THE LAW SOCIETY
OF NEW SOUTH WALES

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26 November 2020

The Hon Adam Searle MLC
Chair
Select Committee on the High Level of First Nations People
in Custody and Oversight and Review of Deaths in Custody
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: First.Nations@parliament.nsw.gov.au

Dear Chair,

Inquiry into high levels of First Nations people in custody and oversight of deaths in custody: responses to questions on notice

Thank you for the opportunity to take questions on notice at the public hearing of this inquiry on 26 October 2020.

The Law Society's responses are set out below, together with the relevant extracts from the (uncorrected) transcript.

1. Minimum age of criminal responsibility (MACR)

> **The Hon. NATALIE WARD:** I just want to pick up on that age of criminal responsibility issue. I note that it is an absolutely critical age and we should do anything we can do to divert. I ask if you could comment on what your suggestion might be for any other forum to take that place were it to be the case that the criminal age is lifted but nonetheless something occurs with a young person aged 10 to 14. Is there something that, in your view, would be ideal to have in its place? We have heard briefly about circle sentencing. Is there another policy response or should it be youth justice? Who or what entity do you see stepping in at that critical juncture?

The Law Society's view is that any upwards shift in the MACR in NSW would need to be accompanied by increased capacity for a needs-based, non-criminal law responses to behaviour, which currently constitutes 'offending' for children aged 10-13. There are a range of evidence-based programs already being employed in Australia and overseas to divert early adolescent children from the criminal justice system. These are set out in more detail in the attached submission the Law Society previously made, at sections 6 and 7.1. We also note section 7.3 of our attached submission, in respect of the protective effect that keeping children within the education system can have, given the flow-on impact that exclusion from school can have on children and contact with the criminal justice system.

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2. An Indigenous list in the Children's Court

> **Mr DAVID SHOEBRIDGE:** Ms Crellin, could you take on notice whether or not the model that the Federal Circuit Court has developed with their Indigenous list on family law matters—which I think originated in the Sydney Registry, and entirely was created by the court, not by Parliament—elements of that could be adopted in the Children's Court in New South Wales?

The Law Society is fortunate to include among the members of its Indigenous Issues Committee key individuals who developed and implemented the pilot Indigenous list at the Sydney Registry of the Federal Circuit Court. These members are available to discuss this issue in more depth if it assists.

Based on its success in the Sydney registry, the Indigenous list at the Federal Circuit Court has been implemented at the Melbourne, Adelaide and Alice Springs registries.

In the Law Society's view, the following elements of the Indigenous list at the Federal Circuit Court are critical for its success, and they are broadly transferable to a specialised Indigenous list in the care and protection jurisdiction of the Children's Court:

1. There must be at least one judicial officer "championing" the Indigenous list and these judicial officers need to take a person-centred, case-management approach to the matters.

2. A therapeutic jurisprudential approach must be taken to Indigenous matters. This requires the close involvement of coordinated 'wraparound' services that are preferably led by Aboriginal people, or trusted by Aboriginal people. The therapeutic and legal services must work closely and in coordination, and Indigenous workers must be present at the Court on Indigenous list days.

3. There should be some mechanism to coordinate the services, and also to hold them accountable for delivery of services. There are existing mechanisms in the *Children and Young Persons (Care And Protection) Act 1998* (NSW) ("Care Act") that may be appropriate for these purposes including parenting capacity orders[1] and Parent Responsibility Contracts (PRCs) (which come with an obligation to provide parents with reasonable access to independent legal advice).[2] The services providing support to parents can then prepare and provide reports that are potentially a source of strengths-based evidence. In the Law Society's view, these mechanisms are a therapeutic engagement opportunity. Particularly with PRCs, parents have the opportunity provide input into which services they consider culturally safe, and are therefore more likely to engage with.

4. In the family law jurisdiction, any party 'concerned with the care, welfare or development of the child' (s 65C(c), *Family Law Act 1975* (Cth)) has standing. There are mechanisms (such as joinder applications) to enable this in the care and protection jurisdiction, and these mechanisms could be used with more frequency to ensure that an Aboriginal child's safe family members are able to 'stand up" for children at risk.

Even if a child remains in the care of the Minister, more meaningful contact and cultural care arrangements might be made through a specialised Indigenous list, for example through specialised family group conferencing.

The Law Society notes that in designing an Indigenous list in the Children's Court, the key issue is that of engaging and empowering Aboriginal family members. That is, putting

[1] Section 91E, Care Act.
[2] Section 38A(4), Care Act.

Aboriginal children and their families at the centre of this work. As the Federal Circuit Court is a private court, the work of engaging and empowering litigants has taken place prior to an application being made, usually by Aboriginal services working together with legal assistance providers. Consideration of how to deal with this issue in the design of an Indigenous list in the care and protection jurisdiction will be critical, given that it is more often than not seen by Aboriginal people to be an environment that is coercive, hopeless and disempowering for Aboriginal families.

Further, the timelines are stricter in care and protection matters, which is a significant threshold issue to consider. This has serious implications in respect of the accessibility of services for parents (for example, we understand that in some areas, waiting lists for spots in drug and alcohol rehabilitation centres can be six months long), and ultimately for the success of an Indigenous list in the Children's Court. Defining success will be another threshold question, but in our view can be evaluated by reviewing levels of engagement and empowerment of Aboriginal families, how fairly families feel they have been treated through the process, and not least of all whether the best interests of Aboriginal children are met, including by being able to grow up within their families and their culture, staying engaged in education and so forth.

