THE LAW SOCIETY
OF NEW SOUTH WALES

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17 December 2020

The Hon Matthew Mason-Cox MLC
Chair
Committee on Children and Young People
NSW Parliament
DX 362 Sydney

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

Dear Mr Mason-Cox,

Inquiry into the NSW child protection and social services system

Thank you for the opportunity to provide a submission to the Committee on Children and Young People's inquiry into the effectiveness of the NSW child protection and social services system in responding to vulnerable children and families ("the Inquiry").

The Law Society's Children's Legal Issues and Indigenous Issues Committees have contributed to this submission, which addresses specific aspects of the Inquiry's Terms of Reference.

As a threshold matter, the Law Society notes that these issues have been the subject of numerous reviews and inquiries in the last five years (and before). In our view, ample evidence is already available to inform effective reform. Comprehensive recommendations have been made, directed at whole-of-government action to improve outcomes for vulnerable children at risk, among other things, of entering the child protection system and, as a consequence, the juvenile justice system. We submit that, at this point, it is time for meaningful and coordinated implementation.

In responding to this inquiry, we take the opportunity to reiterate previous Law Society submissions where relevant to the particular terms of reference.

1. How vulnerable children and families are identified and how the current system interacts with them including any potential improvements, particularly at important transition points in their lives

Early intervention

In our view, the entry of children into the care and protection system is emblematic of a series of failures to support families in crisis. The Law Society's position is that the best form of permanency is to support families to stay together. Child protection services in NSW require a cultural change to provide adequate and effective investment in early intervention efforts to assist parents and families of children at risk to address those risk factors. This

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requires specific and culturally competent services for Indigenous families. We do not support the two year time limit on restoration of children to families, while there remain significant wait lists for access to services including rehabilitation, public housing and other social support services. In our view, current legislation should be amended to impose a positive burden on the Department of Communities and Justice to exercise best efforts to support each child's restoration to their families on a case by case basis.

We reiterate our support for early intervention both from and within the care and protection jurisdiction.

In respect of Indigenous children, we note again the success of the Indigenous list in the Federal Circuit Court in providing Indigenous families access to the family law system when family members have themselves identified children at risk, and thereby keeping children safe within their extended families. In the Sydney registry, we understand that currently the referrals are currently primarily conducted through a combination of an Indigenous-led therapeutic support service in Mt Druitt, together with Legal Aid NSW's family law early intervention unit.

We also note the success of programs such as the Newpin program, once children have come to the attention of the care and protection system. According to the Office of Social Impact Investment, the program is an intensive parenting program that helps parents "build positive relationships with their children and break the destructive cycle of family relationships that lead to abuse and neglect. It has a solid evidence base and track record of successfully restoring children in out-of-home care to their families."[1] In our view, it is critical that the key performance indicator applied to the Newpin program is the rate of restoration of children to their families from out-of-home (OOHC) care. Families participating in that program had children restored at a rate of 63% over four years, compared to a 19% restoration rate for similar families not in the program. This program should be expanded and made more widely available.

We provide further information on the shortcomings of the OOHC system, but at this point note that we have advocated on several occasions for better and more effective use of existing mechanisms in the *Children and Young Persons (Care And Protection) Act 1998* (NSW) ("Care Act") including parenting capacity orders[2] (discussed further below) and Parent Responsibility Contracts ("PRCs") (which come with an obligation to provide parents with reasonable access to independent legal advice).[3] The services providing support to parents can then prepare and provide reports that are potentially a source of strengths-based evidence. In the Law Society's view, these mechanisms are a therapeutic engagement opportunity. Particularly with PRCs, parents have the opportunity to provide input into which services they consider appropriate, and where relevant, culturally safe, and are therefore more likely to engage with the services.

These issues are discussed further in our response to terms of reference 2, 3 and 4 below.

