



ALS

Aboriginal Legal Service (NSW/ACT) Limited

15th January 2021

Mr Mason Cox MLC
Chair, Committee on Children and Young People
Parliament House, Macquarie Street Sydney NSW 2000

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

Dear Chair,

I write to you on behalf of the Aboriginal Legal Service (NSW/ACT) Limited ('ALS') and thank you for the opportunity to provide a submission to the NSW Parliamentary Committee on Children and Young People's Inquiry into the children protection and social services system.

The ALS is a proud Aboriginal Community Controlled Organisation and the peak legal services provider to Aboriginal and Torres Strait Islander men, women and children in NSW and the ACT. The ALS currently undertakes legal work in children's care and protection law, family law and criminal law. We have 24 offices across NSW and the ACT, and we assist Aboriginal and Torres Strait Islander people through representation in court, advice and information, as well as providing broader support programs and undertaking policy and law reform work.

The ALS would welcome the opportunity to discuss this submission further. Please contact me at gemma.slack-smith@alsnswact.org.au to arrange a meeting.

Yours faithfully,

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**Submission to NSW Parliamentary Committee on Children
and Young People's Inquiry into the child protection and
social services system**

15 January 2021

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About Us

The Aboriginal Legal Service (NSW/ACT) Limited ('ALS') is a proud Aboriginal Community Controlled Organisation and the peak legal services provider to Aboriginal and Torres Strait Islander women, men and children in NSW and the ACT.

The ALS currently undertakes legal work in children's care and protection law, family law and criminal law. Our care and protection law practice assists Aboriginal parents and extended family members to have their children restored to them where possible following removal by the Department of Communities and Justice ('DCJ') (the NSW child protection government authority), or to otherwise have them placed in a safe and culturally appropriate placement. We also have an extensive child representation practice, where we represent Aboriginal children and young people who are the subject of care and protection proceedings. We have 24 offices across NSW and the ACT, and we assist Aboriginal and Torres Strait Islander people through representation in court, advice and information, as well as providing broader support programs and undertaking policy and law reform work.

We provide this submission based on our representation of Aboriginal and Torres Strait Islander children and parents who are in contact with DCJ.

Summary of recommendations:

- 1. Urgent implementation of all the Family is Culture review's recommendations in partnership with Aboriginal community representatives and organisations, giving prioritisation to key legislative amendments to strengthen safeguards for Aboriginal children and families.*
- 2. Development, trial and public reporting by DCJ on a 'triage' system for prenatal reporting that ensures that parents of the most frequently reported unborn babies are given priority access to early casework support and early intervention services.*
- 3. Targeted support services for adolescents exiting care, accessed via the single-entry point of DCJ casework with information sharing triggers to ensure young people approaching 'aging out' of care receive wrap-around assistance.*
- 4. Specific funding and resourcing of Aboriginal Community Controlled Organisations ('ACCOs') to develop and lead programs aimed at supporting Aboriginal and Torres Strait Islander young people approaching 'aging out' from out-of-home care.*
- 5. Whole-of-government policy involving collaboration and information sharing protocols and triggers between health, education, policy, justice and social services sectors to provide holistic and integrated assistance to children and families from their first contact with the Department of Communities and Justice*
- 6. Joining up of free or low-cost legal services with culturally safe supports across the health, education, policy, justice and social services sectors to link children, parents and other family members to supports, from a family's first contact with the Department of Communities and Justice.*
- 7. Establishment of a national Aboriginal and Torres Strait Islander Child Protection Notification and Referral System, similar to the Custody Notification System in existence for Aboriginal and Torres Strait Islanders who are arrested or have contact with police, to refer Aboriginal families in contact with the child protection system to culturally appropriate supports and services, including independent legal advice trusted by Aboriginal communities, at the earliest possible opportunity.*
- 8. Whole-of-government commitment to a sustained increase in funding and resourcing for Aboriginal Community-Controlled Organisations to deliver support services encompassing each of the sectors of health, education, policy, justice and social services focused upon self-determination, empowerment and cultural healing for Aboriginal communities and families.*
- 9. The Children and Young Persons (Care and Protection) Act 1998 (NSW) be amended to incorporate a legislative mandate of 'active efforts' to provide remedial services and*

rehabilitative programs designed to prevent the breakup of an Aboriginal family, as soon as a family becomes known to the Department of Communities and Justice.

- 10. The Children and Young Persons (Care and Protection) Act 1998 (NSW) be amended to link funding for the Department of Communities and Justice to the legislative obligation to provided 'active efforts' to incentivise early intervention service provision for families in contact with the Department.***
- 11. Independent review of DCJ's structured decision-making tools for assessment of families and reform of safety and risk assessments and home visits in partnership with Aboriginal community and stakeholders to improve the cultural responsiveness of such decision-making measures.***
- 12. Commencement and regular refresher training for all Department of Communities and Justice staff (delivered by Aboriginal educators) regarding the culturally safe performance of safety and risk assessments with Aboriginal families and children.***
- 13. Targeted, specific funding and resourcing of prevention and early intervention services, tailored to the needs of Aboriginal families, to be available over all of NSW.***

1 – Introduction

More than twenty years ago, the landmark *Bringing Them Home* Report (1997) highlighted the forced removal of Aboriginal children from their families. And yet since that time Aboriginal and Torres Strait Islander children have continued to be overrepresented in Out-Of-Home-Care systems across the country. The over-representation of Aboriginal children in Australia’s out-of-home care systems is a national crisis. The Family Matters Report 2020 found that Aboriginal and Torres Strait Islander children are 9.7 times more likely to be living away from their families than non-Aboriginal children. Aboriginal and Torres Strait Islander children currently make up 37% (20,077) of children removed from their parents into out-of-home care, whilst making up only 6% of the total children in Australia. A continuation of current removal practices is projected to double the number of Aboriginal and Torres Strait Islander children in out-of-home care by 2029.¹

The forced removal of Aboriginal children from their families is rooted in past and present institutional discrimination and the legacy of colonisation and dispossession. The ongoing impacts of intergenerational trauma mean that Aboriginal people are more likely to experience one or more risk factors associated with contact with the child welfare system - such as mental health issues, underemployment or inability to access gainful educational and employment opportunities, homelessness, drug and alcohol misuse, or family violence.² It has also been observed that Aboriginal people who are members of the Stolen Generations, and their family members, have experienced worse outcomes in areas such as health, justice, income, employment and housing compared to other Aboriginal people.³ These ongoing impacts mean that many Aboriginal and Torres Strait Islander people across NSW and Australia, harbour a deep mistrust towards the colonialist and paternalistic practices of state child welfare authorities.⁴

Since the *Bringing Them Home* Report, there have been numerous other inquiries, reports and recommendations, including the recent *Family Is Culture* report, which have focused on ending the over-representation of Aboriginal Children and Young People in the out-of-home-care system and outlined blueprints for reform. Yet these reports continue to sit on the shelf gathering dust, and many of the recommendations remain unimplemented both in NSW, and other states and territories.

Aboriginal people continue to offer up solutions, but they continue to be ignored. And organisations like ours continue to offer our expertise, but it means our services have to deliver more with fewer resources. We know that our children thrive when they are connected with culture, identity and community. And yet whilst governments fail to act, Aboriginal children from their families, communities and culture at vastly disproportionate rates. This is not a choice we need to keep making. We’re not lacking in solutions to address these issues; but we have been lacking the political will.

¹ *Family Matters Data Snapshot 2020* (16 November 2020).

² *Family Matters Report 2020* (Report, 16 November 2020) 78.

³ Productivity Commission, *Overcoming Indigenous Disadvantage – Key Indicators 2020* (Report, December 2020) 4.114.

⁴ *Family Matters Report 2020* (Report, 16 November 2020) 77.

The ALS acknowledges that there are inevitably some matters which will justify the removal of children independently of services provided to the family. This submission however is focused upon the shortcomings in general policy, legislation and DCJ practice which have led to an overrepresentation of Aboriginal and Torres Strait Islander children in out-of-home care. It centres upon an argument that greater investment in service provision as a preventative measure and a focus upon family preservation, at a whole-of-government level, can be used to effect fundamental change for Aboriginal and Torres Strait Islander families and communities, and ultimately result in the reduction of the numbers of Aboriginal and Torres Strait Islander children entering the out-of-home care system.

