Independent review into Aboriginal and Torres Strait Islander Children and Young People in Out of Home Care in NSW

Legal Aid NSW submission to Professor Megan Davis

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Legal Aid NEW SOUTH WALES

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 29 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW has extensive experience assisting Aboriginal and Torres Strait Islander children and young people and their families who have come into contact with the child protection system, including Out of Home Care (**OOHC**).

The Family Law Division of Legal Aid NSW advises and represents Aboriginal children and young people and their families in care and protection matters before the Children's Court through its specialised care and protection litigation service. Legal Aid NSW also provides extensive early intervention legal advice and assistance to Aboriginal children and young people and their families, both through its litigation service and through the Early Intervention Unit.

The Children's Legal Service (**CLS**) of Legal Aid NSW advises and represents children and young people under the age of eighteen involved in criminal cases before the Children's Court. CLS clients include Aboriginal children and young people who are in, or who have a history of, OOHC.

The Legal Aid NSW Children's Civil Law Service (**CCLS**) provides a targeted and holistic legal service to young people identified as having complex needs. Many of CCLS clients are Indigenous children and young people. The CCLS works in collaboration with criminal lawyers in the CLS, the Aboriginal Legal Service NSW/ACT and Shopfront Youth Legal Centre to provide joined up legal services to vulnerable young people, including Aboriginal children and young people who are in, or who have a history of, OOHC.

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Introduction

Legal Aid NSW welcomes the opportunity to contribute to the independent review of Aboriginal and Torres Strait Islander children and young people in out of home care (**OOHC**) in NSW. We set out below our response to the three issues identified in the call for public submissions:

1. The reasons for the high and increasing rates of Aboriginal and Torres Strait Islander children and young people in OOHC in NSW
2. The application of the Aboriginal and Torres Strait Islander Child Placement Principles in NSW (**Aboriginal Placement Principles**), and
3. Strategies to reduce the number of Aboriginal and Torres Strait Islander children and young people currently in OOHC and entering care in NSW, including improving pathways to family reunification.

We also make some brief comments and suggestions regarding the file review and consultation proposed to be undertaken as part of the review.

1. The reasons for the high and increasing rates of Aboriginal and Torres Strait Islander children and young people in OOHC in NSW

Our submission does not seek to address all of the potential reasons for the high and increasing rates of Aboriginal and Torres Strait Islander children and young people in OOHC in NSW. To undertake this exercise properly would require an examination of complex historical, social, economic and cultural factors that are beyond the scope of our expertise as a legal services organisation. Rather, we outline below some of the contributing factors that we have identified in the course of providing legal services to Indigenous children and young people and their families.

Inadequate early intervention with Aboriginal families

Legal Aid NSW is concerned about the lack of early intervention with Aboriginal families, and sees this is a significant contributing factor to the high rates of Aboriginal children in OOHC. It is the experience of Legal Aid NSW care and protection solicitors that Aboriginal children will be removed at birth and placed with non-Aboriginal carers, despite FACS having ample opportunity to undertake Family Finding and to work with family, kin and community to find a suitable placement for the baby after birth. The removal of a baby after birth is a very traumatic experience for both the baby and the parents, and can be exacerbated if the baby is then placed with non-Aboriginal carers not known to the parents.

Legal Aid NSW is currently involved in at least two matters in which Aboriginal babies have been removed after birth and placed with non-Aboriginal carers. In one case the mother's older child had been removed and FACS was aware that the baby was at risk, and in the other case there were risk of significant harm reports four months prior to the birth. The parents in the latter case have now nominated family members to be assessed as carers. We are of the view that case work should have been done during the mother's pregnancy.

Culturally appropriate early intervention can avoid the need for the child to be taken into care or, at the least, allow FACS to make arrangements for the child to be placed with family members following birth. This would reduce trauma for the child and the parent(s) and provide culturally approriate placements for children.

Below we provide two further case studies where FACS has failed to identify and work with extended family to avoid an Aboriginal child or young person being placed into OOHC.

Case Study: Kasey

Kasey is a young Aboriginal woman who experienced abuse and neglect as a child. At three years of age, she was temporarily removed from the care of her mother, who suffered mental health and substance abuse issues, and placed in emergency foster care. Kasey was subsequently restored to her mother. In a five year period, FACS received over 20 risk of harm reports in relation to Kasey. During this period, Kasey was often forced to flee the family home and experienced homelessness, and also spent time in juvenile detention. Kasey has been the subject of a number of sexual assaults and has struggled to deal with the impact of these issues.

Kasey gave birth to two sons when she was 17 and 18 years old, less than one year apart. Due to instability, drug use and domestic violence by the babies' father (himself a teenager and in the criminal justice system), both babies were removed by FACS at birth and placed in the care of paternal family members.

Due to her lack of trust of services and workers, mental health issues, family dysfunction and the effects of past trauma, Kasey was not able to engage in the care proceedings relating to her sons and she has no contact with them. FACS made minimal efforts to overcome these barriers and engage Kasey during pregnancy and removal. The supports offered were not intensive nor culturally appropriate and there was no follow up once her sons were removed. Kasey still struggles with the trauma of having her two sons removed and has spent time in adult gaol and continues to use ice and other substances.

Case Study: Annie

Legal Aid NSW acted as the Independent Legal Representative for Annie, aged three months, who was removed from her 17 year old mother Emma, and placed in OOHC. At the time of the removal, Emma was in a Red Cross program and was breastfeeding.

Annie's maternal grandparents informed FACS that they wanted to be assessed to care for Annie, and filed an application to be assessed as kinship carers and supervisors of the mother's contact the following month.

A Children's Court Clinic report was filed two months later, recommending restoration to Emma, provided that Emma continued to live with her mother (the maternal

grandmother) for a period of two years. The Clinic report did not raise any concerns in relation to the grandmother.

