Submission No 44

INQUIRY INTO SERVICE COORDINATION IN COMMUNITIES WITH HIGH SOCIAL NEEDS

Organisation: The Law Society of New South Wales

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THE LAW SOCIETY
OF NEW SOUTH WALES

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24 August 2015

Mr Stewart Smith
The Director
Standing Committee on Social Issues
Parliament House, Macquarie St
Sydney NSW 2000

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

Dear Mr Smith,

Inquiry into service coordination in communities with high social needs

I write on behalf of the Law Society of NSW.

I understand that the Standing Committee on Social Issues ("Standing Committee") has been asked to inquire into, and report on, service coordination in communities with high social needs. The terms of reference include consideration of:

(a) the extent to which government and non-government service providers are identifying the needs of clients and providing a coordinated response which ensures access to services both within and outside of their particular area of responsibility;
(b) barriers to the effective coordination of services, including lack of client awareness of services and any legislative provisions such as privacy law;
(c) consideration of initiatives such as the Dubbo Minister's Action Group and best practice models for the coordination of services; and
(d) any other related matter.

Preliminary comments

The Criminal Law and Juvenile Justice Committees have had the opportunity to consider the submission of Legal Aid NSW, and endorse that submission.

The Rural Issues Committee provides the following brief comments in relation to terms of reference (a) and (c).

In respect of term of reference (a), the Rural Issues Committee notes that the Law and Justice Foundation of NSW ("Foundation") conducts research and publishes a range of reports identifying the legal needs of socially and economically disadvantaged people. The Foundation has recently published reports on the legal needs and service delivery of the Far South East region of New South Wales which may be of assistance to the Inquiry.[1] Further, the Committee notes that the Foundation's report on Reshaping Legal Assistance Services

[1] Ramsey, S & Macourt, D, 2013, *Legal needs overview of the Far South East region of New South Wales*, Law and Justice Foundation of NSW, Sydney, accessed at: http://www.lawfoundation.net.au/ljf/app/&id=9010E40A586C7714CA257BE90013DE70 on 4 August 2015.

may be of particular assistance as it discusses 'joined-up' services, the options for collaborative work with other services, and the costs and challenges involved.[2]

In respect of term of reference (c), the Rural Issues Committee members have observed that the Dubbo Minister's Action Group initiative appears to provide a good forum for the discussion of ideas but does not yet deliver coordinated responses to the needs identified. An example includes the recognition by government agencies and other service providers that there is need for a residential drug rehabilitation facility and a drug court in the Dubbo area. However, despite this recognition these facilities do not exist and it is unclear whether they will be provided in the future.

The Indigenous Issues Committee ("IIC") represents the Law Society on Indigenous issues as they relate to the legal needs of people in NSW and includes experts drawn from the ranks of the Law Society's membership.

In its submissions, the IIC addresses primarily terms of reference (b), (c) and (d) by providing comments that:

A. Suggest some ways to deliver better service coordination to improve outcomes for Aboriginal children and families in respect of care and protection; and
B. Note the work in Bourke undertaken by the Maranguka initiative and the recent partnership with Just Reinvest.

A. Improving outcomes for Indigenous children and families in the care and protection jurisdiction

1. Context

The IIC's view is that it is a priority to improve outcomes for Indigenous children and families in the context of care and protection. The IIC's view is that better coordination between services (particularly Indigenous services) and the Department of Family and Community Services, would assist in delivering improved outcomes.

