THE LAW SOCIETY
OF NEW SOUTH WALES

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25 February 2014

The Hon. Pru Goward MP
Minister for Family and Community Services
Statutory Child Protection Branch
Department of Family and Community Services (Community Services)
Locked Bag 4028
ASHFIELD NSW 2131

By email: cpreforms@facs.nsw.gov.au and office@goward.minister.nsw.gov.au

Dear Minister,

Child Protection Legislation Amendment Bill 2013

I am writing on behalf of the Indigenous Issues Committee (IIC) of the Law Society of New South Wales. The IIC 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 IIC has considered the Child Protection Legislation Amendment Bill 2013 ("the Bill") and is pleased to note that some of the amendments proposed are likely to have a positive impact on parents and children in the care and protection system.

In particular, the IIC supports the following aspects of the Bill:

- The proposed repeal of s 81 and the amendments to s 79 of the *Children and Young Persons (Care and Protection) Act 1998* ("Care Act") will clarify the existing confusion.

- The amendments that encourage early engagement (at the pre-natal stage) and the amendments that allow the recognition of breaches and which bind both FACS and parents.

- Proposed section 172A in relation to reportable deaths. The IIC is pleased to note that there is a definition of "reportable death" and that death must be reported by the Director-General to the Minister, and that the Minister must table this report annually.

- The inclusion of the hierarchy for permanent placement principles in legislation relating to Aboriginal and Torres Strait Islander children. The IIC notes that FACS has confirmed that adoption will not be an option for Aboriginal and Torres Strait Islander children. However, the IIC continues to be concerned as to how Aboriginal and Torres Strait Islander children will be identified and seeks further information and assurance from FACS as to the Department's proposed procedures in identifying Indigenous children

The IIC has additional concerns about other aspects of the Bill. In this respect, the IIC endorses the Issues Paper provided by Community Legal Centres NSW (attached). The IIC's specific concerns are set out in more detail below.

1. Aboriginal cultural connection

The IIC notes that "kin" as set out in cl 1 of the Bill, is defined as follows:

> ***Kin*** of a child or young person means a person who shares a cultural, tribal or community connection with the child or young person that is recognised by that child or young person's family or community.

The IIC is concerned that under this definition it may be successfully argued that a "community connection" will be considered kin from the community as a whole, and not specifically from the Aboriginal or Torres Strait Islander community. The IIC submits that this definition should be amended to clarify that community connection is a reference to only an Aboriginal community connection.

2. Effective early intervention – care plans and the availability of ADR

The IIC's view is that care plans can and should be used more effectively. This process affords greater flexibility, can be more culturally appropriate and can provide parents with a greater understanding of concerns prior to a child's removal and within a more reasonable time frame. This allows parents a better opportunity to address concerns and to have a genuine opportunity to improve parenting capacity. Parents should also have access to legal assistance in the development of care plans. Further, the IIC's view is that in providing legally assisted mediation in the early intervention stage (prior to filing a care application) would be very beneficial for children and parents.

The IIC submits that s 38 of the Care Act should be amended to allow for the use of ADR in the Children's Court in relation to the development of care plans. The benefits of this approach is that it engages parents (who should be supported by legal assistance) at a time prior to the threat of removal, and the formality of the ADR process can be a signal to parents that care plans should be taken seriously.

ADR should be available at an early stage; even where a care application has not yet been filed. The IIC notes that the Wood Inquiry was "of the strong view that ADR should be used before and during care proceedings."[1]

The IIC notes that the ADR that is currently available does not provide for lawyers to attend with parents, unless with a private mediator. However, parents are very unlikely to be able to afford private mediation. The IIC's view is that in order for ADR to be a meaningful option, affordable or subsidised legal assistance should also extend to the ADR process.

The IIC is advised that Legal Aid piloted a care mediation program out of the Children's Court in Bidura which was successful (albeit available only after a care application had been filed). The Committee understands that Legal Aid will be recommencing care mediation, but that it will only be available to matters after a care application has been made.

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[1] J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), 489

3. Effective early intervention – appropriate diversion to the family law system

The IIC notes that there is no legislative amendment required to allow for FACS to make an application in the family law system rather than to the Children's Court in matters where a suitable kinship carer has been identified and an appropriate risk assessment has been conducted.

In this regard, the IIC notes the submission made to FACS by the Aboriginal Family Pathways Network subcommittee of the Greater Sydney Family Pathways Network ("Network") in relation to the FACS discussion paper *Child Protection: Legislative reform legislative proposals – Strengthening parental capacity, accountability and outcomes for children and young people in state care*. The IIC notes that in that submission, the Network advocated the early referral of matters to the federal family law system. The Network noted the following benefits of such early referral:

> Referral to the Federal Family Law system at an early stage would also allow:
> i) The far more flexible case management processes of that Court to apply;
> ii) Allow Court ordered and supervised therapeutic services to be utilised[2];
> iii) A more culturally sensitive and appropriate environment for management and determination of the dispute[3];
> iv) Allow concerns to be appropriately judicially addressed and without the need for expenditure of department resources and with an outcome that will require no ongoing departmental monitoring or supervision.
> [*footnotes in the original*]

The IIC notes that this would be most effective if FACS staff were to be provided with legal education on utilising the family law system. The IIC may be able to provide recommendations in relation to such legal education efforts. The IIC raises this issue at this time to allow for its consideration in the context of drafting subordinate legislation or guidance material for FACS staff.

4. Contact orders

While the IIC is sensitive to the fact that achieving stability is in the best interests of the child, it is concerned that cl 60 proposes to add a subs 86(6) to provide that the maximum period of a contact order is only 12 months if the Children's Court decides that there is no realistic possibility of restoration. Unless it is unsafe, children should be able to maintain relationships and have contact with their families.

