



3 March 2016

The Director
General Purpose Standing Committee No. 3
Parliament House
Macquarie Street
Sydney NSW 2000

By email: gpscno3@parliament.nsw.gov.au

Dear Director,

Inquiry into reparations for the Stolen Generations in New South Wales

1. Women's Legal Services NSW (WLS NSW) thanks the General Purpose Standing Committee No. 3 for the opportunity to respond to questions on notice relating to the inquiry into reparations for the Stolen Generations in New South Wales.

Current numbers of Aboriginal and Torres Strait Islander people registered to be foster carers or guardians

2. We have been unable to access the current numbers of Aboriginal and Torres Strait Islander people registered to be foster carers or guardians. We refer the Committee to the NSW Department of Family and Community Services (FaCS) and Aboriginal Child, Family and Community Care State Secretariat (NSW) (AbSec) for this information.

What are the barriers and what changes need to be made to ensure the option of Aboriginal and Torres Strait Islander foster carers and guardians are available?

3. Based on the experience of our clients when FaCS intervenes to remove Aboriginal and Torres Strait Islander children from the care of their parents, they often do not make adequate inquiries as to a family member or kinship carer who could be assessed to care for the children.
4. We submit to facilitate the implementation of the Aboriginal and Torres Strait Islander placement principles, where removal of Aboriginal and Torres Strait Islander children is a possibility, parents should be asked by government or NGO early intervention/child protection services that in the event of their child being removed



from their care who would they like to be assessed to be the carer. As this process takes some time, the question should be asked before the child/ren are removed from the parents' care. An assessment should be undertaken promptly. More comprehensive family trees should also be established.

5. We reiterate again that it is extremely important to acknowledge that the impact of the Stolen Generations extends not only to those children who were removed but there has been, and continues to be, trans-generational traumas experienced by the children, grandchildren and extended family members of the Stolen Generations.
6. In addition to the trauma experienced as a result of loss of identity, belonging, community, country connection and impact on wellbeing, many have also experienced trauma as a result of sexual and/or physical abuse which occurred following the forced removal of children from their families.
7. We hear anecdotally from grandmothers who may themselves have been removed as part of the Stolen Generations that the trauma this caused may have meant that they were unable to recover to be able to care as well for their own children as they would have liked, but they are now in a better place to care for their grandchildren.
8. As outlined in our initial submission, it is essential that child protection services are culturally competent, that there is a parity of support for foster carers and kinship carers and that kinship carers can access respite when they need it.
9. We refer to the Senate Community Affairs Reference Committee inquiry into out-of-home care (OOHC) which also discussed this issue.
10. The Senate Committee's *OOHC Report* cites a study into kinship care undertaken by the Benevolent Society, in partnership with the Social Policy and Research Centre (SPRC) and the Aboriginal Child, Safety, Family and Community Care State Secretariat (AbSec) which found that 'kinship carers lack adequate support and appropriate, accessible services for them and their children, including counselling, medical, educational and financial or case worker support'.¹
11. The Secretariat of National Aboriginal and Islander Child Care (SNAICC) notes 'Aboriginal people wanting to be kinship carers are often prevented from doing so by fairly arduous obstacles being put in their way'.²
12. The fear of engaging with government and child protection services due to past policies and practices was also cited as a barrier to Aboriginal and Torres Strait Islander people becoming carers.³
13. We attach a copy of our submission to the Senate Community Affairs Reference Committee inquiry into out-of-home care which provides further information.
14. We also note the recent change to the working with children check in NSW which means both carers and any adult residing in the house where the child will be living

¹ Senate Community Affairs Reference Committee, Out-of-home care report, ('OOHC Report') August 2015 at paragraph 6.18.

² Ibid at paragraph 8.64.

³ Ibid at paragraph 8.66.

need to be assessed, including through the conducting of criminal checks.⁴

15. While acknowledging the need for an assessment process for the protection of children, we submit there should be discretion to determine the relevance of a criminal record. For example, where a criminal record is twenty years old and relates to an incident in a person's youth the person should not automatically be deemed inappropriate to be living in the same house as a child but rather discretion should be used to assess the risk.

Need for adequate funding of early intervention services

16. We also refer to our initial submission to this inquiry which emphasises the importance of culturally appropriate, trauma-informed, strengths based, early intervention services and support, particularly for Aboriginal and Torres Strait Islander families, including early referrals for free legal advice.

17. It is concerning, as stated in the *OOHC Report* that 'In 2013–14, combined real expenditure on intensive family support and family support programs was \$6.7 million, compared to \$2.1 billion for out-of-home care services'. There needs to be much greater investment in early intervention.

If you would like to discuss any aspect of this submission, please contact Dixie Link-Gordon, Senior Community Access Officer or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,
Women's Legal Services NSW

Dixie Link-Gordon
Senior Community Access Officer

Liz Snell
Law Reform and Policy Co-ordinator

Encl: WLS NSW submission to the Senate Community Affairs Reference Committee inquiry into out-of-home care, 18 November 2014

⁴ *Child Protection (Working with Children) Act 2012*, section 10.



18 November 2014

Committee Secretary
Senate Standing Committees on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

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

Dear Committee Secretary,

Out of home care

1. Women's Legal Services NSW (WLS NSW) thanks the Senate Community Affairs References Committee for the opportunity to comment on the inquiry into out of home care (OOHC).
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.
3. We are a member of Community Legal Centres NSW (CLC NSW), the peak body for community legal centres in NSW. We co-convene the CLC NSW Prisoner's Rights Working Group and actively participate in the Aboriginal and Torres Strait Islander Rights Working Group, the CLC NSW Care and Protection Network and the CLC NSW Domestic Violence/Victims Compensation Subcommittee.
4. WLS NSW has an Aboriginal Women's Legal Program (IWLP). This program delivers a culturally appropriate legal service to Aboriginal women in NSW. We provide an Aboriginal legal advice line, participate in law reform and policy work, and provide community legal education programs and conferences that are topical and relevant for Aboriginal and Torres Strait Islander women.
5. This submission will primarily focus on issues in NSW for Aboriginal and Torres Strait Islander women, victims of domestic violence, women in prison and women in regional, rural and remote areas.



6. The term 'domestic violence' is intended to include domestic and family violence. We note that some people prefer to identify as victims of violence and others as survivors of violence. When we use the term 'victim' this is intended to mean both victims and survivors.

Introduction

Overview

7. The issue of child protection is a complex and serious issue and the number of children in OOHC, particularly Aboriginal and Torres Strait Islander children, is concerning.
8. International best practice demonstrates the benefits of serious commitment to early intervention, particularly where mothers have experienced domestic violence; or where trauma, social exclusion and poverty are the causes of child protection concerns.
9. We further note the Senate Community Affairs Reference Committee's recent Inquiry into grandparents who take primary responsibility for the raising of their grandchildren ('Grandparents Inquiry'). We refer to our submission to that inquiry which focussed on the barriers that prevent grandparents who are the primary carers of children (either in the short or long term) from obtaining adequate financial, legal and social support; housing and recognition.
10. We noted in our submission to that inquiry the issue is often raised in Aboriginal and Torres Strait Islander communities that kinship is extensive in Aboriginal and Torres Strait Islander communities, including parents, grandparents, great grandparents, sisters and brothers, aunts and uncles, daughters and sons, nieces and nephews. Furthermore, kinship extends beyond blood relatives within kinship groups. Therefore when the term 'grandparent' is used in this submission we intend there be a wider meaning with respect to Aboriginal and Torres Strait Islander communities.
11. In summary, we recommend:
 - a. Commonwealth government and each state and territory government have a Minister for Preventing Violence against Women and Children who is part of cabinet and can lead a co-ordinated whole-of-government response to violence against women and children;
 - b. Adequate funding of accessible early intervention and parental support, including early intervention legal services, for all who wish to access it;
 - c. Government and non-government organisations being held accountable for the timely provision of accessible support services for parents and children;
 - d. Flexible and culturally appropriate solutions that involve parents and children in the decision-making process and focus on the best interests of the child;
 - e. Prioritising family preservation as the first and primary permanency response as generally it is in the best interests of children to remain with their family;
 - f. Adherence to Aboriginal and Torres Strait Islander placement principles;
 - g. Contact with family where children have to be removed;

- h. Special processes to provide adequate functional recognition of the particular child rearing and kinship practices within Aboriginal and Torres Strait Islander communities as outlined by the Family Law Council in 2004 described as Option 2;
- i. The agency at which the document described by the Family Law Council in Option 2 be registered be an agency other than a government agency;
- j. Greater parity in financial and other practical support between foster carers and kinship carers with informal care arrangements and community education about how to access such support;
- k. Grandparents, other family members or kinship carers with the primary care of children should be able to access respite without the fear of being judged and deemed no longer able to care for these children;
- l. The need for improved recruitment, training and supervision so that experienced and compassionate staff are available to solidly work with parents and carers. A sound understanding of the dynamics of domestic violence¹ and a focus on a “strengths based” approach to parenting are needed;
- m. Positive engagement with Aboriginal and Torres Strait Islander women, particularly those who have experienced domestic violence and intergenerational trauma, to support their capacity to be protective parents;
- n. Further research and studies in the Australian context² and the exploring of alternative solutions, including holistic community based models that include social worker/support services, parent advocates and early intervention legal services to support parents and children.