Aboriginal children deserve to be able to grow up connected to their family and culture. They demand reform in our laws and policies to abandon colonial legacies and place empowerment and self-determination of Aboriginal people and voices at the forefront of a child protection system focused on healing.

Based on our experience and expertise, this submission is focused on responding to the following terms of reference:⁵

1. *How vulnerable children and families are identified and how the current system interacts with them including any potential improvements, particularly at important transition points in their lives;*
2. *The respective roles, responsibilities, including points of intersection, of health, education, police, justice and social services in the current system and the optimum evidence-based prevention and early intervention responses that the current system should provide to improve life outcomes;*
3. *The adequacy of current interventions and responses for vulnerable children and families and their effectiveness in supporting families and avoiding children entering out of home care;*
4. *The child protection intake, assessment, referral and case management system including any changes necessary to ensure that all children assessed as being at risk of significant harm receive a proactive and timely in-person response from child protection staff;*
5. *The availability of early intervention services across NSW including the effectiveness of pilot programs commissioned under Their Futures Matter program;*
6. *The adequacy of funding for prevention and early intervention services;*
7. *Any recent reviews and inquiries*

2 – Urgently implement the *Family Is Culture* Report’s recommendations

The ALS acknowledges and strongly endorses the 125 recommendations made in the *Family Is Culture* Final Report. The independent review, led by Aboriginal woman Professor Megan Davis, examined the individual circumstances of more than 1,000 Aboriginal children and young people in

⁵ For full list of terms of reference, see [Appendix A](#).

NSW who were removed from their parents in 2015-2016.⁶ The ALS is committed to honouring the experiences of the children whose stories were told throughout the *Family is Culture* review process, and continues to call for urgent implementation of the review's recommendations in partnership with Aboriginal communities.

The *Family is Culture* review dispelled the common notion that the number of Aboriginal children entering care in NSW, as signified by the rate of removals, is markedly reducing. Instead, the review emphasised that whilst the total number of Aboriginal children entering care reached a peak in 2014-15, since this time the proportion of Aboriginal children entering care has actually increased.⁷ In 2017-18, 37.9% of all children entering care in NSW were Aboriginal children - the highest proportion since 2011-12.⁸

In addition, one of the key concepts articulated throughout the *Family Is Culture* report was the idea of intergenerational trauma. As noted above, the ongoing impacts of colonisation, land dispossession and family separation mean that Aboriginal people are more likely to be impacted by issues relating to substance abuse, homelessness, mental health issues and domestic and family violence. These are all tangible risk factors associated with child removal and entry into out-of-home care, however for Aboriginal communities these issues are most often rooted in intergenerational trauma and manifest in the continuing overrepresentation of Aboriginal children in out-of-home care.⁹

We strongly endorse the recommendation made by the Family is Culture Review, that reform and policy efforts must recognise the ongoing intergenerational trauma experienced by Aboriginal families; and that caseworkers must recognise that Aboriginal families involved in the child protection system are affected by intergenerational trauma in their parenting capacities, and that these families may then have experienced trauma-affected parenting in previous generations.¹⁰ In terms of child protection casework practice and service provision, the Review emphasised that casework must take into account the experience of intergenerational trauma. This involves culturally informed and culturally safe thinking i.e. recognising that the 'neglect' that caseworkers observe should not be a reason to remove the child, but something to address using service provision which promotes cultural healing as this may in fact stem from intergenerational trauma.¹¹ The Review

⁶ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) ii.

⁷ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 42.

⁸ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 42.

⁹ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 21.

¹⁰ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 21.

¹¹ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 23.

agreed with principles articulated for trauma-informed care by Aboriginal scholar Judy Atkinson, which emphasise the importance of:¹²

- Creating environments where children feel physically and emotionally safe;
- Employing culturally competent staff and adopting practices that acknowledge and demonstrate respect for specific cultural backgrounds;
- Supporting victims or survivors of trauma to regain a sense of control over their daily lives and actively involving them in the healing power to share power and governance, including involving community members in the design and evaluation of programs;
- Integrating and coordinating care to meet children’s needs holistically; and
- Supporting safe relationship building as a means of promoting healing and recovery.

Interlinked with the Review’s priority of addressing intergenerational trauma through culturally safe service provision, the Review highlighted the necessity of reform of current bureaucratic and ritualistic child protection practices. The review defined ritualism as ‘acceptance of institutionalised means for securing regulatory goals while losing all focus on achieving the goals or outcomes themselves’.¹³ Relevantly, the Review highlighted the ritualistic approach of child protection caseworkers, in going through the motions of casework, including safety assessments and risk assessments, whilst losing focus of the family preservation goals of child protection.¹⁴ It is the experience of Aboriginal communities that the child protection system prioritises increasing the number of removals, rather than avoiding removal by supporting families with services, in turn exacerbating the trauma experienced by Aboriginal clients.¹⁵

In our view, the recommendations made in the *Family Is Culture* report lay out a clear blueprint for reform of the NSW child protection system – with a focus on self-determination, transparency and early intervention. To date, the ALS has been disappointed by the extent of the Government’s response to the report. In particular, we are deeply concerned to observe that a focused review of the *Children and Young Persons (Care and Protection) Act 1998* is not slated to commence until 2024.¹⁶ Aboriginal children deserve action now, not handballing off to a future Parliament. While the government waits, thousands of Aboriginal children and young people will be adversely affected by known shortcomings in the legislative framework that are contrary to the basic principle that children are safest when supported to remain with family and connected to culture.

It is also disappointing and concerning to see that the NSW Government’s Response to the *Family is Culture* Review does not seek to directly encourage or mandate early intervention service provision for Aboriginal families who are in contact with the child protection systems. Instead, the current

¹² Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 24 quoting Judy Atkinson, ‘Trauma-informed services and trauma-specific care for Indigenous Australian children’, Resource Sheet No 21 produced for the Closing the Gap Clearinghouse (July 2013) 1.

¹³ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 25.

¹⁴ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 25.

¹⁵ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 23.

¹⁶ NSW Government Response to *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (10 July 2019) 5.

commitments by the NSW Government for service provision to Aboriginal families extend only so far as policy changes unaccompanied by legislative reform, such as:¹⁷

- *Establishing an Aboriginal Quality Assurance Process to track and monitor implementation of the 3026 individual recommendations in relation to the case file reviews of 1144 Aboriginal children and young people who entered care in 2015-16*
- *Continuing implementation of the Aboriginal Case Management Policy to provide guidance for caseworkers on using Aboriginal community-controlled, Aboriginal family-led decision-making and working with Aboriginal advocates and facilitators*
- *Redesigning the Caseworker Development Program within DCJ including a focus on working with Aboriginal families which is being developed in partnership with AbSec.*

In our view, many of the shortcomings that we observe every day in our work are fundamentally connected to and derived from a legislative scheme which fails to prioritise family preservation and the linking up of families with necessary services at the earliest possible point. Unless the *Care Act* is reformed to mandate service provision for prevention and early intervention as a key component of the NSW child welfare system, we will continue to see poor outcomes for our children and communities.

Recommendation:

- *The NSW Government should urgently implement all the Family is Culture review's recommendations in partnership with Aboriginal community representatives and organisations, giving prioritisation to key legislative amendments to strengthen safeguards for our children and families.*

3 – Targeted wraparound support for Aboriginal children, young people and their families, provided at the earliest point.

Vulnerable children and families (including unborn children) are generally first identified, thus becoming 'known' to the child protection system, through a report being made to the Child Protection Helpline by a 'mandatory reporter' specified in the legislation¹⁸ or by another member of the community. Subsequent to a formal report being made, triaging processes will be performed by Helpline workers to determine whether the child is at 'risk of significant harm' pursuant to s 23 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) ('Care Act'). This will include consideration of whether the child is being exposed to physical or psychological harm through exposure to domestic violence, whether the child's basic physical and psychological needs are not

¹⁷ NSW Government Response to Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW (10 July 2019) 4.

