

**Submission
No 10**

CHILD PROTECTION AND SOCIAL SERVICES SYSTEM

Organisation: NSW Office of the Children's Guardian

Date Received: 11 December 2020

Obj File Ref: A4809314

Mr Matthew Mason-Cox
Committee Chair
Committee on Children and Young People
Parliament of NSW

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 about the effectiveness of the NSW child protection and social services system in responding to vulnerable children and families. We define the child protection and social services system broadly, encompassing out-of-home care and the criminal justice system. Many of the same children and young people move between the different parts of this broader system. It is critical that reform efforts are designed with the needs of these vulnerable children and families at the centre, so system silos are not inadvertently created.

Office of the Children's Guardian's role in child protection system

The Office of the Children's Guardian (OCG) is an independent statutory authority in NSW government that works to protect the safety of children. We do this by supporting and regulating quality child safe organisations and services. Wellbeing and safety of children and young people is at the heart of all our efforts. We are a source of authority on quality in child safe practices, in out-of-home care (OOHC) and worker screening and cultivate relationships across child related sectors to promote evidence-based practice. An overview of our legislation is at **Attachment A**.

OCG response to the Family is Culture Independent Review (2019)

The OCG is concerned that despite previous Inquiries, and subsequent child protection reform, Aboriginal children and young people continue to be over-represented in our child protection, OOHC and justice systems. This is a trend across Australia. Future reform efforts require a stronger focus on addressing the unique needs of Aboriginal children, young people and their communities, in partnership with Aboriginal organisations and communities.

Of specific relevance to your Inquiry is the 2019 *Family is Culture Independent Review of Aboriginal children and young people in OOHC* (the 'FIC Review').ⁱ This is the first independent, systematic and comprehensive review of the experiences of Aboriginal children and young people in the NSW child protection system, led by Aboriginal people.ⁱⁱ This review highlights the ongoing over-representation of Aboriginal children in child protection and provides further evidence that OOHC status is linked to poorer outcomes for children.ⁱⁱⁱ



**Office of the
Children's Guardian**

CONTACT (02) 8219 3600
Locked Bag 5100, Strawberry Hills NSW 2012
Contact form www.kidsguardian.nsw.gov.au/contact-us
www.kidsguardian.nsw.gov.au

ABN 43 304 920 597

Taking an 'outsider' view of the child protection system, the FIC Review found:

- The system is overly complex and difficult to understand. Specifically, the system and individuals working within it, lack cultural competency and an understanding of the intergenerational trauma experienced by Aboriginal people.
- There is weak public accountability, oversight and transparency by key stakeholders in the system.
- Caseworker practice is poor and inconsistent and there is a culture of compliance rather than use of professional judgment. Caseworkers often fail to consider less intrusive alternatives to removal.
- Formal Aboriginal consultation is rarely occurring at key practice and casework points for Aboriginal children after they enter OOHC. Very few children in the cohort received Aboriginal consultation in respect of their initial placement (14.3%) and few received Aboriginal consultations in relation to placement changes (14.5%).^{iv}
- Poor practices at initial placement decision-making has resulted in Aboriginal children and young people being more likely to remain in OOHC to 18 years than non-Aboriginal children and young people.
- System initiatives likely to improve outcomes for Aboriginal families have been poorly implemented including Aboriginal Case Management Policy, Joint Protocol to reduce the contact of young people in residential OOHC with the criminal justice system^v and Family Group Conferencing.
- Serious issues around partnership aspects of the Aboriginal Child Placement Principles (ACPP) highlight a concerning lack of partnership with external Aboriginal community members as is required by ACPP.^{vi}
- There is insufficient focus on early intervention for Aboriginal families.
- There are limited opportunities for Aboriginal children, young people, families and communities to participate in decisions that impact them and their children.

The FIC Review strongly argues for the right to self-determination that *“is about finding agreed ways that Aboriginal people and their communities can have control over their own lives and have a collective say in the future wellbeing of their children and young people.”*^{vii}

Aboriginal Deputy Children’s Guardian

The NSW Government response to the FIC Review has led to significant reform within the OCG, creating important opportunities to improve how we serve Aboriginal children, young people, families and communities. Central to this is Aboriginal leadership and increasing the participation of Aboriginal communities in the systems designed to help support children and their families.

The OCG has recently appointed an Aboriginal Deputy Children’s Guardian (DCG), Mr Richard Weston. The DCG will lead a new regulatory approach to ensure a higher standard of practice in the OOHC sector in meeting the needs of Aboriginal children and young people, in partnership with the Aboriginal community and sector. The role will be responsible for reporting on the key recommendations arising from the FIC Review that the OCG has been asked to review by the NSW Government.

The OCG is specifically tasked with reviewing the following recommendations:

- implementation of the Aboriginal Case Management Policy;
- improvement to casework practices regarding the screening and assessment of foster and relative/kinship carers;
- operation of alternative dispute resolution and family group conferencing with Aboriginal families;

- implementation of the *Joint Protocol to Reduce the Contact of Young People in Residential OOHC with the Criminal Justice System*;
- effectiveness of the Department of Communities and Justice's complaint handling system; and
- improved public reporting by the OCG on the accreditation of statutory OOHC providers.

The DCG will be our representative on a newly created Aboriginal Knowledge Circle, advising NSW Government on matters relating to children in OOHC, specifically providing guidance and direction to government in response to the FIC Review.

Issue: Need for investment in early intervention to stop children entering OOHC system in the first place

A strong theme emerging from previous child protection inquiries is the need for investment in early intervention supports to prevent families from reaching crisis. Shifting the system towards early intervention allows families to stay safely together and address challenges before they escalate. Central to this is integrated support early in a child's life, acknowledging the significant evidence around early brain development and attachment, and the importance of setting new parents up for success.

Funding targeted early intervention programs can set struggling families up for success. This has become even more critical with the COVID-19 pandemic. It can improve employment and education engagement, health and wellbeing, social participation and community connectedness while also reducing the conditions leading to homelessness, chronic health problems and engagement with the justice systems.