Support for children of imprisoned parents

The Law Society reiterates the observation contained in our February submission to the Committee on Children and Young People that there is a significant body of evidence

[1] 'The Newpin Social Benefit Bond', *Office of Social Impact and Investment* (Web Page) <https://www.osii.nsw.gov.au/initiatives/sii/newpin-social-impact-bond/>.
[2] *Children and Young Persons (Care and Protection) Act 1998* (NSW) s91E ('Care Act').
[3] Ibid s 38A(4).

illustrating the negative impact that parental incarceration has on a child.[4] Parental incarceration creates a less stable and predictable home life, which increases the likelihood of the child offending in the future.[5] We further note that there can be clear benefits in facilitating an ongoing relationship between incarcerated parents and their children. Children who maintain contact with their incarcerated parents have been found to have enhanced coping skills and reduced problematic behaviour, and incarcerated parents who maintain a relationship with their children while in prison consider this to be an important contributing factor to reducing recidivism.[6]

The Law Society notes, however, that in cases of parental incarceration, the best interests of the child are paramount, and an individual assessment of each child's circumstances is necessary. The opportunity for a child to visit a parent should not be seen as a privilege of the parent, but assessed according to the child's needs and best interests. Any assessment of a child's best interests should consider the importance of the child maintaining a sense of identity, and enabling the parent-child relationship to be as healthy as possible when the parent is released. When parental visits are in the best interests of the child, they should be conducted in suitable contact environments, with play equipment and outdoor space. In circumstances where in-person visits are not possible, contact should be supported through phone or audio-visual facilities.

2. The respective roles, responsibilities, including points of intersection, of health, education, police, justice and social services in the current system and the optimum evidence based prevention and early intervention responses that the current system should provide to improve life outcomes

The intersection between out of home care and the criminal justice system

Children who reach the OOHC stage of government intervention are often critically disadvantaged due to family abuse, financial disadvantage and suffer mental or physical impairments as a result. By reason of their disadvantage and because of shortcomings in the OOHC system in NSW (see at 3 below), children living in OOHC have an observed propensity to come into contact with the criminal justice system at higher rates than their peers.[7] The phenomenon of "cross-over kids" has been noted by the President of the Children's Court of NSW, Judge Peter Johnstone, who stated in a 2016 paper that:

> [W]hen viewed through a criminological and socio-legal lens, the practicality and reality of these young people's lives highlights that there is a distinct correlation between a history of care and protection interventions and criminal offending.[8]

[4] The Law Society of NSW, 'Inquiry into the support for children of imprisoned parents in NSW' (28 February 2020), submission to the Committee on Children and Young People.
[5] Australian Parliament, Legal and Constitutional Affairs Reference Committee, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (Report, 20 June 2013) 21.
[6] Julie-Anne Toohey, 'Children and Their Incarcerated Parents: Maintaining Connections – How Kids' Days at Tasmania's Risdon Prison Contribute to Imprisoned Parent-Child Relationships,' *Changing the Way We Think About Change*, The Australian and New Zealand Critical Criminology Conference 2012 at 33.
[7] Australian Institute of Health and Welfare, *Young people in child protection and under youth justice supervision: 1 July 2013 to 30 June 2017* <https://www.aihw.gov.au/reports/child-protection/young-people-in-youth-justice-supervision-2013-17/contents/table-of-contents>.
[8] Judge Peter Johnstone, 'Cross-over kids: the drift of children from the child protection system into the criminal justice system' (Paper presented at the 2016 Aboriginal Legal Service Symposium on Aboriginal Children, Culture and the Law, 5 August 2016).
<https://www.judcom.nsw.gov.au/publications/benchbks/children/drift_of_children.html>.

This 'cross-over' of children from the child protection system into the criminal justice system is particularly problematic given the ample evidence that the earlier a young person encounters the criminal justice system, the more likely they are to re-offend as an adult or later in their youth.[9]

This cycle of disadvantage experienced by children and young people in OOHC in NSW disproportionately affects Indigenous children and young people. *The Family Matters Report 2020* found that Indigenous over-representation in out-of-home care has increased in every state and territory over the last 10 years.[10] In NSW, 40% of children in out-of-home care are Indigenous,[11] and Indigenous children are nearly 10 times more likely than non-Indigenous children to be in out-of-home care.[12] In relation to young people in detention, of the 251 average daily young people in custody across 2019-20, 45% were of Aboriginal and/or Torres Strait Islander background.[13] In relation to historical rates of over-representation, Judge Johnstone has stated that:

> These statistics present a concerning picture, bolstered further by a considerable amount of research that has been conducted to show that children that have been in care are over-represented in the juvenile justice system.[14]

The Law Society supports an approach to this issue which targets early intervention to address risk issues arising for children well before they have contact with the criminal justice system.[15] In particular, we support an emphasis on diversionary measures as a way of reducing and preventing police contact with children, noting that the arrest, detention and imprisonment of a child should be used only as a measure of last resort.