Human Rights Framework

12. Child Protection must be considered within a human rights framework.
13. It is imperative that the child protection regime is consistent with the principles set out in the *Convention of the Rights of the Child* ('CROC'). This includes:
 - that the best interests of the child³ and protecting a child from harm⁴ are of paramount importance;
 - that children have the right to participate in decisions that affect them;⁵
 - that children have the right to maintain relations and have contact with their family except if it is contrary to the child's best interests;⁶
 - that children have the right to cultural identity, to maintain cultural identity and to

¹ For the importance of understanding of the dynamics of domestic violence, see Lundy Bancroft, Jay Silverman and Daniel Ritchie, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*, 2nd edition, SAGE, Los Angeles, 2012.

² While noting the 2008 Special Commission of Inquiry into Child Protection Services in NSW ('Wood Inquiry'), we believe a more extensive inquiry on this issue is required, as is occurred recently in Queensland.

³ *Convention on the Rights of the Child*, ratified by Australia on 17 December 1990, Article 3(1)

⁴ CROC, Articles 3(2), 3(3), 19.

⁵ CROC Articles 9(2), 12.

⁶ CROC, Articles 8, 9(3).

participate fully in cultural life;⁷ and

- that children have the right to periodic review of their placement in out-of-home-care.⁸
14. *CROC* defines a child as a person below the age of eighteen years. Where a parent is younger than eighteen years of age, the principles of *CROC* will apply not only to that parent but also to their child/ren. In these circumstances, it is important to ensure that the rights of both the parent and child are upheld in accordance with *CROC*.
 15. *CROC* also requires State Parties to “render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities”⁹ and the right of the child to benefit from social security.¹⁰
 16. It is also accepted that it is generally in the best interests of the child to be placed with family. In the case of domestic violence, a form of gender violence,¹¹ the state has a responsibility to protect victims, namely children and their mothers, and bring perpetrators to account.¹²
 17. Australia’s human rights obligations to eliminate violence against women are outlined in the *Convention on the Elimination of All Forms of Discrimination Against Women 1979* (CEDAW) ratified by Australia on 28 July 1983 and *CEDAW Committee General Recommendation No 12 (General Recommendation No 12)* and *CEDAW Committee General Recommendation No 19 (General Recommendation No 19)*.
 18. General Recommendation No 19 makes it clear that gender-based violence is a form of discrimination within Article 1 of CEDAW¹³ and Article 2 of CEDAW obliges state parties to legislate to prohibit all discrimination against women.

Current developments

Intersection of child protection and family law

19. The Australian and state and territory governments have a responsibility to help and support victims of domestic violence to be protective parents.
20. The Australian Law Reform Commission and NSW Law Reform Commission recommend that where a child protection agency investigates child abuse and locates a viable and

⁷ *CROC*, Articles 30, 31, 20(3), 29(1)(c); *International Covenant on Civil and Political Rights (ICCPR)*, ratified by Australia on 13 August 1980 Article 27; *International Covenant on Economic, Social and Cultural Rights (ICESCR)* ratified by Australia on 10 December 1975, Articles 1, 3, 15; *Declaration on the Rights of Indigenous Persons (DRIP)*, Australian Government formally expressed support for the *DRIP* on 3 April 2009, Articles 3, 5, 8, 11, 12, 14, 15, 31.

⁸ *CROC*, Article 25.

⁹ *CROC*, Article 18(2).

¹⁰ *CROC*, Article 26.

¹¹ Domestic violence is also acknowledged as gendered violence in s9(3)(b) of the *Crimes (Domestic and Personal Violence) Act 2007 (NSW)*.

¹² General Recommendation No 19, para 24(b), 24(t); Due diligence obligations outlined in: Human Rights Committee, *General Comment No. 31*, CCPR/C/74/CRP.4/Rev.6, para. 8; Committee on the Rights of the Child, *General Comment No. 5*, CRC/GC/2003/5, 27 November 2003, para. 1; Committee on Economic, Social and Cultural Rights, *General Comment No. 14*, E/C.12/2000/4 (2000), para. 33.

¹³ CEDAW Committee, *General Recommendation No. 19: Violence against Women*, UN Doc A/47/38 (1992), para 7.

protective carer and refers them to the Family Law Court to apply for a parenting order they should “provide written information to a family court about the reasons for the referral; provide reports and other evidence; or intervene in the proceedings”.¹⁴

21. We note this Committee recently recommended state and territory governments re-consider this recommendation to extend it to grandparents.¹⁵
22. We submit the recommendation also includes providing supporting evidence for a mother's family law application for no contact or supervised contact, for example, in circumstances of domestic violence.
23. We note the Commonwealth Attorney-General has recently provided the Family Law Council with terms of reference related to the intersection of child protection and family law with advice due by December 2015.
24. It is important that the intersection of child protection, family law, domestic violence and housing is considered as part of this discussion.

Intersection of child protection and domestic violence responses

25. In 2011 the NSW Legislative Council conducted an inquiry into Domestic Violence trends and issues in NSW. We welcome the NSW Government's acceptance in principle of Recommendation 37 from the *Domestic Violence Trends and Issues in NSW Report*. This recommendation requires Women NSW and the Department of Family and Community Services ('FaCS') to develop a joint plan for addressing the tension between child protection interventions and those for domestic violence, including “promot[ing] practices that harness the strengths of victims and children in order to move on from violence, and seek to build the relationship between them”.

NSW DFV Reforms

26. The NSW jurisdictional response to the *National Plan to Reduce Violence against Women and their Children 2010-2022 ('National Plan')*, called *It Stops Here*, was launched in February 2014. A key component of this strategy is the *Safer Pathway* which was launched in two sites in September 2014: Orange and Waverley.
27. As part of the safer pathway, NSW Police undertake a risk assessment and refer all victims of domestic violence to a central referral point. Victims are then contacted by their local co-ordination point where a further risk assessment is undertaken and support services are offered.
28. If a victim is assessed as at serious threat by either the Police or local co-ordination point s/he is referred to a safety action meeting which is attended by local government and non-government organisations who share information about the victim and perpetrator with the aim of discussing and, where the victim agrees, implementing a co-ordinated response to the violence.¹⁶
29. The two launch sites are expected to be evaluated before the Safer Pathway is rolled out

¹⁴ ALRC & NSWLRC, *Family Violence: A National Legal Response*, 2010, Recommendation 19.3

¹⁵ Senate Standing Committees on Community Affairs, *Grandparents who take primary responsibility for raising their grandchildren report ('Grandparents Inquiry Report')*, 2014, Recommendation 18.

¹⁶ NSW Government, *It Stops Here Safer Pathway Overview*, 2014, accessed on 11 November 2014 at: <http://www.domesticviolence.nsw.gov.au/services>

across the state. It is important that the evaluation feeds into other work discussed below regarding the integration of child protection and domestic violence responses.

NSW Child Protection Reforms

30. Separate to the NSW DFV Reforms, there have also recently been reforms in child protection in NSW called Safe Home for Life.¹⁷ There have also been housing reforms, called Going Home Staying Home.
31. While there are some positive aspects to the NSW Child Protection Reforms, including a greater emphasis on early intervention and resolving issues through Alternative Dispute Resolution (ADR) there must be greater investment in early intervention so parents and primary caregivers can access such services in a timely manner and there are safeguards around the operation of ADR as discussed below.
32. There are also concerning aspects of the reforms such as legislated timeframes for making decisions about restoration; new permanency principles with a greater focus on adoption; simultaneous assessment as carer and prospective adopted parent; NGOs becoming simultaneous providers of restoration services & services for adoptive parents.
33. From WLS NSW's perspective over the past few years the NSW DFV reforms, child protection reforms and housing reforms have largely occurred in silos and lacked co-ordination. This perception is exacerbated by the fact that different Ministers have been responsible for different elements of the reforms.
34. We submit these issues cannot be seen in isolation from each other but rather they intersect.
35. We recommend that the Commonwealth government and each state and territory government have a Minister for Preventing Violence against Women and Children who is part of cabinet and can lead a co-ordinated whole-of-government response to violence against women and children.
36. There has been increasing acknowledgment that perpetrators must be held accountable for their violent behavior and there needs to be an integrated response to child protection and domestic violence.
37. We note that a short-term Working Group of government and non-government organisations has recently been formed in NSW to assist in setting the direction of the integration of domestic violence responses and child protection. This will be fed up to the NSW Domestic and Family Violence Reforms Delivery Board, a board of NSW government representatives. It is important to continue to engage NGOs in this work beyond the short-term Working Group and that such engagement is inclusive and meaningful.