Cultural connection must also be recognised as a protective factor for Aboriginal families. While the need for new investment in early intervention initiatives for Aboriginal families and children is clear, it is essential that decisions on what this looks like are owned and directed by Aboriginal organisations and communities. Early intervention for Aboriginal children and families must be oriented towards the connection with community and family networks, with a deliberate focus on preserving a child in their parent's care, enabling the community to actively support parents doing it tough.

Child abuse has a significant social and economic cost, including healthcare, lost earnings and tax revenue, increased need for welfare and child protection and increased burden on the child protection and criminal justice systems. Research suggests the combined cost of child abuse (including child sexual, physical and emotional abuse) for the Australian, state and territory governments to be between \$3.5 to \$6.8 billion.^{viii} A recent Victorian study found that early intervention, would not only net significant savings of at least \$1.8 billion over the next 10 years, but would also prevent 1,200 children from entering OOHC every year.^{ix} Economic modelling predicted that investment in early intervention supports for vulnerable children and family can prevent up to 14,600 children entering care over the next ten years and save at least \$1.8 billion.

The OCG welcomes NSW Government's 2020-21 budget allocation of \$1.4 billion investment in evidence-based early intervention services to support the safety and welfare of vulnerable children, which includes initiatives to drive down the number of children entering out of home care.^x

Issue: OCG currently has limited power to influence all parts of the system, particularly at prevention and early intervention level

The OCG has lead responsibility for implementing a new Child Safe regulatory scheme in NSW. This Scheme has been developed in response to recommendations made by the Royal Commission

into Institutional Responses to Child Sexual Abuse (the Royal Commission). The Royal Commission recommended that child-related organisations be required to implement Child Safe Standards and be held accountable for their implementation through independent oversight. The aim of this Scheme is to prevent child abuse occurring in organisational contexts, and if it does occur, build the capability of child-related organisations to better respond. Creating child safe cultures can actively assist in preventing the abuse of children and young people and increase awareness and the likelihood that harm will be identified and reported.

Until now the OCG has had limited power to influence all parts of the child protection system. Our oversight function focussed on accreditation of out-of-home care providers. However, with its enhanced role of administering the Reportable Conduct Scheme and Child Safe Scheme, alongside the Working With Children Check Scheme (WWCC), the OCG is in a strong position to deliver comprehensive and streamlined oversight of child safety in organisations. This provides the opportunity for the OOHC to shift its' oversight focus downstream.

The new Child Safe Scheme, if passed by Parliament, has the potential reach across the estimated 15,000 organisations delivering programs and services to children and young people in NSW. It will set the expectation that child safety in organisations is not optional and build on the OCG's work to create opportunities to educate not only staff in organisations but parents and communities about what constitutes child abuse and neglect, how to identify and respond appropriately and build a culture of child safety across the NSW community.

Soon we will be consulting on the Exposure Draft of the Children's Guardian Amendment (Child Safe Scheme) Bill 2020, which, if passed by Parliament, would amend the *Children's Guardian Act 2019* (the CG Act) to implement the Royal Commission's vision to influence and lead change by building capability in organisations to be child-safe make organisations safer for children. The regulatory scheme would enable the OCG to proactively identify gaps in an organisation's systems and processes before an incident occurs and respond to concerns in a proportionate way through strengthened powers to monitor, investigate and enforce Child Safe Standards.

The Bill also provides the foundation for the development of Child Safe Action Plans (CSAPs) for relevant NSW Government agencies, including the Department of Communities and Justice and services it provides, funds, regulates or is otherwise responsible for, including early intervention and child protection service providers. CSAPs would need to detail the strategies that agencies will take to: build awareness in the community about the importance of child safety in organisations; build the capability of organisations to implement the Child Safe Standards; and improve the safety of children by implementing the Child Safe Standards. The primary purpose of CSAPs is to enable NSW Government agencies becoming change agents within their sectors by championing the Child Safe Standards. Agencies required to create CSAPs will also be required to comply with the Child Safe Standards. In summary, the proposed child safe scheme will address the current gap, namely that the OCG does not have any current legislative powers of review that provide oversight of the child protection system.

[Issue: Need to focus on experience of Aboriginal children and young people in OOHC](#)

Oversighting the NSW OOHC system, the OCG is in a unique position to comment on its' strengths, limitations and identify opportunities for improvement. While the OCG strongly supports increased investment in early intervention programs to prevent children entering OOHC in the first place, there continues to be many children and young people who need care outside of their family home. For those children, the OOHC system must provide the best possible pathway into adulthood. It is our view that sustained investment in the OOHC system is also required in parallel to investment in early intervention and prevention programs.

The national Family Matters campaign aims to eliminate the over-representation of Aboriginal and Torres Strait Islander children in OOHC within a generation. Its recent report is the first to be published following the new National Agreement on Closing the Gap, which was entered into in July 2020. The National Agreement commits governments to work in partnership with Aboriginal and Torres Strait Islander peoples across the country; to invest in community controlled services; to build the cultural competence of mainstream services; and to develop data and monitor outcomes in partnership with Aboriginal and Torres Strait Islander peoples. Importantly, the National Agreement commits to achieving a target of reducing Aboriginal and Torres Strait Islander over-representation in OOHC by 45% by 2031.^{xi}

Unfortunately, there can be adverse long-term outcomes for children and young people in care, particularly Aboriginal children and young people where the care experience has led to disconnection from family, culture and community. We are of the strong view that the OOHC system needs not only to be safe but also culturally safe for the children and young people who access it, as well as for the organisations and their staff who support them.

All children and young people need to understand where they have come from and where they belong, and to make sense of their own stories in order to grow into healthy and resilient adults. We believe if we can improve the experience and outcomes for Aboriginal children and young people in the child protection and OOHC system, the experiences of all children and young people will be improved. We submit that any review of the child protection and statutory OOHC system place a primary focus on the needs of Aboriginal children and young people and their families, given the continuing overrepresentation of Aboriginal children in the care system.