¹⁸ Section 27 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) specifies that mandatory reporters will include those working in health care, welfare, education, children's services, residential services, law enforcement, in the provision of religion-based activities to children, and registered psychologists, in the course of their duties.

being met or at risk of not being met, or if the child is at risk of physical or psychological harm due to the conduct of their parents or caregivers.

After the screening process, those reports which meet the threshold of 'risk of significant harm', or 'ROSH', are then allocated to a DCL Community Service Centre ('CSC') for, if necessary, further assessment and field casework responses, including the development of a safety plan (for the child or young person's immediate safety) or family action plan (to provide for the child or young person's safety looking forward in the long-term, to allow the child to remain with their family where possible).¹⁹ This referral will also include a recommendation as to the time required for the CSC to respond to the report and is the method in which the Helpline caseworkers seek to prioritise the needs of children and young people who are reported.

The existing casework process undertaken by DCJ allows for caseworkers to utilise early intervention and prevention measures specified by the Care Act which seek to address child protection concerns. These include Parent Responsibility Contracts (a voluntary agreement for support between the parent(s) and DCJ specifying discrete actions and services to address child protection concerns which can be registered with the Children's Court for up to 12 months),²⁰ Temporary Care Arrangements (a temporary arrangement for an authorised carer to look after a child for 3-6 months, with the consent of a parent of the child where the goal is for the child to be restored to the parent(s)' care)²¹ or Parent Capacity Orders (a standalone order by the Children's Court that the parent participate in a program or engage in a service to improve their parenting skills, which does not require the parent(s)' consent).²² Therefore, in the period of time following the child or family becoming known to DCJ, the existing policy framework specifies numerous avenues for service provision as a mechanism for prevention and early intervention to avoid a child or young person being removed from his or her family.

However, the reality for Aboriginal and Torres Strait Islander children in contact with the child protection system is often far removed from a mindset of family preservation and removals as a last resort. Instead, in our experience, it is more often characterised by casework practice that is culturally inappropriate and insensitive, which correspondingly exacerbates and reinforces the deep mistrust harboured by Aboriginal people towards child protection authorities and other stakeholders involved in the child protection system (including courts). As noted above, Aboriginal and Torres Strait Islander children are more likely than non-Aboriginal children to come into contact with child protection services, and the data shows that they generally continue to progress through the system

¹⁹ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 57-61.

²⁰ 'Parent Responsibility Contract – information for parents', *NSW Department of Communities and Justice* (Web Page, 21 October 2019) <<https://www.facs.nsw.gov.au/families/permanency-support-program/paths/chapters/family-preservation/parent-responsibility>>

²¹ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 63.

²² 'What happens to a child who is not at risk? – Parent capacity orders (PCO)', *NSW Department of Communities and Justice* (Web Page, 18 October 2019) <<https://www.facs.nsw.gov.au/families/caseworker-visits/child-not-at-risk/chapters/pco#:~:text=Parent%20capacity%20orders%20are%20used%20to%20help%20parents%20keep%20their%20children%20safe.&text=the%20potential%20risk%20of%20significant,service%2C%20course%20or%20treatment%20program>>

at increasing levels of overrepresentation. The Productivity Commission highlights that in 2018-2019, Aboriginal and Torres Strait Islander children were around 5 times as likely to have a notification made about them to child protection agencies than non-Aboriginal children, and 8 times as likely to receive a further child protection service (at a rate of 16% compared to 2% of non-Aboriginal children).²³

The interaction between vulnerable Aboriginal children and families and the child protection system can be described as harsh, intrusive and deeply lacking in early intervention support – resulting in the traumatic overrepresentation of Aboriginal children in the out-of-home-care system. In our experience, we often observe instances where families are not offered services prior to children being removed, or where little care is taken to ensure that service provision is culturally safe. There is also a general consensus among stakeholders that alternatives to removal, such as Parent Responsibility Contracts, are underutilised, with caseworkers even going so far as to disclose that these do not form part of their usual ‘protocol’ for intervention into the family.²⁴ Numerous past inquiries into the child protection system have acknowledged that legislative mechanisms have potential for parents to be supported to engage meaningfully in programs, counselling and other support services.²⁵

Many stakeholders have characterised the interaction between clients, particularly Aboriginal clients and the child protection system, as ‘reactive’ rather than ‘proactive’. Early intervention work is often not prioritised as the focus of DCJ lies more in removal work, and DCJ practices often enshrine the view that a ‘better’ child protection system is one where more child removals are undertaken.²⁶ This ‘reactive’ approach was shown in 2018-2019, where only 16% of child protection funding was invested in support services for children and their families whilst 84% was invested in child protection services and out-of-home care, despite the *National Framework for Protecting Australia’s Children 2009-2020* committing to an increased focus on prevention and early intervention.²⁷ The Care Act’s legislative framework (particularly as amended in 2018) reflects this attitude of prioritising removals and subsequent effort to find a permanent placement within a relatively short timeframe, rather than assisting families through early intervention activities or seeking to preserve families. For example, before the making of final orders, the Secretary ‘must assess whether there is a realistic possibility of the child or young person being restored to his or her parents within a reasonable period’, with ‘reasonable period’ for the purposes of this legislative section defined as not exceeding 24 months.²⁸ Likewise, the maximum period for which a s 79(1)(b) final order may allocate all

²³ Productivity Commission, *Overcoming Indigenous Disadvantage – Key Indicators 2020* (Report, December 2020) 4.112.

²⁴ Legislative Council General Purpose Standing Committee No. 2, Parliament of NSW, *Child protection* (Final report, 16 March 2017) 82.

²⁵ Legislative Council General Purpose Standing Committee No. 2, Parliament of NSW, *Child protection* (Final report, 16 March 2017) 83.

²⁶ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 152.

²⁷ *Family Matters Key Findings Briefing* (16 November 2020) 4.

²⁸ Children and Young Persons (Care and Protection) Act 1998 (NSW) s 83.

aspects of parental responsibility to the Minister following the Court's approval of a permanency plan involving restoration, guardianship or adoption is 24 months.²⁹

With such a strong emphasis on quick and permanent resolution as opposed to supporting families to address their child protection concerns, many Aboriginal parents receive very little to no support to promote restoration and family preservation once their child/ren have been removed. It is our experience that clients are often expected to engage in services to address their child protection concerns with little practical guidance by DCJ caseworkers or assistance in referrals. Instead, many parents will receive a Summary of Proposed Plan which merely sets out that a parent abstain from drugs and alcohol, or attend residential rehabilitation or a parenting course, often in broad general terms and non-specific. This is despite the fact that many services will only be available to parents if they are referred by DCJ, and in circumstances where the court will have an expectation that these tasks will be completed by parents in a timely manner.

The limited early intervention services offered to many parents, and the difficulties faced by many of our parent clients in overcoming child protection concerns with minimal DCJ support are shown in the below case study:

Case Study 1:

The ALS assisted an Aboriginal father whose children were removed from his and his partner's care due to concerns surrounding risk of psychological abuse, risk of physical abuse, domestic violence and supervision issues. Although risk reports had been made regarding the father inflicting non-accidental injuries upon his children and perpetrating domestic and sexual violence upon his partner within the last 15 years, DCJ filed evidence that they had only provided extremely minimal support to the family, liaising with services and providing cold referrals only over a 3-year period within these 15 years, before removing the children approximately 5 years later without any sustained services offered to the family prior to that removal.

However, following the removal of the children from the family, the parents were asked by DCJ in respective Summary of Proposed Plans to engage in a variety of services, including undertaking domestic violence courses, completing parenting programs and engaging in domestic violence counselling. Throughout the proceedings, our client expressed that he had felt overwhelmed by DCJ's expectations of him and his partner, particularly given that, prior to the children being removed, DCJ had only communicated to them that they would be removing the children due to the state of the home and he was not aware of the other matters that had been reported to DCJ.