Practice First

38. Another recent development in NSW has been the piloting of a new way FaCS is engaging with clients, namely through the Practice First model which we understand is a strengths based model and focuses on developing relationships with families.

¹⁷ FaCS, *A Safe Home for Life*, 2013 accessed on 15 November 2014 at: http://www.facs.nsw.gov.au/reforms/safe_home_for_life

39. In July 2014 the Minister for Family and Community Services announced the further roll out of Practice First.¹⁸
40. We welcome the development of an approach to child protection which seeks to engage and support families, rather than be focused on what our clients have often experienced as surveillance and a punitive response.
41. However, we also acknowledge that many of our clients continue to experience difficulties in their engagement with FaCS.
42. We recommend continued strong leadership at the highest levels of FaCS to build this new supportive culture and adequate training and support of FaCS staff to effectively implement Practice First.
43. We further recommend that more information about Practice First be publicly available.

Co-design

44. We also acknowledge the new collaborative co-design approach to child protection which FaCS is piloting in up to four local districts in NSW.
45. Co-design involves government and non-government organisations working together to redesign the child protection system in their local district.¹⁹
46. WLS NSW is participating in the South West Sydney co-design process and supports this concept in principle. We welcome the involvement of community legal centres as we believe early access to free legal advice is an important part of a holistic early intervention response and our on the ground experiences as being valuable in informing this process.
47. It is important that as part of the NSW Child Protection Reforms and co-design process that there is adequate funding for effective early intervention programs and implementation of recommendations arising from the co-design process.
48. It is also important that co-design is an inclusive process, actively involving Aboriginal and Torres Strait Islander communities, culturally and linguistically diverse communities, people with disabilities, domestic violence services and others.

a) Drivers of the increase in the number of children placed in OOHC and demographics of the children in care

49. The 2008 *Special Commission of Inquiry into Child Protection Services in NSW ('Wood Inquiry')* found:

A range of complex and often chronic factors characterise many of the families coming into contact with the child protection system such as low income, unemployment, substance abuse, limited social supports, imprisonment, domestic violence, and mental health issues. Many of these factors are inter-related. The elimination or reduction of each of these factors would

¹⁸ Minister Gabrielle Upton, 'Cutting Edge Child Protection – Expanding Practice First Across NSW', Media Release, 9 July 2014 accessed on 14 November 2014 at: <https://www.nsw.liberal.org.au/news/state-news/cutting-edge-child-protection—expanding-practice-first-across-nsw>

¹⁹ FaCS, *Safe Home For Life Child Protection Reforms powerpoint* accessed on 14 November 2014 at: <http://www.acwa.asn.au/downloads/safehomeforlife/SHFLslides20140725.pdf>

significantly lower the number of children and young people reported as being at risk of harm.²⁰

Need for greater investment in early intervention

50. It is noted in the inaugural *Children's Rights Report* that a significant and recurring issue arising in meetings with child advocates included:

the call for a comprehensive and coordinated investment across the nation in early intervention and preventative services for children and families, in order to build resilient children within families and communities, and break the cycle of disadvantage.²¹

51. Research prepared for the Benevolent Society regarding early intervention programs in the United States have highlighted that for an initial investment of US\$15,166 per child in early intervention programs for parents and their preschoolers, this could bring an economic return of US\$244,812 per child into adulthood, including through reduction of interactions with the criminal justice system.²²

52. While we submit the moral and social imperative to adequately fund early intervention should be sufficient, there are also sound economic benefits.

53. The Newpin program conducted by Uniting Care Burnside in NSW provides an intensive, therapeutic program for parents and children who have potential or actual child protection issues.²³ Newpin works from a "strengths based" framework and includes a trained parent for support where one is available. Newpin is able to assist 20-25 families at any one time,²⁴ with the optimal time for a parent being a part of the Newpin service being 18-24 months.²⁵ UnitingCare estimates the cost for a family to attend Newpin is \$10,500 per annum and the outcomes are positive.²⁶ We understand this program is only offered at Bidwell, Doonside and St Mary's for mothers and their children and at Bidwell for fathers and their children.²⁷ Demand exceeds capacity. Such intensive, therapeutic programs need to be provided universally across the state and to be resourced appropriately.

54. Early intervention services must be available and accessible. By "available" we mean there is a place in the relevant program and the parent/primary caregiver can start immediately rather than being placed on a waiting list. By "accessible services" we mean courses that are a short distance from home and can be easily attended by public transport, available in languages other than English, free, provide child care options, run at flexible times, understand the impact of domestic violence, respect diversity and are strengths based and non-judgmental.

²⁰ The Hon James Wood, *Report of the Special Commission of Inquiry into Child Protection ('Wood Inquiry')*, November 2008, at i-ii.

²¹ Australian Human Rights Commission, *Children's Rights Report 2013* at 72, 87-88.

²² *Acting Early Changing Lives: How Prevention and Early Action Saves Money and Improved Wellbeing*, Benevolent Society, 2013 at 18 accessed on 11 November 2014 at:

<http://www.benevolent.org.au/~media/Benevolent/Think/Actingearlychanginglives%20pdf.ashx>

²³ UnitingCare Burnside, Newpin, October 2011 accessed on 12 November 2014 at:

<http://www.burnside.org.au/content/NEWPIN%20Internet.pdf>

²⁴ *Ibid* at 3.

²⁵ *Ibid* at 6.

²⁶ *Ibid* at 6.

²⁷ *Ibid* at 4-5.

55. The importance of adequate investment in early intervention is further discussed in the last section below regarding best practice solutions.

Aboriginal and Torres Strait Islander children

56. WLS NSW is greatly concerned by the large numbers of Aboriginal and Torres Strait Islander children and young people in OOHC. As at 30 June 2013, nationally there were 13,952 Aboriginal and Torres Strait Islander children in OOHC.²⁸ Aboriginal and Torres Strait Islander children are in OOHC at a rate of 10.6 times compared to non-Indigenous children.²⁹
57. The *Child Protection Australia 2012-13 Report* notes that for every substantiation of notification for a non-Indigenous child, there are substantiations of notification for 8 Indigenous children.³⁰
58. It is important we ask the question why and on what grounds such substantiations are being made.
59. We note with concern that the second most common substantiation type is neglect.³¹
60. We submit that flexibility should be especially applied when dealing with Aboriginal and Torres Strait Islander children. Care needs to be given around judging an established culture by a different culture's standard. Through our advice and casework, we have seen many examples of FaCS staff with poor cultural competence and very little understanding of how a child is raised in an Aboriginal and/or Torres Strait Islander community. Placing western standards on Aboriginal and Torres Strait Islander community and family is not appropriate or helpful. There are many things to consider in determining what is best for the child including issues such as identity, belonging, community, country connection and wellbeing.
61. Parents who are suffering from the effects of trans-generational traumas and disenfranchised grief should be provided support and genuine help including parenting skills with a view to creating safe families.
62. This is further supported by the NSW *Child Death 2010 Annual Report* which recommends "working with intergenerational risk factors".³²
63. This has been an issue that has continued to be raised in Child Death Annual Reports since then.³³ Further work is required to ensure accessibility and availability of services for families facing intergenerational disadvantage. Significantly, timeframes for working with families must be realistic and flexible.
64. Further, there has been a 20% increase in the incarceration of Aboriginal women since June 2011.³⁴ While it is not clear how many women had children in their care before being

²⁸ Australian Government, *Child Protection Australia 2012-13*, Child Welfare Series No 58, Australian Institute of Health and Welfare, Canberra, 2013 at 51.

²⁹ Ibid.

³⁰ Australian Government, *Child Protection Australia 2012-13*, Child Welfare Series No 58, Australian Institute of Health and Welfare, Canberra, 2013, Table 3.5.

³¹ Australian Institute of Health and Welfare, *Child Protection*, accessed on 15 November 2014 at: <http://www.aihw.gov.au/child-protection/>

³² Family and Community Services, *Child Death 2010 Annual Report* at 8.

³³ For eg Family and Community Services, *Child Death 2012 Annual Report* at 11, 65.

³⁴ Australian Bureau of Statistics, *4517.0 Prisoners in Australia*, 2012.

incarcerated, based on our experience of working with women in prison, some children would have been removed from their primary caregiver mother for this reason.

