THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IIC/JFEvk:1042346

6 August 2015

Mr David Shoebridge MLC
Parliament House,
Macquarie Street,
Sydney NSW 2000

By email: david.shoebridge@parliament.nsw.gov.au

Dear Mr Shoebridge,

Child Protection Legislation Amendment Bill 2015

I refer to an email dated 24 June 2015 from your office seeking the views of the Law Society of NSW regarding the Child Protection Legislation Amendment Bill 2015 (the "Bill"). The Law Society's views were sought particularly in respect of Schedule 3[19] of the Bill.

Schedule 3[19] proposes to remove the discretion of the Civil and Administrative Tribunal ("NCAT") to review decisions to:

- not authorise a person as an authorised carer;
- cancel a provisional authorisation; and
- cancel authorisation due to certain prescribed events.

The Indigenous Issues Committee of the Law Society ("Committee") considered this issue. 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. These views are informed by the experience of members of the Committee in respect of providing assistance to Indigenous peoples in NSW in the care jurisdiction. For the reasons provided below, the Committee's view is that the Bill should be amended to remove Schedule 3[19].

The Committee acknowledges that the Children's Court of NSW has expertise in considering care matters, and acknowledges the concern that the NCAT may not in all instances have the appropriate expertise in respect of safeguarding the interests of children. The Committee notes that this decision-making process can be counter-intuitive and decision-makers must have the requisite expertise to be able to understand the risks involved in each alternative. In this respect, it is possible for a person who has not been authorised as a carer, or whose provisional authorisation has been cancelled, to make an application under s 90 of the *Children and Young Persons (Care and Protection) Act 1998* ("Care Act").

However, the Committee notes the relationship between Indigenous peoples and the Department of Family and Community Services, and the Children's Court can be fraught. For many Indigenous people there is a historical and ongoing distrust of FACS.

The Committee also notes that in its experience, it can be difficult to make applications under section 90 of the Care Act. A significant barrier is the difficulty in accessing Legal Aid grants for an applicant (who may in fact be a suitable carer) who have not passed a Working With Children Check ("WWCC") because he or she may have a criminal record.

In considering whether a WWCC clearance should be given, the Office of the Children's Guardian takes into consideration convictions (spent or unspent), charges (whether heard, unheard or dismissed) and juvenile records. In the Committee's experience, this process can disproportionately exclude Indigenous people from getting a WWCC clearance and therefore exclude people who may in fact be appropriate carers. In this regard, the Committee notes the relationship between Indigenous peoples and the NSW Police Force is one that is complicated by historical and contemporary experience.[1]

The following example is not uncommon. An Indigenous grandparent may, be in fact the best carer for an Indigenous child, but may not pass the WWCC because of a conviction (which may be a spent conviction). In the Committee's experience, an applicant in that position is unlikely to receive a Legal Aid grant to make an application under s 90 of the Care Act. Without recourse to the NCAT, and taking into account that it is very difficult to access pro bono legal representation in this jurisdiction, such an applicant is unlikely to be able to be authorised as a carer.

The Committee notes that this scenario may lead to the child in question being placed in the care of someone outside of that child's kin or family structure. In the Committee's experience, contact orders made in the care jurisdiction are often minimal and provide for contact only for the purpose of establishing identity. The Committee would have concerns in respect of ensuring that the child is able to maintain family and cultural connection. The Committee's concerns in respect of the over-representation of Indigenous children in out of home care, and in respect of adequate cultural contact are set out more fully in its submission to the Inquiry into out of home care and attached for your information.

