

The Law Society of New South Wales

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The Secretary  
Senate Community Affairs References Committee  
Suite S1 59  
Parliament House  
Canberra ACT 2600



Dear Secretary,

**Re: Inquiry into Children in Institutional Care**

Thank you for the opportunity to make a submission to the Inquiry. Given the broad scope of the Inquiry the Law Society has chosen not to respond to all the Terms of Reference. The Law Society has chosen to comment with specific reference to item (g) of the Terms of Reference which directs the Inquiry to examine:

*“the need for public, social and legal policy to be reviewed to ensure an effective and responsive framework to deal with child abuse matters in relation to:*

- (i) any systemic factors contributing to the occurrences of abuse and/or neglect,*
- (ii) any failure to detect or prevent these occurrences in government and non-government institutions and fostering practices, and*
- (iii) any necessary changes required in current policies, practices and reporting mechanisms.”*

The Law Society has concerns about the operation of the “Aboriginal and Torres Strait Islander principles” formulated in Chapter 2 of the *Children and Young Persons (Care and Protection) Act 1998* in New South Wales.

Despite the Society’s comments relating primarily to New South Wales legislation, the concerns raised have resonance in all parts of Australia that indigenous children are in foster care. Any legislation that mandates a regime of care and protection requires ongoing assessment of the adequacy and practical effectiveness of the principles that legislation espouses.

**Background**

Part 2 of Chapter 2 of the *Children and Young Persons (Care and Protection) Act 1998* as amended introduces what are called “Aboriginal and Torres Strait Islander principles”.

The hierarchical approach under Section 13 provides:-

- (a) Placement with extended family or kinship group as recognised by the community.
- (b) Placement with an indigenous community to which the young person belongs.
- (c) If not practicable or in the best interests of the child or if the child could suffer detriment, then only after consultation with the family kinship groups and appropriate welfare organisations a placement out of home can be undertaken.

Subsection 7 of Section 13 provides that the principles do not apply to placements of less than two weeks or emergency placements apparently made pursuant to Emergency Care and Protection Orders. These provisions are similar to obligations under the preceding legislation in New South Wales<sup>1</sup>.

### **Law Society concerns**

The concern of the Law Society and practitioners in the children's jurisdiction is that the Department of Community Services and/or the Courts frequently fail to give proper effect to the principles even allowing for the best interests of the child or children. The failure is illustrated in the following ways:-

- (a) There is frequently a failure to properly identify whether the child is Aboriginal or a Torres Strait Islander as defined under Section 5 (this is a wide definition which may require investigations of the general community in which the child lives to identify whether the child is Aboriginal or a Torres Strait Islander).
- (b) The apparent or alleged paucity of placements with indigenous carers frequently means the children are placed in foster care placements for months while proceedings are pending. These placements frequently do not accord with the principles. The explanation for the failure to place children is based on the lack of availability of appropriate placements or a failure to identify the need for such a placement.
- (c) There is frequently a failure to consult with the welfare groups or indigenous community groups that may be able to assist in identifying a placement. This is exacerbated in some country areas where appropriate temporary arrangements have been made through local indigenous welfare groups or communities. Often when the matter is referred to the Department, the child or children are frequently removed from a placement which is culturally appropriate. This change is not on the basis it is in their best interests to remove them but because as the bureaucracy has not assessed those carers. There is no basic attempt made to engage with the indigenous welfare services which are otherwise well known to

<sup>1</sup> *Children (Care and Protection) Act 1987* (see Section 87).

the Department of Community Services and the Courts in those country areas.

- (d) Where an indigenous child is placed in a non-indigenous placement there is typically no real attempt to allow the child to develop any understanding of the child's heritage and culture. Any plans proposed by the Department are espoused in a general way and non-specific in their services. There is frequently a reliance upon the foster carer doing the right thing without any commitment by the Department and its Officers to ensure the heritage and culture needs are followed through.
- (e) Not infrequently indigenous siblings are separated, sometimes into indigenous appropriate placements and sometimes not. There is frequently a failure to provide regular contact not only between the siblings but with their extended family members as another form of identifying their heritage. That failure is both in breach of the principles referred to and the objects of the Act which require a child to know and develop a relationship with the child's family and in the wider sense his or her community.

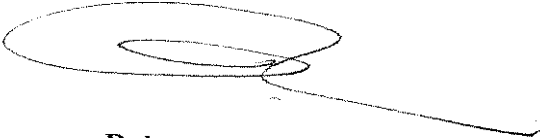
The Law Society considers that the relevant Government agencies must always consider family and kinship options for children entering a care environment, not least because it is culturally appropriate.

#### **Listing of Indigenous Care Agencies in Australia**

Practitioners have noted that the Minister for Indigenous Affairs may consider compiling a list of appropriate and approved indigenous welfare agencies to be made available to stakeholders in care proceedings including solicitors, Magistrates and agencies such as the Legal Aid Commission and Department of Community Services. The Law Society proposes the list be available in electronic form to facilitate easy updating.

If you would like further information about this submission please contact Simon Arcus, Executive Member, Children's Legal Issues Committee on (02) 9926-0310 or by electronic mail at [swa@lasocnsw.asn.au](mailto:swa@lasocnsw.asn.au).

Yours sincerely,



**Robert Benjamin**  
President