A Care Plan was filed three months later, recommending that Annie be placed in OOHC under the parental responsibility of the Minister until 18 years of age, with contact for the mother and the maternal grandmother twice a year. The OOHC provider noted at the back of the Care Plan that, in the event the child was not placed with family, they would look at adoption.

After concerns were raised by Legal Aid NSW and the Children's Court about the Care Plan, FACS undertook an assessment of the maternal grandparents, who were subsequently approved as long term carers for the baby. On the first day of the hearing, and after lengthy negotiations, FACS agreed to look at restoration and to place the child in the care of her maternal grandmother while Emma engaged with services.

Legal Aid NSW considers that, if further prior alternative action had been taken to assess the maternal grandparents and work with the family prior to Annie's birth, it may have been possible to avoid Annie being removed or proceedings being commenced.

We also refer to our recent submission to the Discussion Paper, "Shaping a better child protection system", outlining our concern that FACS does not always engage in appropriate 'alternative action' before removing children from their parents.[1] The Care Act has been amended to provide legislative alternatives to removal, including dispute resolution processes such as Family Group Conferencing, Parental Responsibility Contracts, and Parent Capacity Orders. However, we have observed that these practices have not been adopted as standard casework procedure by the Community Services manager caseworkers in many areas of NSW. In our experience, the in-house legal teams in FACS are also often unfamiliar with the use of these alternatives.

The lack of alternative action or early intervention is a general issue, but regularly arises with Aboriginal families. It can be exacerbated for Aboriginal families because of the lack of services in rural and remote areas, and the historical mistrust and cultural disconnect between FACS and Aboriginal communities. For example, even where there are prevention and early intervention services, there are barriers that can prevent Aboriginal people from accessing these services. One of the key barriers would be a concern that using these services would trigger a report to FACS that may ultimately lead to the removal of their child(ren).[2] Other barriers include remoteness, practical issues such as literacy and cost, a lack of effective casework to bridge the gap between families/ communities and services, and cultural barriers. Aboriginal community-based culturally competent

[1] Legal Aid NSW submission to the Family and Community Services Discussion Paper, "Shaping a better child protection system" (2017) (attached), pp11-12.
[2] See discussion of this issue in the Legislative Council General Purpose Standing Committee Report No 2, *Inquiry into Child Protection* (2017), pp127-128.

prevention and early intervention services are critical in order to effectively assist Aboriginal families and children.

Intergenerational experience of removal and OOHC

Our Children's Civil Law Service (**CCLS**) solicitors act for Aboriginal children and young people in OOHC who are the second, third or fourth generation in their families to have been removed from their families. This can be viewed as a direct legacy of past government policies of protectionism and assimilation towards Aboriginal people. For example, it is estimated that in the period from 1910 to 1970, between 10 per cent and 33 per cent of all Indigenous children were separated from their families.[3] In addition to the personal, social and cultural loss and trauma brought about by removal, many of these children also went on to experience abuse and neglect in institutions and foster families.[4] The effects of these policies and practices reverberate today.

Our CCLS solicitors observe that if Aboriginal children and young people in OOHC have children themselves, their children are also often removed and placed in OOHC. This intergenerational pattern of removal and placement in OOHC appears to magnify state-wide statistics for all children (Indigenous and non-Indigenous) in OOHC. These statistics show that:

- 20% of females and 12% of males in OOHC will have a child in OOHC at some point in the 20 years after exit, and
- OOHC leavers are more than 10 times more likely to need OOHC for their child compared to the general population.[5]

In our view, this points to considerable failings in the OOHC system, in terms of its ability to respond to the trauma experienced by Aboriginal children and young people who come into OOHC, and support and build their capacity to parent their own children. Rather than supporting their recovery and healing, the OOHC system can compound and add to the trauma of Aboriginal children and young people. This inevitably compromises their ability to parent their own children in the future, and therefore results in more Aboriginal children and young people in OOHC.

[3] Human Rights and Equal Opportunity Commission, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997), p31.
[4] Human Rights and Equal Opportunity Commission, above. See Part 3 generally.
[5] *Their Futures Matter: A new approach, Reform directions from the Independent Review of Out of Home Care in New South Wales* (2016), p6, available at https://www.facs.nsw.gov.au/__data/assets/file/0005/387293/FACS_OOHC_Review_161116.pdf

Some of the failings of the OOHC system are not only experienced by Aboriginal children and young people, but are rather endemic to the child protection system generally. However in some cases, these experiences or issues are unique, or more acute for Aboriginal children. For example, the following issues have been observed by our solicitors:

- Aboriginal children and young people are often provided with little information about the reasons for their removal and placement into OOHC.
- Sibling groups are regularly separated.
- Aboriginal children and young people often experience multiple placements. As the Australian Institute of Family Studies have noted:

  Studies have found that continued instability is associated with poor educational, employment, social and psychological outcomes, as well as behavioural and emotional problems. Experiencing multiple placements can also influence a young person's capacity to develop and maintain relationships.[6]

Case study: Rebecca

Rebecca was an 8 year old Aboriginal girl. She had three siblings and all four children were removed from their Aboriginal parents and placed in a variety of placements during the Children's Court proceedings. One of Rebecca's siblings went to carers who were able to provide a stable placement, and the oldest child ran back home and was allowed to remain there. Rebecca and her brother were placed together in another foster home but the carers decided they did not want Rebecca. Rebecca was removed and endured 20 different placements during the eight months that the matter was in court. A number of these placements were in motels, where a roster of short term carers were contracted to stay with Rebecca one on one. There was often no kitchen and Rebecca could not attend school as she did not have a secure address. During this time, Rebecca said that she should not be allowed to live as no one wanted her. When the matter came before the court for final hearing, FACS gave evidence that Rebecca was in a secure placement, and did not disclose that she was in a motel. On that basis, final orders were made granting parental responsibility to the Minister to the age of 18 years. Legal Aid NSW raised concerns about the actual circumstances of Rebecca's situation and FACS made an application to vary the orders. Only at this stage did genuine 'finding family' procedures occur to find a stable placement for Rebecca.