By way of background, the IIC notes that Aboriginal and Torres Strait Islander children were the subject of a child protection substantiation at eight times the rate of non-Indigenous children in 2012-2013.[3] According to the Australian Institute of Health and Welfare ("AIHW"), Aboriginal and Torres Strait Islander children are represented in out-of-home care at ten times the rate of non-Indigenous children across Australia.[4] According to the AIHW:

> At 30 June 2013, there were 13,952 Aboriginal and Torres Strait Islander children in out-of-home care, a rate of 57.1 per 1,000 children. These rates ranged from 22.2 per 1,000 in the Northern Territory to 85.5 per 1,000 in New South Wales...Nationally, the rate of Indigenous children in out-of-home care was 10.6 times the rate for non-Indigenous children. In all jurisdictions, the rate of Indigenous children in out-of-home care was higher than for non-Indigenous children, with rate ratios ranging from 3.9 in Tasmania to 16.1 in Western Australia.[5]

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[2] Pleasence, P, Coumarelos, C, Forell, S & McDonald, H M, 2014, *Reshaping legal assistance services: building on the evidence base: a discussion paper*, Law and Justice Foundation of NSW, Sydney, accessed at: http://www.lawfoundation.net.au/ljf/site/templates/reports/$file/Reshaping_legal_assistance_services_web.pdf on 4 August 2015.

[3] AIHW, *Child Protection Australia 2012-13*, at 25 available at: http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129548164 (accessed on 22 October 2014)

[4] Cited in Judy Cashmore, 'Children in the out-of-home care system', in *Families, policy and the law: Selected essays on contemporary issues for Australia*, Alan Hayes and Daryl Higgins, (eds), AIFS http://www.aifs.gov.au/institute/pubs/fpl/fpl15.html

[5] Note 2 at 51.

Further, "[t]he rate of Aboriginal and Torres Strait Islander children placed in out-of-home care has steadily increased since 2009, from 44.8 to 57.1 per 1,000 children."[6]

The IIC acknowledges that there are children in unsafe situations where their removal is warranted. However, in the IIC's experience, children may be unnecessarily removed from family and kin through a combination of factors that can adversely affect the outcomes for both Aboriginal children and their families when proceedings are brought in the Children's Court without meaningful early intervention. These are explained in more detail below.

2. Contact and cultural connection

While the IIC's primary focus remains the safety and best interests of children, the IIC submits that if a child is removed from his or her parents, maintaining family and cultural connection must be part of the consideration of whether an action is in fact in the best interests of the child. Securing better outcomes for Indigenous children and families must meaningfully provide for cultural contact.

The IIC notes that a principle underpinning the Wood Inquiry was that:

> All Aboriginal children and young people in out-of-home care should be connected to their family and their community, while addressing their social, emotional and cultural needs.[7]

In the IIC's experience, cultural connection is vital for an Indigenous child's resilience. The Committee holds the strong view that cultural contact plans should be made as part of court-ordered arrangements, and children should have meaningful contact with their families, and families from their own Indigenous nations. The IIC notes that some out-of-home-care providers recruit Indigenous people to run internal "cultural contact programs." In the IIC's view, this arrangement is neither culturally safe nor sufficient as culture is nurtured within culturally appropriate, lived experiences.

Cultural contact must be provided for a significant and substantial time with the purpose of establishing a meaningful relationship with parents, family and community; beyond the establishment of identification. The IIC notes that structured and positive engagement can assist to establish a positive cultural connection, and nurture the understanding in children that culture is a positive aspect of their lives and something they should feel proud of.

Children have a right to enjoy their own culture and to use their own language (Article 27, *International Covenant on Civil and Political Rights,* Article 30, *Convention on the Rights of the Child*).[8]

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[6] Ibid.

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

[8] Article 27 of the *International Covenant on Civil and Political Rights* states:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 30 of the *Convention on the Rights of the Child* states:

> In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

See also Articles 11, 12 and 31 of the *UN Declaration of the Rights of Indigenous Peoples.*

The IIC notes further that the 1997 *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families,*[9] (the "Bringing them Home Report") recommended that there be national standards set in state and territory legislation, which included the factors to be considered in determining the best interests of an Indigenous child. The Bringing them Home Report recommended that national standards legislation provide that the initial presumption is that the best interest of the child is to remain within his or her Indigenous family, community and culture (recommendation 46a). Further, recommendation 46b provided that in determining the best interests of an Indigenous child, the decision maker must also consider:

1. The need of the child to maintain contact with his or her Indigenous family, community and culture,
2. The significance of the child's Indigenous heritage for his or her future well-being,
3. The views of the child and his or her family, and
4. The advice of the appropriate accredited Indigenous organisation.