Given the difficulties experienced in practice to make successful s 90 applications, on balance the Committee's view is that the NCAT's discretion to review authorisation

---

[1] The Committee notes that the Royal Commission into Aboriginal Deaths in Custody found that the relationships between Aboriginal and non-Aboriginal people were historically influenced by racism and that police officers:

> naturally shared all the characteristics of the society from which they were recruited and the idea of white superiority in general; and being members of a highly disciplined centralist organisation their ideas may have been more fixed than most; but above and beyond that was the fact that police executed on the ground the policies of government and this brought them into continuous and hostile conflict with Aboriginal people. The policeman was the right hand man of the authorities, the enforcer of the policies of control and supervision, often the taker of the children, the rounder up of those accused of violating the rights of the settlers. Much police work was done on the fringes of non-Aboriginal settlement where the traditions of violence and rough practices were strongest. [1.4.14]

While the RCIADIC provided its report in 1991, the Committee is of the view that these findings remain current. See for example the NSW Legislative Council Standing Committee on Social Issues, *Final Report on the Inquiry into issues relating to Redfern and Waterloo*, Report 34, December 2004, at 16, [2.41], available online: http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/77220a893aea0e16ca256f6c00098a80/$FILE/03%20Final%20Report%20Chapter%202.pdf (accessed 25 June 2015).

decisions should be maintained. The Committee is advised by practitioners that NCAT members often take a very cautious approach in respect of these applications and in considering the question of whether that person poses a risk to children.

As the removal of the NCAT's discretion in this regard is likely to have access to justice implications for Indigenous peoples, the Committee submits that the Bill should be amended to remove Schedule 3[19].

Thank you for the opportunity to provide comments. Any questions may be directed to Vicky Kuek, policy lawyer for the Committee, at victoria.kuek@lawsociety.com.au or on 9926 0354.

Yours sincerely,

Michael Tidball
Chief Executive Officer

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IndgIssuesREvk:909852

7 November 2014

Committee Secretary
Senate Standing Committees on Community Affairs
PO Box 6100
Parliament House

By email: community.affairs.sen@aph.gov.au

Dear Committee Secretary,

Inquiry into out of home care

I am writing on behalf of the Indigenous Issues Committee of the Law Society of New South Wales ("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 has a particular interest in out of home care ("OOHC") given that Aboriginal and Torres Strait Islander children were the subject of a child protection substantiation at eight times the rate of non-Indigenous children in 2012-2013.[1] According to the Australian Institute of Health and Welfare, Aboriginal and Torres Strait Islander children are represented in OOHC at ten times the rate of non-Indigenous children across Australia.[2] According to the AIHW:

> At 30 June 2013, there were 13,952 Aboriginal and Torres Strait Islander children in out-of-home care, a rate of 57.1 per 1,000 children. These rates ranged from 22.2 per 1,000 in the Northern Territory to 85.5 per 1,000 in New South Wales (Table 5.4). Nationally, the rate of Indigenous children in out-of-home care was 10.6 times the rate for non-Indigenous children. In all jurisdictions, the rate of Indigenous children in out-of-home care was higher than for non-Indigenous children, with rate ratios ranging from 3.9 in Tasmania to 16.1 in Western Australia.[3]

Further, "The 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."[4]

---

[1] AIHW, *Child Protection Australia 2012-13*, at 25 available at: http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129548164 (accessed on 22 October 2014)
[2] Cited in Judy Cashmore, 'Children in the out-of-home care system', in *Families, policy and the law: Selected essays on contemporary issues for Australia*, Alan Hayes and Daryl Higgins, (eds), AIFS http://www.aifs.gov.au/institute/pubs/fpl/fpl15.html
[3] Note 1 at 51.
[4] Note 1 at 53.

Given this, the Committee provides its comments below on the terms of reference. The format adopted in this submission has slightly different headings to those provided in the terms of reference in order to better reflect the focus of the Committee's work and experience.

1. Over-representation of Aboriginal and Torres Strait Islander children in care: drivers of the increase in the numbers in out of home care

The Committee notes that the reasons why Indigenous children are over-represented in the care and protection system are complex, intergenerational and multi-layered. Some of the drivers discussed are not strictly legal issues. However, they often have legal consequences and it is in this context that the Committee provides its comments.