- Aboriginal children and young people can go on to suffer a sub-standard level of care in the OOHC system, or further abuse. This includes sexual abuse, either by carers/staff, or by other children and young people in OOHC. For example, in her study of over 180 Parramatta Children's Court matters, McFarlane found that 24 percent of children in OOHC had witnessed or experienced physical, emotional or

[6] Australian Institute of Family Studies, *Children in Care*, CFCA Resource Sheet (October 2017), citations omitted, available at: https://aifs.gov.au/cfca/publications/children-care

sexual abuse while in care. For the children who were aged 13 years or under, this rate was one third.[7]

- Aboriginal children and young people in OOHC experience increased contact with the criminal justice system.[8] Young people placed in OOHC care are 16 times more likely than the equivalent general population to be under youth justice supervision in the same year, and this risk increases when the young person is Aboriginal.[9]

- If an Aboriginal teenager in OOHC has a baby or child removed from his or her care, we rarely see an appropriate response from FACS to support that young person. These Aboriginal young people will suffer additional and ongoing grief and trauma following the removal of their children. However in our experience there is no intervention to address this grief and trauma, or to build their capacity to parent their children in the future.

Case study: Emily

Emily is a young Aboriginal woman from a family that has experienced four generations of OOHC: Emily, her mother, grandmother and Emily's own babies were all removed by FACS. Emily was in the foster care of a non-Aboriginal family when she fell pregnant at age 15. She had been sexually abused by older males in the town who were known to prey upon teenage girls in OOHC. Emily had been in a number of placements and had no secure attachments to a carer; she felt unsupported by her foster carers. When Emily found out she was pregnant, the placement broke down and FACS could not find a home for her. She became homeless and occasionally stayed with her mother. FACS advised Emily that if she chose to live with her mother they would remove her baby. Emily did not receive any funding or supports even though she was no longer in a placement. Emily moved back to her mother's house when she had nowhere to go. Emily's mother did not have a permanent lease and there were risks to Emily and her baby from the home, including homeless people who resided at her mother's house. FACS removed Emily's baby when he was born, and also a subsequent child two years later.

[7] Katherine McFarlane, *Care-criminalisation: the involvement of children in out of home care in the NSW criminal justice system* (2015), p126–127, available at: http://unsworks.unsw.edu.au/fapi/datastream/unsworks:38185/SOURCE02?view=true

[8] See, for example, Judge Peter Johnstone, 'Cross-Over Kids—The Drift of Children From the Child Protection System into the Criminal Justice System' (Speech, Newcastle, 5 August 2016) 22; McFarlane, above; and Legal Aid NSW, *The Drift from Care to Crime: an Issues Paper* (2011), available at https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0019/18118/The-Drift-from-Care-to-Crime-a-Legal-Aid-NSW-issues-paper.pdf

[9] See Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision 2014–15* (2016), p8; Catia G Malvaso, Paul H Delfabbro and Andrew Day, 'The Child Protection and Juvenile Justice Nexus in Australia: A Longitudinal Examination of the Relationship between Maltreatment and Offending' (2017) 64 Child Abuse & Neglect 32

- There is inadequate planning and support from either FACS or residential OOHC services before Aboriginal young people leave care. In particular, there is limited Aboriginal-identified staff and support to develop culturally appropriate plans in the leaving care process.[10]
- There are limited resources to provide aftercare support for Aboriginal young people who are transitioning out of care and who have left care.[11]

If the above gaps and issues are not addressed, it will be difficult to break the cycle of intergenerational engagement with the child protection system.

The over-representation of Aboriginal people in the criminal justice system

As the review is no doubt aware, Aboriginal people are over-represented in the criminal justice system. According to the ABS, 24 percent of all prisoners in NSW are Aboriginal.[12] The rate of Indigenous imprisonment has also been rising rapidly: between 2013 and 2016, the Indigenous imprisonment rate in NSW grew by 25 per cent.[13] The Indigenous imprisonment rate in NSW is now 13.5 times higher than the non-Indigenous imprisonment rate.[14]

The high and growing over-representation of Indigenous people in the prison system is particularly stark for women. As others have observed, "Aboriginal women are … the most rapidly growing group in prison, having increased disproportionately against both Aboriginal males and non-Aboriginal females over the past two decades".[15] Despite currently making up approximately 2.1 per cent of the NSW female population, Indigenous women make up approximately 30 per cent of the NSW female prison population.[16] A significant amount of these Aboriginal women will be mothers. For example, in a 2003 study of over half of the Indigenous women in NSW prisons, most were single mothers

[10] See for example our submissions on this issue in Legal Aid NSW, *Submission to the General Purpose Standing Committee No 2 Inquiry into Child Protection* (July 2016), available at https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0016/25342/Child-Protection-Inquiry-submission.pdf
[11] See Legal Aid NSW, *Submission to the General Purpose Standing Committee No 2 Inquiry into Child Protection* (July 2016), above, p17.
[12] Australian Bureau of Statistics, Prisoners in Australia 2016, Canberra: Australian Bureau of Statistics (2016). Table 13: Prisoners, selected characteristics by state/territory 45170DO002_2016
[13] Australian Bureau of Statistics, *Prisoners in Australia 2016*, Canberra: Australian Bureau of Statistics (2016).
[14] Ibid.
[15] Baldry, Eileen and McCausland, Ruth, "Mother Seeking Safe Home: Aboriginal Women Post-Release, Aboriginal women post-release", *Current issues in Criminal Justice* Vol 21 No 2, (Nov 2009) 287-301 at p290.
[16] Ibid.

