



ALS

Aboriginal Legal Service (NSW/ACT) Limited

1 June 2018

Committee Secretary
House of Representatives Standing Committee on Social Policy and Legal Affairs
PO Box 6021
Parliament House
Canberra ACT 2600

By Email: spla.reps@aph.gov.au

Dear Committee Secretary,

House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into local adoption

I write to you on behalf of the Aboriginal Legal Service (NSW/ACT) Limited (**ALS**). The ALS thanks the House of Representatives Standing Committee on Social Policy and Legal Affairs (**Committee**) for the opportunity to provide a submission in relation to its Inquiry into Local Adoption (**Inquiry**) and in particular on approaches to a nationally consistent framework for local adoption in Australia, with specific reference to:

1. stability and permanency for children in out-of-home care with local adoption as a viable option; and
2. appropriate guiding principles for a national framework or code for local adoptions within Australia.

The ALS is the peak legal services provider to Aboriginal and Torres Strait Islander men, women and children in NSW and the ACT.

The vast majority of the work carried out by the ALS is in the criminal justice system. In addition, the ALS performs significant work in the areas of care and protection and family law, despite considerable resourcing and operational constraints. It is a sad reality that many of our broader clients have complex family and children's legal issues.

We make this submission from an Aboriginal justice and advocacy perspective on the basis of our direct involvement with and representation of clients who are caught up in the legal system, the majority of whom inevitably have related family or children's issues. We note that this submission is made in relation to NSW/ACT only.

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The ALS broadly endorses the submissions of AbSec (Aboriginal Child, Family and Community Care State Secretariat), Grandmothers Against Removals and SNAICC - National Voice for our Children which have already been received by the Committee.

The ALS is of the view that traditional adoption that severs the connection for children to their families and communities of origin is not an appropriate care option for Aboriginal children.

We strongly encourage Government at all levels to heed the recommendations of the *Family Matters Report 2017: Measuring trends to turn the tide on the over-representation of Aboriginal and Torres Strait Islander Children in Out of Home Care in Australia* and the SNAICC - National Voice for our Children *Achieving stability for Aboriginal and Torres Strait Islander children in out-of-home care Policy Position Statement 2016*, and to support and partner with Aboriginal communities and Aboriginal organisations to keep Aboriginal children in their culture and with their families, so that yet another generation of Aboriginal children is not deprived of their culture and connection to country.

We look forward to working with you and thank you for the opportunity to contribute to this review. If you have any questions regarding this submission, please contact our Senior Law Reform and Policy Officer Julia Grix via julia.grix@alsnswact.org.au or 02 9213 4117.

Yours sincerely,



Lesley Turner
Chief Executive Officer
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Response to Terms of Reference

Background

The vast majority of the work carried out by the ALS is in the criminal justice system. However, it is a sad reality that many of our broader clients have complex family and children's legal issues.

In addition to our work in the criminal justice system, the ALS performs significant work in the areas of care and protection and family law with a small dedicated team, despite considerable resourcing and operational constraints. There is clearly an identified need to increase these services and the ALS is committed to enhancing our service delivery to Aboriginal communities in NSW and the ACT.

Data on key indicators of socio-economic disadvantage in Australia clearly demonstrate that Aboriginal people experience much higher rates of disadvantage than the population at large, a reality 'strongly intertwined with the historical legacy of colonialism, including forced child removals and discrimination.'¹

Aboriginal people experience high levels of poverty, with almost 40% of the Aboriginal and Torres Strait Islander population in Australia living in the most disadvantaged geographical regions of our country.²

The recent *Pathways to Justice – Inquiry into the Incarceration rate of Aboriginal and Torres Strait Islander Peoples* report shows that the over-representation of Aboriginal people imprisoned is "both a persistent and growing problem" with Aboriginal people now comprising 27% of Australia's adult prison population, despite being only 2.4% of Australia's total population.³

The Redfern Alliance Statement⁴ notes pointedly that when the *Bringing Them Home* report⁵ into the Stolen Generations was released in 1997, Aboriginal and Torres Strait Islander children

¹ *Family Matters Report 2017: Measuring trends to turn the tide on the over-representation of Aboriginal and Torres Strait Islander Children in Out of Home Care in Australia*, p 11 available at <http://www.familymatters.org.au/wp-content/uploads/2017/11/Family-Matters-Report-2017.pdf> accessed 30 May 2018.