In relation to Indigenous children, our view is that addressing the complex issue of Aboriginal overrepresentation in the juvenile justice system requires a holistic, multi-pronged approach. Resources must be directed towards early intervention, prevention and diversion along with strategies that strengthen communities. It is critical that diversionary programs for young Indigenous offenders are Indigenous community-led to ensure Indigenous self-determination to provide culturally responsive (and thereby effective) approaches.

The impact of the minimum age of criminal responsibility

The current minimum age of criminal responsibility, and the limitations of *doli incapa*x, are significant factors leading to the 'cross-over' of children from the child protection system to the criminal justice system. In 2019, the Law Society Council, by majority, took the position that the criminal age of responsibility in NSW should be raised from 10 to 14 years old, and *doli incapax* should be removed. There is widespread recognition of the developmental immaturity of children and young people compared to adults, with research studies illustrating that "law and order" morality is generally not achieved until mid-teens,[16] and

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[9] The Australian Institute of Health and Welfare, *Young people returning to sentenced youth justice supervision 2017-2018* <https://www.aihw.gov.au/getmedia/39a11036-3ffb-4411-8fcf-6c0eee83a372/aihw-juv-130.pdf.aspx?inline=true>.
[10] SNAICC – National Voice for our Children, *The Family Matters Report 2020*, 12.
[11] Ibid 108.
[12] Ibid 5.
[13] NSW Department of Communities and Justice, *Young people in custody* (accessed 2 December 2020) <https://www.juvenile.justice.nsw.gov.au/Pages/youth-justice/about/statistics_custody.aspx>.
[14] Judge Peter Johnstone, above n 8.
[15] The Law Society of NSW, 'Inquiry into the adequacy of youth diversionary programs in NSW' (20 February 2018), submission to the Legislative Assembly Committee on Law and Safety, 14 <https://www.lawsociety.com.au/sites/default/files/2018-03/1447687.pdf>.
[16] UK Houses of Parliament – Parliamentary Office of Science and Technology, 'Postnote: Age of Criminal Responsibility' (June 2018), 3.

logical thinking and problem-solving abilities develop considerably between the ages of 11 and 15.[17] As well as being a time of developmental vulnerability, early adolescence also presents a unique window of opportunity for prevention and early intervention to address spirals of negative behavioural and emotional patterns.[18] As a result, prevention and intervention methods are especially significant in this transition period. It is critical, therefore, that children in early adolescence are steered away from the criminal justice system and instead integrated into positive programs to shape social, emotional, psychological, and neurodevelopmental behaviours. Rehabilitation and intervention – rather than incarceration – are instrumental to creating positive trajectories in early adolescence.[19]

We note that this issue is the subject of a separate ongoing review by the Council of Attorneys-General.

The intersection between education, OOHC, and the criminal justice system

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

The poor outcomes that result from non-attendance at school are myriad, not least of which is the fact that it is a risk factor for children in respect of entering the youth justice system. The Law Society notes that anecdotally the Children's Court of NSW believes that roughly 40% of children coming before the court in its criminal jurisdiction are not attending and are totally disengaged from school.[21] The Law Society supports the initiative of the Children's Court, which has seen officers of the Department of Education placed in the Children's Court to assist in identifying those children who are not attending school and to help them to re-engage in school.