with a number of children.[17] Other studies have estimated that approximately 80 per cent of Aboriginal and Torres Strait Islander women in prisons are mothers.[18]

The high and growing numbers of Aboriginal people, and in particular Aboriginal women, inevitably has a flow on effect on the rates of Aboriginal children and young people in OOHC. As the Human Rights Law Centre and Change the Record state:

> *Women are often the primary or sole carer of their own children and the children of extended family members, as well as caring for the sick and elderly. When women are taken into custody, even for short periods, the impacts ripple throughout families and communities and can have 'long-term cumulative effects'".*[19]

Lack of support services

We also see a lack of support services, particularly culturally appropriate support services, for Aboriginal children and young people and their families. This issue is acute in regional and remote parts of NSW. Given that mental illness, domestic and family violence and drug and alcohol abuse are drivers of entry to OOHC,[20] the lack of services to address these issues is another contributing factor behind the high and increasing rates of Aboriginal children and young people in OOHC.

2. Aboriginal Placement Principles

As a preliminary comment, we wish to highlight our concern that the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (**Care Act**) does not adequately require or provide for cultural planning for Aboriginal children and young people. Although it is usual for FACS to prepare a cultural plan for an Aboriginal child as part of their care plan, and there is reference to cultural considerations in the content of a care plan,[21] there is no reference to, or requirement for, cultural plans in the Care Act. For example, neither section 78 (Care plans) nor the Aboriginal and Torres Strait Islander Principles[22] expressly mention cultural planning or require a cultural plan to be incorporated into a care plan for Aboriginal children. Similarly, while section 78A (Permanency planning), requires a permanency plan to demonstrate compliance with the Placement Principles, there is no

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[17] Baldry et al, above, citing R Lawrie, *Speak Out, Speak Strong, Rising Imprisonment Rates of Aboriginal Women*, Aboriginal Justice Advisory Council, Sydney, p290.

[18] Juanita Sherwood and Sacha Kendall, 'Reframing Space by Building Relationships: Community Collaborative Participatory Action Research with Aboriginal Mothers in Prison' (2013) 46 *Contemporary Nurse: A Journal for the Australian Nursing Profession* 83, 85.

[19] Human Rights Law Centre and Change the Record, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (May 2017), p13.

[20] See *Their Futures Matter: A new approach, Reform directions from the Independent Review of Out of Home Care in New South Wales* (2016), available at: available at https://www.facs.nsw.gov.au/__data/assets/file/0005/387293/FACS_OOHC_Review_161116.pdf

[21] Clause 22 of the *Children and Young Persons (Care and Protection) Regulation 2012 (NSW)* states that a care plan must contain information on "(g) issues of social, cultural, educational or economic significance in relation to the child or young person or his or her family" but there is no specific reference to cultural planning for Aboriginal children.

[22] Chapter 2, Part 1, of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (**Care Act**).

reference to cultural planning as part of permanency for Aboriginal children and young people. Section 83 (Preparation of permanency plan) is also silent on cultural planning requirements for Aboriginal children.

Legal Aid NSW recommends the introduction of requirements in relation to cultural plans and permanency for Aboriginal children in the above sections of the Care Act. For example, section 78 and 78A could both be amended to incorporate specific reference to a cultural plan, and set out what needs to be included in a cultural plan and how it should be prepared.

We also recommend that consideration be given to local Aboriginal Elders or Aboriginal community members being required to review and endorse a cultural plan for Aboriginal and Torres Strait Islander children, before it can be approved as part of a care plan by the Children's Court.

The Children's Court could also consider drafting a Practice Note on the case management of cases involving Aboriginal and Torres Strait Islander children to support this legislation and practice, which could be informed by the Aboriginal Case Management Policy that is being developed by Absec.[23]

We now set out our comments and concerns on the implementation of the Aboriginal Placement Principles.

Identifying appropriate placements at an early stage

Legal Aid NSW is concerned that FACS is not identifying potential placements within Aboriginal families, kinship groups, and communities before children are removed. On the first mention of an application for a care order in relation to a child or young person, it sometimes becomes apparent that there is a member of extended family, often a grandmother, interested in caring for an Aboriginal child or young person. FACS will then inform the Children's Court that it will take six weeks to assess the person as a suitable carer. This is the case even on an interim basis, and even when the family member has been known to the caseworker before making the decision to remove the child or young person.

While the six week assessment is being undertaken, the child will be placed in OOHC. Not only are there risks inherent with OOHC placements, there is no guarantee that the child or young person will not experience more than one placement, even during the six weeks it takes to assess the relative or kin. It is also not uncommon for a child or young person in this situation to have very limited contact with family. As a result, the trauma that an Aboriginal child or young person has experienced can be exacerbated by the processes designed to protect them.

[23] See https://www.absec.org.au/aboriginal-case-management-policy-guidelines.html

Case study: Daniel

Daniel was a ten year old Aboriginal boy who had lived with his Aboriginal maternal grandmother during times when his mother was unable to care for him due to her drug use and incarceration. When Daniel's mother was released from custody, Daniel's grandmother returned Daniel to her care. Shortly thereafter, Daniel's mother overdosed and Daniel was removed from her care.

FACS did not make contact with Daniel's grandmother and Daniel was placed into OOHC. Daniel's grandmother had another grandchild living with her on a permanent basis under an order made in Queensland. That child was a young teenager and there were no concerns about that child being in the care of the grandmother.

FACS eventually assessed Daniel's grandmother as unsuitable to care for Daniel. Daniel was moved to a second placement in OOHC. The grandmother successfully prosecuted a joinder application to become a party to the proceedings. She was represented in proceedings. Some months later, Daniel's carers decided to move and Daniel again changed OOHC placements. By this stage Daniel's behaviour had deteriorated. Daniel's grandmother continued to argue for contact with Daniel during proceedings and funded her own transport from Queensland to see Daniel.