However, in the IIC's experience, there are barriers to providing that children who are removed from their parents continue to have the opportunity to maintain and develop a positive cultural connection to their own nations or language groups.

3. Relationship between Indigenous people and FACS

In the IIC's view, early intervention and engagement is a strategy that would likely address some of the drivers leading to the removal of Indigenous children. The IIC notes that meaningful and collaborative early intervention and engagement requires better coordination between FACS and Aboriginal service providers (and not just services identified as out-of-home care providers); better use of care and safety plans; and the availability of legal representation at earlier stages, such as in relation to parental responsibility contracts.

However, the IIC understands that there is a historical distrust between Indigenous people and FACS. In the IIC's experience, this distrust may result in sub-optimal consequences for process and outcome. For example, in some instances, the fear of FACS may make family members reluctant to nominate as carers as there are concerns that FACS might become involved in their own family if something were to happen while a family member's child is in their care.

Further, the IIC notes that there is a potential for conflict with FACS being the investigative and removal body, as well as the key (and for some services, the only) referrer to therapeutic services. This is not unique to FACS or NSW but is consistent with the type of child and family welfare systems that have developed in each of the Australian states and territories. Australian child and family welfare systems are identified as child protection systems.[10] Key characteristics of how child protection systems address child protection can be seen in the table below:

[9] National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997). "Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families" available online: http://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf (accessed 24 February 2015)

[10] Other countries with child protection systems are the UK, US and Canada. These types of child and family welfare systems differ from those identified as 'family service' and 'community caring' systems of child and family welfare (See Nancy Freymond and Gary Cameron, 2006, *Towards Positive Systems of Child and Family Welfare: International Comparisons of Child Protection, Family Service and Community Caring Systems,* University of Toronto Press). These other types of child and family welfare systems apply different approaches to the characteristics outlined in Table one on this page.

CHARACTERISTIC	CHILD PROTECTION SYSTEM
Framing the problem of child abuse	The need to protect child from harm
Entry to services	Single entry point; report or notification by third party
Basis of government intervention and services provided	Legalistic, investigatory in order to formulate child safety plans
Place of services	Separated from family support services
Coverage	Resources are concentrated on families where risks of (re-)abuse are high and immediate
Service approach	Standardised procedures; rigid timelines
State-parent relationship	Adversarial
Role of the legal system	Adversarial; formal; evidence-based
Out-of-home care	Mainly involuntary

Table 1. Characteristics of the 'child protection' orientation to child protection[11]

Seeing these general features of a child protection system may help to explain the currently poor low levels of engagement with early intervention services.

While useful and effective early intervention schemes exis, access to these programs for Aboriginal families may be restricted in a number of ways.

For example, the New Parent and Infant Network[12] ("Newpin") is one preventative and therapeutic program that works intensively with parents and families facing potential or actual child removal. In the IIC's experience, this has been a very effective program. Previously, other organisations were able to make referrals to Newpin.

However, due to a change in funding arrangements, FACS is now the only referral agency. In the IIC's experience, FACS generally will not make a referral until children have already been removed. The IIC considers that this approach is counter-intuitive on a number of levels. Referrals should be made to therapeutic, early intervention programs before removal in order to prevent removal. Further, given the historical relationship of distrust between Aboriginal people and FACS, the effectiveness of this service is, in the IIC's view, significantly reduced by removing the ability of Aboriginal-community controlled organisations to make referrals.

4. Opportunities to improve outcomes

4.1. Better involvement of Aboriginal services in both Children's Court and Family Court proceedings

As noted above, there is a historical relationship of distrust between Aboriginal people and FACS, and its associated agencies. This will be difficult to resolve, and in the IIC's view, better outcomes for Aboriginal people will result if they are serviced by agencies outside of FACS. Funding Aboriginal services to operate as out-of-home-care providers may create divisive mistrust in Aboriginal communities.