65. Child Protection reform should not occur in isolation. It is imperative that it is part of a holistic response which includes: a focus on justice reinvestment; alternatives to custody for women offenders, particularly women who commit non-violent offences;³⁵ supporting parents suffering from the effects of trans-generational traumas and disenfranchised grief; and the *National Plan to Reduce Violence against Women and their Children 2010-2022 (National Plan)* and state and territory jurisdictional plans. Such responses are urgently needed for Aboriginal and Torres Strait Islander women and children and will benefit all women and children.
66. It has been six years since the National Apology to Australia's Aboriginal and Torres Strait Islander peoples and over 12 months since the National Apology for Forced Adoptions. These were important acknowledgments of the long-term and ongoing pain and suffering caused particularly to mothers and their children by removing children from their mother's care and the loss of children's cultural identity.
67. Many in Aboriginal and Torres Strait Islander communities refer to the current high number of Aboriginal and Torres Strait Islander children and young people in care as 'the next generation of the stolen generations.'

b) The outcomes for children in OOHC (including kinship care, foster care and residential care)

Aboriginal and Torres Strait Islander placement principles

68. A key factor that can positively influence outcomes for children in OOHC is connection to their culture and identity. This is particularly important for Aboriginal and Torres Strait Islander children.
69. If restoration to parents is not possible for Aboriginal and Torres Strait Islander children, guardianship is an option most preferred by kinship carers. This allows the child to remain within the family while transferring the responsibilities for the child to the adult that is considered to be the best carer. This provides continuity of identity and culture for the child.
70. We refer to the Aboriginal and Torres Strait Islander principles, including placement principles, as outlined in s13 of the *Children and Young Persons (Care and Protection) Act 1998 (NSW)* ('*Care Act*'). We regularly advise Aboriginal and Torres Strait Islander clients who report to us that FaCS workers have failed to apply the kinship principles when considering placements for removed children. This is in spite of the *Wood Inquiry* which recommended the development of guidelines to ensure compliance with these principles.³⁶

³⁵ See Corrective Services NSW Women's Advisory Council submission in response to the NSW Law Reform Commission Review Crimes (Sentencing Procedure) Act 1999 Special categories of offenders – Women, October 2012 accessed on 12 November 2014 at: http://www.womenslegalsw.asn.au/downloads/law-reform/2013_WAC_LRCNSW_Specialcategoryofoffenders_Women.pdf (WLS NSW is a consultant member of the Corrective Services NSW Women's Advisory Council and contributed to this submission).

³⁶ *Wood Inquiry*, Note 20, Recommendation 11.5.

71. The failure to adhere to Aboriginal and Torres Strait Islander placement principles is also acknowledged in the *Children's Rights 2013 Annual Report*.³⁷
72. We are concerned that as rigid timeframes and a permanency principles hierarchy recently introduced as part of the NSW Child Protection Legislative Reforms (discussed below at paragraphs 85 – 88) pressure decisions for long-term care, many Aboriginal and Torres Strait Islander children will miss out on culturally appropriate care.
73. We submit there needs to be greater focus on the development of cultural plans which need to be more extensive than attending events during NAIDOC Week. Cultural plans should be in place when children are taken into care or shortly thereafter and should not be left until the matter is being finalised.
74. We do acknowledge the important work of the NSW Children's Court President in trying to address the issue of the failure to adhere to Aboriginal and Torres Strait Islander placement principles.³⁸ This is an issue that needs to be constantly monitored.
75. There is also a need for FaCS workers and NGO child protection staff to be more transparent and accountable for the decisions they make from removal to long-term care arrangements.
76. We submit that when Aboriginal and Torres Strait Islander children are removed from the care of their parents, wherever possible, they should be placed with family or in a culturally appropriate kinship placement.
77. To facilitate this, where removal of children is a possibility, parents should be asked by government or NGO early intervention/child protection services that in the event of their child being removed from their care who would they like to be assessed to be the carer. As this process takes some time, the question should be asked before the child/ren are removed from the parents' care.

Changes to working with children checks

78. We also note the recent change to the working with children check in NSW which means both carers and any adult residing in the house where the child will be living need to be assessed, including through the conducting of criminal checks.³⁹
79. While acknowledging the need for an assessment process for the protection of children, we submit there should be discretion to determine the relevance of a criminal record. For example, where a criminal record is twenty years old and relates to an incident in a person's youth the person should not automatically be deemed inappropriate to be living in the same house as a child but rather discretion should be used to assess the risk.
80. Further, there appears to be confusion as to how wide the working with children check should be applied. For example, some of our Aboriginal clients have been told by FaCS workers that this change also applies to anyone that visits their home and anyone whose homes they visit despite no reference to this in the *Child Protection (Working with*

³⁷ *Children's Rights 2013 Annual Report* at 72.

³⁸ See, for example, President of the Children's Court, the Hon Judge Peter Johnstone, "The five critical issues confronting the Children's Court of NSW," *ACWA Research Forum*, 23 July 2014, paragraphs 59-73 accessed on 15 November 2014 at: http://www.acwa.asn.au/downloads/research_forums/presentations/Johnstone-ACWA_Research_ForumFINAL23July.pdf

³⁹ *Child Protection (Working with Children) Act 2012*, section 10.

Children) Act 2012. There needs to be clarification on how wide the net is cast and consistency in how this is applied.

OOHC, the criminal justice system and homelessness

81. There is a correlation between OOHC, the criminal justice system and homelessness.⁴⁰
82. This is further supported by the report by NSW Legal Aid about the fifty highest users of their service. The 2013 report states 80% of high users of NSW Legal Aid were children and young people aged 19 years and under; 72% had experienced abuse or neglect at home or witnessed violence at home; 94% had spent time in a juvenile justice centre; 58% had experienced homelessness; and 46% had being in OOHC.⁴¹
83. The Committee on the Rights of the Child in *General Comment No 10: Children's rights in juvenile justice* emphasises that prevention must be a key element of any juvenile justice policy.⁴² Prevention includes "requir[ing] State parties to provide the necessary assistance to parents (or other caretakers), in the performance of their parental responsibilities", including positive obligations "even more [so] on the promotion of the social potential of parents."⁴³
84. We submit this is the role of state/territory governments as well as the commonwealth government.

Self-placement

85. Studies indicate that approximately 85% of children in out-of-home-care self-place back with their parents at some time.⁴⁴ We suggest that this highlights the need to work collaboratively with families; to better support parents to improve parenting; and the importance of listening to children. It is argued that because "return is the norm", working in partnership with parents leads to better outcomes for children, because parents are important to children "even if their family experience is not entirely positive".⁴⁵

c) Current models for OOHC

Legislated timeframes

86. The recent NSW Child Protection Reforms include the introduction of a legislated timeframe for a decision to be made about restoration of children to parents— 6 months where the child is younger than 2 years and 12 months where the child is 2 years and over.⁴⁶

⁴⁰ Australian Institute of Health and Wellbeing, *Children and young people at risk of social exclusion: Links between homelessness, child protection and juvenile justice*, Canberra 2012.

⁴¹ NSW Legal Aid, *High service users at Legal Aid NSW: Profiling the 50 highest users of legal aid services*, July 2013 at 3-4 accessed on 12 November 2014 at: http://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0004/16537/Legal-Aid-NSW-Study-on-high-service-users-June-2013.pdf

⁴² UN Committee on the Rights of the Child, *General Comment No 10: Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10 at paragraphs 15-21, accessed on 12 November 2014 at:

<http://www.refworld.org/docid/4670fca12.html>

⁴³ *Ibid* at paragraph 19.

⁴⁴ Bullock et al cited in C Tilbury and J Osmond, 'Permanency planning in foster care: A research review and guidelines for practitioners', *Australian Social Work*, 2006, 59(3) at 273.

⁴⁵ C Tilbury and J Osmond, Note 44 at 273-274.

⁴⁶ *Child and Young Persons (Care and Protection) 1998 (NSW)* section 83(5).

87. While there is discretion to grant an extension of time⁴⁷ we fear the very mention of a timeframe will lead to rigid decisions that fail to take into account that each child and family is unique and the best outcome will depend on individual circumstances. We do not support legislated timeframes.
88. Legislated timeframes also fail to acknowledge the challenges in accessing support services in a timely manner.
89. We submit that where there are legislated timeframes there should be a corresponding enforceable right to services such that they are available and accessible.

Hierarchy of permanency principles

90. In NSW there is now also a hierarchy of permanency principles. The first priority is family restoration, followed by guardianship and then adoption. Parental responsibility to the Minister is a last resort.
91. Adoption is a last resort for Aboriginal and Torres Strait Islander children. However, this relies on Aboriginal and Torres Strait Islander children being correctly identified and this does not always happen. This means there is a possibility that Aboriginal and Torres Strait Islander children in NSW can also be fast-tracked to adoption.
92. The NSW government asserts the reason for the hierarchy of permanency principles is because young people in care in NSW experience multiple placements.
93. We agree that it can be detrimental for children and young people to experience multiple placements and we welcome discussion about the best way to achieve more stability. However, we submit solutions must be flexible, appropriate to the individual circumstances, culturally appropriate and not driven by arbitrary and rigid timeframes. Further, family preservation or restoration must also be actively pursued.

