Submission
No 137

INQUIRY INTO CHILD PROTECTION

Organisation: The Shed, Western Sydney University

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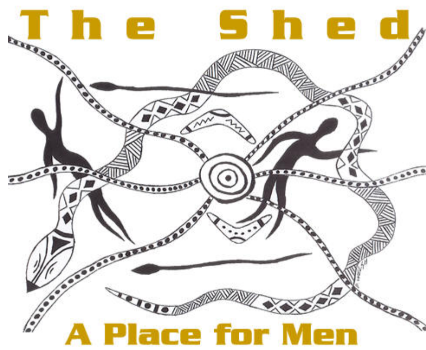

22 September 2016

The Director
General Purpose Standing Committee No. 2
By email: gpscno2@parliament.nsw.gov.au

Dear Director,

<u>Inquiry into child protection - submission of The Shed, Western Sydney University</u>

Thank you for the opportunity to make written submissions to this inquiry, and for the extension of time. We note that The Shed, Western Sydney University, together with the Law Society of NSW, facilitated Aboriginal community consultations on 8 September 2016. We note also that this is a written submission of The Shed following up on those consultations.

The Shed is a suicide prevention service targeted at Aboriginal men. However, the service is available to anyone, whether Aboriginal or non-Aboriginal, men or women. We aim to provide client-centred, wraparound therapeutic services. We provide warm referrals to 28 different services including legal, mental health, drug and alcohol, financial counselling, housing and probation and parole services. We also receive referrals from other services.

Based on our experience and coalface engagement with Aboriginal people, some of the more significant determinants of suicide include the following:

- Adverse contact with the justice system
- Mental health, particularly untreated trauma
- Unaddressed sexual abuse, particularly when this occurred when the person was a child
- Homelessness
- Substance abuse
- Family breakdown including child removal by care and protection services

In our experience, many of these factors negatively interact with each other and can create adverse feedback loops. Issues in respect of mental health, trauma, homelessness and so forth that are unaddressed can result in the removal of children. The removal of children can worsen those issues, and can itself be a significant factor leading to suicides.

At The Shed we have had five years' experience of working with the judiciary, lawyers and the Law Society of NSW in collaborative models of legal service delivery and community legal education in the Child Protection and family law jurisdictions. We have been able to assist to provide better outcomes for Aboriginal people in respect of care and protection matters by establishing pathways

of collaboration between the justice and health systems. In some of these cases, such better outcomes are achieved within the care and protection jurisdiction by, for example, better use of cultural contact plans. In other cases, better outcomes are achieved through diverting appropriate matters to the family law jurisdiction. We refer to the submission made by the Law Society of NSW, which provides details on the differences between the care and protection jurisdiction and the family law jurisdiction, and how Aboriginal families are in many cases better served by the family law jurisdiction. This is also our view.

In respect of the terms of reference of this inquiry, our view is that the Department of Family and Community Services (FACS) can and should play a stronger role in respect of engaging and assisting families at the early intervention stage, under a paradigm aimed at helping families, in a culturally effective way, to stay together.

In the event that child removal is unavoidable even after sustained and meaningful early intervention, FACS should be facilitating meaningful contact arrangements that go beyond merely maintaining identity. The contact arrangements reached should be actually in the best interests of the child, and not just what is considered best to keep a placement stable. In our view, placement stability is just one of a number of factors that should be considered. In this submission we provide further detail on what we believe to be the key aspects of the care and protection process that should be reconsidered.

1. Aboriginal self-determination must be a fundamental design principle for FACS programs and services

The trauma of past child removal and the distrust between Aboriginal people and institutions involved in child protection (including FACS, police and mandatory reporting services) continues to be a live issue. It continues to be a barrier to effective engagement between the State and Aboriginal people. In our experience, evidence from the past is not informing current child protection practices, a factor which likely plays a part in the increasing rates of child removal in Aboriginal communities.