Daniel's lawyer obtained an expert report by a well-respected and experienced Aboriginal psychologist. That report recommended placement with Daniel's grandmother. FACS did not agree and the matter was set down for five days of final hearing, some thirteen months after Daniel's removal. By this time, Daniel was living in residential care with 24 hour supervision and with other young people with behavioural problems and he was not attending school. Daniel was sexually abused in that placement on more than one occasion.

Following three days of a contested hearing and evidence about the sexual abuse, the Court, with some reservation due the evidence not being complete, made it clear that Daniel should be placed with his maternal grandmother on an interim basis. Following a further two days of the hearing, final orders were made placing Daniel in the parental responsibility of his maternal grandmother. The grandmother told Daniel's lawyer that Daniel was unrecognisable on his return to her care. FACS made it clear to the grandmother on the record that because they did not approve of the placement, she would not be paid a carers allowance.

Lack of available placements

Notwithstanding the comments above, Legal Aid NSW acknowledges that it can be challenging to identify family and kin to care for Aboriginal children at risk. As noted earlier, often Aboriginal parents who have their child(ren) removed will themselves have been in the care of the state. It can be difficult to find family or kin to care for the child at risk in these circumstances. This inevitably hampers the implementation of the Aboriginal Child Placement Principles.

In remote regions of NSW, there is a chronic shortage of placements for Aboriginal children. NGOs have expensive contracts with FACS to house children in motels and short term hostels to alleviate a shortage of placements. Sometimes these motel arrangements can last for months at a time (see the case study of Rebecca, above). Local schools will not accept enrolments from these children as they are not in a settled placement. As a result these children exist on fast food, television and very limited social interaction with their peers.

We recommend that the review investigate all such temporary placement arrangements, and the expense of these arrangements compared to a better model where fully funded Aboriginal community based carers can provide proper culturally appropriate emergency care.

Assessments of Aboriginal carers

Where prospective Aboriginal carers are found, we are concerned that assessments are not always culturally appropriate, and/or do not take into account the importance of cultural factors in determining whether a placement is in a child's best interests. In the case of Daniel, above, the Aboriginal psychologist stated in his report that the assessment of the grandmother undertaken by FACS was not culturally sensitive or appropriate. He recommended that Daniel be placed with his grandmother and detailed a number of benefits to Daniel of living in his community. The psychologist assessed these benefits as outweighing concerns held by FACS about the grandmother.

We have observed that FACS takes a highly risk-averse approach to placement with family, kin and community. In our experience, is not uncommon for FACS to refuse to authorise an Aboriginal family for reasons essentially related to poverty. This is problematic given the high rates of socio-economic disadvantage experienced by Aboriginal communities. Further, any associated risks arising from socio-economic conditions must be balanced against the cultural loss that the child will experience if he or she is placed into a non-Aboriginal or residential placement, and the reality that the child is also at risk of harm in those placements. These risks are also illustrated by the case study of Daniel, above.

Implications of the Working with Children Check

There is also concern that the requirement to obtain a Working With Children Check (**WWCC**) can act as a bar to Aboriginal extended family and kin providing placements for Aboriginal children and young people.[24] For example, the Law Society of NSW has expressed concern about:

> *"… anecdotal reports that potentially suitable Aboriginal and Torres Strait Islander carers (and in particular, Aboriginal and Torres Strait Islander kin in informal care arrangements) are not being considered by [FACS] due to an actual or perceived*

[24] Authorised carers must obtain a Working with Children Check under the *Child Protection (Working with Children) Act 2012* (NSW).

failure by those potential carers to gain a WWCC. In some cases, this may occur due to historical convictions that do not reflect the current ability of those individuals to care for their family members".[25]

We have also made submissions raising concerns about this aspect of the legislation and its implementation in our submission to the Legislative Council inquiry into child protection.[26] Set out below is a case study of this issue affecting one of our clients.

Case study: Evie

Evie was an eleven year old Aboriginal girl who had been in kinship care with her maternal grandmother. The maternal grandmother was suffering significant health issues and as a result the family came to a decision that the child would have a better quality of life if she was integrated into the family of her maternal uncle, Jim. Legal Aid NSW represented Jim. FACS were notified and an assessment was undertaken approving Jim as a kinship carer. Evie was placed with Jim and his family which included his wife and six children. Evie was in Jim's care for about two years and was considered family.

Jim was then refused a WWCC and Evie was removed from his care on 24 hours' notice and placed back with her maternal grandmother. The basis of the refusal was a charge for a child sex offence in 2005, for which Jim was acquitted. Notwithstanding the acquittal, the Children's Guardian determined that Jim remained a risk to children, noting that while the matter was progressing through the criminal justice system there was an Apprehended Violence Order protecting the complainant from Jim.

NCAT confirmed the decision of the Children's Guardian to refuse the WWCC, despite an expert risk assessment suggesting that Jim was not a risk to children. In running the case, FACS material was produced which clearly indicated that in their placement assessment, Jim had been frank in relation to the allegation and that it had been taken into consideration when authorising the placement with respect to the child. As a result, Evie was removed from a stable, long term family placement and separated from family and a sibling group agreed by her family and community.

Support and assistance provided to placements

Children in need of care and protection will usually have complex needs. When they are placed with family or kin in accordance with the Aboriginal Placement Principles, additional supports are needed to maintain the placement. Legal Aid NSW is aware of cases where the necessary supports have not been provided to Aboriginal family and kinship carers, and consequently the placements have broken down. Based on the experience of the

[25] Law Society of NSW, *Submission to the statutory review of the Child Protection (Working with Children) Act 2012* (NSW) (2017), p2.
[26] See Legal Aid NSW, *Submission to the General Purpose Standing Committee No 2 Inquiry into Child Protection* (July 2016), pp37-40.

CCLS, this can result in the young person ending up in residential care and/or potentially in custody.