Despite our client and his partner wanting to take steps to address the concerns identified by DCJ, the client expressed that he had experienced difficulties in meeting the goals set out in the Summary of Proposed Plan. For example, although he took steps to enrol in a men's behaviour change program (without the referral of DCJ), he was told that he was not eligible for the program as he did not have an Apprehended Violence Order listing him as the defendant. It was not until DCJ spoke with the team leader of the organisation providing the program that the team leader expressed willingness to assess our client for the other eligibility criteria.

²⁹ Children and Young Persons (Care and Protection) Act 1998 (NSW) s 79(9).

In addition, many Aboriginal families are dealt with by non-Aboriginal caseworkers, who may not necessarily be trained in how to interact with Aboriginal families and clients in a culturally safe manner. In our view, there is a need for greater caseworker training to ensure that caseworkers can recognise the specific needs of Aboriginal families in the child protection system.³⁰ Although Aboriginal clients are entitled to request to have an Aboriginal caseworker, this may not be possible in many cases due to lack of available Aboriginal caseworkers in the area, or due to the vulnerability of parent clients, who may not be aware of this option or otherwise fear a hostile reaction or retribution if they voice their requests. In some cases, the request is denied on the basis that the Aboriginal caseworkers are in a 'different casework team'. Simultaneously, while Aboriginal support workers possess the necessary connection to culture to work with Aboriginal clients, many Aboriginal people are reluctant to work with DCJ due to the stigma associated with DCJ by Aboriginal communities.³¹ It is crucial to keep in mind that promoting greater links between Aboriginal clients and Aboriginal caseworkers is not the panacea; the mistrust and trauma associated with the mainstream child welfare system is deeply ingrained in the consciousness of many Aboriginal people, families and communities. Importantly, many Aboriginal clients will be hesitant to work with Aboriginal caseworkers from their own community, as they may fear the whole community 'knowing their business.'

Current practices surrounding risk of harm reports at the prenatal stage and the removal or assumption of newborn babies into care (including from hospital) illustrate the deep trauma which continues to affect Aboriginal clients and families in their interactions with the child protection system, at a crucial transition point in a child's life. The phases of birth and early childhood are essential for attachment to development between children and their parents; it is well-established that rituals to bond a parent to their baby, including breastfeeding and physical contact between a parent and child, will carry significant health benefits to the child.³²

However, it is the ALS' practice experience that many children are assumed into care from the hospital on the basis of a parent having had previous children removed (evidence of which must be admitted into the Children's Court proceedings for the current subject child and becomes prima facie evidence that the subject child is in need of care and protection)³³ or on the basis of reports made at a prenatal stage. This in turn contributes to parental avoidance of health services or other antenatal supports to build up a mother's parenting skills, for fear that the child will be removed. Evidence exists to show that pregnant Aboriginal women are less engaged with ante-natal supports than non-Aboriginal women.³⁴ Newborn removals are also extremely distressing for birth parents and are often conducted in a culturally inappropriate manner, such as not allowing family members

³⁰ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 179.

³¹ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 182-83.

³² Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 184.

³³ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 106A(1).

³⁴ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 186.

to meet with the child, giving the birth parents minimal time to spend with the baby or pass on any personal or family memento to them.³⁵

A potential reform to newborn removal and prenatal reporting practices is given by Recommendation 46 of the *Family is Culture* Report:

‘The Department of Communities and Justice should develop, trial and publicly report on a ‘triage’ system for prenatal reports that ensures that the parents of the most frequently reported unborn babies are given priority access to early casework support and early intervention services’.

However, we note that such reforms must be linked to a broader whole-of-government cultural and policy shift towards prioritising holistic early intervention service provision, helmed by a legislative mandate placed upon DCJ to deliver such support. This will be further discussed below.

Another crucial transition point arises as vulnerable children in contact with the child protection concern approach adolescence and ‘aging out’ of child protection involvement. The link between out-of-home-care and involvement in the criminal justice system, is a well-established one. The Australian Institute of Health and Welfare has found that children and young people in out-of-home care were 16 times more likely than other children and young people to be under the supervision of youth justice.³⁶ It has been theorised that risk factors for involvement with criminal legal system, such as exposure to abuse and neglect, are exacerbated at key transition points such as entering or exiting the care system (where those in the care system have themselves often been exposed to trauma associated with abuse and neglect), thus leading to a definitive correlation between child protection involvement and criminal justice involvement.³⁷

This phenomena of ‘care criminalisation’³⁸ also arises from the acknowledged harms which arise from placement in out-of-home care, such as lower educational outcomes, difficulties in finding and maintaining employment, and an increased risk of mental health issues, drug and alcohol abuse, or violent behaviour, which themselves are risk factors for contact with the criminal legal system. For example, the practice of calling police (instead of an alternative therapeutic response) in response to behaviour of traumatised children in out-of-home care. Importantly, children who have been removed from their families are also removed from key protective factors and community supports, such as their friends or their school, and the trauma from their removal and placement in out-of-home care may compound with that which predicated their removal to cause consequences for

³⁵ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 190.

³⁶ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 235, citing Australian Institute of Health and Welfare, *Young people in child protection and under youth justice supervision 1 July 2013 to 30 June 2017* (Report, No 24, 2018) 16.

³⁷ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 236.

³⁸ McFarlane, Katherine, *Care-criminalisation: the involvement of children in out of home care in the NSW criminal justice system* (2015)

emotional and behavioural regulation as they grow older.³⁹ Consequently, the sad reality for many adolescents who grow up in out-of-home care and subsequently come into contact with the criminal legal system is that they will be prosecuted for behaviour that ‘may otherwise have been dealt with in the family home.’⁴⁰

The ALS supports the availability of targeted support services for adolescents exiting care. For example, this could include perpetrator intervention and men’s behaviour support for male adolescents exiting care who have experienced violence prior to or during their time in care, to prevent the occurrence of family violence, or programs aimed at preventing drug and alcohol abuse. It is our view that these support services should be accessed via a single-entry point of DCJ casework, with integration and information sharing triggers between services to ensure holistic support.

In order to ensure that programs are effective, it is critical that the programs being offered to Aboriginal and Torres Strait Islander young people are driven and led “by communities and for communities” and tailored to addressing the particular needs of the individual and local community.⁴¹ It is vital that Aboriginal Community Controlled Organisations are appropriately resourced to enable the development of programs aimed at supporting Aboriginal and Torres Strait Islander young people approaching their ‘aging out’ from out-of-home care. In addition, as with the recommendation above to triage prenatal reports and ensure service provision to parents as a matter of priority, we emphasise it is important that the crucial transition point of adolescence be viewed as part of a broader whole-of-government policy reform aimed delivering holistic assistance.

Recommendations:

- *Whole-of-government policy involving collaboration and information sharing protocols and triggers between health, education, policy, justice and social services sectors to provide holistic and integrated assistance to children and families from their first contact with the Department of Communities and Justice.*
- *Joining up of free or low-cost legal services with culturally safe supports across the health, education, policy, justice and social services sectors to link children, parents and other family members to supports from a family’s first contact with the Department of Communities and Justice*
- *Enactment of a national Aboriginal and Torres Strait Islander Child Protection Notification and Referral System, similar to the Custody Notification System, to refer Aboriginal families in contact with the child protection system to culturally appropriate supports and services, including independent legal advice trusted by Aboriginal communities, at the earliest possible opportunity.*
- *Whole-of-government commitment to a sustained increase in funding and resourcing for Aboriginal Community-Controlled Organisations to deliver support services encompassing each of the sectors of health, education, policy, justice and social services focused upon self-determination, empowerment and cultural healing for Aboriginal communities and families.*

³⁹ Productivity Commission, *Overcoming Indigenous Disadvantage – Key Indicators 2020* (Report, December 2020) 4.142.

⁴⁰ Productivity Commission, *Overcoming Indigenous Disadvantage – Key Indicators 2020* (Report, December 2020) 4.142.

⁴¹ Aboriginal Legal Service NSW/ACT, Submission to the House Standing Committee on Social Policy and Legal Affairs, *Inquiry into Family, Domestic and Sexual Violence* (12 August 2020) 15.