In the Committee's view, the starting point for the analysis of the over-representation of Indigenous children in care should be the existing levels of trauma in Aboriginal families.[5] The Committee notes the view of the Australian Institute of Health and Welfare ("AIHW") and of the Human Rights and Equal Opportunities Commission ("HREOC") (as it was then):

> The reasons for the over-representation of Indigenous children in child protection substantiations are complex. The legacy of past policies of forced removal; intergenerational effects of previous separations from family and culture; lower socioeconomic status; and perceptions arising from cultural differences in child-rearing practices are all underlying causes for their over-representation in the child welfare system (HREOC 1997).[6]

In the Committee's experience, the ongoing experience of trauma is compounded by a number of factors, which can lead to the removal of children. Such trauma can be accompanied by self-medicating behaviour (substance abuse), domestic violence, and other issues that can lead to child protection substantiations. There may be a lack of early engagement with mental health and other therapeutic services for various reasons, and even if there is engagement, in the Committee's experience there is a lack of capacity among service providers to deal with the needs of Indigenous people.

In the Committee's view, there are children who are removed for issues that could be resolved. The Committee notes that the AIHW 2012-2013 Child Protection report stated:

> Overall, the most common type of substantiated abuse for Aboriginal and Torres Strait Islander children was neglect, which represented 40% of substantiations (compared with 23% for non-Indigenous children). The proportion of substantiations for all other abuse types was accordingly higher for non-Indigenous children (Figure 3.7). Nationally, the second most common substantiation type for Indigenous children was emotional abuse, which was 34% compared with 40% for non-Indigenous children. [...]

---

[5] The Committee notes the finding of the Special Commission of Inquiry into Child Protection Services in New South Wales ("Wood Inquiry") at [18.225]: "The literature is consistent in stating or implying that the trauma experienced by Aboriginal people is not only historic but is current and continuing. Responses to trauma and early removal from family and community include antisocial activity, violence and depression, which in turn lead to continuing social isolation and dislocation." Further, at [18.240]: "The literature supports an approach which addresses both the past traumas and history of colonialism and the present situational problems and health disadvantages of Aboriginal communities. The concept of culturally appropriate or culturally competent service provision requires that Aboriginal ways of understanding are incorporated into and respected within models of service delivery."

[6] See Note 1.

> Across all jurisdictions, sexual abuse was the least common type of substantiation for Indigenous children (9%).[7]

Addressing this situation requires early intervention disengaged from the government department associated with the care and protection system, the provision and availability of better targeted services, and changes to legislation and the legal process associated with care and protection.

For example, in the Committee's experience, in domestic violence situations, Indigenous people are unlikely to seek help from the police, for fear of child removal. There are also practical barriers and gaps in services that can lead to child removal. Emergency and specialist refuges for women fleeing domestic violence are scarce (exacerbated by the *Going Home Staying Home* reforms in NSW[8]), and the lack of available public housing. The lack of alternative safe shelter can lead either to women staying in violent relationships, or to homelessness for women and children. Both situations can lead to the removal of their children.

Also in the context of domestic violence, the Committee notes that breaches of Apprehended Violence Orders ("AVOs") can lead to the removal of children. However, the Committee is concerned that in some breach situations, children are unnecessarily removed in situations where they are not in fact unsafe. For example, s 5(h) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) provides for recognising Aboriginal kinship structures including past and present extended family in its definition of "domestic relationship". In some cases, the inclusion of extended family in this definition has afforded protection as intended. However, in other instances, the breadth of the definition in s 5(h) has led to breaches of AVOs that do not in fact affect the safety of children, but which have led to the unnecessary removal of children. The Committee submits that the nexus between AVOs and child removal is one that requires closer examination so as to avoid these serious unintended consequences.

In the Committee's experience, drug rehabilitation services can also be difficult to access, especially in relation to methamphetamine addiction. The Committee's experience suggests the waiting lists for rehabilitation services are long, and the duration of the courses are also long. This presents a difficult situation because the NSW Children's Court timetable is relatively short, and children will be removed before these courses can be accessed.

In the Committee's view, early intervention and engagement is a strategy that would address some of the drivers leading to the removal of Indigenous children.