As at 30 June 2019, there were a total of 16,884 children and young people in OOHC in NSW. 6,754 were Aboriginal children and young people, representing 40% of the total OOHC population at that period.

In 2017-18, Aboriginal children and young people accounted for almost **38%** of all children and young people entering OOHC in NSW – the *highest proportion* since 2011.

- Compared with their same-aged non-Aboriginal peers, Aboriginal children were approximately eight times more likely to enter care by the age of 5 years (i.e. ~8% vs ~1%).
- Aboriginal children are more likely than non-Aboriginal children to experience a substantiated actual or risk of harm while in OOHC (8.6% of Aboriginal children v. 5.2% of non-Aboriginal children who entered care).
- Children and young people in OOHC were 16 times more likely than other children to be under youth justice supervision.^{xii}

Diverting Aboriginal children and young people and their families from the OOHC system should be a priority. Any investment in early intervention services should reflect this and be done in direct partnership with the Aboriginal community. However, there is also a critical need to improve the capacity of the statutory OOHC sector to meet the needs of Aboriginal children and young people who do come into the care system.

Issue: Need to meet cultural care needs of Aboriginal children and young people

There are currently 16 Aboriginal statutory OOHC care providers in NSW. Significant growth is required if all Aboriginal children and young people in OOHC are to be placed with Aboriginal agencies. Currently, just over half of Aboriginal children and young people in statutory OOHC are in placements supervised by the Department of Communities and Justice (DCJ).^{xiii} There are no

Aboriginal agencies providing residential care, yet Aboriginal children and young people are regularly placed in residential care arrangements. The lack of culturally appropriate residential care services is a significant gap in the OOHC system.

Improving the capacity of the OOHC sector to promote the safety, welfare and wellbeing of Aboriginal children and young people is a key OCG priority.

The OCG is currently reviewing the NSW Child Safe Standards for Permanent Care which establish the mandatory practice requirements for statutory OOHC and adoption service providers in NSW. Statutory OOHC and adoption service providers must comply with the standards in order to achieve and maintain accreditation to provide services in NSW.

The OCG has recently completed a series of consultation workshops with each of the Aboriginal OOHC providers, regarding the practices that promote the safety, welfare and wellbeing of Aboriginal children and young people in OOHC. Based on these discussions, the OCG is currently drafting new standards and practice requirements for the statutory OOHC sector. The standards and practice requirements will be released to the wider OOHC sector in December 2020 for comment.

Discussions with Aboriginal OOHC service providers clearly indicate that the safety, welfare and wellbeing of Aboriginal children and young people is compromised where family and community connections are not maintained. Proactively engaging with children and young people's families is crucial and cultural support plans must be developed in consultation with children and young people's families.

Aboriginal agencies are uniquely placed to undertake the sensitive casework required to rebuild family and community connections that have been lost and to support the people caring for Aboriginal children and young people to provide culturally appropriate care. Aboriginal staff working in OOHC have spoken with the OCG about the importance of working sensitively with Aboriginal carers who themselves may not be confident in their own understanding of culture. Aboriginal staff have told the OCG that there is often an assumption that all Aboriginal people have a deep knowledge and understanding of their own community's culture and it can be humiliating for carers when they may have lost, through their own life experiences, important family or community connections.

Supporting Aboriginal children and young people requires a genuine commitment to engaging their families and wider community networks in decision making regarding the child or young person's care. Aboriginal families must have a role in determining how a child or young person's cultural identity is to be supported and the care system needs to develop a more sophisticated understanding of the meaning of 'family' in Aboriginal cultures. Aboriginal workers have told the OCG that Aboriginal communities have a much broader concept of who is 'family' and a failure to understand this means that family placement options for children and young people may be overlooked.

The importance of family engagement in children and young people's lives is not unique to Aboriginal children, but a failure to support meaningful family participation is particularly harmful to Aboriginal children and young people in the care system, as cultural experiences and understanding are inextricably connected to family. Put simply, Aboriginal children and young people cannot have the depth of cultural experience they need if their families are not closely and meaningfully involved in their lives.

Given this, there are clearly real and significant challenges for non-Aboriginal OOHC providers to provide the culturally safe care that Aboriginal children and young people need and deserve.

Aboriginal Case Management Policy

The Aboriginal Case Management Policy ('ACMP') was developed by the NSW Child, Family and Community Peak Aboriginal Corporation (commonly referred to as 'AbSec') in consultation with Aboriginal communities, Aboriginal OOHC providers and DCJ.

Released in 2018, the ACMP provides guidance for caseworkers and practitioners engaging with Aboriginal children and young people and their families, across the child protection and care sector. The ACMP sets out the principles of culturally sensitive and respectful engagement with Aboriginal children and young people and their families, including implementation of the Aboriginal child placement principles.

Aboriginal OOHC providers have told the OCG that the ACMP reflects the principles that underpin their practices with Aboriginal children and their families and if implemented, would go some way to achieving improved outcomes for Aboriginal children and young people in OOHC.

The FIC Review recommended that *"the Department of Communities and Justice should actively fund and support the implementation of the Aboriginal Case Management Policy and the Aboriginal Case Management Rules and Practice Guidance and report publicly on its activity in this domain"*.^{xiv} Subsequently, the OCG has been tasked with reviewing the implementation of the ACMP. Initial consultation with the sector indicates that while there is broad support from Aboriginal workers in the sector for the ACMP, it does not yet appear to have been fully implemented.

Given that engagement with Aboriginal children and their families requires time as well as skilled and sensitive casework, the OCG anticipates that there will be a need for investment of resources to build the capacity of the non-Aboriginal OOHC sector to implement the ACMP.