4 – Development of a whole-of-government response to supporting children and families

Policy and practice responses which prioritise family preservation wherever possible will result in improved life outcomes for children and families involved in the child protection system. In our view, the failure to maintain this principle as the cornerstone of the child protection system will result in a loss of Aboriginal culture, heritage and identity on a wide and devastating scale.

The ALS urges the development of a holistic approach, which understands that services from the health, education, justice and social services sectors must collaborate to provide integrated prevention and early intervention assistance to children and families, triggered by the singular event of a child or family first becoming known to the child protection authority. Whole-of-government policy should be focused upon resourcing and making available integrated responses, through the joining up of free or low-cost legal services with other culturally safe supports to offer wraparound assistance to Aboriginal clients from a single-entry point. We therefore recommend that DCJ's caseworkers work to facilitate the linking up of children, parents and other relevant family members to an appropriate range of services which are tailored to the needs of the particular family which precipitated the making of ROSH reports regarding the family.

In the same vein, and as an example of how such information sharing could take place, Recommendation 111 of the *Family is Culture* Report stated:⁴²

'The Department of Communities and Justice should develop a memorandum of understanding (MOU) between Housing and Community Services that allows for the sharing of information held by Community Services when it is required by Housing before parents can access Housing services. This should include information needed to satisfy housing eligibility requirements, to be given 'priority status', or to access programs such as Staying Home, Leaving Violence.'

This recommendation was made in the context of the Review's concerns that parents would be impeded from seeking to have their children restored to them due to a lack of appropriate housing, and would have to provide substantial supporting documentation for their request prior to obtaining housing, although NSW Housing policy prioritises families seeking restoration of children from out-of-home care or families experiencing domestic and family violence.⁴³

ALS has previously recommended the enactment of a national Aboriginal and Torres Strait Islander Child Protection Notification and Referral System, similar to the Custody Notification System.⁴⁴ This recommendation was itself first advanced by Secretariat of National Aboriginal and Islander Child Care ('SNAICC'), National Aboriginal and Torres Strait Islander Legal Services and National Family Violence Prevention Legal Services in its 2017 joint release, *Strong Families, Safe Kids: Family*

⁴² Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 359-360.

⁴³ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 359-360.

⁴⁴ Aboriginal Legal Service NSW/ACT, Submission to the House Standing Committee on Social Policy and Legal Affairs, *Inquiry into Family, Domestic and Sexual Violence* (12 August 2020) 7.

Violence Response and Prevention for Aboriginal and Torres Strait Islander children and families ('Strong Families, Safe Kids'). This system would refer Aboriginal families in contact with the child protection system to culturally appropriate supports and services, including independent and culturally safe legal advice by services such as the ALS, at the earliest possible opportunity.⁴⁵ In our view, this could help to decrease entries into care through service provision, as relationships of trust are developed between Aboriginal families and culturally appropriate holistic supports.

As a corollary to the development of a whole-of-government policy approach aimed at integrated service provision, there must also be a prioritisation of Aboriginal community-designed, community-driven and community-led early intervention programs and support services – spanning across health, education, justice and social services. For thousands of years, Aboriginal communities and families have supported their children to thrive and remain connected to their culture. This has occurred in spite of invasion, dispossession of traditional lands and decades of forced child removal – which continue to have reverberating impacts of Aboriginal communities, including through intergenerational trauma.⁴⁶ Cultural healing, which involves the reinstatement of traditional cultural practices and the re-identification with cultural values of family and the need to support and nurture children, is needed to allow the development of strengths in Aboriginal child-rearing practices to keep children and families safe.⁴⁷ In addition, there must be a shift away from a focus on deficits, towards a strength-based approach which is aimed at empowering parents and equipping them with the tools they need to support their children to thrive.

One example of an Aboriginal Community-Controlled Organisation which has been provided with control for decision-making about Aboriginal and Torres Strait Islander children in, or at risk of entering, the child protection systems is Victoria's Aboriginal Children's Forum. The Forum was established in 2015 and constitutes a tripartite approach to bringing together ACCOs, community sector organisations and the Victorian Government to support the implementation of the *Wungurilwil Gaggapduir* Aboriginal and Children's Families Agreement ('the Agreement').⁴⁸ The Agreement aims to celebrate the resilience of Aboriginal families in the face of the devastating impacts of colonisation and dispossession, including by eliminating the overrepresentation of Aboriginal children in child protection and reducing the numbers which progress to the criminal justice system by providing Aboriginal community-based prevention and early intervention mechanisms as they arise.⁴⁹ Within the Aboriginal Children's Forum, ACCOs have a significant role in designing and delivering local services and supports, and have received dedicated additional funding for growth and research into development of an Aboriginal evidence base for these initiatives.

⁴⁵ Aboriginal Legal Service NSW/ACT, Submission to the House Standing Committee on Social Policy and Legal Affairs, *Inquiry into Family, Domestic and Sexual Violence* (12 August 2020) 7; SNAICC, NATSILS, NFVPLS, 'Strong Families, Safe Kids: Family violence response and prevention for Aboriginal and Torres Strait Islander children and families' (Policy Paper, September 2017) 5.

⁴⁶ SNAICC, NATSILS, NFVPLS, 'Strong Families, Safe Kids: Family violence response and prevention for Aboriginal and Torres Strait Islander children and families' (Policy Paper, September 2017) 5.

⁴⁷ SNAICC, NATSILS, NFVPLS, 'Strong Families, Safe Kids: Family violence response and prevention for Aboriginal and Torres Strait Islander children and families' (Policy Paper, September 2017) 18.

⁴⁸ Productivity Commission, *Overcoming Indigenous Disadvantage – Key Indicators 2020* (Report, December 2020) 4.119-4.120.

⁴⁹ 'Aboriginal Children's Forum', *Victorian Government* (Web Page) <<https://www.vic.gov.au/aboriginal-childrens-forum>>

Furthermore, with the ACF, ACCOs are majority members with the most voting rights surrounding critical decisions (including about the ACF's membership and structure), to ensure Aboriginal voices are placed at the forefront of decisions which fundamentally impact Aboriginal communities.⁵⁰

All levels of government must commit to a sustained increase in investment to respond to and prevent risk factors for child protection involvement, with a key focus on resourcing existing Aboriginal and Torres Strait Islander community-controlled organisations to deliver trusted holistic services and programs. It is our view that this needs to involve the state-wide capability of services such as:

- *Family and restoration support;*
- *Free and low-cost legal assistance for Aboriginal parents, and appropriate and adequate financial resourcing for representation of Aboriginal children in care and protection proceedings;*
- *Programs working with domestic and family violence perpetrators;*
- *Early intervention and prevention for drug and alcohol abuse and domestic and family violence;*
- *Trauma counselling and specialist supports for mental health issues;*
- *Crisis housing and access to safe, stable and culturally appropriate long-term housing options for parents and families at risk of homelessness;*
- *Services or programs promoting Aboriginal and Torres Strait Islander healing practices.*

The adequacy of funding for services, particularly culturally safe and Aboriginal community-designed and led services is discussed in greater detail below.

Recommendations:

- *Whole-of-government policy involving collaboration and information sharing protocols and triggers between health, education, justice and social services sectors to provide holistic and integrated assistance to children and families from their first contact with the Department of Communities and Justice*
- *Joining up of free or low-cost legal services with culturally safe supports across the health, education, policy, justice and social services sectors to link children, parents and other family members to supports from a family's first contact with the Department of Communities and Justice*
- *Enactment of a national Aboriginal and Torres Strait Islander Child Protection Notification and Referral System, similar to the Custody Notification System, to refer Aboriginal families in contact with the child protection system to culturally appropriate supports and services, including independent legal advice trusted by Aboriginal communities, at the earliest possible opportunity.*
- *Whole-of-government commitment to a sustained increase in funding and resourcing for Aboriginal Community-Controlled Organisations to deliver support services encompassing each of the sectors of health, education, policy, justice and social services focused upon self-determination, empowerment and cultural healing for Aboriginal communities and families.*

⁵⁰ Productivity Commission, *Overcoming Indigenous Disadvantage – Key Indicators 2020* (Report, December 2020) 4.119-4.120.