² Op cit 1 pp 8, 37.

³ Australian Law Reform Commission, ALRC report 133, *Pathways to Justice – Inquiry into the Incarceration rate of Aboriginal and Torres Strait Islander Peoples* Available at https://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_133_amended1.pdf accessed 30 May 2018

The Executive Summary states that in 2016:

- around 20 in every 1,000 Aboriginal and Torres Strait Islander people were being jailed;
- Aboriginal men are 14.7 times more likely to be jailed than non-Aboriginal men;
- Aboriginal women are 21.2 times more likely to be imprisoned than non-Aboriginal women;
- Total costs of Aboriginal incarceration in 2016 were \$3.9 billion, with associated costs increasing it to \$7.9 billion.

⁴ A statement published in 2016 by a coalition of Aboriginal and non-government organisations available at <https://nationalcongress.com.au/wp-content/uploads/2017/02/The-Redfern-Statement-9-June-Final.pdf>

⁵ National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (Australia), Ronald Darling Wilson, and Australia Human Rights and Equal Opportunity Commission. *Bringing Them Home: Report of the National Inquiry Into the Separation of Aboriginal and Torres Strait Islander Children From Their Families* available at https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf nder Children From Their Families. Sydney: Human Rights and Equal Opportunity Commission, 1997.

represented one in every five children living in out-of-home care. In 2016, this figure had risen to be one in every three children.

Notwithstanding numerous legal and policy frameworks protecting the rights of Aboriginal and Torres Strait Islander children, the rate of Aboriginal and Torres Strait Islander children in out-of-home care is almost ten times that of other children, and continues to grow. The rate of overrepresentation had escalated by 65 per cent since the 2008 Apology, with Aboriginal and Torres Strait Islander children then representing over 35 per cent of all children in out-of-home care in Australia. The Redfern Statement attributed this reality to the widely recognised failure of culturally appropriate early intervention and child protection systems to embrace evidence-based holistic strategies, attuned to the needs of our families.⁶

Disturbingly, Aboriginal women now represent 34% of Australia's female prison population, and is the fastest growing prison cohort nationally. The vast majority of these Aboriginal women are mothers or primary caregivers of children. This links in with a spiralling and alarming overrepresentation of Aboriginal and Torres Strait Islander children in out of home care.⁷

These worrying statistics tell us that too many Aboriginal families are in crisis, with many children unable to remain with their parents and who have been removed to out-of-home care or foster care.

For Aboriginal families, harm to children often has inter-generational causes, linked to the breakdown of culture and community connectedness and identity. Prevention of harm therefore must seek to intervene in inter-generational cycles of harm by healing, strengthening and reconnecting families and communities.⁸

The importance of connection to family, culture and community

Strong connection to family, culture and community are central to the safety, welfare and well-being of Aboriginal young people.⁹ We echo the concerns of Absec following recent public comments regarding the intention to increase adoption of Aboriginal children and young people from out-of-home care by non-Indigenous families.¹⁰ The *Bringing Them Home* report highlighted that the legacy of past policies of forced removal and cultural assimilation and the ongoing intergenerational transmission of trauma as a result of such practices materially contributes to the overrepresentation of Aboriginal children in the child protection and out of home care systems.¹¹ Such trauma has been shown to result in higher incidences of alcohol and illicit drug abuse, mental health problems and family violence, issues which invariably impact

⁶ Ibid.

⁷ Op cit, pp161-163.

⁸ Ibid.

⁹ We note that Article 30 of the International Convention on the Rights of the Child (ICRC) (to which Australia is a signatory) states that "...a child belonging ... 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. "

⁹ Op cit 5.

¹⁰ See joint statement by AbSec (Aboriginal Child, Family and Community Care State Secretariat) and ACWA (the Association of Children's Welfare Agencies) dated 21 May 2018 available at <http://www.acwa.asn.au/3124> accessed 30 May 2018. Please note nothing in this submission should be construed as the ALS supporting placements with family or otherwise within the Aboriginal community where there is an appreciable risk of harm to a child or children.