The key way in which this issue can and should be recognised in the provision of services by FACS is to enshrine the principle of Aboriginal self-determination in the provision of services and engagement with Aboriginal families.

In our experience, Aboriginal people have a strong preference for Aboriginal-controlled services and will generally not access mainstream services, for reasons including cultural safety. If Aboriginal specific services are unavailable, in practice this usually means that Aboriginal people will not have access to those services. The legislation already accepts and recognises the principle of Aboriginal self-determination.

Section 11 of the *Children and Young Persons (Care and Protection) Act 1998* ("*Care Act*") provides for Aboriginal self-determination in care matters:

> (1) It is a principle to be applied in the administration of this Act that Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young persons with as much self-determination as is possible.
>
> (2) To assist in the implementation of the principle in subsection (1), the Minister may negotiate and agree with Aboriginal and Torres Strait Islander people to the implementation of programs and strategies that promote self-determination.

We note also that section 12 of the *Care Act* builds on the principle in section 11, stating that:

> 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.

As far as we are aware, sections 11 and 12 are still not utilised properly. We understand that there has not been any state-wide training programs made available for Aboriginal service providers, nor have any participation strategies been formulated in order to give life to these legislative provisions. In our experience, Aboriginal services are generally unaware of sections 11 and 12, and as a result, Aboriginal families are also unaware of these provisions.

A simple way to begin the process of animating these legislative provisions would be to embed child protection services into existing Aboriginal services and infrastructure, including in Local Aboriginal Land Councils and Aboriginal Medical Services. These organisations are generally well represented throughout NSW, and can function as the focal point for cultural programs to build resilience, centres for cultural contact and other health/justice partnerships.

This intensive training program and the ongoing inter agencies involve the judiciary committed to collaborative practice with Aboriginal service providers.

We would also strongly suggest that a distinction be made between FACS staff involved in the removal of children, and staff who provide services as caseworkers. In our view, there should be a prohibition on staff working in removals to continue working as caseworkers, as this merely engender further distrust between Aboriginal families and FACS, which is likely to limit any positive engagement.

2. Reassessing early intervention

In our experience, for myriad reasons, the FACS model of early intervention is not functioning well for Aboriginal families. In addition to the historical distrust discussed in the section above, there is a lack of awareness and education efforts in Aboriginal communities about how the care and protection system works. Further, legal advice and services, when they are available, are often made available too late in the process to address the issues that can lead to the removal of children. Funding is limited to serious matters only, which, in our view, is counterproductive as there are therefore little to no resources available to prevent the escalation of seriousness in other matters. We discuss two particular aspects of FACS early intervention practice which in our view should be reassessed

2.1. Parental responsibility contracts

Crucially, in our experience, FACS is not using tools that are currently available to it to manage early intervention in a structured and transparent way, such as parental responsibility contracts (PRCs).

Section 38A of the *Care Act* provides for PRCs, which are agreements between the Secretary and one or more of the child's primary care givers which "contains provisions aimed at improving the parenting skills of the primary care-givers and encouraging them to accept greater responsibility for the child or young person." PRCs can provide for such things as attendance at counselling, treatment for drug and alcohol or other substance abuse and drug testing requirements.

Among other things, section 38A (2) provides that PRCs must be:

(a) in writing, and
(b) signed by the Secretary and each primary care-giver or each expectant parent who is to be a party to the contract
(c) registered with the Children's Court, and
(d) specify the circumstances in which a breach of a term of the contract by a party to the contract will authorise the Secretary to file a contract breach notice with the Children's Court

Section 38A (4) provides that proposed parties to the PRC must be given a reasonable opportunity to obtain independent advice about the PRC before entering into the contract.

In our view, the legislation offers a transparent, accountable and predictable model for early intervention with families that provide safeguards to ensure that families understand what is expected of them in order to avoid the removal of their children.