In the IIC's view, there should be more Aboriginal-specific services available particularly at the early intervention stage, and more pathways to engagement with therapeutic services without the involvement of FACS. Aboriginal parents and families should be connected by FACS with Aboriginal-controlled organisations, or organisations that are partnered with Aboriginal-controlled organisations. Aboriginal parents should be supported by an intensive

[11] Table adapted from Rhys Price Robertson, Leah Bromfield and Alistar Lamont, 2014, 'International approaches to child protection. What can Australia Learn?', CFCA Paper No. 23, p.4 https://aifs.gov.au/cfca/sites/default/files/publication-documents/cfca-paper23.pdf, last accessed 15 May 2015)

[12] See http://www.newpin.org.au/

case management approach, and in order to avoid a repeating process, the focus of the services must be focused on trauma and healing.

The IIC notes that s 12 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) ("*Care Act*") provides:

> Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Minister, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under this Act that concern their children and young persons.

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

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

Facilitating the greater engagement by FACS with Aboriginal organisations does not necessitate that those organisations be brought under the out-of-home-care umbrella. There may be an advantage in having Aboriginal organisations independent of FACS in the process.

4.2. Family law pathways

The IIC considers that in appropriate matters, better outcomes could be secured for Aboriginal children and families if matters regarding contact were referred to the Family Courts at the early intervention stage (such as when parental responsibility contracts are being drawn up). In the IIC's experience, the differences in the enabling legislation and consequent approaches taken between the Children's Court and the Family Courts can lead to very different outcomes for Indigenous children and families, without compromising the safety of children.[13] The IIC's experience is that in proceedings in the Family Courts, there is less focus on the "wrongness" or culpability of the parents' position which allows more potential for meaningfully addressing risk and structuring appropriate contact.

For the reasons set out above in relation to better contact arrangements, the IIC suggests that it would assist if FACS was required, at the early intervention stage, to take reasonable steps to advise the kin and family of the child of their entitlement to take family law

[13] The Children's Court applies care and protection legislation, which provides for state intervention into family life when it is necessary for the safety, welfare and well-being of the child. The *Children and Young Persons (Care and Protection) Act 1998* is structured around State intervention being triggered by there being existing concerns about the child being at risk of significant harm (see sections 23,24,25,30) but the State only responding when it determines that it can make an impact on the future care and protection of the child (see sections 34, 71). The *Family Law Act 1975,* by contrast, provides a mechanism for families to have their own disputes resolved. Further, the *Family Law Act* expressly sets out in s 60B(2)(b) that a child has the right to contact, subject to the contact not being contrary to the child's best interest. However, there is no such strongly expressed right to contact in the care and protection jurisdiction.

proceedings. The IIC acknowledges that there are practicalities associated with FACS advising extended family and kin members of access to the family law jurisdiction which may need to be considered more closely. Given the relationship of distrust and fear that can exist between FACS and the Aboriginal community, the IIC suggests consideration will need to be given to processes to assist FACS to meaningfully provide this information. The IIC suggests that FACS would be assisted by developing relationships that would allow genuine engagement with Aboriginal organisations. These relationships would assist FACS with, among other things, identifying relevant family and kin members, particularly in regional areas.

If a Children's Court Magistrate has already made a decision about placing the child, the Magistrate could then make directions that contact be decided by family court pathways.

The IIC notes the view of the Chief Justice of the Family Court and the Chief Federal Magistrate (as he was then), that:

> In child protection proceedings where contact between parents arises as an incidental matter it is difficult to see an objection in principle to this being determined in a state child protection court. Once a child protection issue has been determined however, the state court's jurisdiction in what is otherwise a federal family law issue should cease.[14]

If parties can agree on contact arrangements, FACS does not need to be further involved unless the child is actually at risk. The IIC considers this arrangement to be useful particularly as children get older (and as parenting capacity may improve), family law pathways provide good potential for reviewing the continued appropriateness of arrangements. As noted previously, the IIC's view is that contact should be commensurate with risk. However, in its experience, due to its different perspective, the contact orders made in the Children's Court are likely to be minimal and only for the purposes of establishing identity. For this reason, Family Courts are more likely to make adequate contact arrangements.

