



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IIC/CLIC/DHvk:1608683

9 November 2018

The Hon Pru Goward MP
Minister for Family and Community Services
GPO Box 5341
SYDNEY NSW 2001

By email: office@goward.minister.nsw.gov.au

Dear Minister,

Children and Young Persons (Care and Protection) Amendment Bill 2018

The Law Society of NSW, on balance, opposes the passage of the Children and Young Persons (Care and Protection) Amendment Bill 2018 ("Bill"). The Bill proposes substantial changes to the child protection system in NSW, yet key stakeholders, including Aboriginal community organisations and Stolen Generations organisations, have not had the opportunity to review or comment on the Bill. Given the significant time constraints, the Law Society sets out its concerns in brief below, together with recommendations. In the Law Society's view, the Bill should not pass, primarily because it appears to be underpinned by the view that adoption should be the preferred policy for permanency. In our view, this position fails to understand the complexities surrounding adoption, particularly as it relates to Indigenous children in the care system. If the Bill passes, we submit that the amendments below should be made.

1. Summary of the Law Society's views and recommendations

- 1) **Facilitate public consultation on the provisions of the Bill:** The Bill should be referred to an inquiry.
- 2) **We oppose the maximum two year time limit for restoration:** Clauses 20, 25 and 27 of Schedule 1 should be removed, or should be amended to exclude Indigenous children.
- 3) **We oppose guardianship orders by consent, and dispensing with parental consent where adoption is sought by the child's current guardian:** Clauses 13 and 14 of Schedule 1, and all clauses in Schedule 2, should be removed, or should be amended to (1) exclude Indigenous children; and (2) state that each party other than the Secretary should be provided with "independent legal advice, and in the case of Indigenous parties, advice that is culturally competent".
- 4) **We oppose additional limitations on applications to vary or dispense with care and protection orders:** Section 90 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should remain unchanged. At the very least:
 - a. the factors set out in subclauses 29(2A) and (2B) should be given equal weight.
 - b. the reference to the stability of present care arrangements in subclauses 29(2B)(b) and 32(c) should be removed.
- 5) **We support the requirement for ADR processes, but they must be supported by the provision of independent legal assistance:** Clause 12, Schedule 1 should be amended to require the provision of independent legal assistance to the family of a child or young person at risk of significant harm. In the case of Indigenous parties, the legal advice provided must be culturally competent

THE LAW SOCIETY OF NEW SOUTH WALES

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966

T +61 2 9926 0333 F +61 2 9231 5809
www.lawsociety.com.au



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2. Public scrutiny of the Bill

The Law Society is deeply concerned about the lack of opportunity for public scrutiny of the Bill. We note that although the Government carried out community consultations on broad proposals in October 2017, the report on the outcome of consultations was not made available until the day the Bill was introduced. Some of the proposals in the Bill were opposed in this consultation process, and some were not included in the consultation process at all. We note that a number of Aboriginal community organisations, including a Stolen Generations Organisation, have expressed deep concerns about the Bill's potential to repeat the mistakes of the past.

Recommendation 1:

The Bill should be referred to a NSW Parliamentary committee for inquiry, to allow for adequate public engagement and scrutiny of what appear to be significant reforms of the care and protection system.

3. Substantive concerns

It is the Law Society's long-standing position that the best form of permanency is to support families to stay together.¹ Child protection services in NSW require a cultural change to provide adequate and effective investment in early intervention efforts to assist the parents and families of children at risk to address those risk factors. This requires specific and culturally competent services for Indigenous families. Programs such as the Newpin Social Benefit Bond, which has resulted in restoring more children to their families at a rate of 63% over four years compared to 19% for similar families not in the program, should be expanded and made more broadly available. We note that from a funding perspective, restoration is incentivised in that program.

However, it appears that the rationale underlying the Bill is that adoption is the preferred permanency solution. Adoption is a very significant step in the life of any child and any family. The best interests of the child, and especially any group of siblings, should always be the primary consideration. Unfortunately, we continue to see the devastating effects of separating siblings from each other and the cutting of ties with birth families. The reality is that adoption is a strong disincentive to maintenance of birth family relationships. Except with the most dysfunctional families, this is a benefit to the child.

Regard should also be had to the struggles that come with adoption and the fact that adoptions do fail. They are not as straightforward as some would like to believe.