However, in NSW there is a fundamental conflict with the NSW Department of Family and Community Services ("FACS") being the investigative and removal body, as well as the key (and for some services, the only) referrer to therapeutic services.

The Committee notes that Indigenous people are likely to view the relevant government care and protection departments with distrust and this current arrangement will not address the low levels of engagement with early intervention services.

---

[7] See Note 1 at 26.

[8] See Amy Corderoy, "Fears funds cut will leave homeless women without shelter," *Sydney Morning Herald*, 12 April 2014, available at: http://www.smh.com.au/nsw/fears-funds-cut-will-leave-homeless-women-without-shelter-20140411-36i6a.html (accessed 7 November 2014)

In the Committee's experience, useful and effective early intervention schemes exist. However, access to these programs for Aboriginal families is restricted in a number of ways.

For example, the Committee notes that the New Parent and Infant Network[9] ("Newpin") is a preventative and therapeutic program that works intensively with parents and families facing potential or actual child removal. In the Committee'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 Committee's experience, FACS will generally not make a referral until children have already been removed. The Committee submits 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 Committee's view, significantly reduced by removing the ability of Aboriginal-controlled organisations to make referrals.

In the Committee's view, there should be more Aboriginal-specific services available, and more pathways to engagement with therapeutic services without the involvement of FACS. Aboriginal parents and families should be connected with Aboriginal-controlled organisations, or organisations that are partnered with Aboriginal-controlled organisations. Aboriginal parents should be supported by an intensive case management approach, and in order to avoid a repeating process, the focus of the services must be focused on trauma and healing.

Further, the Committee notes that despite the existence of the Aboriginal placement principles, approximately a third of Aboriginal children are not placed in kinship care,[10] or with an Aboriginal carer. The Committee's experience suggests that a significant driver of this outcome is that FACS is unwilling to place children in kinship care if the kinship carer continues to have a relationship with the child's parents, and prefer care placements that are at arms' length from the parents. Given that Aboriginal communities are commonly close-knit; this may disqualify otherwise-appropriate kinship carers. The Committee notes that even if a child is placed in kinship care, such a placement is not always accompanied by an allocation of parental responsibility and as such a child in this situation can be removed at any time. In the Committee's experience, there are many children who are moved between foster care placements (an outcome which the Courts may not be aware of in making orders).

2. Outcomes for children in out of home care (including kinship care, foster care and residential care) versus staying in the home

The Hon Geoff Eames QC noted that the Royal Commission into Aboriginal Deaths in Custody uncovered the "remarkable" statistic that 43 of the 99 Aboriginal deaths in custody involved a person who had been separated by welfare policies from their families when they were young.[11] The Committee notes that the association between the care and protection system and the criminal justice system appears to be ongoing.

---

[9] See http://www.newpin.org.au/ .
[10] Note 2 citing the AIHW 2013 report.
[11] Geoff Eames, "The Royal Commission into Aboriginal Deaths in Custody – 20 years on", *Exchanging Ideas II – A conference sponsored by the Ngara Yura Committee, Judicial Commission of NSW* (September 2011) at 14, cited in Judge Stephen Norrish QC, "Sentencing Indigenous Offenders – Not enough 'judicial notice'?," *Judicial Conference of Australia Colloquium*, (October 2013) at 40.

In 2013 Legal Aid NSW commissioned a study profiling the 50 highest users of legal aid services in NSW.[12] Among its other findings, the study showed that nearly half of all high service users (46%) had spent time in OOHC.[13] The Legal Aid study noted that the 2008 Report of the Wood Inquiry found that approximately one third of young people in juvenile detention had a history of OOHC, and that the findings supported the anecdotal experiences of Legal Aid lawyers who have observed the increasing "drift" from the care system to the criminal justice system.[14]

These findings are of serious concern, given the overrepresentation of Aboriginal and Torres Strait Islander children in care.