Family Group Conferencing

Family group conferencing (FGC) is used by NSW Government as a method of alternative dispute resolution in the child protection system.^{xv} Aboriginal OOHC providers have told the OCG that family group conferencing approaches have a place in the OOHC system, particularly as a mechanism to implement the Aboriginal child placement principles and to discuss the child or young person's cultural care needs. However, several agencies raised concerns regarding the lack of Aboriginal facilitators and the costs associated with facilitating family group conferences.

The FIC Review also made a number of recommendations regarding the development and implementation of a family group conferencing model that is designed and led by Aboriginal community controlled organisations^{xvi}. AbSec noted *"family group conferencing, done well, remains a powerful tool for achieving real and sustainable change engaging families and their broader networks in solutions to keep children safe within their family"*.^{xvii} In the coming months the OCG will be exploring these options with the sector as part of the NSW Government response to the FIC Review.

Supporting the Aboriginal OOHC Sector

Ideally, all Aboriginal children and young people in OOHC should be placed with Aboriginal agencies. However, the Aboriginal OOHC sector remains small, relative to the population of Aboriginal children in the care system.

A number of strategies have been trialed to support the growth of the Aboriginal OOHC sector, including partnerships between Aboriginal community controlled organisations and existing accredited OOHC care providers. The purpose of these arrangements is to allow the Aboriginal organisation to build capacity to provide OOHC care services while operating under the

accreditation of an existing provider. One of the benefits of this approach is that the Aboriginal organisation can focus on day-to-day service delivery and utilise the back-office resources of the accredited agency.

A small number of Aboriginal organisations have emerged as independently accredited providers from these arrangements, however there are a number of challenges in these arrangements:

- the accredited agency carries all the risk associated with the partnership and where services are non-compliant with mandatory standards of care, the accredited agency's accreditation can be put at risk. As a result, the accredited agency is likely to be cautious regarding the degree of independence with which the Aboriginal organisation can operate;
- funding and contracting decisions are between the accredited agency and DCJ and there is little opportunity for the Aboriginal organisation to participate in high-level organisational decisions regarding placement numbers and growth. As a result, Aboriginal organisations do not develop the same relationships with DCJ from a contracting perspective as other accredited agencies;
- determining when an Aboriginal organisation is sufficiently financially viable to establish itself as an independently accredited agency is complex, particularly where the Aboriginal organisation does not have other funding streams to support a new OOHC program. For this reason, many of the Aboriginal OOHC providers sit within Aboriginal medical services; and
- the accredited agencies involved in partnership arrangements to date have all been non-Aboriginal and Aboriginal workers may not be comfortable working for a non-Aboriginal organisation.

The OCG is currently considering options to better-support partnership arrangements to provide for greater flexibility for Aboriginal organisations working within accredited agencies, however regulatory approaches will need to be supported by financial support for newly-emerging Aboriginal organisations, particularly where funding to provide OOHC services is the organisation's primary funding stream.

The OCG is also reviewing its assessment and monitoring processes for Aboriginal OOHC care providers, recognising that the current regulatory approach is euro-centric and does not adequately reflect Aboriginal agencies' unique ways of working with children and young people and their families.

Agencies have told the OCG that the NSW regulatory environment has become more complex under the current funding arrangements with DCJ and that the system as a whole is becoming risk-averse and compliance – rather than practice- driven. As part of the review of the OOHC standards, the OCG is working with the sector to re-orientate the OCG's assessment and monitoring framework to place a greater emphasis on practice and continuous improvement.

Adherence to Aboriginal Child Placement Principles

Aboriginal child placement principles have been a feature of the NSW care and protection legislation since the *Children (Care and Protection) Act 1987* and minor amendments to the principles have been made through successive legislative amendments. However, despite these legislative improvements, compliance with the principles has historically been poor.^{xviii}

The placement principles are intended to protect Aboriginal children and young people who come into contact with the statutory child protection system and wherever possible, divert children and young people from entering OOHC. Effectively implementing the principles requires the child protection system to address the systemic causes of child protection interventions; proactively supporting the participation of children and young people's families in decision making; promoting partnership with local communities to design services to address systemic disadvantage as well as

supporting community participation in decision making regarding children and young people; placing children and young people according to the Aboriginal child placement hierarchy; and maintaining children and young people's connections to family, community and culture.^{xix}

It has been the OCG's experience that in practice the sector conceptualises the placement principles as simply a hierarchy of placement options that must be considered when a child or young person enters the statutory OOHC system. In the OCG's experience, there are a number of barriers to fully implementing the placement principles and, in particular, the need for significant capacity building in the non-Aboriginal sector to confidently and respectfully engage with Aboriginal families and communities. The crisis-driven nature of the child protection and OOHC system which forces agencies to make decisions quickly and under pressure also poses significant challenges to thoughtful and meaningful engagements with families and communities.

Many Aboriginal OOHC providers have told the OCG that adherence to the placement principles is tokenistic and that in order to properly implement the principles, the sector as a whole must embrace a much more sophisticated and nuanced understanding of what 'family' means in Aboriginal cultures. Aboriginal agencies have told us that the system is based on Euro-centric notions of family and that failure to embrace a broader understanding of family means that viable family placement options for children and young people are being overlooked.

The FIC Review observed that an incomplete understanding of the placement principles has driven inadequate data collection regarding compliance with the principles. Reporting on compliance tends to focus only on where children and young people are placed, rather than more broadly capturing data regarding the engagement and participation of family and community.^{xx}

Further engagement with Aboriginal stakeholders to design data collection and reporting mechanisms is necessary if we are to better-understand the extent of the implementation of the placement principles in the NSW child protection and care system.