However, we understand that PRCs are not commonly used by FACS, and that generally, FACS caseworkers rely instead on tools like safety plans. Safety plans are not accompanied by the safeguards that PRCs are, in that they are not required to be registered with the Children's Court, and there is no requirement to allow for the reasonable opportunity to obtain independent advice. In our experience, families under a safety plan are often unsure of the real parameters of the plan, and the circumstances that may be considered a "breach" and which in fact lead to the removal of children. Feedback that we have received in relation to how safety plans are used is consistently that FACS "shifts the goalposts" and that the reasons for concern listed in the safety plan often might not reflect reasons that FACS may have on file and have not disclosed.

While we understand that there are currently a small number of pilot projects aimed at increasing the use of PRCs by FACS caseworkers, we recommend that FACS carry out extensive education of its staff in order to ensure that FACS early intervention practice consistently reflects what is already provided for in legislation.

The use of PRCs should be extended and strengthened to create a significant tool of therapeutic jurisprudence in the NSW child protection system.

In our view, if PRCs are required for the protection of the children, there should be a process where parents are required to appear before a registrar or magistrate of the Children's Court in a conference. Present at such a conference should also be various therapeutic services they may be engaged with. At this conference, variations could be made to the PRC which may include:

- commitments by parents;
- commitments by FACS;
- commitments by other agencies; and
- notations by the judicial officer as to progress or otherwise.

This process should take place before proceedings for removal are commenced. During this process, it remains a possibility for parents to enter into alternative (temporary or otherwise) care arrangements with family under the *Family Law Act 1975,* or temporary care arrangements with FACS.

We note that families involved in these conferences should be offered legal assistance and representation in the conference process.

Finally, we call for PRC pilots for Aboriginal families, focussing particularly on areas in NSW where there are high Aboriginal populations.

2.2. Mandatory reporting and information sharing

Section 27 of the *Care Act* provides that people who work in the delivery of certain services to children must make a report if they have reasonable grounds to suspect that a child may be at risk of significant harm.

Chapter 16A of the *Care Act* aims to facilitate information sharing, collaboration and coordination of services between agencies that have responsibility for the safety, welfare and well-being of children.

Given the character of the mandatory reporting requirement, it is not surprising that only adverse information regarding risks to children is collected. It is also not surprising that FACS would adopt a risk adverse approach to considering this information. However, we query the quality of the information collected, which may then form the basis of further action by FACS.

We note that by judiciously weighing the information available under the information sharing provisions, it would be possible to obtain a a clearer picture of the particular family's circumstances and efforts to address the concerns raised by FACS. We understand that information provided by services that parents are engaged with may not always be taken into account. We submit that if parents are actively engaging with services, and those services provide information to support the contention that parents are taking positive steps to address situations of concern, there should be a process for considering and giving weight to positive information prior to formal court proceedings.

We are concerned also that while information flows towards FACS, it can be very difficult for services to receive information from FACS. By way of example, we heard from an Aboriginal service provider of the difficulties encountered in merely attempting to receive information about FACS policy on contact. We submit that there is nothing in Chapter 16A of the *Care Act* that would prevent reciprocal flows of information, and that FACS practice should be addressed to allow for this. This would allow service providers to better understand FACS concerns and to assist their clients to address these issues. It would also improve the efficiency of services, and assist service providers to manage their clients' expectations. For example, if service providers are aware that FACS are of the view that there is no realistic possibility of restoration, service providers can then direct their efforts towards assisting families to work towards better contact arrangements.

It should be noted that in making these submissions, we are guided by the principle that the safety, welfare and well-being of children is paramount. We are of the view (informed by principles set out in international instruments such as the Convention on the Rights of the Child and the UN Declaration on the Rights of Indigenous Peoples) that considerations such as ongoing connection to family and culture form part of the considerations in respect of the child's safety, welfare and well-being. It is accepted that cultural connection is essential for, and is the greatest source of, resilience for children (see for example the tip sheet provided by the Victorian Commission for Children and Young People on cultural safety for Aboriginal children: http://www.ccyp.vic.gov.au/downloads/tipsheets/tipsheet-cultural-safety-aboriginal-children.pdf).