3. The adequacy of current interventions and responses for vulnerable children and families and their effectiveness in supporting families and avoiding children entering out of home care

Shortcomings in the OOHC system

Concerns about the quality of OOHC providers in NSW have been wide-ranging and persistent. As Dr Katharine McFarlane has noted, "the Australian care system has been

[17] Michael Lamb and Megan Sim, 'Developmental factors affecting children in legal contexts' (2013) *Youth Justice*, 13(2), 131-144.
[18] UNICEF Office of Research – Innocenti, *The Adolescent Brain: A second window of opportunity* (2017), 15.
[19] Ibid 33.
[20] NSW Ombudsman, *Inquiry into behaviour management in schools,* August 2017, 46, <https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0018/47241/NSW-Ombudsman-Inquiry-into-behaviour-management-in-schools.pdf>.
[21] Children's Court of NSW, 'Legislative Assembly Law and Safety Inquiry into the adequacy of youth diversionary programs in NSW' (8 February 2018), submission to the Legislative Assembly Committee on Law and Safety, 16. <https://www.parliament.nsw.gov.au/committees/DBAssets/InquirySubmission/Body/59799/Submission%2019.pdf>.

subject to criticism for over a century".[22] A 2015 study by Dr McFarlane, *Care-criminalisation: the involvement of children in out of home care in the NSW criminal justice system,* reviewed 180 Children's Court files spanning 2008-2010 and found that of 79 children who had been in OOHC, almost a quarter had been abused while in care.[23] In 2019 Professor Megan Davis handed down her independent report *Family is Culture*, commissioned by the NSW Minister for Family and Community Services.[24] The report found that there had been "widespread noncompliance with care legislation and policy among FACS caseworkers and managers".[25] In many instances departmental caseworkers and managers had made no attempt to take the least intrusive intervention in the life of a child. The report specifically noted this issue was compounded for Indigenous children where "willing and available Aboriginal family members were routinely ignored and not assessed to care for their kin, and siblings, including twins, were separated unnecessarily".[26] The report remarked that:

> … the Aboriginal community, as well as the general Australian public, would be concerned to learn of the actions and attitudes of caseworkers in many of the cases reviewed during the Review, as well as by the evidence of the repeated failure of the service system to adequately support vulnerable families.

A recent decision by Dr J Lucy, Senior Member of the NSW Civil and Administrative Tribunal, provides a concerning account of the failings of a specific agency with oversight of children in foster care and of their carers. At paragraphs [165] – [187] and [232] – [246], the decision outlines three specific case studies which included the following failings in care standards:

- A child in care was not provided with any support following the death of her mother;
- The agency failed to investigate concerns raised about a child's treatment by the child's mother, a caseworker, and the NSW Department of Family and Community Services; and
- A child with complex trauma and high needs was inappropriately physically punished, rather than being provided with required support.[27]

The Joint Protocol to reduce the contact of children in OOHC with the criminal justice system

The Joint Protocol to reduce the contact of children in OOHC with the criminal justice system ("Joint Protocol"), which commenced in 2016, was developed over a number of years by stakeholders including OOHC providers, the NSW Police Force, Legal Aid NSW, and the NSW Ombudsman.[28] The Joint Protocol provides procedures for OOHC workers responding to challenging behaviour that focus on alternatives to calling police.[29] It also provides guidance to police officers responding to calls from residential care providers, with a focus on "the appropriate and informed use of police discretion".[30] It was developed in response to

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[22] Katherine McFarlane, 'Nothing to see here? The abuse and neglect of children in care is a century-old story', ABC News (online), 15 November 2016 <https://www.abc.net.au/news/2016-11-15/abuse-and-neglect-of-children-in-care-is-a-century-old-story/8026408>.

[23] Katharine McFarlane, *Care-criminalisation: the involvement of children in out of home care in the NSW criminal justice system*, (PhD thesis, University of NSW, 2015) 126.

[24] Megan Davis, *Family is Culture: Independent Review into Aboriginal Out-of-home Care in NSW* (Final Report, October 2019).

[25] Ibid 107.

[26] Ibid.

[27] *Foundations Care Ltd v Children's Guardian* [2020] NSWCATAD 224.

[28] NSW Ombudsman, *Joint Protocol to reduce the contact of children in out-of-home-care with the criminal justice system* (2016) <https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0003/55443/Joint-Protocol-to-reduce-the-contact-of-young-people-in-residential-OOHC-with-the-criminal-justice-system.PDF>.

[29] Ibid 14.

[30] Ibid 19.

concerns that young people were coming into contact with the criminal justice system for low-level challenging behaviour, which would be best managed by the OOHC provider within the care setting.