There is a significant amount of literature on these issues, which details research into outcomes for children in OOHC, and other organisations are better placed than the Committee to discuss this research. However, the Committee does note the qualitative findings of the Australian Institute of Family Studies in 2006[15] focusing on the experiences of Aboriginal children in foster and kinship care, and of the carers. The extracts from this study state:

> The young people's responses focused almost exclusively on the importance they placed on connection to family, community and culture.[16]

And further states:

> A consistent theme expressed by the young people was about wanting to be back in their home community, and wanting to be reunited with their parents. When asked about their experience of being in care, many of their answers focused on their biological families. When asked if there was one thing in their lives that they could change – what would it be, young people responded:
>
> *"Get out of foster care."*
> *"To be with your family."*
> *"Go back to my mother."*
> *"We would be really really want to be with our parents."*
> *"Would rather be back in [local community]"*
> *"Get my dad back." (His father had died).*
> *"Dad come to my house."*
> *"Have family together – Dad and Mum."*
>
> These themes of re-connection to community and family re-unification are important messages from young people. They did not spontaneously suggest concepts such as "stop the abuse" or "stop the neglect", but instead re-affirmed the importance of connection to people and place, even if those situations were deemed by authorities to be inadequate or placing the young person at risk. This was despite the child protection system having swung into action to protect these young people from harm and to prevent them from future harm.[17]

---

[12] Pia van de Zandt and Tristan Webb, *High Service Users at Legal Aid NSW: Profiling the 50 highest users of legal aid services,* June 2013, Legal Aid NSW ("Legal Aid study").
[13] Legal Aid Study, note 10 at 16.
[14] Ibid.
[15] Daryl Higgins, Leah Bromfield, Jenny Higgins and Nicholas Richardson, "Protecting Indigenous Children: Views of carers and young people in 'out-of-home-care'", *Australian Institute of Family Studies,* Family Matters 2006, No. 75 at 42-49 available online: http://www.aifs.gov.au/institute/pubs/fm2006/fm75/dh.pdf (accessed 5 November 2014)
[16] Note 14 at 44
[17] Ibid.

The study concluded that: "Although children's safety is of paramount importance, it is not the only issue to be considered in securing their best interests."[18]

3. Improving intervention

3.1. Wood Inquiry findings

The Committee notes the Wood Report[19] examined models of intervention in the care and protection of Aboriginal children, and extracts below the following findings on "promising practice":

> [18.238] The review highlighted the limited quality and quantity of programs addressing these factors in Aboriginal communities in Australia, which makes formulation of specific recommendations difficult. However, the review did identify a number of features of successful programs. These included:
>
> a. involvement of local Aboriginal people in the design and implementation of programs
> b. effective partnerships between community members and the organisations involved, which resulted in community capacity building and employment for local Aboriginal people
> c. cultural understanding
> d. mechanisms for effective feedback to individuals and families.
>
> [18.239] The conclusion that can be drawn from this information is that the best evidence for what works in addressing the issues in Aboriginal communities is likely to be drawn from the Aboriginal people themselves, through consultations, drawing on their ideas, experiences and opinions, respecting their knowledge drawn from their own individual and community experiences, and drawing on case reports of individual Aboriginal people and specific programs.

Further the report found:

> [18.241] A number of principles for the way forward have been proposed and reiterated in the literature. Favoured models of intervention:
>
> a. are tailored to meet the needs of specific localities
> b. are based on community development principles of empowerment
> c. are linked to initiatives that deal with poor health, alcohol abuse and similar problems in a holistic manner
> d. employ local people where feasible
> e. respect traditional law and customs where appropriate
> f. employ a multidisciplinary approach
> g. focus on partnership between agencies and community groups
> h. add value to existing community structures where possible
> i. place greater stress on the need to work with men
> j. place more emphasis on intervention that maintains family relationships and healing

---

[18] Ibid.
[19] James Wood, 2009, *Report of the Special Commission of Inquiry into child protection services in NSW*, NSW Department of Premier and Cabinet, available online: http://apo.org.au/node/2851 (accessed 5 November 2014).