Resolving the potential conflict of interest: simultaneous assessment as carer and prospective adopted parent; simultaneous provider of restoration services & services for adoptive parents

94. Under the NSW Child Protection Reforms simultaneous assessment as carer and prospective adopted parent can take place. We believe that the role of a foster carer is fundamentally different to that of an adoptive parent.
95. We submit that serious consideration must be given to identifying strategies to avoid the risk that concurrent planning may undermine attempts at reunification, particularly if services “are not adequately resourced to provide comprehensive or intensive services to families”.⁴⁸
96. Similarly, under the reforms more NGO child protection service providers can now work both with parents to restore children to their care as well as with foster carers with the possibility of adoption. We fear this poses a conflict of interest.

Alternative Dispute Resolution (ADR)

97. In principle, we support the establishment of a comprehensive legislative framework for the use of ADR in child protection matters in NSW. We recognise that the potential

⁴⁷ *Children and Young Persons (Care and Protection) Act 1998 (NSW)*, section 83(5A).

⁴⁸ C Tilbury and J Osmond, Note 44 at 271.

benefits of ADR include informing parents of concerns at an earlier stage than at the time of removal of children and providing parents with an opportunity to respond to concerns. In addition, we accept that the ADR process can offer flexibility and provide culturally responsive procedures and outcomes.

98. However, we hold a number of concerns about the use of ADR in child protection cases and consider it vital that the NSW government properly address these concerns. In summary, we consider that the framework should properly account for:

- a. The involvement of legal advisors as well as other support persons in the ADR process to properly address power imbalances between parents and child protection authorities. This is particularly important in cases where domestic violence is present.⁴⁹ It is also important that the services parents agree to participate in are available and accessible.
- b. Comprehensive screening and risk assessment frameworks and tools designed to assess risk and determine suitability of matters for ADR,⁵⁰
- c. The impartiality of the mediator whose role is to provide a neutral environment in which to resolve issues between the parties; and
- d. A Court process or similar review mechanism where an outcome at ADR has the potential to affect the rights of parties.

f) Supports available for relative/kinship care, foster care and residential care

Kinship care – need for parity of support

99. Kinship carers are predominantly the grandparents of the subject child/ren and financial and other non-financial support for these kinship carers is vital.

100. Where guardianship may create ongoing family problems that will impact on the child, consideration needs to be given to a child remaining with informal kinship carers.

101. Where informal arrangements are made, primary caregivers should receive parity of financial and other assistance as compared to foster carers. Our clients report this is not the case.

102. It seems incongruous that where grandparents or other family members intervene to care for children where the parents are unable to and/or where the children will otherwise be in immediate risk of harm, but before FaCS removes the children from their parents' care, that there is little or no financial and practical assistance from Government. Yet, if the same family members waited until FaCS removed the children and placed the children formally in their care, they would be eligible to receive greater financial and practical assistance.

103. In *Kinship Care in NSW – Finding a Way Forward*, relative/kinship carers speak of the desire to have “parity with foster carers in terms of the supports available to them” and the

⁴⁹ This concern is noted by the Australian Law Reform Commission in Report 114 *Family Violence – A National Legal Response*, 2010 at paragraph 23.109.

⁵⁰ This concern is noted by the Australian Law Reform Commission in Report 114 *Family Violence – A National Legal Response*, 2010, at recommendation 23-9.

importance of resources available “to assist them to assist the children to flourish”.⁵¹ They also speak of the challenges when DoCS, as they were then called, and Centrelink are unable to provide accurate responses to questions about entitlements and support services.⁵² They also raise the issue of the need for training, but being advised they are not eligible for such training or it was on at times that they were unable to attend.⁵³

104. We welcome this Committee’s recommendation in the Grandparents Inquiry to extend foster care allowances to grandparents raising grandchildren without court orders.⁵⁴ We recommend this be inclusive of other family and kinship carers.

Housing

105. As we raised in our submission to the Grandparents Inquiry, issues with housing are a common theme raised amongst grandparent carers. We are aware of grandparents who have been charged more rent due to taking on the care of their grandchildren despite the fact they receive little or no additional financial assistance for taking on the primary care of their grandchildren.

106. In other circumstances, grandparents have been threatened with eviction due to allegations of overcrowding.

107. It is concerning that grandparents are at risk of being evicted or being charged more rent in circumstances where they take on the primary care of children and receive little or no additional financial support for doing so.

Financial support for other family members to provide respite

108. All carers, parents and grandparents alike, need a break from care duties from time to time. We submit there needs to be an acknowledgement that seeking a brief break from full-time care duties is acceptable and may in fact ensure the longevity of the care arrangements.

109. Grandparent carers are typically part of the ageing population and may be more likely to suffer some health issues that may have an impact on the full-time care of their grandchildren.

110. We understand that some grandparents are reluctant to disclose health issues for fear their children will be assumed into care.

111. We note the life expectancy at birth for Aboriginal and Torres Strait Islander males is estimated to be 67.2 years, and 72.9 years for females. There is a gap of 11.5 years for males and 9.7 years for females between Aboriginal and Torres Strait Islander life expectancy and non-Aboriginal and Torres Strait Islander life expectancy.⁵⁵

112. To increase the sustainability of the care arrangements, it is therefore important that grandparents are supported and have the opportunity to have a break without the fear that

⁵¹ Ainslie Yardley, Jan Mason, Elizabeth Watson, *Kinship Care in NSW – finding a way forward*, University of Western Sydney, November 2009 at 39.

⁵² *Ibid* at 40.

⁵³ *Ibid* at 41.

⁵⁴ *Grandparents Inquiry Report*, Note 15, Recommendation 9.

⁵⁵ ABS, 4704.0 - *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, Oct 2010.

they may be deemed no longer able to care for their grandchildren.

113. There is an intergenerational fear amongst Aboriginal and Torres Strait Islander communities of having children removed by the State.
114. Support can come in a variety of forms, including other family members or members of the kinship group taking on this caring role for a short period. Financial support should be available for this.
115. We welcome this Committee's recommendation in the Grandparents Inquiry to provide respite services to grandparents raising grandchildren.⁵⁶ We recommend this be inclusive of other family and kinship carers.

Family Law Council recommendation

116. In 2004 the Family Law Council acknowledged the need to develop special processes to provide adequate functional recognition of the particular child rearing and kinship practices within Aboriginal and Torres Strait Islander communities:

Council sees merit in considering easier ways of recognising the parental responsibilities of non-biological parents in Aboriginal and Torres Strait Islander communities. The aim would be to devise processes which do not in most cases require a full scale court application with its attendant costs and difficulties.⁵⁷

117. The Family Law Council outlined 3 possible options which are extracted in full below:

Option 1

Create a special procedure by legislation departing from the normal procedures under the Family Law Act for recognition of non-biological parents as having parental responsibility. This legislation would allow an appropriate person under Aboriginal and Torres Strait Islander customary law to be recognised as having parental responsibility for the purposes of Federal law where both biological parents indicate their consent without having to go through a complex and court-based process. Simple registration with a Government agency familiar to Aboriginal and Torres Strait Islander people such as Centrelink would be all that is required.

That parental responsibility could last for as long as neither biological parent withdraws his or her consent. An application to a court or to the Administrative Appeals Tribunal might be required in a situation where the primary caregiver consents (e.g. the mother) but the father either does not consent, or cannot be located for the purposes of seeking consent.

Option 2

Same as option 1, but the recognition of parental responsibility would be for all purposes, state and federal. This would then cover medical treatment and schooling for example. This could only be done after appropriate consultation with the States and Territories.

⁵⁶ *Grandparents Inquiry Report*, Note 15, Recommendation 10.

⁵⁷ Cited in Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Island Clients*, February 2012, Part 5.10.2 at 83.

Option 3

Amend specific legislation on child support, family tax benefit or whatever, to create a process whereby non-parent persons can be recognised as exercising primary parental responsibility for the purposes of that Act e.g. receiving child support payments or family tax benefits.

Council believes that this is not an issue that can be resolved by the Commonwealth alone given the range of benefits and services provided by State and Territory governments. We also believe that requiring that this matter be determined on a legislation by legislation basis is a complex solution and one that is unlikely to be welcomed by Aboriginal and Torres Strait Islander people. On this basis Council believes that Option 2 above offers the best practical approach to dealing with this issue.⁵⁸

118. We support Option 2 in principle, as the recognition of parental responsibility would apply to both state and federal jurisdictions and would, for example, include medical treatment and schooling.