Issue: Need to address criminalisation of children and young people in OOHC

Young people who have experienced childhood maltreatment are more likely to engage in criminal behaviour, both as adolescents and as adults.^{xxi} Young people with OOHC backgrounds are often younger at age of first contact with the youth justice system, are less likely to receive probation or be granted bail, and are more likely to be placed in custody on remand.^{xxii} They are more likely to have disadvantaged family backgrounds, problems with school and education and significant mental health issues (including suicidal ideation and substance abuse issues).^{xxiii}

We know that the pathway for many vulnerable children and young people in OOHC in NSW is into our youth justice system.^{xxiv} In particular, young people living in residential services are at increased risk of coming into contact with police and other parts of the criminal justice system. This risk, known as 'care criminalisation,' arises from the fact that children are often charged with offences against carers or residential staff which would not be criminalised if they occurred in the child's home environment.^{xxv}

In residential care, police may be called to address behavioural issues that in a home environment would be managed by parents or carers.^{xxvi} This behaviour is often the result of trauma associated with complex histories of abuse and neglect. The OCG has observed that where police are called to respond to challenging behaviour in residential units, a child or young person may end up with an Apprehended Violence Order (AVO) to protect staff or other young people, which then has implications for the young person being able to remain in the placement.

Legal Aid NSW has identified the growing trend towards the criminalisation of young people living in OOHC.^{xxvii} A review of the 50 most frequent users of their Children's Legal Service, which advises

and represents children and young people under 18 involved in criminal cases and Apprehended Violence Order applications, over a five year period highlighted this stark reality. Of the 50 people profiled, 80% were 19 years or younger and 82% had had first contact with Legal Aid NSW by the time they were 14 years old. Nearly half (46%) had spent time in OOHC and 72% had a history of abuse of neglect in the home, including witnessing domestic violence. Nearly all had spent time in juvenile detention at some time, with contacts with Legal Aid NSW ranging from 63 to 142.

Subsequently, a Joint Protocol between DCJ and the NSW Police Force has been developed to address the issue of reducing contact of children and young people in residential OOHC with the criminal justice system.^{xxxviii}

Strategies and programs need to be culturally safe to effectively engage with Aboriginal and Torres Strait Islander people. Due to the over-representation of Aboriginal children in the OOHC system, they are more likely to experience care criminalisation, perpetuating a cycle of disadvantage.^{xxxix}

A 'trauma informed' approach recognises the presence of trauma symptoms, acknowledges the role of trauma in patterns of behaviour and aims to support young people to manage their emotions and regulate their behaviour. For Aboriginal children and young people, the impact of intergenerational trauma and being absent and/or disconnected from their community and culture means that the importance of preserving their connection to culture must also be considered as part of a trauma informed and culturally responsive approach.^{xxx}

We know connection to culture and community is a critical protective factor that reduces the likelihood that Aboriginal children would engage in criminal behaviour.^{xxxi} Cultural resilience and family bonds provide a context for the mitigation of stress and violence by providing emotional support, cohesion, and a sense of identity.^{xxxii} Strong cultural identity and community bonds can improve coping skills, emotional strength, self-esteem and resilience for Aboriginal children and young people.

OCG supports raising of minimum age of criminal responsibility

The OCG also recommends that the minimum age of criminal responsibility be raised to at least 14 years, in line with recommendations by the United Nations Committee on the Rights of the Child^{xxxiii} and medical consensus on child brain development.^{xxxiv} Socially excluded children and young people, like those in OOHC, experiencing homelessness, or from low socio-economic backgrounds, are more likely to come into contact with the law. Criminalising the behaviour of young and vulnerable children creates a cycle of disadvantage and forces children to become entrenched in the criminal justice system.^{xxxv}

This disadvantage is acutely experienced by Aboriginal and Torres Strait Islander children and young people who are disproportionately represented in both the OOHC and criminal justice systems, not only in NSW, but across Australia. The United Nations Committee on the Rights of the Child and the Special Rapporteur on the Rights of Indigenous Peoples have expressed concern regarding the over-representation of Aboriginal children and young people in the criminal justice system.^{xxxvi}

In 2019-20, the average daily numbers of children young people in the NSW criminal justice system were 1,459. Approximately 83% of these children were in the community, 7% were control, while 10% were in remand. If the minimum age of criminal responsibility were raised to 14 years old, 35 fewer children would be in the criminal justice system on any one day.^{xxxvii}

In our joint submission (with the Advocate for Children and Young People) to the Council of Attorneys-General Working Group examining this issue, we submitted that we supported raising the

minimum age of criminal responsibility to at least 14. We also noted that the United Nations Committee on the Rights of the Child commends States parties that have a higher minimum age, for instance 15 or 16 years of age.^{xxxviii} Recently, the Australian Capital Territory Legislative Assembly voted to raise the age of criminal responsibility from 10, to 14, making it the first jurisdiction in Australia to agree to bring its laws in line with United Nations standards.

We also submit that raising the minimum age of criminal responsibility be done in conjunction with increased investment in programs and frameworks for children and young people, under 14 years old, with complex needs- such as children and young people who have experienced abuse or neglect, have been excluded from school or spent time in OOHC. These interventions should be trauma-informed to address risk factors and strengthen protective factors. They should be therapeutic, supportive and available to children, young people and their families before a crisis occurs.

Other Inquiries

The OCG acknowledges that this is not the first inquiry into the NSW child protection and social services system. There have been a number of significant inquiries over the past two decades highlighting the complexity and challenges of delivering child protection services. The OCG urges this Committee to review the recommendations made in previous reports outlined below. We also urge the Committee to not only carefully consider what programs and supports will have the biggest impact for children and families most in need, but also make recommendations to strengthen accountability and reporting mechanisms across the service system.