3.2. Better integration of Aboriginal-controlled organisations, or organisations that partner with Aboriginal organisations into the FACS decision making process

In addition to the Wood Inquiry findings above, the Committee notes also that s 12 of the *Care and Protection (Children and Young Persons) Act 1988* (NSW) ("*Care Act*") provides:

> 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.

Given this, the Committee notes that Aboriginal organisations are entitled to be involved with the FACS decision making process at an early stage. In the Committee's view, there is significant potential for reducing the numbers of Aboriginal children entering the OOHC system if Aboriginal-controlled services were more involved with the FACS decision making process at an early stage. This would contribute to FACS' understanding of how it could meet the needs of Aboriginal families better (for example, by connecting with trauma or mental health services), thereby preventing removal, or providing for meaningful pathways to restoration.

The Committee notes that this would require building the capacity of Aboriginal organisations through education, to highlight to these organisations the potential significance of their impact, and the scope of their influence. Further, if these organisations were provided with community legal education to understand the difference in the care and family law jurisdictions, they would be better placed to identify matters appropriate for referral to the family law jurisdiction; which can result in better outcomes for Aboriginal families.

It is important to note that that in advocating greater engagement between FACS and Aboriginal organisations, the Committee is not calling for more Aboriginal services to be brought under the OOHC system umbrella (that is, for Aboriginal organisations to be paid to be an OOHC service). The Committee notes that the service provider fees for OOHC providers are lucrative, and would be enticing for service providers. However, funding Aboriginal services to be OOHC providers is unlikely to improve outcomes for Aboriginal families.

As submitted 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 Committee's opinion, better outcomes for Aboriginal people will result if they are serviced by agencies outside of FACS. Funding Aboriginal services to operate as OOHC providers is likely to create deep mistrust in Aboriginal communities.

An example illustrates this point. The Aboriginal Medical Service ("AMS") plays a central role in Aboriginal communities on many levels, and if the AMS was funded as an OOHC provider, the Committee's view is that the effect of this would be to create a barrier for Aboriginal people to approach this service because of the fear and distrust the association of the AMS with FACS would create. While the AMS is currently mandated by law to report, it is not making direct decisions to remove or restore. Should its role include OOHC, there is the potential for families to disengage with an otherwise trusted Aboriginal service provider in fear of having children removed, or not having children restored.

4. Improving out of home care

4.1. Better cultural contact arrangements: court ordered cultural contact plans

The Committee 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.[20]

From the Committee's experience, cultural connection is vital for an Aboriginal child's resilience. The Committee holds strongly to the 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 Aboriginal nations. The Committee notes that some OOHC providers recruit Aboriginal people to run internal "cultural contact programs." In the Committee's view, this arrangement is neither appropriate, nor sufficient as culture is nurtured within a culturally appropriate, lived experience.

If cultural contact plans are part of the court orders, FACS will be obliged to implement these orders. Even if the legislation is not amended to provide for this, the Committee submits that it is open to the Children's Court to create specific policy to ensure that cultural contact plans are part of the care plan. For example, the Children's Court President could instruct magistrates to require that care plans for Aboriginal children be accompanied by cultural contact plans that are capable of establishing meaningful relationships with the child's parents, family and/or nation.[21] The Committee notes that if cultural contact plans are court-ordered, there will be a positive obligation on FACS to identify family members who can fulfil that cultural role. The Committee also notes that non-Aboriginal parents are often given supervised contact outside of FACS offices.

In the Committee's view, court orders should provide, for contact for a significant and substantial time with the purpose of establishing a meaningful relationship with parents and family; beyond the establishment of identification. The Committee notes that structured and positive engagement can assist to establishing positive cultural connection, and nurture the understanding in children that culture is a positive aspect of their lives. For noting, alcoholism and domestic violence is not a part of Aboriginal culture.

The Committee notes that there is much scope for meaningful cultural contact plans. For example, even though a parent may not have capacity for full parental responsibility, they may still have the capacity to coach that child's football team.