The IIC suggests that, if the parties consent, the matter could be transferred to the Family Court for the making of contact orders.

B. Maranguka and justice reinvestment

The IIC notes the work currently being undertaken in Bourke to develop and implement a community-owned model of service coordination and realignment. The IIC brings this example to the attention of the Standing Committee for the purpose of noting that there is currently service coordination work underway that is community owned, and has the potential to reduce offending and create a safer community in what is currently a community with high social needs.

The IIC understands that Maranguka is an Aboriginal owned and run community organisation in Bourke, set up to be a best practice model. It does not seek to replace existing services or organisations, but rather to act as a hub for individuals and service providers. The IIC understands also that Maranguka facilitates assistance where required. The Maranguka proposal is founded on "overturning society's historical deficit-based approach that views Aboriginal people as 'the problem', rather than as people 'having a problem'."[15]

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[14] D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168,* 25 June 2010 as cited in Australian Law Reform Commission, *Family Violence –A National Response,* October 2010, ALRC Report 114, available online: http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114_WholeReport.pdf (accessed 10 July 2015). The report is referred to hereafter as "ALRC Family Violence Report").

[15] Graeme Gibson, "We are not just passing through" *Griffith Review,* Edition 44: Cultural Solutions

The IIC is advised that Maranguka was developed by the Bourke Aboriginal Community Working Party over a number of years, and is informed by extensive research, input and expertise from Australia, North America and New Zealand. It is focused on improving outcomes and creating better coordinated support for vulnerable families and children through the empowerment of the local Aboriginal community. The model builds on existing NSW Government policy initiatives, including the NSW Department of Premier and Cabinet Strategic Coordination Group in Bourke, and the OCHRE strategy of the NSW Department of Aboriginal Affairs.

The Maranguka Proposal involves establishing community-led, multi-disciplinary teams working in partnership with relevant government and non-government agencies and organisations to develop a new accountability framework for addressing Aboriginal disadvantage, and develop a fiscal framework that ensures the sustainability of programs and services. The priority areas of the Maranguka Proposal were set by the community, and are safe families, connected communities, youth and justice reinvestment and women's and men's action.

The IIC further understands that Maranguka is now working in partnership with Just Reinvest NSW on its justice reinvestment campaign, focusing on the prevention, early intervention and treatment for young Aboriginal people at risk of incarceration. The focus of the campaign is to develop a justice reinvestment framework for Bourke, including the implementation of the first key phase of that framework. From the Just Reinvest website:

> The *Maranguka/JR Team* formed in 2014 with the aim of convincing all tiers of government to shift policy and spending away from incarceration – and from services not effectively being utilised in the community – to be reinvested into programs which address the underlying causes of youth crime and meet community need.
>
> The *Maranguka/JR Project* will run for two years and evidence of the Project impact will be used to present a compelling, evidence-based case for State government to divert funds away from incarceration and into prevention, diversion and early intervention programs.

The IIC understands that the approach taken has been to determine needs and solutions through comprehensive community consultation, and to create community-owned frameworks of measuring and implementing outcomes (to the extent that this is possible).[16] Within the long-term vision of reducing offending and creating a safer community, the project has identified a number of "circuit breakers" that can be implemented in the shorter term that would address factors leading to incarceration such as bail, driver licensing and sentencing options in respect of young Aboriginal people.

The IIC notes that this project is currently being developed. However, the model is provided to the Standing Inquiry for further examination as, in the IIC's view, it has the potential to be a better practice model for more efficient service delivery where needs and services are better aligned through being community owned and evidence based. Such a model is likely to be consistent with the rights to self-determination; and to free, prior and informed consent.

Yours sincerely

John F Eac
President

[16] Detailed information about the project's milestones and methodology is available on the website: www.justreinvest.org.au