In the IIC's experience, contact orders are problematic unless parties have the opportunity to be legally represented. Parents may not understand the conditions of the orders, or may not understand the consequences of breaching the orders. Further, contact variation orders where parties do not have legal representation

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[2] s.13C of the Family Law Act allows the Court to order parents to participate in Family Dispute Resolution (mediation) and Family Counselling and other courses, programs and services and generally (s.65F) proceedings are not to be finalised until family counselling has occurred.

[3] The Federal Magistrates Court (from 12 April, 2013 renamed the Federal Circuit Court) has an Indigenous Access Committee that consults with the ATSI community and recommends processes and services within the Court to ensure better access and response to Aboriginal and Torres Strait Islander children. Further, the Family Law Act incorporates the totality of the International Convention on the Rights of the Child as part of its objects and principles (s.60B) and contains specific provisions, such as s.60CC(6) and s.60CC(3)(h) requiring the identification of Aboriginal and Torres Strait Islander children and specific considerations focused around culture.

may be problematic for the same reasons. Parties to contact variation orders should have a right to legal representation and redress by the Court prior to the contact variation occurring.

5. Guardianship orders

The IIC strongly opposes the introduction of guardianship orders in cl 49 in the Bill. The IIC's view is that there are potential negative implications for families if guardianship orders are made that may not be immediately apparent to parents and kin.

First, the IIC notes that a child under guardianship orders is not considered in out of home care and the Minister would therefore no longer be responsible for that child. Proposed s 79C notwithstanding, the IIC's view is that where the Minister is no longer responsible for a child under guardianship orders, the practical effect may be that financial assistance for that child's needs will be limited, and will be subject to the continuation of FACS support for the carer.

Second, the IIC notes that the options available to allocate parental responsibility orders appropriately (such as contact orders, splitting and sharing parental responsibility and so on) in proposed s 79 in the Bill are not available under guardianship orders in proposed s 79A.

That is, once guardianship orders are made, contact orders will no longer be available, nor can parental responsibility be allocated to anyone else. It appears that if a guardianship order is made in favour of a foster carer or an agency, there will be no opportunity for parents to apply for contact orders. Nor will there be any opportunity for parents to apply for an order allocating, for example, the cultural aspect of parental responsibility to parents, and for the educational aspect to be allocated to the Minister.

In the IIC's view, guardianship orders are too blunt an instrument and are not in the best interests of Aboriginal and Torres Strait Islander children. The IIC's view is that a move towards permanency planning in this way is inappropriate for Aboriginal and Torres Strait Islander children and will have the effect of further disadvantaging Aboriginal and Torres Strait Islander parents and families. This is particularly so after the decision of *Re June (No. 2)* NSWSC 1111 discussed in more detail at section 6 below.

While the IIC's view is that the Bill should not include guardianship orders, if the Government intends to move ahead with them, the IIC submits that the *Family Law Act 1975* (Cth) should be amended to allow discrete contact applications.

Alternatively, the IIC submits that if the Government proceeds with guardianship orders, the Care Act should be amended so that a "Family Law Certificate" is issued contemporaneously with any guardianship order, and indeed with any parental responsibility order. The Certificate could give parties and FACS consent to undertake proceedings in the family law system. The IIC's view is that this Certificate would comply with s 69ZK of the *Family Law Act* if signed by a delegate of the Director-General.

The IIC notes also that the Certificate could also direct parties to Family Dispute Resolution ("FDR") available in the community; and prior to filing any application in the family law system. This would be consistent with existing provisions about FDR which are, in the IIC's view, otherwise meaningless.

6. Standing of foster carers/involvement in proceedings

The IIC notes the decision of McDougall J in *Re June (No. 2)* where His Honour held that s 87 of the Care Act allowed foster carers standing to be heard. The IIC is concerned that this decision may have the effect of further disadvantaging Aboriginal and Torres Strait Islander parents, particularly if the care proceedings are in relation to a child removed at birth.

These concerns are reinforced by the proposed addition of a new s 79(3) by cl 49. The IIC is concerned that foster carers will have the opportunity to be heard at first instance. The IIC notes also that pursuant to the proposed s 79B(1)(b), NGOs would be able to apply for guardianship orders in favour of foster carers once an application commencing proceedings (s 61 application for guardianship orders) has been made. Similarly, the proposed s 79B(1)(c) would allow an authorised carer to also apply for a guardianship order.

The IIC opposes these amendments on the basis that they are not in the best interests of Aboriginal and Torres Strait Islander children.

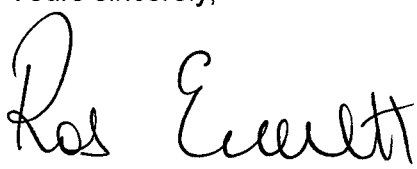
7. Removal of appeals de novo

The IIC notes that cl 65 inserts a new s 91I, which provides that a party to proceedings dissatisfied with a parent capacity order of the Children's Court may appeal to the District Court on a question of law.

The IIC does not support removing the right to appeal de novo. The IIC notes that appeals by parents to the District Court on a de novo basis are upheld a very large percentage of the time where parties are represented. The IIC notes also that it is very difficult to obtain a Legal Aid grant for appeals in the District or Supreme Courts. Currently, many practitioners provide assistance for appeals on a pro bono basis, sometimes for the purposes of obtaining precedents from the District or Supreme Courts. The IIC's view is that if appeals are allowed only on a question of law, the willingness and capacity of practitioners to provide assistance on a pro bono basis is likely to be curtailed.

The IIC is grateful for the opportunity to provide comments and would welcome the opportunity to discuss these concerns further. Questions can be directed to Vicky Kuek, policy lawyer for the IIC. She is available on 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely,



Ros Everett
President