In our view, adoption is not a culturally appropriate option for Indigenous children in NSW. Indigenous children must be placed in accordance with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles in s 13 of the *Children and Young Persons (Care*

¹ This position is in line with the United Nations Convention on the Rights of the Child ("CRC"), which Australia is obliged to comply with, as a ratifying State Party. Article 9 of the CRC requires states to ensure that a child "shall not be separated from his or her parents against their will" unless competent authorities subject to judicial review determined that the separation "is necessary for the best interests of the child". Article 7 states that a child has "the right to know and be cared for by his or her parents" and Article 30 states that "a child... who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture". With regard to Article 30, the UN Committee on the Rights of the Child recommended in 2012 that Australia:

Fully implement the Indigenous Child Placement Principle and intensify its cooperation with indigenous community leaders and communities to find suitable solutions for indigenous children in need of alternative care within indigenous families. (Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention – Concluding Observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012), paras [51] – [56]).

and Protection) Act 1998 (NSW) ("Care Act"). In NSW there are strong examples of partnerships with Indigenous leadership that are keeping Indigenous children safe within their families, including early diversion of Indigenous children and families potentially at risk to the family law system when there is family breakdown, and a safe family member has been identified who is willing to care for the child. We strongly oppose any changes that would have the effect of undermining the rights to self-determination and a child's best interests, including his/her right to culture and family. We understand that previous FACS policy acknowledging that adoption is not a culturally appropriate option for Indigenous children is no longer current, and we are of the view that it should be reinstated.

We oppose the following specific provisions of the Bill:

3.1. Two year time maximum time limit for restoration

From a rule of law perspective, these provisions are concerning as they limit the discretion of the court in relation to restoration time limits, and limit the court's discretion to consider each matter on a case by case basis. We also oppose the provision proposing to interfere with judicial decision-making by requiring the court to make a determination regarding the Secretary's assessment of whether "there is a realistic possibility of restoration with a reasonable period."

The Law Society notes also that the two year maximum time limit may in fact set families up to fail, given the significant wait lists for access to services including rehabilitation, public housing and other social support services. In our view, rather than setting an arbitrary time limit on restoration, the current legislation should be amended to impose a positive burden on FACS to exercise best efforts to support each child's restoration on a case by case basis. FACS should be resourced appropriately to meet this obligation.

Recommendation 2:

- a. Clauses 20, 25 and 27 of Schedule 1, should be removed, or they should be amended to exclude Indigenous children.
- b. An amendment be made to impose a positive burden on FACS to exercise best efforts to support each child's restoration on a case by case basis.

3.2. Guardianship orders by consent, and dispensing with parental consent where adoption is sought by the child's guardian

While the child's safety and best interests are of course paramount, these provisions would allow the court to make a guardianship order with the parent's consent, even where there is no finding that a child is at risk of significant harm or should be subject to a care and protection order. We echo the concerns of Community Legal Centres NSW that this provision, taken together with the provision allowing the Supreme Court to dispense with parental consent where a guardian seeks adoption of the child, create a fast-tracked pathway to adoption without adequate safeguards for parents and families.

Recommendation 3:

Clauses 13 and 14 of Schedule 1 (and any other consequential provisions including clauses 1 and 19), and all clauses of Schedule 2, should be removed, or should be amended to (1) exclude Indigenous children; and (2) state that each party other than the Secretary should be provided with "independent legal advice, and in the case of Indigenous parties, advice that is culturally competent".

3.3. Additional limitations on applications to vary or dispense with care and protection orders

In the Law Society's view, section 90 applications are already a very difficult process. We note that in its report on the October 2017 consultations, FACS notes that most submissions were opposed to limiting the circumstances in which s 90 applications can be made, given that they already represent a very high bar. Despite this, the NSW Government recommended further limitations on parties' ability to apply to vary or dispense with current care orders. We note that the Government has not made a case for requiring the court to consider the stability of present care arrangements, and note also that the court already has the power to dismiss unmeritorious applications.

Recommendation 4:

Section 90 of the Care Act should remain unchanged. At the very least:

- a. the factors set out in subclauses 29(2A) and (2B) should be given equal weight.
- b. the reference to the stability of present care arrangements in subclauses 29(2B)(b) and 32(c) should be removed.

3.4. ADR processes must be supported by guaranteed access to free, independent and culturally competent legal assistance

While the Law Society supports the provisions requiring FACS to engage families in ADR before seeking care and protection orders, this process must be a meaningful one. Given that most families in this situation are unlikely to be well-resourced, the legislation should require that independent legal assistance be provided. In respect of Indigenous families in particular, the Law Society's long-standing position is that in order to be effective, legal assistance will require culturally competent legal advisers, supported by Aboriginal community and therapeutic workers.

Recommendation 5:

Clause 12 of Schedule 1 should be amended to require the provision of independent legal assistance to the family of a child or young person at risk of significant harm and in the case of Indigenous parties, the legal advice provided must be culturally competent.

If it assists, the Law Society would be pleased to provide further detail. Questions at first instance may be directed to Vicky Kuek, Principal Policy Lawyer, available at (02) 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely,



Doug Humphreys OAM
President

CC:

- Shadow Minister for FACS
- Minister for Aboriginal Affairs
- Shadow Minister for Aboriginal Affairs
- Attorney General
- Shadow Attorney General
- David Shoebridge MLC
- Fred Nile MLC
- Paul Green MLC
- Robert Borsak MLC
- Robert Brown MLC
- Trevor Khan MLC
- Shaoquett Moselmane MLC