Legal Aid NSW is also aware that the NSW Government is considering removing supported care arrangements where there is no court order in place (that is, a carer would need to get an order from the Children's Court or Family Court in order to be eligible for any financial support from FACS).[27]

In our submission to the Discussion Paper which raised this issue, Legal Aid NSW opposed this suggestion. Our reasons for this and case studies are set out in full at page 32 of the submission (attached), and are particularly relevant for Aboriginal families. In essence, some family or kinship placements are only able to exist because of financial or other support provided by FACS, and it is not practical or appropriate for every carer to obtain a court order. This is particularly the case for older children: if a child is 16 or 17, it is not a sensible use of family, government or court time and resources to bring court proceedings. In other cases, obtaining a court order may place family members into conflict, or at the very least result in delay. There is therefore a risk that implementing this change may result in more Aboriginal children and young people entering statutory OOHC, and in particular OOHC placements outside of their family, kin and community.

Unintended consequences of applying the Placement Principles

We have also observed that the application of the Aboriginal Child Placement Principles has had unintended consequences. In Legal Aid NSW's experience, young Aboriginal people who are placed in kinship placements often do not get the benefit of casework assistance and support from FACS. When kinship placements break down (usually for our clients, at an older age), FACS may not have had any involvement with the young person for a significant period of time. These young people are typically not engaged with any service and it is often not until Legal Aid NSW advocates with FACS on their behalf that a case worker is allocated to either provide support and assistance, and to develop a Leaving Care Plan.

We also note that guardianship arrangements are being recommended to suitable family and kin who have the long term care of Aboriginal children. Children in guardianship arrangements are not eligible for the Australian Government's Transition to Independent Living Allowance (currently a payment up to $1500).[28] Children in guardianship arrangements are also not entitled to any of the financial or other assistance available under section 165 of the Care Act on leaving care.[29] These factors can compound the poverty and disadvantage of Aboriginal families attempting to care for and support children and young people in need of care and protection.

[27] See FACS, *Shaping a better child protection system: Discussion Paper* (2017) at page 32.
[28] See FACS, *Guardianship financial facts for carers*.
[29] See FACS, *Guidelines for the provision of assistance after leaving out-of-home care* (June 2017).

The incarceration of Aboriginal young people who are in OOHC

The high rates of incarceration of Aboriginal young people, particularly those in OOHC, also compromise the implementation of the Aboriginal Placement Principles and the assistance and support that these young people receive. There is often little contact or engagement from designated agencies where a young person in OOHC is in custody, and there is nominal consultation and participation of the young person in the leaving care process.

Case study: Stephen

Legal Aid NSW acted for a Stephen, an Aboriginal boy aged 14 years who had been in long term OOHC. Stephen's placement broke down and he began running away from the carers. Stephen was soon charged with minor criminal offences, largely motivated by his need to survive on the streets without any support. He was charged and brought before the court. When the charges were dealt with by way of a non-custodial sentence, the Magistrate sought to release Stephen into FACS' care. However, FACS had no available placement for Stephen and requested that Stephen be placed in Juvenile Justice custody rather than releasing him onto the streets. Stephen spent two nights in custody until a placement could be found for him. Stephen had never been in trouble with the police or in juvenile detention before.

3. Strategies in response

Reducing the number of Aboriginal children and young people currently in OOHC and entering care is a complex exercise that will require considerable socio-economic and cultural change. While we again do not seek to address this issue comprehensively, we highlight below strategies that we consider should be taken by FACS. These are suggested by, or drawn from, the concerns we have raised above. In the time available, we did not have time to fully explore and develop all of these proposed strategies, but would be pleased to discuss them with the review if that would assist.

Building relationships with communities

Legal Aid NSW is of the view that FACS needs to improve its liaison and relationships with Aboriginal communities. In many Aboriginal communities, the relationship with FACS is damaged and lacks trust, which contributes to the entry of Aboriginal children and young people into OOHC, and compromises the implementation of the Aboriginal Placement Principles. It is essential for FACS to develop meaningful relationships with elders and responsible community members to assist with managing and placing children who are at risk, while restoration or alternative long term options are considered. We suggest that FACS employ appropriately qualified staff (either Aboriginal-identified positions or non-identified positions working alongside Aboriginal staff) to create positive working relationships with communities.

One example of positive relationship-building by FACS is in Broken Hill. In Broken Hill, FACS has succeeded in breaking down barriers in the community. The Broken Hill FACS office is a popular gathering place for many Aboriginal community members who feel welcome to approach the office. We understand that the removal rates of Aboriginal children into care in the Broken Hill District are lower as a result of such community consultation and respect for local Aboriginal Elders in determining the best ways to protect their children.

A trauma-informed approach to child protection casework and legal intervention

We also recommend a greater focus on trauma-based practice or trauma-informed care in working with Aboriginal children and young people and their families. Trauma-informed care is a framework for service delivery that is based on "knowledge and understanding of how trauma affects people's lives, their service needs and service usage".[30] For Aboriginal children and families, it is an approach that requires an understanding of the intergenerational trauma associated with colonisation, including past child removal policies and practices, as well as the trauma associated with distressing life events, such as exposure to abuse and family violence.[31] Atkinson has highlighted that trauma-informed services understand trauma and its effects, and also:

- *"create environments in which children feel physically and emotionally safe*
- *employ culturally competent staff and adopt practices that acknowledge and demonstrate respect for specific cultural backgrounds*
- *support/victims/survivors of trauma to regain a sense of control over their daily lives and actively involve them in the healing journey*
- *share power and governance, including involving community members in the design and evaluation of programs*
- *integrate and coordinate care to meet children's needs holistically*
- *support safe relationship building as a means of promoting healing and recovery".*[32]

Although there has not been systematic research or evaluations in this area, trauma-informed services and trauma-informed care for Indigenous children and families "show promise for supporting healing and recovery".[33]

We are aware that Winangay, an Aboriginal controlled non-government organisation, has developed trauma-informed principles and resources in this area, including Aboriginal kinship carer assessment tools, that could be considered by FACS and other agencies.