The Special Commission of Inquiry into Child Protection Services in NSW (2008)

In 2008, the Special Commission of Inquiry into Child Protection Services in NSW (the 'Wood Commission') highlighted that the child protection system in NSW consists of much more than the statutory child protection agency.^{xxxix} The underpinning principle for its' recommendations was *"child protection is the collective responsibility of the whole of government and of the community. Primary responsibility for rearing and supporting children and young people should rest with families and communities, and with government providing support where it is needed, either directly or through the funded non-government sector"*.^{xl}

In terms of children and young people entering the OOHC system, the Wood Commission outlined a number of principles and goals underpinning the proposed reforms that the OCG believes should continue to be applied today:

- Early decision making about permanency planning, including restoration to family, results in better outcomes for children and young people, both in immediate terms and for life after care.
- All Aboriginal children and young people in OOHC should be connected to their family and their community, while addressing their social, emotional and cultural needs.
- Greater in-depth assessment of children and young people coming into care through more comprehensive assessment and interventions in the crucial early stages of placements should be part of agency placement and planning processes.
- Carers should be provided with timely information about those in their care, their needs, and the type of support they need to flourish in their care and given ongoing support by designated agencies in fulfilling their care responsibilities.

- Children and young people where possible should be placed with relatives and/or with siblings, and generally should be placed as close as possible to where their family/kinship and support networks are located.
- There should be sufficient health and specialist services including dental, psychological, counselling, speech therapy, mental health and drug and alcohol services available to meet the needs of children and young people in OOHC
- Foster, kinship and relative carers should be supported in caring for children and young people, including assistance to work with those with challenging behaviours, to improve the stability of placements. This should include access to regular and planned respite care, behavioural management support, and other evidence-based specialist services.
- Young people should be assisted when leaving care to transition effectively to stable accommodation and to receive further education and/or training and/or employment, so as to maximise their potential for independent living.

We note that the Wood Commission found that *“the contemporary challenge facing all child protection systems in Australia, and in particular NSW as the largest, is sufficiently resourcing flexible prevention and early intervention services so as to reduce the numbers of children and young people who require the state to step in to keep them safe.”*^{xli} Building capacity in Aboriginal organisations was a focus of the Inquiry to reduce Aboriginal representation in the child protection system, and of securing greater participation of Aboriginal agencies in that system.^{xlii}

Keep Them Safe (KTS): A shared approach to child wellbeing was the NSW Government’s response to the Wood Commission. KTS was a five-year action plan (2009-2014) and included a commitment to progressively evaluate its implementation and the effects of the new child protection system on outcomes for children, young people, and their families. The Committee may wish to consider the Final Evaluation Report, which found that KTS had some success in changing the system towards earlier intervention, however five years was not long enough to realise its objectives fully.^{xliii}

Independent Review of Out of Home Care in NSW (2015)

The 2015 Independent Review of Out of Home Care (the ‘Tune Review’) examined the state of out of home care in NSW. The Tune 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.^{xliiv} It found *‘despite numerous reports and significantly increased expenditure, over a long period of time, the number of children and young people in OOHC has doubled over the past ten years.’*^{xliiv} It concluded that *‘a significant disruption of the system’* was needed.^{xliiv}

The Tune Review found that the drivers of demand for OOHC are complex – including socioeconomic disadvantage, drug and alcohol, domestic violence and mental health issues – and cut across the portfolio responsibilities of many agencies. However, expenditure is focused on programs that are provided within agencies silos. It also found that *“interventions are not adequately evidence based or tailored to meet the multiple and diverse needs of vulnerable children and families”*.^{xliiv} It recommended systemic change to address problems that previous reforms had also observed and sought to improve:

- The system is not client-centred – complex, entrenched problems are not adequately addressed by a program by program approach.

- The system does not improve outcomes for children and families with complex needs – vulnerable families have needs that cross-government silos and agencies are not held accountable for whole of person outcomes.
- DCJ hold primary responsibility for very vulnerable families with little influence over the drivers or levers for change. It is not the agency that has primary accountability for addressing the issues that drive demand for OOHC.
- Expenditure is crisis-driven and not well aligned with the evidence – greatest proportion of investment is in OOHC service delivery (\$960 million ~approx. 50%~ of \$1.86 billion budget in 2015/16).^{xlviii}

The Tune Review outlined a vision for a whole-of-system reform, based on an investment and commissioning approach, to deliver improved outcomes for vulnerable children, young people and families. This recommendation was approved by Cabinet in August 2016 and led to the establishment of Their Futures Matter (TFM).

The then Department of Family and Community Services (FACS) designed the TFM reform initiatives, in consultation with central and human services agencies. A cross-agency board, senior officers' group, and a new unit in the FACS cluster were established to drive the implementation of TFM. In the 2016–17 Budget, the government allocated \$190 million over four years (2016–17 to 2019–20) to the reform. This resourced the design and commissioning of evidence-based pilots, data analytics work, staffing for the implementation unit and secretariat support for the board and cross-agency collaboration. The government intended that the TFM Implementation Board would use a 'investment pool' to direct and prioritise resource allocation to evidence-based interventions for vulnerable children and families in NSW.^{xlix}

Actuarial analysis found that young people leaving OOHC in NSW are more likely to have contact with the health system and the juvenile and criminal justice systems, to require public housing and to have children who are placed in OOHC.^{li}

The OCG points your Inquiry to the recently released NSW Auditor-General's Performance Audit Report 'Their Futures Matter.'^{lii} Specifically this audit assessed whether TFM had effective governance and partnership arrangements in place. It did not seek to assess impact of funded programs on children and their families. It concluded that *“the governance and cross-agency partnership arrangements used to deliver the Their Futures Matter reform were ineffective. Important foundations were put in place, and new programs trialled over the reform's four years. However, an evidence-based whole-of-government early intervention approach for vulnerable children and families in NSW – the key objective of the reform – was not established. The reform concluded in June 2020 without a strategy or plan in place to achieve its intent.”*^{liii}

We highlight this report as TFM was a significant reform program, with significant investment in building an evidence base to reorient the child protection system and reduce the number of children and young people in OOHC. The current inquiry could examine what effective governance and accountability structures are needed to achieve cross government outcomes for vulnerable children and young people in NSW.