5 – Urgently undertake legislative amendments to mandate the prioritisation of early intervention and prevention

The discussion and recommendations made above emphasise the ALS' view that current interventions and responses for vulnerable children and families are vastly inadequate and fail to take into account the deep, inextricable links between intergenerational trauma and the continued overrepresentation of Aboriginal and Torres Strait Islander children in the out-of-home care system. Instead, they are characterised by paternalistic and deficit-focused attitudes to child protection, with unrealistically high burdens placed upon parents and families to refer themselves and engage themselves in services to 'prove' their commitment to improving themselves. A common sentiment expressed by ALS parent clients is that the practices taken by DCJ to addressing child protection concerns 'sets [them] up to fail' – a sentiment often shared by the ALS solicitors representing them.

The current intervention responses observed are bolstered and enabled by legislation which promotes inadequacy in DCJ practice and thus reinforces the reality of a child protection landscape where removals are a *de facto* first response, rather than a last resort. For example, section 17 of the Care Act specifies that:

'(1) In deciding what action should be taken to promote and safeguard the safety, welfare and well-being of a child or young person, the Secretary may request a government department or agency, or a non-government agency in receipt of government funding, to provide services to the child or young person or to his or her family.

(2) Without limiting the generality of subsection (1), the Secretary may request a government department or agency, or a non-government agency in receipt of government funding, to provide prioritised access to services to a child or young person who is at risk of significant harm and to his or her family.'

However, in response to such a request made under section 17, the government department or agency, or the non-government agency, who is in receipt of that request, is statutorily obliged only to 'use its best endeavours' to comply with such a request, if this is 'consistent with [the agency's] own responsibilities and does not unduly prejudice the discharge of its functions'.⁵¹ Likewise, section 63(2) of the Care Act explicitly states that the Children's Court must not:

- a) Dismiss a care application in relation to a child or young person, or
- b) Discharge a child or young person who is in the care responsibility of the Secretary from that care responsibility

by reason only that the Children's Court is of the opinion that an appropriate alternative action that could have been taken in relation to the child or young person was not considered or taken.⁵²

⁵¹ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 18(1).

⁵² *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 63(2).

This is despite s 9(2)(c) providing that the course that must be followed to protect a child or young person from harm must be the:

‘least intrusive intervention in the life of the child or young person and his or her family that is consistent with the paramount concern to protect the child or young person from harm and promote the child’s or young person’s development’

As part of legislative reform to support families and avoid children entering out-of-home care, the ALS recommends the NSW Government amend the Care Act to impose a mandate upon DCJ to take ‘active efforts’ in prevention and early intervention as soon as a family becomes known to the Department.⁵³ SNAICC has identified tangible benefits in the introduction of ‘active efforts’ in leading to better outcomes for Aboriginal and Torres Strait Islander children. These include the flexibility of the ‘active efforts’ standard to meet the unique needs of each case (and thus increasing the scope for cultural relevance of interventions undertaken in each case), and the increased accountability of child welfare authorities in their engagement with Aboriginal families.⁵⁴

The ‘active efforts’ recommendation is derived from the United States *Indian Child Welfare Act 1978* (‘ICWA’), which establishes minimum procedural and substantive standards to be met as federal law. Whilst the United States child welfare system is a state-based system, ICWA is a federal mechanism to displace less protective State laws and procedures which do not meet the minimum standard set by ICWA. Relevantly, ICWA provides that:

‘Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.’⁵⁵

The Guidelines for Implementation of the ICWA emphasise that active efforts are to be ‘affirmative, active, thorough and timely efforts intended primarily to maintain or reunite an Indian child with his or her family’. The Guidelines have emphasised that, as much as possible, these efforts need to be in line with the social and cultural conditions and practices of the child’s tribe, and in partnership with the child’s family (including extended family members) and tribe.⁵⁶ The Guidelines provide that active efforts are to be tailored to the facts and circumstances of the case and may include such actions as:⁵⁷

- Conducting a comprehensive assessment of the circumstances of the Indian child’s family, with a focus on safe reunification as the most desirable goal;

⁵³ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 161 (Recommendation 26).

⁵⁴ AbSec, *Shaping a Better Child Protection System – AbSec Submission* (November 2017), 24; SNAICC, *The Aboriginal and Torres Strait Islander Placement Principle: A Guide to Support Implementation* (April 2019), 3.

⁵⁵ *Indian Child Welfare Act of 1978*, 25 USC s 1912(d).

⁵⁶ US Department of the Interior, Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act* (December 2016), 39.

⁵⁷ US Department of the Interior, Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act* (December 2016), 41-2.

- Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
- Identifying, notifying and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;
- Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;
- Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;
- Taking steps to keep siblings together whenever possible;
- Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety and welfare of the child;
- Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;
- Monitoring progress and participation in services;
- Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;
- Providing post-reunification services and monitoring.

In order to meet the 'active efforts' requirement, the Bureau of Indian Affairs in the US Department of the Interior has made clear that it is insufficient for the state child protection agency to merely make services available (i.e. providing 'cold' or 'passive' referrals); instead, the actions of the state agency must be active and meaningful.⁵⁸ The following case from the Court of Civil Appeals of Oklahoma clarifies the standard of support (traversing different areas of a particular parents' needs) which must be offered by the state agency to meet the 'active efforts' threshold:

Stephens v. State (in re J.S.,) OK CIV APP 15 (2008)

The State of Oklahoma filed a petition to terminate parental rights of an Indian mother to her two children. The children had been placed in foster care with the Department of Human Services for 15 of the last 22 months, whereas the mother had failed to correct the child welfare concerns which led to the foster care placement, leading the state to seek to terminate her rights. The mother appealed against this decision, arguing that no active efforts had been made in her case, nor did she receive any assistance from the Department.

Although the mother acknowledged testimony from witnesses that 'active efforts' were performed, she contended that alone did not prove that such efforts were made, especially since the Department of Human Services worker here admitted that she had not done anything differently in this case than with non-Indian parent clients, other than providing them with transportation. at a health facility, however this was inadequate on the State's part, as there was little, if any, evidence that State or tribal workers had made any effort to identify resources which might have assisted the mother.

⁵⁸ US Department of the Interior, Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act* (December 2016), 42.

The Court emphasised that ‘active efforts’ requires ‘leading the horse to water’, and therefore it could not be found here that the Department had made ‘active efforts. Saliiently, there was evidence that one of the major obstacles to the mother completing her service plan for reunification of the children was her inability to pay for a required psychological evaluation. Through her own efforts, the mother had eventually obtained the evaluation through a program at a health facility, however this was inadequate on the State’s part, as there was little, if any, evidence that State or tribal workers had made any effort to identify resources which might have assisted the mother.

Furthermore, although ‘active efforts’ is viewed in most US states as being a higher threshold than ‘reasonable efforts’ (the legislative standard for state support for non-Indian children),⁵⁹ the ALS recommends a link between funding for state child protection agencies and the meeting of mandatory legislative standards to support families and prevent Aboriginal children entering out-of-home care, similarly to the approach taken to state child welfare funding for non-Indian children in the US. The US Federal Title IV-E program requires that States make reasonable efforts to preserve and reunify families (i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child’s home, and (ii) to make it possible for a child to safely return to the child’s home (i.e. reducing the amount of time for which a child must stay in an out-of-home placement).⁶⁰ If this ‘reasonable efforts’ requirement is not met, the State will not be eligible for Federal funding payments.⁶¹ Laws in all the US states, the District of Columbia, Guam, Puerto Rico and the US Virgin Islands require that reasonable efforts are made to provide services to help families remedy the conditions that brought the child and family into the child welfare system.⁶²

It is the ALS’ view that the imposition of a link between DCJ funding and mandated holistic early intervention support will incentivise a cultural change in DCJ’s protocols to emphasise family preservation as a priority in child protection. In summary, to parallel both the higher legislative obligation placed upon state child welfare workers working with Indian families by the ‘active efforts’ mandate in the US, and the financial incentives to promote service provision associated with ‘reasonable efforts’, we support the enactment of provisions requiring DCJ to show they have undertaken ‘active efforts’ to prevent the breakup of the Aboriginal family with consequences for their government funding if this threshold is not met.