3. Post removal of children: towards fostering families

There are a number of aspects of the process post-removal of children that in our view should be addressed in order to provide better outcomes for Aboriginal children and families. We note that our practice suggests that better outcomes can be achieved for Aboriginal families who have been

provided with pathways to the family law jurisdiction. The submission prepared by the Law Society of NSW details this practice and we endorse the comments made in that submission.

We also refer to and endorse the comments made in the Law Society submission in relation to the use of Aboriginal cultural contact plans, both in the care and protection jurisdiction, and in the family law jurisdiction.

In this submission, we focus our comments on some of the difficulties that arise in respect of placements, the realistic limits of foster care and a way forward.

3.1. Children's Court processes

There are characteristics of the Children's Court proceedings once instituted which make it difficult for Aboriginal families, such as timeframes, difficulty in accessing legal services and consequential difficulty in presenting evidence and opportunity to consider and address FACS evidence. Further, after orders are made, FACS in practice retains all the power and discretion in the matter.

In respect of the Children's Court process, we submit that there should be specific lists in the Children's Court for Aboriginal families. These matters should be heard by Magistrates who are culturally competent, and supported by Children's Court clinicians who are similarly competent. Further, these roles should be Aboriginal identified at first instance. We submit also that there should be further Aboriginal liaison roles with the court correspond with regions where there are the Aboriginal child protection agencies.

We consider that the kinds of orders the Children's Court is currently empowered to make are too limited. That orders need to be able to deal with what the issues are in a family. The Children's Court should be empowered to make more nuanced orders that are commensurate with the risk issues, while taking into account stability of placement.

We request the following further options be considered for appropriate matters:

- Orders providing for children to be in care from Monday to Friday from specific hours, and with parents on weekends or school holidays.
- Orders providing for children to be in care, or the care of a relative on the weekends
- Specific orders requiring parents or other family to be responsible for travel.
- Specific orders for cultural and other extracurricular activities; that is, that a parent can attend events.
- Time limited care orders for 2 years within a framework of other therapeutic orders.
- Capacity for Magistrates to accept proposed family law orders that deal with risk issues, and to allow for Children's Court proceedings to be suspended, pending the family law orders, and then dismissed upon the making of the family law orders.
- Capacity for Magistrates to propose and invite appropriate family members to join proceedings.
- Specific orders for the provision of school and medical reports are provided to parents.
- Specific orders for Aboriginal Children to have contact with their families on country.

3.2. Placements

While we acknowledge that stability of placements is important, we note also that there is an accompanying cost on children in keeping placements stable. In prioritising stability, contact with family is limited, and the consequences are often that children are alienated from parents, siblings and extended family. However, culture is a lived experience that can only meaningfully be fostered

through relationships with family and place; that is, with that child's specific family and language group. Without meaningful contact, the child is not able to properly access what should be a source of resilience. Scholarly research suggests that culturally appropriate indicators of a child's well-being should be developed for Aboriginal children. For example, research cited by the Australian Institute of Family Studies notes that "The use of concepts such as attachment and bonding to assess the wellbeing of Aboriginal and Torres Strait Islander children are inconsistent with Aboriginal and Torres Strait Islander values of relatedness and childrearing practices." (See "Cultural considerations in out-of-home care" online: https://aifs.gov.au/cfca/publications/cultural-considerations-out-home-care).

Further, in our experience, it is generally difficult for children to be raised well in foster care, and it can be particularly difficult for young people in care. Adolescence can bring identity crises, and search for family. In practice, court orders do not prevent children searching for family, such as through the use of social media. We understand that it is common for Aboriginal children to "run away" from foster care in search of family. In practice this is called "self placement" by children. It is common for FACS to acquiesce to older children self placing while younger children remain in care with limited and regimented contact(usual 6times a year) until such time as they self place. The outcome is children returning to parents with fractured relationships with limited parenting skills who have (often) not dealt with issues.