119. We note due to past government policies which have resulted in dispossession of land, the forced removal of children and the loss of connection to land and cultural identity, Aboriginal and Torres Strait Islander people may be reluctant to register a document regarding the care of Aboriginal and Torres Strait Islander children with a government agency. Consideration should therefore be given to registering the document with an agency other than a government agency.

Role of mediation

120. There needs to be better recognition that Aboriginal and Torres Strait Islander families are suffering the effects of transgenerational traumas and disenfranchised grief. Family violence may present in multiple forms including: parents to children; parents to grandparents where grandparents have intervened due to safety concerns about their grandchildren; grandchildren to grandparents where the grandchildren may have been raised in a situation of violence but miss their parents. It is vital that appropriate support be available to help people address their traumas.

121. In our experience, many grandparents want the opportunity to meet with the parents of the grandchildren to try and heal the broken relationships and help the parents resume their role as primary carers of their children when they are ready to do so.

122. We therefore recommend where consent is not provided by one or both parents that mediation be available for the parents and grandparents. Where one or both parents withdraw consent and a grandparent has concerns about the safety or well-being of the child, mediation should also be available.

123. We submit mediation should be free or subject to a means test.

124. We have had Aboriginal and Torres Strait Islander grandparent clients who have indicated that the option of culturally appropriate and responsive mediation should be more widely utilised in Aboriginal and Torres Strait Islander grandparent carer cases to ensure the people making decisions about the children's long-term care and welfare are the

⁵⁸ Family Law Council, Note 57 at 84.

children's family – not state or commonwealth agencies or Courts.

125. This is particularly important given the high number of Aboriginal and Torres Strait Islander children in OOHC.

126. Given many current family dispute resolution models are set up on the basis of having two primary caregivers only: that is, a mother and father, it is important that the mediation process be inclusive of all relevant parties: that is, parents and grandparents. We submit such mediation would more likely be effective if adequate time and resources were invested, particularly in pre-mediation processes. Time must be allowed for parents and grandparents to understand, reflect upon and have their say about the options. Further, the service delivery of these mediation services must be culturally responsive. We submit this would include having Aboriginal and Torres Strait Islander mediators.

127. We acknowledge that mediation may not be appropriate in all circumstances, for example if there is family violence. However, we also acknowledge that mediation is possible in some circumstances of family violence, provided there is an appropriate risk assessment, safeguards are in place and the victim of violence is adequately supported.

h) Consultation with individuals, families and communities affected by removal of children from the home

128. It has been the experience of several of our clients that there is inadequate consultation with families and communities affected by the removal of children from the home both before the removal and after.

129. We are contacted by mothers who have been unaware that they have been monitored by FaCS until after their child/children has/have been removed from their care. See, for example, case study 1 below. It is of concern that FaCS does not contact such parents to offer support and early intervention assistance and the opportunity to address issues of concern prior to the removal of the child. It is particularly traumatic when babies are removed from their mother's care in hospital immediately after birth. While in some cases babies are restored to their families, this would likely have an impact on attachment.

Case study 1

Jacquie* is under eighteen and had just given birth to a healthy baby who she was breastfeeding. When she was younger and living in another state she had to live with a relative for a while because of safety concerns in her family.

The day after she gave birth FaCS came to the hospital and told her they were placing the baby in the care of the Minister and that she could not take her baby with her when she was discharged. FaCS indicated that they had no concerns about her capacity as a mother, but they did have safety concerns about her family.

Jacquie had not had any contact with FaCS prior to this time and nor had she been referred to early intervention services throughout her pregnancy. Further, no one had ever told her that they were concerned about where the baby would be living.

Jacquie was not told by FaCS about her right to get legal advice until the day before the first court date.

* Not her real name

130. We understand that FaCS has developed a prenatal program in some local districts in NSW which engages and supports mothers during their pregnancy. We welcome supportive programs that are strength based. However, little is known about this program and there is a real fear, particularly within Aboriginal and Torres Strait Islander communities, that by engaging with services children will be removed from their parents' care. We recommend that there be better community education about these programs.
131. We further note the experience of many of our Aboriginal and Torres Strait Islander clients generally that there is inadequate contact with FaCS prior to the removal of children. Further, once children are removed inadequate family assessment are undertaken to determine if there is a suitable kinship carer.
132. A number of Aboriginal and Torres Strait Islander women have contacted our service wanting to find out how they can become kinship carers for nieces and nephews who are already in care and living with unrelated caregivers. We are often told that these women only discover their nieces and nephews are in care long after their initial removal. They are not contacted at the point of removal and therefore are not given an opportunity to be assessed as appropriate caregivers. This is contrary to the Aboriginal and Torres Strait Islander Child Placement Principles which aim to place Aboriginal and Torres Strait Islander Children with relatives or kinship groups. This problem could be addressed if better family assessments were undertaken and more comprehensive family trees were established as discussed above.

i) Extent of children in OOHC remaining connected to their family of origin

Contact

133. Where children are removed from the care of their parents an important way to remain connected to their family of origin is through contact.
134. Children have the right to contact with their birth family unless contrary to the best interests of the child.
135. Sen et al cite research that concludes that “foster placements tend to be more stable where parental contact is encouraged and there are positive relationships between birth parents and social workers”.⁵⁹
136. We submit that contact arrangements through case planning should occur with judicial oversight as otherwise contact is left to the discretion of FaCS and carers.
137. We regularly hear of contact orders being made and not followed by FaCS and/or carers. In our experience, this very frequently occurs when mothers are incarcerated.
138. There are important positive outcomes for children who maintain contact with a parent while they are in prison. For example, Toohey cites several studies which found children's coping skills were enhanced and “problematic behaviour” was reduced by maintaining contact with their incarcerated parents.⁶⁰

⁵⁹ R Sen and K Broadhurst ‘Contact and children in out-of-home placements’ *Child & Family Social Work*, 2011, 16, 298-309 at 301.

⁶⁰ 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.

139. We often advocate on behalf of clients to ensure contact continues while the mother is in prison as can be seen in case studies 2 and 3 below. However we are concerned that re-establishing contact in these instances has required the intervention of legal advocates.

Case study 2

Imee* came to see us at a legal advice clinic at a correctional centre. Her child had been removed from her care a few years earlier following concerns relating to drug use and domestic violence. Final orders had been made in the Children's Court providing for Imee to have contact with her child six times a year. At the time of our appointment she had not had any contact with her child for nine months despite advising FaCS of her whereabouts and requesting contact. There had recently been a change in caseworker for her matter. We were able to successfully advocate for resumption of contact.

*not her real name

140. If contact arrangements are by discretion, we fear children will have even less contact with their parents and other family members than is currently the case.
141. In our experience, those who have the child in their care often have significant power and influence in determining contact arrangements, irrespective of whether contact is in the best interests of the child and any orders providing for contact. See case studies 3 & 4 below.

Case study 3

Sally* was the primary care giver for her children before she was incarcerated. While in prison, the children lived with their father. While Shine for Kids was willing to transport the children to and from contact, the father did not always ensure the children were available as arranged and so contact stopped.

After our intervention, Sally had monthly face-to-face contact with her children and spoke with them on a weekly basis by phone.

*not her real name

Case study 4

Mary* cared for her two grandchildren under an arrangement with FaCS for a period of time before the Children's Court made orders that the children live with the father.

There were no safety concerns with the children being in the care of the grandmother.

A notation was made in the court orders to require the father to facilitate contact between Mary and her grandchildren. The care arrangements were to be reviewed after 6 months and a report to be supplied to court.

The father cancelled several of Mary's visits with the children and told the caseworker Mary did not want to see the children.

Mary was upset because she felt the caseworker believed that she did not want to see her grandchildren. Mary wanted the children returned to her care and hoped that might happen when it went back to court. Mary was concerned that when she spoke with the caseworker, she felt the caseworker was quite hostile and antagonistic towards her and appeared to be taking an adverse view (based on the father's word) which could jeopardise her position as potential carer.