⁵⁹ Cassandra Crandall, ‘Moving Forward from the Scoop Era: Providing Active Efforts Under the Indian Child Welfare Act in Illinois’ (2019) 40(1) *Northern Illinois University Law Review* 100, 112; *In re Michael G.*, 74 Cal. Rptr. 2d 642 (Cal. Ct. App. 1998); *People ex rel. K.D.*, 155 P.3d 634 (Colo. App. 2007)

⁶⁰ 42 USC s 671(a)(15) (2018)

⁶¹ 42 USC s 671(a) (2018)

⁶² Children’s Bureau, ‘Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children’, <https://www.childwelfare.gov/pubPDFs/reunify.pdf#page=1&view=Introduction> page 1.

Recommendations:

- *The Children and Young Persons (Care and Protection) Act 1998 (NSW) be amended to incorporate a legislative mandate of 'active efforts' to provide remedial services and rehabilitative programs designed to prevent the breakup of an Aboriginal family, as soon as a family becomes known to the Department of Communities and Justice*
- *The Children and Young Persons (Care and Protection) Act 1998 (NSW) be amended to link funding for the Department of Communities and Justice to the legislative obligation to provide 'active efforts' to incentivise early intervention service provision for families in contact with the Department.*

6 - Review and improve DCJ's decision-making and training practices

The ALS strongly endorses Recommendations 56 and 58 given in the *Family is Culture* Final Report pertaining to necessary reforms to child protection intake and assessment processes:

- Recommendation 56: The Department of Communities and Justice should commission an independent review of its structured decision-making tools and processes to identify how they can be improved to enhance objectivity within child protection assessments. This review should be undertaken in partnership with Aboriginal community and stakeholders to ensure that it examines the cultural adequacy of current risk and safety paradigms and tools.
- Recommendation 58: The Department of Communities and Justice should ensure all staff receive commencement and regular refresher training in how to use the safety and risk assessment tools. The training should be delivered by Aboriginal educators and should incorporate training in cognitive bias and how to undertake safety and risk assessments with Aboriginal families and children.

Our experience working with clients reflects the observation given in the *Family is Culture* Report that the approaches of DCJ in conducting assessments and case management are 'subject to caseworker fallibility, despite the veneer of objectivity'.⁶³ We have similarly observed that caseworker inexperience and bias impacts upon caseworker perceptions of Aboriginal parents and families who are in contact with the child protection system.⁶⁴

Many Aboriginal parents and families are assessed by caseworkers from a non-Aboriginal background and are thus vulnerable to negative beliefs and stereotypes of Aboriginal people and cultures in child protection decision-making. Professor Davis in the *Family is Culture* Final Report comments that 'Aboriginal' is in some cases used as a stand-alone risk factor. More commonly, caseworkers viewed markers of poverty or intellectual disability as equating to abuse or other endangering of the child, as a justification to impose a harsher assessment or to remove the child

⁶³ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 213.

⁶⁴ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 213.

from their parents.⁶⁵ This is despite the explicit provision in s 71(2) of the *Care Act* that poverty or intellectual disability alone cannot be used to conclude that the basic needs of a child or young person are likely not to be met (thereby satisfying the Children’s Court that the child or young person is in need of care and protection pursuant to s 71(1)(d)).⁶⁶ It is the experience of many clients that, as discussed in the *Family is Culture* Report, DCJ caseworkers have in their assessments equated practices normal for Aboriginal people e.g. having a large number of family members living in one household, a lack of food or other food preparation facilities where meals are undertaken as a community in the residence of kin, with risk of harm to the child.⁶⁷ As is, when substantiation occurs, Aboriginal and Torres Strait Islander children are increasingly more likely than non-Aboriginal children to be placed in out-of-home care; although the rate of placement in out-of-home care for non-Aboriginal children has remained relatively stable since 2004-2005, it has nearly tripled for Aboriginal and Torres Strait Islander children.⁶⁸

The prevalence of these negative stereotypes can also be observed in the rates at which reports of neglect are substantiated for Aboriginal children. In 2018-19, Aboriginal children were 12 times more likely to be subjected to a substantiation for neglect than non-Indigenous children, which is double their overrepresentation for all other forms of maltreatment.⁶⁹ Neglect is associated with poverty, and substantiations for neglect are thus associated with indicators in the home visit and assessment process which display a Western-centric bias e.g. the aforementioned indicators of overcrowded residences overly harshly.⁷⁰ However, due to the association between neglect and more complex issues, such as inadequate housing, homelessness, substance abuse and family violence, support for families, rather than removal of children, is crucial; Australian and overseas research into First Nations families has noted that alternative referral pathways, including support with access to resources and education, are more suitable as a response than invasive child protection mechanisms.⁷¹

This is highlighted in the following case study:

⁶⁵ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 214.

⁶⁶ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 71(1)-(2).

⁶⁷ Professor Megan Davis, *Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-home Care in NSW* (Review Report, 2019) 214.

⁶⁸ Productivity Commission, *Overcoming Indigenous Disadvantage – Key Indicators 2020* (Report, December 2020) 4.114.

⁶⁹ Productivity Commission, *Overcoming Indigenous Disadvantage – Key Indicators 2020* (Report, December 2020) 4.113.

⁷⁰ Productivity Commission, *Overcoming Indigenous Disadvantage – Key Indicators 2020* (Report, December 2020) 4.113.

⁷¹ Productivity Commission, *Overcoming Indigenous Disadvantage – Key Indicators 2020* (Report, December 2020) 4.113.

Case Study 2:

The ALS acted as a child representative in a matter involving the assumption into care of a newborn baby from hospital. DCJ determined that the child should be removed from the mother's care months before the child was born. The mother was a young teenage girl who was herself placed in foster care. The order to assume the child into care made reference to the mother's moderate intellectual disability, and the father's intellectual disability and the fact that he lived in a household that the Secretary had received a number of ROSH reports for, including pertaining to neglect and the condition of his residence. However, the order to assume the child into care made no reference of the mother's participation in antenatal care, or the supports that were available to her from her foster carer. Even though there had been positive reports from the hospital regarding the mother's parenting ability, which clarified that her intellectual functioning was only one aspect of her parenting, DCJ nonetheless relied on historical references to the mother 'absconding' and staying with the paternal grandfather prior to her pregnancy.

After a care application had been filed by DCJ, the child was discharged from hospital and allowed to return home with the mother and the mother's foster carer in the interim, pursuant to an agreement between the parties. DCJ sought to argue that the child was in need of care and protection but for the arrangements they had put in place. The ALS argued that the matter should not be established and the application should be instead dismissed, due to clear evidence surrounding the mother's parenting capacity, and that, aside from her intellectual disability, she had been taking all appropriate actions to care for the child.

The Children's Court magistrate was clear that there was in fact very positive evidence of the mother's parenting ability and therefore the child was not in need of care and protection. He rejected the argument given by DCJ that the child would be in need of care and protection had DCJ not put arrangements in place, arguing that DCJ had not put in place anything substantially different than what the mother had always intended, that is, for the child to be discharged into her care and return home to her foster carer.

In our experience, it is commonplace for cases to involve few referrals to early intervention services and cold referrals often take place. As a result, we recommend that DCJ re-evaluate its practice protocols surrounding referral of Aboriginal parents, clients and families to prevention and early intervention support services. This should involve, as recommended above, the legislative mandate for 'active efforts', as well as DCJ mechanisms, including a Care and Protection Notification Service, to provide tailored, wraparound assistance to the client from a single entry point at the earliest stage possible once the family becomes known to DCJ.