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[30] Liz Wall, Daryl Higgins and Cathryn Hunter, "Trauma informed care in child/welfare services", *CFCA Paper No 37* (2016), p2.
[31] Judy Atkinson, "Trauma-informed services and trauma-specific care for Indigenous Australian children", *Resource Sheet No 21 produced for the Closing the Gap Clearinghouse* (July 2013), p1.
[32] Atkinson, above, at p1.
[33] Atkinson, above, p2.

More generally, we would recommend that FACS and other agencies integrate the theory and practice of trauma-informed care into casework as a means of reducing the numbers of Indigenous children in and entering OOHC. We also recommend that solicitors and Magistrates undertake training in this area.

Providing families with intensive support

Legal Aid NSW recommends that Aboriginal parents and families be given early and intensive support to address any issues impacting upon parenting capacity. These interventions should be driven by Aboriginal people, consistent with the Aboriginal and Torres Strait Islander principles of self-determination and participation in decision-making.[34]

We understand that in Moree, FACS has placed increased resources into the community in the form of Intensive Family Support Services, which are designed to work with families rather than to remove children. We would be interested to know if this model is working, and if so, whether it could be expanded to other areas of the state. We do have some concerns with the extent to which FACS has contracted out its responsibilities (for instance, we understand that FACS is requiring the NGO to assess risk, which Legal Aid NSW considers should remain the responsibility of FACS). However, the theory of putting intensive supports into a community is sound.

We are also aware that many Aboriginal children are at risk due to inadequate housing, over-crowding, and poor building maintenance. We therefore recommend that the difficulties experienced by Aboriginal families in finding and maintaining suitable housing should be addressed as a priority early intervention strategy to promote child protection.

Alternatives to removal

As noted in our recent submission to FACS, we recommend embedding in case work practice, and potentially legislation, action that should be considered and, where appropriate, taken before removing a child. This issue is particularly relevant to Aboriginal families, given the high rates of removal. In that submission, we suggested the following action be mandated for consideration:

- Family group conferences, with the added obligations of Family Finding and identification of government agencies and/or services who can offer support to the family
- Parental Responsibility Contracts, and
- Parent Capacity Orders.[35]

[34] See sections 11 and 12.
[35] See Legal Aid NSW submission to the Family and Community Services Discussion Paper, "Shaping a better child protection system" (2017) (attached), pp 11-12.

Early identification and assessment of culturally appropriate placements

As indicated earlier, placements for Aboriginal children at risk need to be identified early in order to avoid those children being placed into OOHC. We recommend that FACS identify potential placements with family or kin, and ensure assessment can occur ahead of time, rather than after removal. As noted above, this will require efforts by FACS to build positive relationships within Aboriginal communities.

Assessments of potential Aboriginal caregivers must be culturally sensitive and appropriate, and recognise the benefits of children staying with their extended family, kin and/or community. We recommend that FACS ensure this occurs by consulting with specialists with cultural knowledge (including psychologists, counsellors and caseworkers) in the preparation of assessments of Aboriginal families and kin.

Support and assistance to Aboriginal children and their carers

As noted above, Legal Aid NSW has concerns about the level of support provided to family and kinship placements. We therefore recommend that FACS provide support to placements of Aboriginal children and young people with family or kin to ensure they can be sustained. We reiterate that placements with kin and family should be supported by FACS, even where there is no court order.

It is also critical that support and assistance to Aboriginal young people in OOHC continues if the young person is taken into custody. This is consistent with, and indeed required by, the concept of having parental responsibility for a child or young person. Some specific areas where attention is warranted:

- Accommodation while on bail: Where an Aboriginal child or young person in OOHC is seeking bail, FACS should be required to find suitable accommodation for the young person to avoid them being held in custody.
- Casework while in custody: Where an Aboriginal child or young person in OOHC is in custody, they should continue to receive casework support from their designated agency. In the experience of CCLS, the time when a young person is in custody can be utilised by case workers to organise psychological or physical assessments, plan for supports in the community and develop a relationship with the young person through face-to-face visits, facilitating family contact and assisting with basic items like clothing and magazines. Unfortunately, many young people receive minimal or no case work support while in custody.

Timely and culturally appropriate support to Aboriginal young people leaving care and in aftercare

It is the experience of Legal Aid NSW that the needs of children in OOHC will increase as they get older. With the onset of puberty and adolescence, the consequences of trauma in early childhood can manifest in issues such as learning difficulties, attention deficits and acting out behaviours with drugs, alcohol and sex. This period can also bring a focus on

"leaving care" and transitioning to independent living. Legal Aid NSW suggests that these are particularly complex years for Aboriginal young people, particularly when they have been displaced from community. Despite these observations, FACS casework directives appear to be based on an assumption that young people can "self- protect" and "self-determine" the teenage years, and therefore need less support, rather than more, during this time.

We recommend that there be significant work undertaken to identify appropriate services to support Aboriginal young people in care as they enter teenage years and on properly supporting Aboriginal young people as they transition to independent living. FACS has a leaving care plan which, according to FACS Standards for OOHC, is to be introduced at 15 years of age and continue until the child is 18 years old, and section 165 of the Care Act provides for assistance after leaving OOHC for young people 15 to 25 years of age at the Minister's discretion. Legal Aid NSW considers that an investment of well targeted and ongoing supports leading up to and after transitioning from care would not only be a sound investment in young Aboriginal people, it would also have significant economic benefits.