* not her real name

142. Some caseworkers and foster carers believe a child's contact with their family of origin can be disruptive "causing behavioural problems to worsen and threatening children's coping and adaptation to their foster homes".⁶¹ While Mennen and O'Keefe refer to research that "children often display problematic behaviour after a visit", they also emphasise the need for caseworkers to work closely with foster carers and help foster carers to "understand this and develop strategies to deal with the behaviour" rather than reduce contact.⁶² They also suggest helping foster carers in dealing with their feelings.
143. It is important to acknowledge that there are many reasons why children may be unsettled or distressed by contact with a parent. For example, younger children in particular may simply be tired or hungry; they could be over-excited; they may have been inadequately prepared for the purpose of the contact and had their hopes raised that they would be reunited with the parent only to find they are returning indefinitely to OOHC; they may have heard the carer complaining about having to drive them to contact and feel guilty about causing inconvenience; or they might feel intimidated or scared by a child unfriendly environment, such as a sterile government building or institution.
144. Additionally, other barriers to effective contact include a lack of supportive assistance for carers,⁶³ unsuitability of the venue and the training of caseworkers/supervisors.⁶⁴ Additional reasons include: that the child(ren) are not accompanied by the same worker,⁶⁵ children not understanding why their visits are supervised and being upset by not taking during visits.⁶⁶
145. In the absence of paediatric assessment as to the catalyst of the so called "disruptive or problematic behaviour" it is essential to proceed cautiously and not make assumptions as to the cause of a child's distress after spending time with a parent. It is natural to be sad after seeing a parent and then saying goodbye to them. It is vital that carers are trained in supporting children through the contact process with particular emphasis on developing awareness of their own agenda in the carer role, especially if they are hopeful of achieving permanency with the child in their care. We note that there is clearly potential for conflict

⁶¹ F E Mennen & M O'Keefe, 'Informed decisions in child welfare,' *Children and Youth Services Review*, Vol 27, 2005 p577-593.

⁶² Mennen and O'Keefe, Note 61 at 587.

⁶³ Mennen and O'Keefe, Note 61 at 587; This is also discussed in Morrison, F Mishna, C Cook and G Aitken, 'Access visits: Perceptions of child protection workers, foster parents and children who are Crown wards' *Children and Youth Services Review*, 2011, 33(9) at 1477.

⁶⁴ G Schofield and J Simmonds 'Contact for infants subject to care proceedings', *Adoption & Fostering*, 2011, 35(4) at 74. See also Morrison et al, Note 63 at 1479 -80.

⁶⁵ Morrison et al, Note 63 at 1479.

⁶⁶ Morrison et al, Note 63 at 1480.

of interest if the person reporting that contact is distressing to a child is also the person who wishes to retain the child permanently.

146. As part of the NSW Child Protection Reforms there is a greater focus on ADR including regarding contact. We support in principle the use of ADR to resolve contact disputes. However, as discussed above, it is important for parents to have access to legal advice before ADR and legal representation at ADR. Additionally, ADR must be facilitated by an independent, impartial mediator.
147. Where ADR is not successful we support contact disputes being resolved by the Children's Court.
148. Under recent amendments to the *Care Act* where the Children's Court decides there is no realistic possibility of restoration of the child to his or her parent, the maximum duration of a contact order is 12 months.⁶⁷
149. Following the expiry of this order, should a further contact order be made there is no restriction on duration.
150. We do not support contact orders of limited duration.
151. There appears to be no good reason for a limit of 12 months on the first contact order. This will make it resource intensive on the part of the State when parties seek to review contact at the end of 12 months through an ADR process and possibly seek a further contact order following an ADR process. If anything, the limited duration of a contact order acts as a barrier to biological parents having contact with their children.
152. We recommend the Children's Court having the power to enforce contact orders and arrangements.

j) Best practice solutions for supporting children in vulnerable families including early intervention

Support for parents

153. The *Wood Inquiry* found that the key to reducing risk to children 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”.⁶⁸ For decades advocates have been calling for better resourcing of child protection.⁶⁹
154. We acknowledge and welcome programs implemented in response to the *Wood Inquiry* in NSW such as Intensive Family Support Services. However, we believe that these initiatives do not incorporate some essential features that are both recommended and present in international models, including legal and parent advocacy.

⁶⁷ *Children and Young Persons (Care and Protection) Act 1998 (NSW)*, section 86(6).

⁶⁸ *The Wood Inquiry*, Executive Summary at i.

⁶⁹ Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, ALRC Report 84, November 1997 at 17.6.

Keep Them Safe Evaluation

155. The recent *Keep Them Safe Evaluation*, an evaluation of the first 5 years of the NSW Government's Keep the Safe child protection policy developed in response to the 2008 *Wood Inquiry*, found that many families with children at risk of significant harm "continue to be provided with fragmentary services or in some cases, no service at all".⁷⁰
156. The evaluation also found that there are gaps in service provision, "particularly outside metropolitan areas" and there is a continued urgent need for safe affordable housing.⁷¹ Further "A relatively small amount of KTS expenditure was devoted to early intervention services and this tended to be in the form of small pilots".⁷²
157. While recognising the value of pilot programs and the importance of building the evidence through evaluation of such programs it is vital that there is long-term, sustainable funding for early intervention services so that more than a few people can benefit from effective programs.

Cornerstone Advocacy Model in New York

158. We believe a successful early intervention approach is a holistic community based service for parents and children which includes social worker/support services, early intervention legal services and parent advocates, that is, parents who have successfully engaged in early intervention and are willing to offer support. It is important that such intervention is strengths-based and as the *Keep Them Safe Evaluation* suggests, it needs to be widely available.
159. The Cornerstone Advocacy approach is a good example of an integrated holistic response, albeit, a service which is provided post removal of a child. We believe this model would be highly successful where implemented prior to removal of a child with a view to supporting and working with families to remain intact.
160. The Cornerstone Advocacy approach developed by the Center for Family Representation (CFR) in New York City involves intensive advocacy in the first 60 days following removal. Once a child is removed each parent is provided with a lawyer, a social worker and a parent advocate.⁷³ This approach recognises the complexity of matters where children are removed and the importance of an immediate and appropriate response to ensure that state intervention does not create further barriers between parent and child.

⁷⁰ Social Policy Research Centre, *Keep Them Safe Evaluation: Final Report: NSW Department of Premier and Cabinet*, June 2014 at 55(57) accessed on 15 November 2014 at: http://www.keepthemsafe.nsw.gov.au/__data/assets/pdf_file/0006/166281/KTS_Outcomes_Evaluation_Final_Report.pdf

⁷¹ Ibid at 84(86).

⁷² Ibid.

⁷³ The Cornerstone Advocacy model is described further on their website: "The CFR lawyer provides quality legal representation in court. The social worker gets to the root of the problem and helps the client access stabilizing services, such as housing, employment training, drug treatment, and domestic violence counseling. Finally, the parent advocate, a trained professional who has experienced the child welfare system and can empathize with the struggles vulnerable families face, provides emotional support and helps the client engage in services, ensuring follow through" accessed on 12 November 2014 at <http://www.cfrny.org/our-work/team-model/>.

161. Research has found that parents who were partnered with an advocate or mentor who has successfully achieved restoration themselves were more than four times likely to be reunified with their children.⁷⁴
162. It is vital when children are in care to actively involve birth parents in decision-making, encourage communication and interaction between the birth parent and carers and increase contact between children and their birth parents to assist to increase the likelihood of successful restoration.⁷⁵
163. Similarly the Cornerstone Advocacy approach recognises that it “is not natural for a parent to “visit” with a child”.⁷⁶ Alternatively, CFR argue for inclusive parental involvement in activities that are normal for children, such as attending sporting events or helping with homework. Crucially, CFR recommend that parents must be supported, prepared and debriefed. The approach outlines models including Visit Coaching, which focuses on training workers and carers as coaches.⁷⁷
164. CFR have achieved some significant results. For example, children under their model spend an average of 2.5 months in care compared with averages of 6.4 months in New York City and 29 months in New York State. Additionally CFR services cost US\$6,000 per family compared with US\$29,000, which is the average cost of keeping a child in care per year.⁷⁸

Co-ordinated, holistic, strengths-bases response

165. In cases where parental substance abuse has been identified as a contributing factor to child protection intervention it is important to recognise that substance dependency may arise from past trauma and violence. Every effort should be made to develop a range of accessible treatment programs to provide parents with a genuine opportunity to address their alcohol and/or drug misuse, including any underlying catalysts. A key component of this is identifying parents as “in need of services/support” rather than viewing them as perpetrators or bad parents.⁷⁹ Research clearly identifies that a significant obstacle for parents to enter into and complete treatment programs is motivation.⁸⁰ If there was a cultural shift towards support rather than surveillance and punishment, parents are likely to feel more able to engage with treatment services.
166. Where research about mothers’ experiences with caseworkers has been undertaken, it highlights that positive interaction and support of parents by experienced caseworkers who show empathy, trust and respect decreases removal and increases the likelihood of

⁷⁴ Child Welfare Information Gateway, *Family reunification: What the evidence shows*, Issue Brief June 2011 at 8 accessed on 12 November 2014 at

www.childwelfare.gov/pubs/issue_briefs/family_reunification/family_reunification.pdf; See also details of Parent Partner Programs in Child Welfare Information Gateway, *Supporting reunification and preventing reentry into out-of-home care*, Bulletin for Professionals February 2012 at 6 accessed on 16 November 2014 at https://www.childwelfare.gov/pubs/issue_briefs/srpr.pdf

⁷⁵ Child Welfare Information Gateway, Note 74 at 4.