In this regard, we suggest the Select Committee consider the 2019 evaluation[3] of Marram-Ngala Ganbu, a Koori Family Hearing Day at the Children's Court of Victoria in Broadmeadows, which was established in 2016. Extracted for the Select Committee's convenience are the key findings of the evaluation:[4]

Key evaluation findings

Overarching finding: Marram-Ngala Ganbu is achieving its intended short to medium-term outcomes, and there are early indicators that it is on track to deliver the desired long-term outcomes. The program is providing a more effective, culturally appropriate and just response for Koori families through a more culturally appropriate court process, that enables greater participation by family members and more culturally-informed decision-making.

Stakeholder	Finding
Children and young people	1. *Short-term outcome:* Koori young people have reported positive experiences about their involvement in Marram-Ngala Ganbu 2. *Long-term outcome:* There are early indicators that Marram-Ngala Ganbu is contributing to young people feeling more connected to their family, culture and community
Families	3. *Short-medium term outcome:* Koori families have reported a range of positive experiences about their involvement at Marram-Ngala Ganbu. This led to greater engagement with court processes and services, and more satisfaction with decisions 4. *Medium term outcome:* Koori families are more likely to follow court orders in Marram-Ngala Ganbu, in part due to the encouragement from the Magistrate and the support of the Koori Services Coordinator, Koori Family Support Officer and the (Child Protection) Practice Leader M-NG 5 *Long-term outcome:* There are early indicators that Koori families have increased cultural connections, more Koori children are being placed in Aboriginal kinship care and that families are more likely to stay together, as a result of Marram-Ngala Ganbu

[3] Arabena, K., Bunston, W., Campbell, D., Eccles, K., Hume, D., & King, S. (2019), Evaluation of Marram-Ngala Ganbu, prepared for the Children's Court of Victoria. Available online: https://www.socialventures.com.au/assets/Evaluation-of-Marram-Ngala-Ganbu-November_SVA-Consulting.pdf

[4] Note 3, 4.

Carers	6. *Short-medium term outcome:* Aboriginal and non-Aboriginal carers (including foster parents) have reported positive experiences about their involvement in Marram-Ngala Ganbu
Elders	7. *Short-medium term outcome:* Anecdotal evidence from third parties (not Elders) that older family members feel respected, heard, can influence court decisions, and carry out their responsibilities to provide family leadership in Marram-Ngala Ganbu
Child protection system, magistrates & lawyers	8. *Short-medium term outcome:* The Department of Health and Human Services (DHHS) is more accountable to magistrates and the court process in Marram-Ngala Ganbu 9. *Short to medium term outcomes:* There is greater compliance with the Aboriginal Child Placement Principle 10. *Short-medium term outcome:* Magistrates experience a range of positive outcomes as a result of Marram-Ngala Ganbu, such as improved cultural competency, better-informed decision making and satisfaction that they are better meeting the needs of Koori families and children 11. *Short-medium term outcome:* Lawyers reported professional development and increased cultural competency as a result of participating in Marram-Ngala Ganbu
Unexpected outcomes	12. Magistrates in Marram-Ngala Ganbu explicitly incorporate considerations of cultural connection into assessing and balancing the risks to children in making their decisions 13. Marram-Ngala Ganbu has led to an increase in therapeutic judicial approaches being adopted in mainstream Children's Court hearings 14. Marram-Ngala Ganbu has contributed to improved recording of Aboriginal and Torres Strait Islander status in other courts

Finally, our members note that there are opportunities that currently exist that can be taken to improve outcomes for Aboriginal children and families in care matters. For example, family group conferencing can and should take place much earlier in the process. Better contact and cultural care arrangements can already be made even without a specialist list. If Aboriginal out of home care agencies were involved in family group conferencing, there is an opportunity to also build the capacity of those agencies to engage with meaningful contact and cultural care arrangements.

Further, it is open to Children's Court magistrates to make family law style contact orders in certain circumstances, and there are also opportunities to refer matters in the care and protection jurisdiction to the family law jurisdiction.

The Law Society considered these issues comprehensively in its 2015 submission to the Family Law Council in respect of its consideration of the issue of families with complex needs and the intersection of family law and care and protection. This submission is attached for the Select Committee's information.

In the experience of our members, in proceedings where Indigenous family members are able to exercise greater agency and control (ie, greater opportunities for self-determination), better outcomes are achieved. The Indigenous list at the Federal Circuit Court delivers on self-determination goals, hence the high levels of engagement with Indigenous family members, and better engagement with therapeutic services. Opportunities to transfer appropriate matters from the care jurisdiction to the family law system should not be passed up as this incorporates the benefits of the family law system even if a matter first comes to the attention of the legal system in the care and protection jurisdiction. In the event that an Indigenous list is set up in the Children's Court in the care and protection jurisdiction, that list should include, by design, a capacity to transfer appropriate matters to the family law jurisdiction.

Thank you for the opportunity to provide these responses. Questions at first instance may be directed to Vicky Kuek, Principal Policy Lawyer, at victoria.kuek@lawsociety.com.au or 9926 0354.

Yours sincerely,

Richard Harvey
President