If you would like to discuss any of the issues outlined in our submission further, please contact Louise Coe, Director Child Safe Organisations on [REDACTED]
[REDACTED]

Yours sincerely

[REDACTED]

Janet Schorer PSM
Children's Guardian

11 December 2020

Attachment A: NSW Office of the Children’s Guardian legislation

The *Children’s Guardian Act* commenced on 1 March 2020, consolidating the powers and functions of the Children’s Guardian from the *Children and Young Persons Care and Protection Act 1998* and *Adoption Act 2000*. It makes a number of key provisions:

- consolidates the existing powers and functions of the Children’s Guardian into one Act;
- transfers the oversight of the Official Community Visitors scheme (in relation to children) from the Ombudsman’s office to the OCG;
- transfers the reportable conduct scheme from the Ombudsman’s office to the OCG;
- implements recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse regarding reportable conduct schemes;
- establishes a register of residential care workers;
- strengthens the Children’s Guardian’s powers to share information with other bodies including Commonwealth investigative and enforcement agencies in relation to the NDIS;
- provides for the reportable conduct functions to be oversighted by the Joint Parliamentary Committee on Children and Young people;
- provides for decisions of the Children’s Guardian to be reviewed by NSW Civil and Administrative Tribunal;
- provides for the Children’s Guardian to appoint a Deputy or Assistant Children’s Guardian; and
- enshrines the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles in the guiding principles of the Children’s Guardian Act.

The Guardian also administers the Child Protection (Working with Children) Act 2012. The Guardian administers the following Regulations:

- Child Protection (Working with Children) Regulation 2013
- Children and Young Persons (Care and Protection) (Child Employment) Regulation 2015
- Children and Young Persons (Care and Protection) Regulation 2012
- Adoption Regulation 2015

Regulations under *Children and Young Persons (Care and Protection) Act 1998* and *Adoption Act 2000* remain in force until new Regulations are made under the new Act.

ⁱ *Independent Review of Aboriginal Children and Young People in OOHC, Family is Culture Review Report, 2019.*

ⁱⁱ NSW Office of the Children’s Guardian, Response to the *Family is Culture* independent review into Aboriginal OOHC in NSW, July 2020, p. 3.

ⁱⁱⁱ *Independent Review of Aboriginal Children and Young People in OOHC, Family is Culture Review Report, 2019.*

^{iv} *Independent Review of Aboriginal Children and Young People in OOHC, Family is Culture Review Report, 2019, p. 102.*

^v 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

^{vi} *Independent Review of Aboriginal Children and Young People in OOHC, Family is Culture Review Report, 2019, p. 102.*



-
- vii *Independent Review of Aboriginal Children and Young People in OOHC, Family is Culture Review Report, 2019, p.xvii*
- viii Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Volume 3, p 243.
- ix Social Ventures Australia, The economic case for early intervention in the child protection and OOHC system in Victoria, Research Paper, November 2019. Funded by the Macquarie Group viewed at <https://www.berrystreet.org.au/sites/default/files/SVA%20Research%20Paper%20Early%20Intervention%20November%202019.pdf>
- x NSW Communities and Justice, Media Release, 17 November 2020 viewed at <https://www.dcj.nsw.gov.au/news-and-media/media-releases/improving-outcomes-for-the-most-vulnerable#:~:text=for%20vulnerable%20children%20and%20families,out%2Dof%2Dhome%20care>.
- xi The Family Matters Report 2020 Measuring Trends to turn the tide on the over-representation of Aboriginal and Torres Strait Islander Children in OOHC in Australia viewed at https://www.familymatters.org.au/wp-content/uploads/2020/11/FamilyMattersReport2020_LR.pdf.
- xii *Independent Review of Aboriginal Children and Young People in OOHC, Family is Culture Review Report, 2019.*
- xiii NSW Department of Communities and Justice *Annual Statistical Report 2018-2019.*
- xiv *Independent Review of Aboriginal Children and Young People in OOHC, Family is Culture Review Report, 2019 p.xlx.*
- xv *Independent Review of Aboriginal Children and Young People in OOHC, Family is Culture Review Report, 2019 p. 316.*
- xvi *Independent Review of Aboriginal Children and Young People in OOHC, Family is Culture Review Report, 2019 p.lii*
- xvii *In, dependent Review of Aboriginal Children and Young People in OOHC, Family is Culture Review Report, 2019p. 316*
- xviii *Independent Review of Aboriginal Children and Young People in OOHC, Family is Culture Review Report, 2019 p.lii*
- xix *Independent Review of Aboriginal Children and Young People in OOHC, Family is Culture Review Report, 2019.*
- xx *Independent Review of Aboriginal Children and Young People in OOHC, Family is Culture Review Report, 2019 p. 333-334*
- xxi Malvoso, C, Delfabbro, P & Day (2017), Child Maltreatment and criminal convictions in youth: The role of gender, ethnicity and placement experiences in the Australian population, *Children and Youth Services Review* 73, p.57.
- xxii Cashmore, J. (2011). The link between child maltreatment and adolescent offending: Systems neglect of adolescents. *Family Matters*, 89, 31-41; McFarlane, K. (2015). Care-criminalisation: The involvement of children in OOHC in the NSW criminal justice system (Doctoral dissertation). University of New South Wales, Sydney, Australia.
- xxiii Malvaso, C, Delfabbro, P, Day, A & Nobes, G (2018) Young People under Youth Justice Supervision with Varying Child Protection Histories: An Analysis of Group Differences, *International Journal of Offender Therapy and Comparative Criminology*, p. 3.
- xxiv Special Commission of Inquiry into Child Protection Services in NSW, Report of the Special Commission of Inquiry into Child Protection Services in NSW, 2008. The Commission reported that between 2003 and 2006, 28% of male and 39% of female juvenile detainees had a history of OOHC.
- xxv *Family is Culture: Independent Review of Aboriginal Children in OOHC in NSW, Sydney 2019, p. xxxv.*
- xxvi NSW Government, Joint Protocol to reduce the contact of young people in residential OOHC with the criminal justice system, 2016, p.5.
- xxvii Legal Aid NSW, The Drift from Care to Crime: A Legal Aid NSW Issues Paper, October 2011; Katherine McFarlane, From Care to Custody: Young Women in OOHC in the Criminal Justice System, *Current Issues in Criminal Justice*, Vol 22. No. 2, November 2010, p. 345; Special Commission of Inquiry into Child Protection Services in NSW, Report of the Special Commission of Inquiry into Child Protection Services in NSW, 2008.
- xxviii NSW Government, Joint Protocol to reduce the contact of young people in residential OOHC with the criminal justice system, Version 2:2019 available at https://www.facs.nsw.gov.au/__data/assets/pdf_file/0006/585726/NSW-Joint-Protocol-2019.pdf.
- xxix *Family is Culture: Independent Review of Aboriginal Children in OOHC in NSW, Sydney 2019, p. xxxv.*