Law Society members report that although the existence of the Joint Protocol represents significant progress in addressing the increased propensity for children living in OOHC to come into contact with the criminal justice system, much more commitment to training and implementation, including culture change, must be demonstrated by OOHC providers and police for its potential to be realised. This view is also expressed in the *Family is Culture* report, which includes recommendations directed at training and review of the implementation of the Joint Protocol.[31]

The operation of laws regulating adoption in NSW

As discussed above, it is the Law Society's long-standing position that the best form of permanency is to support families to stay together.

The Law Society has previously stated its view that adoption is not a culturally appropriate option for Indigenous children in NSW.[32] Indigenous children must be placed in accordance with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles in s 13 of the Care Act. In NSW there are strong examples of partnerships with Indigenous leadership that are keeping Indigenous children safe within their families. In our view, consideration of an Indigenous child's best interests must include their rights to culture and to family.

Concerns arising from the amendments contained in the Children and Young Persons (Care and Protection) Amendment Act 2018 (NSW)

In addition to our opposition to the two-year time for restoration introduced by the *Children and Young Persons (Care and Protection) Amendment Act 2018 (NSW)* ("Care and Protection Amendment Act 2018")[33] we also have concerns in relation to the operation of s 79(9) of the Care Act, which was inserted by the Care and Protection Amendment Act 2018. The section provides that:

> The maximum period for which an order under subsection (1)(b) may allocate all aspects of parental responsibility to the Minister following the Court's approval of a permanency plan involving restoration, guardianship or adoption, is 24 months.

The Law Society is of the view that the length of an interim order should be left to the discretion of the Court on a case-by-case basis. If a final order is made and a planned restoration fails, this necessitates fresh litigation which is not in a child's best interests. The Law Society appreciates that two-year orders are intended to ensure case work is undertaken expeditiously and parents are engaged and supported, and that children cannot wait indefinitely for parents. Nevertheless, given the many complex factors affecting families in care and protection matters the Law Society has some concern about the lack of flexibility in this provision. The Law Society suggests the Care Act be amended to provide that when a

[31] Megan Davis, above n 24, pp 107 and 245.
[32] The Law Society of NSW, 'Inquiry into local adoptions' (9 May 2018), submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs <https://www.lawsociety.com.au/sites/default/files/2018-05/Submission%20-%20Inquiry%20into%20local%20adoptions-ilovepdf-compressed%20%281%29_0.pdf>.
[33] The Law Society of NSW, 'Children and Young Persons (Care and Protection) Amendment Bill 2018' (9 November 2018), submission to the Minister for Family and Community Services <https://cdn.theconversation.com/static_files/files/344/Letter_to_Minister_for_Family_and_Community_Services_-_Children_and_Youn....pdf?1542063294>.

child has been found to be in need of care and protection, their matter should stay before the Children's Court until final orders are made about their long-term placement.

The Law Society further notes that the Care and Protection Amendment Act 2018 inserted ss 90(2A) – 90(2E) into the Care Act. This section includes significant new restrictions on applications to vary or rescind final care orders, the prosecution of which requires the leave of the Court. These restrictions make it more difficult for parents or other family members to disturb a final order for children. The Law Society considers that these restrictions to dispensing with a final order are a cause for concern in light of the increasing number of adoptions proposed as the permanency outcome for children.

4. The child protection intake, assessment, referral and case management system including any changes necessary to ensure that all children assessed as being at risk of significant harm receive a proactive and timely in-person response from child protection staff

The *Child Protection Legislation Amendment Act 2014* (NSW) introduced ss 91A to 91I – which provide for a parent capacity order regime – to the Care Act. A parent capacity order is defined as an order requiring a parent or primary care-giver of a child or young person to attend or participate in a program, service or course or engage in therapy or treatment aimed at building or enhancing his or her parenting skills.[34] Section 91E of the Care Act provides that:

> (1) The Children's Court may make a parent capacity order in relation to a parent or primary care-giver of a child or young person (including a parent or primary care-giver found to have breached a prohibition order under section 90A) if it is satisfied that—
>
> (a) there is an identified deficiency in the parenting capacity of the parent or primary care-giver that has the potential to place the child or young person at risk of significant harm and it is reasonable and practicable to require the parent or primary care-giver to comply with the order, and
>
> (b) the parent or primary care-giver is unlikely to attend or participate in the program, service or course or engage in the therapy or treatment required by the order unless the order is made.
>
> (2) A parent capacity order may be made whether or not a care application or care order has been made and at any stage in care proceedings.