Recommendations:

- *Independent review of DCJ's structured decision-making tools for assessment of families and reform of safety and risk assessments and home visits in partnership with Aboriginal community and stakeholders to improve the cultural responsiveness of such decision-making measures*
- *Commencement and regular refresher training for all Department of Communities and Justice staff (delivered by Aboriginal educators) regarding the culturally safe performance of safety and risk assessments with Aboriginal families and children.*

7 - Invest in resourcing prevention and early intervention services for Aboriginal children and families, with a focus Aboriginal-led and community-controlled services

To supplement our above recommendations for the development of a whole-of-government policy and legislative shift towards service provision and early intervention support, the ALS recommends that prevention and early intervention services, targeted towards the specific needs of Aboriginal families and communities, be resourced and made available over all of NSW.

An examination of the early intervention services available across NSW for Aboriginal children and families reveals that limited availability of financial resources, and cuts in funding, have correspondingly limited the capacity of these services to effectively engage with Aboriginal communities. For example, the Aboriginal Child and Family Centres initiative, run in 9 centres across NSW (with 2 in Sydney and 7 in regional areas), received \$564 million in funding over 6 years as part of the Council of Australian Governments National Partnership Agreement on Indigenous Early Childhood Development, however its federal funding ceased in June 2014 and ongoing alternative funding could not be secured.⁷² This program provides early learning child care and family support services (including child and maternal health, and cultural activities) for children aged 0-8 years and their families.⁷³ Evaluation of outcomes between 2013-2014 by the Cultural and Indigenous Research Centre Australia (CIRCA) indicated that the program increased the proportion of children who were fully immunised and received the latest age appropriate health check from 78.6% to 94.5% and estimated that 78 of the children attending these centres had not previously accessed early learning services, thereby implying that the Centres were successful at reaching families who had not accessed services in the past.⁷⁴ However, despite positive outcomes and high satisfaction with the centres, funding for them is unstable, as discussed above; online waiting lists also suggest limited capacity of these services and their inability to meet demand.⁷⁵

Pilot programs commissioned under the Their Futures Matter include Multisystemic Therapy for Child Abuse and Neglect (MST-CAN) and Functional Family Therapy – Child Welfare (FFT-CW). \$25 million was invested into these two new service models in 2017 with the aim of helping at least 900 children a year in 15 priority locations.⁷⁶ MST-CAN was launched in October 2017 and is an evidence based treatment and child welfare program for children ages 6-17 and families referred to child protection services due to physical abuse and/or neglect. MST-CAN is a 24/7 home-based treatment model lasting 6-9 months and addresses key behavioural systems embedded within the family.⁷⁷ In conjunction with overall treatment strategies such as ongoing safety assessment and planning, MST-CAN also provides tailored interventions including cognitive behavioural therapy, PTSD treatment

⁷² CIRCA, *Evaluation of NSW Aboriginal Child and Family Centres* (Final Report, December 2014) 14.

⁷³ CIRCA, *Evaluation of NSW Aboriginal Child and Family Centres* (Final Report, December 2014) 7.

⁷⁴ CIRCA, *Evaluation of NSW Aboriginal Child and Family Centres* (Final Report, December 2014) 30-31.

⁷⁵ See for example, the wait list applications for the Ngallu Wal Aboriginal Child and Family Centre in Doonside, and for the Yenu Allowah Aboriginal Child and Family Centre in Mt Druitt.

⁷⁶ Department of Communities and Justice (NSW), 'Care for most vulnerable in record \$7 billion FACS budget' (Media Release, 20 June 2017).

⁷⁷ 'Multisystemic Therapy for Child Abuse and Neglect (MST-CAN)', Department of Communities and Justice (Web Page) <<https://www.theirfuturesmatter.nsw.gov.au/our-initiatives/mst-can>>.

and anger management training. Funding is determined by each provider and each provider may run numerous projects under the umbrella of MST-CAN. There is no singular source of funding for MST-CAN. The program is delivered by six NGOs across five DCJ districts in NSW. As of April 2020, 225 children had participated in MST-CAN.⁷⁸ Due to the small number of participants thus far and the lack of published data or evaluations, there is no indication of the effectiveness of the program in meeting the needs of vulnerable families, in particular for Aboriginal and Torres Strait Islander families. The FFT-CW program was launched in August 2017 and is a home-based therapy model for families with substantiated abuse and/or neglect of a children or young person aged 0-17.⁷⁹ The program delivers a comprehensive service to all family members, after assessing the abuse dynamics within the family. The program is delivered by six NGOs across ten DCJ districts in NSW. As of April 2020, 2449, children had participated in FFT-CW.⁸⁰ There has yet to be a formal evaluation of the effectiveness of FFT-CW in NSW, and in particular, it's suitability for Aboriginal and Torres Strait Islander families.

Brighter Futures is an early intervention program which received \$36.7 million in funding during the lifespan of the Keep Them Safe Action Plan (2009-2014).⁸¹ An additional \$60 million was invested into the program in 2017-2018.⁸² The program aims to reduce the rate of entry to out-of-home care⁸³ and assists at-risk families with issues including domestic and family violence, problematic parental drug and alcohol use, mental health and parental learning and/or intellectual disabilities.⁸⁴ Families must be referred to Brighter Futures by an NGO lead agency, as a result of a report made to the Child Helpline, or through Aboriginal Maternal Health. The program is limited to families with children between 0-9 years of age.⁸⁵ Comparison of program outcomes between 2008-2009 and 2011-2012 reveals that the percentage of Aboriginal children and families who exited the Brighter Futures program and subsequently entered out-of-home care declined from 5.95% to 3.5%.⁸⁶ In the same period, the percentage of Aboriginal children and families who exited Brighter Futures and subsequently been subject to a ROSH report declined from 55.4% to 35.7%.⁸⁷ However, the Keep Them Safe Evaluation noted that due to the limited amount of data, it is difficult to draw firm conclusions about the effectiveness of the program as an early intervention tool.⁸⁸ Furthermore, the Brighter Futures program guidelines do not provide for consultation with Aboriginal-led

⁷⁸ Audit Office of New South Wales, Their Futures Matter (Report, 24 July 2020) 49.

⁷⁹ 'Functional Family Therapy— Child Welfare (FFT-CW)', Department of Communities and Justice (Web Page) <<https://www.theirfuturesmatter.nsw.gov.au/our-initiatives/fft-cw>>.

⁸⁰ Audit Office of New South Wales, Their Futures Matter (Report, 24 July 2020) 49.

⁸¹ SPRC UNSW: 2014, Annex A, 15

⁸² Department of Communities and Justice (NSW), 'Care for most vulnerable in record \$7 billion FACS budget' (Media Release, 20 June 2017).

⁸³ 'Program Guidelines for the Brighter Futures Program', Department of Family & Community Services (Web Page, May 2014). <https://www.facs.nsw.gov.au/__data/assets/pdf_file/0020/321185/tabb_bf_program_guidelines_may_2014.pdf>.

⁸⁴ 'Brighter futures', Department of Communities and Justice (Web Page) <<https://www.facs.nsw.gov.au/families/support-programs/all-families/brighter-futures>>

⁸⁵ 'Brighter futures', Department of Communities and Justice (Web Page) <<https://www.facs.nsw.gov.au/families/support-programs/all-families/brighter-futures>>

⁸⁶ SPRC UNSW: 2014, Annex A, Table 35

⁸⁷ SPRC UNSW: 2014, Annex A, Table 34

⁸⁸ SPRC UNSW: 2014, Annex A, p.16

organisations or communities to develop culturally sensitive and appropriate support services,⁸⁹ despite significant over-representation of Aboriginal children in the out-of-home-care system.⁹⁰ Although the above outcomes appear to be positive, the program could better meet the social and cultural needs of Aboriginal families by introducing guidelines for Aboriginal and Torres Strait Islander community involvement and consultation.

Recommendations:

- *Targeted, specific funding and resourcing of prevention and early intervention services, tailored to the needs of Aboriginal families, to be available over all of NSW.*

⁸⁹'Program Guidelines for the Brighter Futures Program', Department of Family & Community Services (Web Page, May 2014).
<https://www.facs.nsw.gov.au/__data/assets/pdf_file/0020/321185/tabb_bf_program_guidelines_may_2014.pdf>.

⁹⁰ *Family Matters Data Snapshot 2020* (16 November 2020).