¹¹ Op cit 5.

upon the safety of children. Research demonstrates the adverse impact the stolen generations has had upon the functioning of its survivors and their extended family networks throughout several generations. Stolen generations survivors and their families “have significantly poorer physical health and over double the rates of mental illness and alcohol abuse compared to that suffered by those Aboriginal and Torres Strait Islander people who were not removed. They have also, on average, received a poorer education and are more likely to be unemployed.”¹²

It is the experience of the ALS that direct and intergenerational trauma not only manifests in issues that lead to Aboriginal families coming to the attention of the child protection system (for example an individual’s experience of trauma resulting in substance abuse, poor mental health, homelessness) but that the Aboriginal communities’ collective experience of intergenerational trauma as a result of historical child removal policies directly impacts upon their capacity to engage with the Department of Family and Community Services (**FACS**). Aside from the substantive child protection risks that may exist in any particular case, the poor relationship between Aboriginal people and the FACS inhibits opportunities for collaborative casework, which could potentially reduce risk and stem the tide of removals. It is our service’s observation that the poor relationship between Aboriginal people and the FACS is a combination of both fear and mistrust from the Aboriginal community due to historical child removal policies, and the failure of casework staff to exercise empathy for/sensitivity to, the lived experiences of Aboriginal families who within their extended family networks often have firsthand experience of the stolen generations and continue to ‘live’ the trauma associated with the stolen generations.

Child protection system in NSW

It is the view of the ALS that the NSW child protection system has failed to invest adequate resources in early intervention services, resulting in significant missed opportunities to intervene in the lives of families before risk escalates and issues become entrenched. Further, it is the observation of the ALS that the current legislative framework in NSW does not go far enough to require that meaningful and sustained efforts be made to work with Aboriginal families to preserve children within their family unit.

The NSW system has historically failed to adequately empower and resource Aboriginal community-controlled organisations to be working with families in an early intervention context, and for those services to then have ongoing meaningful input into risk assessment and decision-making in conjunction with the FACS. It is our services’ observation that when the Aboriginal community provides family support services, in a culturally safe and appropriate way, there is greater engagement by families and better outcomes for children.

Our children’s court litigation practice comprises numerous cases where reports about children at risk have been received by FACS over several years, but no support or services were provided by way of response to address any identified concerns. As a consequence, risk often escalates over time to the point where children are removed from their families. Such outcomes beg the question, had the right support been provided at the right time would such an outcome have

¹² Australian Bureau of Statistics (ABS). (2011). “4704.0 – The Health and Welfare of Australia’s Aboriginal and Torres Strait Islander Peoples, Oct 2010.” Retrieved 25 August 2016, from <http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter470Oct+2010> – as cited in The Healing Foundation’s Report, *Bringing Them Home 20 years on: An Action Plan for Healing*, p 20

been inevitable? What data is available on investment in early intervention affirms these anecdotal observations. Nationally in 2016 and 2016 only 17% in overall expenditure in child protection funding was invested in support services for children and their families, with the vast majority of funds (83%) spent on investigation, court orders and out of home care.¹³ It is also difficult to ascertain what proportion of early intervention funding is allocated to Aboriginal children and ‘whether Aboriginal and Torres Strait Islander children receive an equitable share of resources relative to needs’ as the available data does not show expenditure by Indigenous status.¹⁴

Aboriginal and Torres Strait Islander Placement Principles

Aboriginal and Torres Strait Islander children have a right to be brought up within their own family and community.¹⁵

The five core elements of the Aboriginal and Torres Strait Islander Placement Principles are Prevention, Partnership, Placement, Participation and Connection. The ALS acknowledges and affirms the importance of each of these five interrelated elements to upholding the inherent rights of Aboriginal children and as foundational to addressing the overrepresentation of Aboriginal children within the child protection and out of home care system.

Rather than a renewed focus on adoption, the ALS calls for a strong commitment on the part of Government to resource allocation and the capacity building of Aboriginal community-controlled organisations targeted toward family preservation and early intervention services which address vulnerabilities before there is an escalation of risk requiring the removal of children.¹⁶ It requires a re-engineering of the child protection system towards early intervention, an appreciation of removal as a last resort and a strong focus upon restoration and reunification wherever a removal is effected.¹⁷

The ALS also considers that an absence of cultural competence among child protection casework staff and an associated reticence to consult broadly with extended family networks and the Aboriginal community means that opportunities for the placement of Aboriginal and Torres Strait Islander children within extended family networks or the Aboriginal community at large are missed.