-
- ^{xxx} NSW Government, Joint Protocol to reduce the contact of young people in residential OOHC with the criminal justice system, Version 2:2019 available at https://www.facs.nsw.gov.au/__data/assets/pdf_file/0006/585726/NSW-Joint-Protocol-2019.pdf.
- ^{xxxi} Family is Culture: Independent Review of Aboriginal Children in OOHC in NSW, Sydney 2019, p. 238.
- ^{xxxii} S M Shephard, 'Finding colour in conformity: A commentary on culturally specific risk factors for violence in Australia', *International Journal of Offender Therapy and Comparative Criminology*, Vol 59(19), 2015.
- ^{xxxiii} UN Committee on the Rights of the Child (CRC), *General comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10, available at: <https://www.refworld.org/docid/4670fca12.html>
- ^{xxxiv} Australian Medical Association and Law Council of Australia, Minimum Age of Criminal Responsibility, Policy Statement, 2019, available at <https://www.lawcouncil.asn.au/files/pdf/policy-statement>.
- ^{xxxv} Australian Institute of Health and Welfare 2016. Young people returning to sentenced youth justice supervision 2014–15. Juvenile justice series no. 20. Cat. no. JUV 84. Canberra: AIHW
- ^{xxxvi} Committee on the Rights of the Child, *Concluding Observations—Australia*, 40th sess, UN Doc CRC/C/15/Add.268 (20 October 2005) [73]; Committee on the Rights of the Child, *Concluding Observations—Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [84]; *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, 36th sess, UN Doc A/HRC/36/46/Add.2 (8 August 2017) [112].
- ^{xxxvii}
- ^{xxxviii} UN Committee on the Rights of the Child, *General comment No. 24 (2019) on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019) [22].
- ^{xxxix} State of NSW through the Special Commission of Inquiry into Child Protection Services in NSW, Report of the Special Commission of Inquiry, Executive Summary and Recommendations, The Hon James Wood AO QC, November 2008, p.i.
- ^{xl} State of NSW through the Special Commission of Inquiry into Child Protection Services in NSW, Report of the Special Commission of Inquiry, Executive Summary and Recommendations, The Hon James Wood AO QC, November 2008, p.v.
- ^{xli} State of NSW through the Special Commission of Inquiry into Child Protection Services in NSW, Report of the Special Commission of Inquiry, Executive Summary and Recommendations, The Hon James Wood AO QC, November 2008, p.ii.
- ^{xlii} State of NSW through the Special Commission of Inquiry into Child Protection Services in NSW, Report of the Special Commission of Inquiry, Executive Summary and Recommendations, The Hon James Wood AO QC, November 2008, p.ix.
- ^{xliii} Cassells R, Cortis N, Duncan A, Eastman C, Gao G, Giuntoli, G, Katz I, Keegan M, Macvean M, Mavisakalyan A, Shlonsky A, Skattebol, J, Smyth C and valentine k (2014), Keep Them Safe Outcomes Evaluation Final Report, Sydney: NSW Department of Premier and Cabinet. viewed at https://www.theirfuturesmatter.nsw.gov.au/__data/assets/pdf_file/0004/678946/KTS_Outcomes_Evaluation_Final_Report.pdf
- ^{xliv} Tune, D, AO,ASM Independent Review of Out of Home Care in NSW, Final Report, 2015, p.3.
- ^{xlv} Tune, D, AO,ASM Independent Review of Out of Home Care in NSW, Final Report, 2015 Executive Summary, p.3.
- ^{xlvi} Tune, D, AO,ASM Independent Review of Out of Home Care in NSW, Final Report, 2015 Executive Summary, p.4.
- ^{xlvii} Tune, D, AO,ASM Independent Review of Out of Home Care in NSW, Final Report, 2015, Executive Summary, p.3.
- ^{xlviii} Tune, D, AO,ASM Independent Review of Out of Home Care in NSW, Final Report, 2015, Executive Summary, p.3.
- ^{xlix} Audit Office of NSW, NSW Auditor-General's Performance Audit Report 'Their Futures Matter' 24 July 2020, p.1 viewed at <https://www.audit.nsw.gov.au/sites/default/files/documents/Their%20Futures%20Matter%20-%20PDF%20Report.pdf>,
- ^l Tune, D, AO,ASM Independent Review of Out of Home Care in NSW, Final Report, 2015, Executive Summary, p.4.
- ^{li} NSW Youth Justice Statistics, Average daily number by Legal status and age for 2019-20.

ⁱⁱⁱ Audit Office of NSW, NSW Auditor-General's Performance Audit Report '*Their Futures Matter*' 24 July 2020 viewed at <https://www.audit.nsw.gov.au/sites/default/files/documents/Their%20Futures%20Matter%20-%20PDF%20Report.pdf>

ⁱⁱⁱ Audit Office of NSW, NSW Auditor-General's Performance Audit Report '*Their Futures Matter*' 24 July 202, p.20 viewed at <https://www.audit.nsw.gov.au/sites/default/files/documents/Their%20Futures%20Matter%20-%20PDF%20Report.pdf>