4.2. Better cultural contact: alternative models of OOHC

Further to the comments made in relation to court-ordered cultural contact plans, the Committee proposes for consideration a system of foster care similar to open adoptions. Under this proposed model, contact plans would include acknowledgement of the child's cultural heritage such as the child's family of origin and nation. Further, there would be court-ordered arrangements for cultural contact and parents would be able to secure more meaningful contact with their children in OOHC.

---

[20] Wood Inquiry at v.

[21] The Committee notes that this issue is tied to the issue of joining grandparents to the application, and the availability of grants of Legal Aid to joinder applications.

The Committee submits that the level of contact available to parents should be commensurate with the risk. If, for example, the parents' issues leading to the removal of the child are mental health issues and, for example, they have psychotic episodes every three to four years, then a child should be able to see his/her parents when the parents are well. Similarly, if the parents' issues are drug related, a child should have contact when his/her parents when they are not using drugs.

In the Committee's view, parents are more likely to accept having their children in OOHC if contact is commensurate with the reasons why the removal took place.

Alternatively, OOHC arrangements could be supported with family law-style orders to manage contact with parents in the family law jurisdiction. The advantage of this proposal is that the time constraints that exist in the care jurisdiction do not appear in the family law jurisdiction. This allows time for parents to regain control over their lives through engagement with therapeutic services, and children are kept safe and connected by placing them with kin. The Committee suggests that if FACS has built strong networks with Aboriginal organisations, appropriate matters could be referred through these organisations to the family courts by Aboriginal organisations; and be appropriately resourced to provide support for these families.

4.3. Better cultural contact: partial parental responsibility allocations

Under the current model of OOHC, the Committee notes that kinship carers are generally not allocated parental responsibility, and those placements can be ended at the discretion of FACS. The Committee submits that unless there is not any adult in that child's kinship structure available, it is not appropriate for the Minister to undertake the cultural aspect of parental responsibility for an Aboriginal child. Rather, a family or kinship member should undertake the cultural aspect of parental responsibility, even if that child is placed with an Aboriginal carer not of her own nation. The Committee's view is that as culture is ontological, children are only able to be meaningfully taught their culture by their own family, community or nation.

The Committee notes that the allocation of the cultural aspect of parental responsibility to the kinship carer would also provide due process for kinship carers: if FACS sought to end that placement, a court order would be required.

5. Pathways to restoration

The Committee notes that the current FACS practice is, after final proceedings in a removal hearing, to cease assisting families. The Committee notes also that under s 21(1) of the *Care Act*:

> A parent of a child or young person may seek assistance from the Director-General in order to obtain services that will enable the child or young person to remain in, or return to, the care of his or her family.

Requests for assistance are dealt with under Chapter 7, Part 1 of the *Care Act*. Relevantly, s 113 provides that:

> (1) A parent, child or young person, or any other person may ask the Director-General for assistance:
>
> (a) if there is a serious or persistent conflict between the parents and the child or young person of such a nature that the safety, welfare or well-being of the child or young person is in jeopardy, or

(b) if the parents are unable to provide adequate supervision for the child or young person to such an extent that the safety, welfare or well-being of the child or young person is in jeopardy.

(2) On receiving a request for assistance, the Director-General may provide or arrange for the provision of such advice or assistance as is necessary:

(a) to help the parents and the child or young person to resolve the conflict between them without recourse to legal proceedings, or
(b) to ensure that the child or young person is adequately supervised, or
(c) to enable the child or young person and his or her parents to have access to appropriate services.

The Committee submits that FACS should continue to assist families after final proceedings in relation to pathways to restoration. In this regard, the Committee understands that in Queensland child protection orders for custody or short term guardianship are made for a period of no more than two years, and during this two year period the focus is on restoration of the child to its family.[22] In the Committee's view, this approach should be implemented in NSW.

Thank you for the opportunity to comment. The Committee would be pleased to discuss further if it assists. Questions can be directed to Vicky Kuek, policy lawyer for the Committee, at victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely,

Michael Tidball
Chief Executive Officer

[22] See ss 62(2) and 73 of the *Child Protection Act 1999* (Qld).