A parent capacity order may be made on the application of the Secretary, or on the Children's Court own initiative if the Court determines under s 90A that a prohibition order has been breached by the parent or primary care-giver.[35] At any stage during the hearing of an application by the Secretary for a parent capacity order, or after it finds a prohibition order has been breached in proceedings under section 90A, the Children's Court may refer the matter to the Children's Registrar for a dispute resolution conference.[36] Section 91D(3) states that "the purpose of a dispute resolution conference is to provide the parties with an opportunity to agree on action that should be taken to build or enhance the parenting skills of the parent or primary care-giver".

Law Society members advise that while the parent capacity order regime holds potential as an early intervention tool to enhance parenting skills, the orders have in practice been used only rarely. We suggest the regime may have greater utility, and therefore receive greater uptake, if the Care Act and/or the Children and Young Persons (Care and Protection) Regulation 2012 was amended to provide the opportunity for a broader range of stakeholders, such as representatives from housing and health agencies, to be involved in

[34] *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 91A.
[35] Ibid s 91B.
[36] Ibid s 91D(1).

dispute resolution conferences. At the dispute resolution conference, these stakeholders would have the opportunity to suggest appropriate actions to take, or potential elements of an order made by consent under s 91F. Given the complex needs of many families coming into contact with child protection services, the Law Society would support a multi-agency approach to working with parents when problems are first identified and submit that there may be benefits to such processes taking place under the jurisdiction of the Children's Court.

5. The availability of early intervention services across NSW including the effectiveness of pilot programs commissioned under Their Futures Matter program

The Law Society commends the Government of NSW for its support of the Youth Koori Court. We note that a 2018 review found that participation in the Youth Koori Court reduced reoffending – specifically the more serious forms of reoffending that result in detention – and led to positive outcomes such as safe living environments and restoring contact with Clan and Country.[37]

The Law Society in principle supports the reinstatement of the Youth Drug Court ("YDC") in NSW, which was closed down in 2012. The YDC was viewed by Law Society members practicing in youth criminal justice as a positive diversionary option to deal with the underlying cause of involvement in crime, and a means of keeping children from prolonged contact with the criminal justice system. The Law Society submits that if the YDC is reinstated, safeguards should be in place to ensure that children who appear before the YDC are not at risk of receiving a greater sentence if they fail to complete a YDC program, than if the matter had not proceeded through the YDC.

7. Any recent reviews and inquiries

In 2015, David Tune AO PSM conducted the *2015 Independent Review of Out of Home Care* ("Tune review"). According to the Department of Communities and Justice website, this review "examined the state of out of home care in NSW. The review found the system to be ineffective and unsustainable, failing to improve long-term outcomes for children or to arrest the devastating cycles of intergenerational abuse and neglect. Outcomes are particularly poor for Aboriginal children, young people and families."[38] The Tune review found that the system was not client-centred, and that the greatest proportion of relevant expenditure was crisis driven, and made in OOHC service delivery rather than in evidence-based early intervention strategies to support children and families when vulnerabilities first become apparent (such as through missed school days or presentations to health services).[39]

We understand that the Government responded to the Tune review primarily with *Their Futures Matter* (TFM), intended to be a whole-of-government reform aimed at delivering improved outcomes for vulnerable children, young people and their families.

However, this year, the Audit Office reviewed the TFM reform in respect of whether TFM had effective governance and partnership arrangements in place to enable an evidence-based early intervention investment approach for vulnerable children and families in NSW (and not

[37] Williams M, Tait D, Crabtree L, Meher M, *Youth Koori Court Review of Parramatta Pilot Project* (May 2018), Western Sydney University Aboriginal and Torres Strait Islander Employment and Engagement Advisory Board <https://www.westernsydney.edu.au/__data/assets/pdf_file/0008/1394918/YKC_review_Oct_24_v2.pdf>.

[38] 'Our Story', *Their Futures Matter* (Web Page) <https://www.theirfuturesmatter.nsw.gov.au/about-us/our-story>.