While the *Care Act* properly provides for the Aboriginal placement principle, in practice, this principle may not function as intended. For example, embattled parents may not nominate appropriate family members as carers. Appropriate carers may not step up for fear of assessment themselves, and fear of state care and protection mechanisms as discussed earlier in this submission. Appropriate carers may be excluded for irrelevant reasons because of how the working with children check system functions (we refer to the Law Society's submission for further detail on this issue). Carers may be motivated by money received for being foster carers rather than seeking parental responsibility (and therefore greater certainty in placement). In our view, the utility of even the Aboriginal placement principle is limited by the care and protection system itself.

4. A way forward

In our view, it will be difficult to reverse the trend of rising rates of Aboriginal children in the care and protection system unless we work towards a care and protection system that fosters families, not children.

First, as noted above, the effects of intergenerational trauma must be acknowledged, and must be fundamentally integrated into the design of programs and services, principally through empowering Aboriginal service providers. There should be specific Aboriginal intensive restoration programs. We have had extensive dealings with the NEWPIN program that also operates in the Mt Druitt region of western Sydney. We have seen extraordinary results for Aboriginal families in this program. We call for funding for Aboriginal community controlled organisations to allow these organisations to replicate this successful model, but embedded in a culturally safe and culturally connected environment.

Second, a therapeutic approach should be adopted in respect of the legal process. That is, the legal process should be embedded in a broader context of a therapeutic, rather than punitive, framework. Legal services should be provided as part of a broader suite of therapeutic services that address the particular needs of those parents and families, and the relationship between lawyers and clients can be rendered culturally appropriate and therefore effective if it is brokered by Aboriginal service providers. It is our strong view that legal service providers are not truly able to address the needs of

Aboriginal clients in this jurisdiction, who often have complex needs, without the support and guidance of Aboriginal service providers. Aboriginal service providers should be properly supported to carry out this role through further education and resourcing, and should be integrated into the care process.

Third, the care and protection of children should be embedded in the family law jurisdiction. The Law Society has made numerous submissions on this approach, including to this Inquiry. We refer also to the submission the Law Society made to the Family Law Council in respect of its reference on families with complex needs and the intersection of family law and child protection systems (available here:
https://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/1044586.pdf)

In this regard and in addition to the submissions already made in the Law Society submission, we submit that the work and approach of the Aboriginal Family Law Pathways Network (AFLPN) should be supported. The AFLPN provides education to Aboriginal communities about options available through the family law jurisdiction. Appropriate family members who are able to care for children at risk of harm and removal may proactively seek orders through the family law jurisdiction to care for children. Better outcomes are achieved for those children and their families, as those children can be safely placed within their own families. The AFLPN has run roadshows in locations throughout NSW, including in Redfern, Newcastle and Broken Hill, and has the support of a number of judicial officers of the Federal Circuit Court and the Law Society of NSW.

We submit also that FACS staff be provided with training and education about the options available through the family law jurisdiction, and to create pathways for diversion to that system where appropriate. In this regard, we commend the training that FACS has provided to its staff in respect of family finding techniques (more information available here:
https://www.facs.nsw.gov.au/about_us/news/family-trees-to-provide-home-for-kids-in-care). We suggest that once appropriate family members are found that they be supported in every way to provide permanent homes for children, including through the family law system.

In addition to training of FACS staff, we call for an immediate intensive state-wide training program for Aboriginal community organisations on child protection. The legislation recognises that there is a role for Aboriginal services to play in reducing the number of Aboriginal children at risk and going into care, as set out in sections 11 and 12 of the *Care Act*. Further, regional Aboriginal interagencies should be funded to provide ongoing support in a similar way as is set up for the AFLPN federally. Aboriginal community controlled organisations should auspice these networks and manage them.

Thank you once again for the opportunity to provide written submissions. Please do not hesitate to contact me if I can provide further information on any of the above.

Yours sincerely,

Rick Welsh, Coordinator
The Shed, Western Sydney University