¹³ Op cit 1, page 51

¹⁴ Ibid. However, the ALS acknowledges and supports the recent Department of Family and Community Services commitment to redirect 30% of targeted early intervention funding to Aboriginal children and families and to ensure it is delivered by Aboriginal community controlled organisations. Furthermore we support the recent in principle commitment to refocus child protection casework practice on intervening early to keep families together under the *Permanency Support Program*. We continue to call for greater resource allocation to early intervention services as a proportion of overall child protection expenditure.

¹⁵ Article 9 of the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) recognises that “Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned”.

Article 11 of UNDRIP states that “Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures...”.

¹⁶ *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and care Elements*, SNAICC, June 2013

¹⁷ Ibid.

Anecdotally it is not uncommon for Aboriginal children to be placed in short term non-Aboriginal foster care placements following removal and no evidence is proffered by FACS during the court process as to their having consulted with the Aboriginal community regarding the placement. This is especially problematic for very young children who are placed with carers who then volunteer to retain care of the child. If court proceedings are drawn out and a family placement not readily identified it is not uncommon to see care plans proposing that the child remain placed with the nominated non- Aboriginal carer on the basis of having formed an attachment over time. Such care plans may make an in principle commitment or intention to continue to work to secure a culturally appropriate placement, or to assess any family that may in time present, which is ultimately not acted upon.

It is the view of the ALS that the placement principles as presently drafted are insufficiently robust to ensure that wherever possible Aboriginal children remain placed within the Aboriginal community. In practice, what might be broadly termed the “best interests” qualification to the operation of the placement principles culminates in legal arguments around the implementation of the principles that reveals a degree of cultural bias when it comes to the construction of a child’s safety, welfare and wellbeing.

Conclusion

We strongly advocate Government at all levels to partner with Aboriginal people and Aboriginal community-controlled organisations in order to lead efforts to address and overcome the circumstances that lead to large numbers of Aboriginal children being removed from their children, rather than facilitating local adoption of Aboriginal children.

Where adoption is a potential outcome in a situation, or where a national adoption framework is to be considered, we strongly urge the Committee to consider and adopt the following recommendations and Principles for Stability and Permanency Planning from the *SNAICC - National Voice for our Children report Achieving stability for Aboriginal and Torres Strait Islander children in out-of-home care Policy Position Statement 2016* report:

1. Aboriginal and Torres Strait Islander children have rights of identity that can only be enjoyed in connection with their kin, communities and cultures. In accordance with the *Aboriginal and Torres Strait Islander Child Placement Principles*, their rights to stay connected with family and community must be upheld and the child, their families and communities enabled to participate in decision-making regarding their care and protection. There must be consistent and comprehensive consideration of the hierarchy of placement options, culturally appropriate kinship carer identification and assessment, and regular review to give priority for placement with a child’s family and community before considering permanent care.

2. Permanent care for Aboriginal and Torres Strait Islander children should only be considered where the family has been provided with culturally appropriate and ongoing intensive and targeted family support services, and there has been an appropriate independent assessment that there is no future possibility of safe family reunification.

3. Traditional adoption that severs the connection for children to their families and communities of origin is never an appropriate care option for Aboriginal and Torres Strait Islander children, except as it relates to traditional Torres Strait Islander adoption practices.

4. Decisions to place an Aboriginal and/or Torres Strait Islander child in permanent care should only be made with the appropriate and timely review of the child's individual circumstances, and with informed support for the decision from an appropriate Aboriginal and Torres Strait Islander community-controlled agency.

5. Aboriginal and Torres Strait Islander communities and organisations must be resourced and supported to establish and manage high-quality care and protection-related services, and to make decisions regarding the care and protection of children and young people in their own communities.

6. Permanency should never be used as a cost saving measure in lieu of providing Aboriginal and Torres Strait Islander families and communities with adequate and appropriate support. The burden of care held by Aboriginal and Torres Strait Islander families and communities should be adequately resourced, whether placements are temporary or permanent.

7. Aboriginal and Torres Strait Islander communities and their organisations must lead the development of legislation and policy for permanent care of their children based on an understanding of their unique kinship systems and culturally-informed theories of attachment and stability.

8. Where Aboriginal and Torres Strait Islander children are on long-term/permanent orders, genuine cultural support plans must be developed and maintained (including with regular review) on an ongoing basis.

We endorse the comments of the Grandmothers Against Removals that Aboriginal people first and foremost need to be empowered to look after their families and communities this through *“adequate resourcing and a whole of government approach to investing in their capacities and healing their wounds. Stability and permanency planning for First Nations children means supporting families to stay together, not pulling them apart”*.