[39] New South Wales Auditor-General, *Their Futures Matter* (Performance Audit, 24 July 2020) <https://www.audit.nsw.gov.au/our-work/reports/their-futures-matter>.

in relation to outcomes actually achieved for children and families in NSW). According to the Audit-Office's media release, "The Auditor-General found that while important foundations were put in place, and new programs trialled, the key objective to establish an evidence-based whole-of-government early intervention approach for vulnerable children and families in NSW was not achieved."[40] We note that key recommendations in the Tune review were not implemented in the TFM reforms. For example, the Tune review recommended the establishment of a standalone authority outside of the relevant government clusters (ie, a Family Investment Commission). However, this recommendation was not adopted, and according to the Audit-Office,

> TFM was not independent of FACS and the child protection and out of home care (OOHC) systems which the reform was intended to transform. The governance arrangements were unable to secure support from ministers beyond the FACS portfolio, and the reform struggled for visibility and traction against other government priorities.[41]

The Audit Office made a number of recommendations, and the Law Society recommends this report to the Committee.

We also note that Professor Megan Davis carried out the *Independent Review of Aboriginal Children and Young People in Out of Home Care,* which was commissioned in 2016, and the *Family is Culture* report was released in 2019. In the Law Society's view, this report is well-considered, balanced and comprehensive. The Government has still not provided any substantive indications of how it will implement the recommendations made in this report.

In addition to these more recent review and inquiry reports, in 2016 the NSW General Purpose Standing Committee No. 2 – Health, conducted an inquiry into the child protection system in NSW, and made comprehensive recommendations. We query the implementations status of these recommendations.

Lastly, we note that the NSW General Purpose Standing Committee No. 3 inquired into, and in 2016 reported on, reparations for Stolen Generations in NSW. Three of the recommendations made in that report were directly relevant to the child protection system in NSW:

> **Recommendation 31**
> That the Department of Family and Community Services, in consultation with Aboriginal organisations and communities, identify strategies to promote early intervention services and programs that aim to prevent Aboriginal children and young people being removed from their family.
>
> **Recommendation 32**
> That the Department of Family and Community Services commission an independent audit of adherence to the Aboriginal and Torres Strait Islander Child Placement Principles, with a view to improving compliance and reporting.
>
> **Recommendation 33**
> That the Department of Family and Community Services review the quality and effectiveness of cultural care planning for Aboriginal children and young people placed in out-of-home care.

At the Commonwealth level, in 2009, the Council of Australian Governments ("COAG") endorsed the National Framework for Protecting Australia's Children 2009 – 2020 ("National Framework") which provides a set of indicators relating to the safety and wellbeing of Australia's children, including the number of child protection substantiations, placement

[40] Ibid.
[41] Ibid 2-4.

stability, kinship placement and family contact.[42] Updated child protection indicators from the National Framework published by the Australian Institute of Health and Welfare in August 2020 show that over recent years, at a national level:

- The rate of Indigenous children in OOHC has remained stable, at around 54 children per 1,000. The equivalent rate for non-Indigenous children is 5.1.
- 78% of Indigenous children in care have a cultural support plan, whereas all such children are required to have a cultural support plan under the National Framework.
- 52% of children in out-of-home care are placed with relatives and kin.[43]

We further note that Chapter 30 of the Final Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory discussed in depth the child protection systems across Australia and concluded that, "in all Australian jurisdictions, child protection systems are facing unprecedented demands and challenges, and are generally seen to be in crisis."[44]

Should you have any questions or require further information about this submission, please contact Andrew Small, Policy Lawyer, on (02) 9926 0252 or email andrew.small@lawsociety.com.au.

Yours sincerely,

Richard Harvey
President

[42] Australian Institute of Health and Welfare, *Child protection Australia 2015–16* (2016), 5.
[43] Australian Institute of Health and Welfare, *National framework for protecting Australia's children indicators* (18 August 2020) <https://www.aihw.gov.au/reports/child-protection/nfpac/contents/summary>.
[44] Royal Commission into Children and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Final Report* (17 November 2017), Volume 3A, Chapter 30, 199 <https://childdetentionnt.royalcommission.gov.au/Documents/Royal-Commission-NT-Final-Report-Volume-3A.pdf>.