Unfortunately, many placements for Aboriginal children break down when the child is around 13 to 14 years old and the young person tends to drift in and out of placements and between their families and foster care. During this time, boys often fall into criminal behaviour and girls are at high risk of teenage pregnancies. We therefore suggest that the leaving care system should be adapted differently for Aboriginal children and young people. In cases where they are returning to community, then planning should start at the early teen stage. Increased contact and finding family should be intensified and strongly driven by the Community Services, so that the young person can find a way to fit back into community and onto their country. The funding that accompanies the leaving care phase should be made available earlier so that this transition can succeed. By 18 years of age, many Aboriginal young people are no longer in OOHC placements and therefore cannot receive the leaving care package that they need.

Aboriginal young people must also receive culturally appropriate support when planning to leave care, and in aftercare. Culturally appropriate support builds resilience, and is essential to social and emotional development;[36] it increases the chances that a young person can go on to live a safe, healthy and productive life. We made submissions on this issue to the Parliamentary inquiry into child protection.[37]

[36] See Arney, Iannos, Chong, McDougall & Parkinson, *Enhancing the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Policy and practice considerations* (CFCA Paper No. 34). Melbourne: Australian Institute of Family Studies, Available at <aifs.gov.au/cfca/publications/enhancing-implementation-aboriginal-and-torres-strait-islander-child>

[37] See Legal Aid NSW, *Submission to the General Purpose Standing Committee No 2 Inquiry into Child Protection* (July 2016).

Support for Aboriginal parents in custody

Given the high incarceration rates of Indigenous people in NSW, and the flow on effects this has for child protection, we encourage the NSW Government to consider ways in which it can better support Aboriginal parents in custody. As a consultant to Corrective Services NSW observed:

> *"Incarceration provides an ideal opportunity for the criminal justice system to support women with children by providing services that address both the personal and parenting needs of these mothers, and to implement in situ parenting policies and programs that support positive parenting skills and continuous contact of children with their mothers during their incarceration. Such programs have the long term capacity to reduce re-offending in these women, improve their parenting, thereby assisting the diversion of their children from following in their footsteps to prison".*[38]

For example, in Washington, USA, the Parent Sentencing Alternative allows eligible, incarcerated offenders to remain or return home with their children to serve their sentence while receiving wrap-around services that benefit the family. It is a collaborative initiative between the Washington State Department of Corrections and the Washington State Department of Early Learning. The program was designed to "reduce recidivism, address intergenerational incarceration, and promote efficient effective supervision practices".[39] As at March 2017, more than 300 participants had completed the program, and only eight per cent had re-entered prison after successfully completing the program in the five years of its operation.[40] We suggest that a similar model be explored and trialled with Aboriginal parents in gaol in NSW, and in particular with Aboriginal mothers.

We also understand that the Kempsey Office of FACS is running a program called *Kempsey Place Plan* with the local correctional centre for Aboriginal male inmates. If the inmates meet certain criteria, they have the opportunity for training in custody, then for early release into employment, provided they live in custom-built accommodation and engage with services. A similar model or program could also be considered for Aboriginal women in prison.

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[38] Professor Dianna Kenny, *Meeting the needs of children of incarcerated mothers: The application of attachment theory to policy and programming*, A consultant report prepared by the Department of Corrective Services (2012).

[39] Department of Corrections, Washington State, "Press release: Washington Partnership Bolsters Parental Resilience, Documented in National Film" available at http://www.doc.wa.gov/news/2017/03292017p.htm

[40] Ibid. See also United States Children's Bureau, *An Unlikely Partnership: Strengthening Families Touched by Incarceration*, available at http://www.doc.wa.gov/news/2017/03292017p.htm

Other aspects of the review

File review

We note that the independent review will include a contemporaneous review of case files for all Aboriginal and Torres Strait Islander children and young people entering OOHC for the period 2015-2016 that will identify specific action for improved outcomes for the individual child or young person.

In this process, we would recommend that the review examine the adequacy of cultural care planning for these children and young people. We understand from Absec that Aboriginal children and young people in OOHC should have a care plan that incorporates a cultural plan. In the experience of our care and protection litigation solicitors, the content of the cultural plans has improved, but can still be deficient. It is rare to see a thorough cultural plan which includes input from family, kin, elders or community. In the experience of our CCLS solicitors, culture is addressed under 'Personal Identity/Culture' in case planning for children and young people who are already in OOHC.

The cultural needs of the child or young person change over time, yet there is often only a cursory reference to culture and the objectives and actions are often not updated during regular case conferences through their years in care. Ideally this would involve the child or young person as well as ongoing consultation and engagement with as many people as possible such as family, Elders/community leaders, and local Aboriginal organisations. It requires case workers and managers to have ongoing cultural training to be able to ensure that cultural plans are conducted and developed in a culturally sensitive and respectful manner that do not stereotype or presume. It should be a strengths-based approach and individual to the needs of that child or young person. It should also address sibling contact which can often be overlooked for children and young people in OOHC (particularly where the siblings are also in care and may be managed by another agency). We propose that this aspect of the case files that are reviewed be given specific attention in the Inquiry.

If it is possible, we would also encourage the review to examine older files (not only those in the 2015-16 financial year), to gain insight into the experiences and outcomes for Aboriginal and Torres Strait Islander children in OOHC.

We also recommend that the review include findings of the Office of the Children's Guardian under their accreditation process for all the Community Service Centres (**CSCs**) around NSW. The OCG assessed a sample of files from every CSC in 2015-2016. We consider that the findings would be beneficial to the review.

Consultation process

The terms of reference state that the review will include a consultation process, including with Aboriginal and Torres Strait Islander children and young people in OOHC and their families and communities. Legal Aid NSW would recommend the review consult with Aboriginal children, young people and adults in juvenile detention centres and gaols. These children and young people are often omitted in consultation processes, but are

likely to have valuable perspectives on the OOHC system, and suggestions for reform. The CCLS could seek to facilitate consultation with clients in juvenile detention or gaol who may be willing to be speak to the reviewers to share their experiences if the review is interested in this course.