in rural and remote locations around Australia prior to the recent IAS funding round: <http://www.nationalfvpls.org/> (accessed 14 April 2015).

⁴ National Association of Community Legal Centres, "NACLC welcomes funding of Family Violence Prevention Legal Services, expresses concern about cuts to some CLCs" media release, available online: http://www.nacclc.org.au/cb_pages/news/MediaReleases.php (accessed 14 April 2015)

⁵ Note 3.

⁶ Natasha Robinson, "Indigenous Advancement Strategy funding revealed," 24 March 2015, *The Australian*, available online: <http://www.theaustralian.com.au/national-affairs/indigenous/indigenous-advancement-strategy-funding-revealed/story-fn9hm1pm-1227277037488> (accessed 14 April 2015).

Services.⁷ The Committee understands that Shire Councils were among the list of successful organisations, as well as universities, and other already well-funded non-government organisations such as the Australian Rugby Union.⁸

This suggests that larger organisations were more successful, and that smaller or medium sized Aboriginal-controlled organisations may have been less likely to be successful. If this is indeed the case, the Committee is very concerned that this would undermine community-based management structures, and is inconsistent with the human rights principles of self-determination.⁹

The Committee considers that it may be a false economy to shift the funding model from high quality community service provision targeted towards Indigenous peoples, to a generalist model that prioritises cost efficiency rather than culturally based expertise. For example, the cultural sensitivity afforded by the FVPLS has been cited as crucial in assisting Aboriginal women and children to safety.¹⁰ In the Committee's view, the loss of expertise, specialisation and established relationships of trust held by the community, among other factors, is in the Committee's view, likely to impact on the effectiveness of the services¹¹ and may have adverse downstream impacts for Indigenous peoples, including in respect of the already disproportionate rates of incarceration of Indigenous people.

Finally, the Committee notes that the issue of effective funding models for Aboriginal organisations has been thoroughly examined in the NSW Ombudsman's Special Report to Parliament, *Addressing Aboriginal disadvantage: the need to do things differently*¹² ("Report"). The Committee notes the significance of the Report's findings, which were informed by extensive consultation with thousands of Aboriginal people, as well as hundreds of agencies and organisations responsible for service provision. The Report is also supported by a decade of work by the Ombudsman on these issues.¹³

The Committee recommends consideration of the findings and recommendations of the Report, which in the Committee's view, supports a transparent funding model that is underpinned by the principle of self-determination, and which establishes true

⁷ The list of organisations recommended for funding under the IAS grant funding round is available at the Department of Prime Minister and Cabinet website: <https://www.dpmc.gov.au/indigenous-affairs/grants-and-funding/funding-under-ias> (accessed 23 April 2015). In listing the various government departments recommended for funding, no information is provided on the specific jurisdictions of the government departments that are to receive funding.

⁸ *Ibid.*

⁹ Articles 3 and 4, *Declaration on the Rights of Indigenous Peoples* and Article 1, *International Covenant on Civil and Political Rights*.

¹⁰ Zoe Daniel, "Indigenous health and domestic violence agencies fear they may fold following budget changes", *ABC News*, 16 September 2014, available online: <http://www.abc.net.au/news/2014-09-16/funding-doubts-have-indigenous-health-agencies-worried/5748070> accessed 14 April 2015.

¹¹ The Committee notes that the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs ("House Committee") in its 2011 *Doing Time – Time for Doing* report acknowledged that ATSILS play a critical role in providing culturally appropriate services to victims, offenders and their families.¹¹ The House Committee noted that "ATSILS have been found to be more effective than mainstream legal services; the latter often avoided by Indigenous people". (House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 2011, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, [7.63] at p 210, available online: http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=atsia/sentencing/report.htm (accessed 23 May 2014).

¹² NSW Ombudsman, *Addressing Aboriginal disadvantage: the need to do things differently*, A Special Report to Parliament under s 31 of the Ombudsman Act 1974, October 2011, available online: https://www.ombo.nsw.gov.au/data/assets/pdf_file/0012/3342/SR_Aboriginal-disadvantage-report.pdf (accessed 14 April 2015).

¹³ Note 12, at 2.

partnerships. The Report noted that in NSW "substantial government investments have "yielded dismally poor returns to date"..."¹⁴ and that in order to change this, the reform process must make Aboriginal affairs core business for all agencies, where change is driven from the centre of government. Further, the reform process must involve a true partnership between government and Aboriginal leaders. The Report also noted that:

government must work with Aboriginal leaders in developing strategies to facilitate greater participation by Aboriginal people in successful economic endeavours.¹⁵

The Committee's view is that while the Report examines the NSW Government's Aboriginal affairs strategy, its findings and recommendations are likely to be applicable nationally.

The Committee thanks you for considering its comments. Questions may be directed to Vicky Kuek, policy lawyer for the Committee, at victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely,

John F Eades
President



¹⁴ Note 12, at 5.

¹⁵ Ibid.