⁷⁶ CWCIP Best Practice Bulletin, *Cornerstone Advocacy in the first 60 days: Achieving safe and lasting reunification for families*, June 2011 at 4 accessed on 12 November 2014 at www.courts.state.ny.us/ip/cwcip/Publications/CIPBBulletin6_11.pdf

⁷⁷ CWCIP, Note 76 at 4.

⁷⁸ CFR Our Results accessed on 12 November 2014 at <http://www.cfrny.org/about-us/our-results/>

⁷⁹ Northern California Training Academy, *The importance of family engagement in child welfare services*, June 2009 at 6-7 accessed on 12 November 2014 at <http://academy.extensiondlc.net/file.php/1/resources/LR-FamilyEngagement.pdf>

⁸⁰ Northern California Training Academy, Note 79 at 8.

restoration of children to a parent.⁸¹ It is therefore important that caseworkers receive the necessary training, supervision and support to undertake their work and efforts be made to retain and support competent casework staff.⁸²

167. While, as acknowledged above, FaCS has been implementing a new approach to casework, namely, Practice First, several of our clients continue to speak of surveillance and punishment rather than a culture of support. Further work is required to change this culture.
168. If parents enter into an agreement, such as a parent responsibility contract (PRC) or a parent capacity order (PCO), we recommend they must be realistic, achievable and specific to the individual. Parents must be guaranteed a place in a program that is clearly linked to an issue of concern that is affecting their capacity to parent. Services must also be accessible. In addition, parents and primary caregivers must have access to free legal advice before entering such agreements. Given the implications of a failure to comply with a PRC or PCO, PRCs and PCOs should be voidable if FaCS cannot guarantee timely entry to a service.
169. In the context of domestic violence, it is often the case that rather than holding the perpetrator (often the father) to account, the mother is punished for not acting in a protective manner. This can be explained by the different professional approaches used in responding to domestic violence in criminal, child protection and family law contexts which can result in conflicting messages.
170. For example, in the family law courts the focus is on balancing a meaningful relationship with both parents and protecting the child from harm. While amendments to the *Family Law Act* came into effect on 7 June 2012 prioritising safety over a meaningful relationship, the presumption of equal shared parental responsibility remains the starting point. While it is too early to tell the impact of these legislative changes, it will be important to monitor decisions in this area.
171. In contrast, the child protection context focuses on protecting children. It is often the case that if a mother is unable to leave a violent relationship within a suggested and often arbitrary timeframe, she will be viewed as failing to act protectively. It is therefore the mother who is unfairly seen as responsible for dealing with the consequences of violence in a child protection context.⁸³ This view fails to recognise that when a woman leaves a relationship, it is one of the most dangerous times of the relationship and requires planning and support.
172. In addressing the intersection of domestic violence with family law in the NSW DFV Reforms: *It Stops Here*, the focus should be on the victim (generally the woman) who should be treated with dignity and respect, and supported to be a protective parent. The early intervention strategy should include early intervention services to work with women who have experienced domestic violence to strengthen their protective parenting capacities; and to also be willing to support her to seek protective orders in the family court rather than be subject to care proceedings as discussed above.

⁸¹ Festinger cited in C Potter and S Klein-Rothschild, 'Getting home on time: Predicting timely permanence for young children', *Child Welfare*, 2002, 81(2) at 127; K Dawson and M Berry, 'Engaging families in child welfare services: An evidence-based approach to best practice', *Child Welfare*, 2002, 81(2) at 302-303. J Thomson and Ros Thorpe 'Powerful partnerships in social work: group work with parents of children in care' *Australian Social Work*, 2004, 57(1) at 46-56.

⁸² C Potter and S Klein-Rothschild, Note 81 at 146.

⁸³ L Radford and M Hester, *Mothering through domestic violence*, Jessica Kingsley Publishers, London, 2006 at 143.

173. It is essential to support rather than blame mothers escaping domestic violence. Research in the United States has found no evidence to indicate that mothers who had experienced domestic violence were “less affectionate, less proactive, less likely to provide structure for the child, or more punitive”.⁸⁴ This research also found that mothers who had experienced domestic violence engaged in mother to child aggression at almost twice the rate of mothers from non-violent relationships, but six months after leaving refuge accommodation, showed a significant decrease in parenting stress and child-directed aggressive behaviour.⁸⁵
174. Additionally mothers who had experienced domestic violence reported a decrease in depressive symptoms after escaping the violence, but also a decrease in self-esteem, suggested to be connected to a lack of psychological and social supports and financial security.⁸⁶ This clearly demonstrates the necessity of providing appropriate supports including counselling, safe and secure housing, financial independence and treatment programs once a mother removes herself and her children from a violent relationship.
175. The lack of access to services is exacerbated for women in regional, rural and remote areas. See case study 5 below.

Case study 5

Sarah* lived in a regional area. She had experienced significant violence in her life both as a child and an adult. She had a physical disability and a history of substance abuse. She was a single parent, but seeing a man who, unbeknown to her, had been previously investigated by FaCS. After experiencing severe anxiety and depression she self referred for psychological assistance. As a result of the mental health intervention she was admitted into a facility that was some distance from her children who had been placed in out of home care. Sarah was unable to see the children regularly or attend the court proceedings about the children. As a result, she initially had infrequent and disrupted contact with the children which caused significant distress to both Sarah and her children.

After discharge, in addition to contact visits and legal appointments, Sarah was required to attend a range of treatment programs addressing substance abuse, mental health and protective behaviours, all located in different parts of the region in which she lived but mostly not directly accessible by public transport, thus requiring multiple forms of transport. The cost of getting to appointments created financial stress and the process of travel aggravated her physical impairment. Despite the obstacles, Sarah worked hard to meet these requirements, but it still took more than a year for her children to be returned to her full time care.

*not her real name

Allocation and relationship with caseworker

176. We further note our concerns that having a number of caseworkers allocated to a family or frequently changing caseworkers can inhibit prospects of restoration. Research from the United States “found that the number of caseworkers was associated with timely permanence and may even be more important than the number and type of services

⁸⁴ G Holden et al, ‘Parenting behaviours and beliefs of battered women’ in G Holden, R Geffner and E Jouriles (eds), *Children exposed to marital violence*, APA Press, Washington, 1998, 289-334 at 325.

⁸⁵ G Holden et al, Note 84 at 304, 321-322.

⁸⁶ G Holden et al, Note 84 at 323.

provided to a child and family”.⁸⁷

177. The 2013 report, *Experiencing Out-of-Home Care in Australia - The Views of Children and Young People* emphasises the importance of children having only one or two caseworkers during their time in care so they can build a relationship of trust with this worker. Research cited in the report states this has the capacity “for improving mental health and permanency outcomes”.⁸⁸

178. This report also refers to a 2010 comparative study of the child protection system in Norway and Queensland. The focus in Norway is on “promot[ing] social equality among all citizens”, by requiring “the municipality to intervene early to take action to ensure the child and family have access to resources needed to ‘avoid lasting problems’ for the child”.⁸⁹ This is consistent with the right of the child to benefit from social security.⁹⁰ Significantly, this is reported to “lead to lower caseworker turnover”.⁹¹

179. Additionally, research shows that family restoration is facilitated by more frequent contact with the caseworker, particularly where that parent feels that “their involvement in case planning and services is valued and respectful of their potential to keep their children safe, provides them with the information they need to successfully advocate for themselves and their children, and enables them to access the services and resources they need to achieve reunification”.⁹²

180. For children under two years of age, bonding with primary carers is important and can affect the child’s personal development. Studies have shown if a mother is able and supported to maintain significant time with her child during the initial time of removal and care planning, this increases the chance of successful restoration. See paragraphs 161-163.

If you would like to discuss any aspect of this submission, please contact me or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours sincerely,

Women’s Legal Services NSW



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⁸⁷ C Potter and S Klein-Rothschild, Note 81 at 135.

⁸⁸ Dorsey, Kerns, Trupin, Conover, & Berliner, 2012 cited in Joseph McDowall, *Experiencing Out-of-Home Care in Australia -The Views of Children and Young People*, CREATE Foundation, Sydney, 2013 at 86 (112).

⁸⁹ Cited in McDowall, Ibid.

⁹⁰ CROC, Article 26.

⁹¹ McDowall, Note 88 at 86 (112).

⁹² Child Welfare Information Gateway, *Family reunification: What the evidence shows*, Issue Brief June 2011 at 6-7 accessed on 12 November 2014 at

www.childwelfare.gov/pubs/issue_briefs/family_reunification/family_reunification.pdf