

# NATIONAL FAMILY VIOLENCE PREVENTION LEGAL SERVICES

WORKING TO ACHIEVE IMPROVED JUSTICE OUTCOMES FOR ABORIGINAL AND TORRES STRAIT ISLANDER  
VICTIMS/SURVIVORS OF FAMILY VIOLENCE AND SEXUAL ASSAULT

National Family Violence Prevention Legal Services Forum submission to  
the Senate Community Affairs References Committee:

## **INQUIRY INTO OUT OF HOME CARE**

**October 2014**

## Introduction

The National Aboriginal Family Violence Prevention and Legal Services Forum (National Forum) welcomes the opportunity to provide input to the Community Affairs References Committee for the inquiry into out-of-home care.

Aboriginal and Torres Strait Islander children are significantly over-represented in child protection systems across the country. Nationally, Aboriginal and Torres Strait Islander children are ten times more likely to be on care and protection orders and almost eleven times more likely to be in out-of-home care than non-Aboriginal children.<sup>1</sup> Family violence is the key driver of Aboriginal children and young people into out-of-home care.

Levels of family violence in Aboriginal and Torres Strait Islander communities present enormous risks to the safety and wellbeing of children. In addition to direct harm to children that can arise from family violence, it also increases the likelihood that children will experience other forms of maltreatment and disadvantage.

The over-representation of Aboriginal and Torres Strait Islander children in the child protection system including out-of-home care cannot be separated from past policies of forced removals and intergenerational trauma. The *Bringing Them Home* report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families in 1997 clearly identified the legacy of past policies of forced removal and cultural assimilation, including intergenerational trauma, as underlying causes of the current situation.<sup>2</sup>

The unique and complex causes of Aboriginal children's over-representation in out-of-home care necessitate long-term, intensive responses that are specifically tailored to the unique needs and barriers to access to justice of Aboriginal and Torres Strait Islander communities. Sustainable and adequate funding is critical for support services to address demand and produce effective long-term outcomes for children, families and communities.

Aboriginal and Torres Strait Islander families, communities and organisations must be supported and empowered to provide for the safety of Aboriginal and Torres Strait Islander children.

## About the National FVPLS Forum

The National Forum was established in May 2012. The goal of the National Forum is to work in collaboration across various Family Violence Prevention Legal Services (FVPLSs) to increase access to justice for Aboriginal and Torres Strait Islander victims/survivors of family violence. The National Forum has its own Charter, is led by an elected National Convenor and supported by a Secretariat. Members are represented by their CEO/Coordinator (or delegates) and have worked together to develop tools for capacity building, good governance, training and evaluation and data collection.

National Forum members are:

- Aboriginal Family Violence Prevention and Legal Service Victoria (Melbourne HO, Mildura, Gippsland, Barwon South West)
- Aboriginal Family Legal Service Southern Queensland (Roma)

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<sup>1</sup> Australian Institute of Health and Welfare, *Child Protection Australia 2012-3*, 43 and 55.

<sup>2</sup> National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, *Bringing them Home*, 1997 available at [http://www.humanrights.gov.au/sites/default/files/content/pdf/social\\_justice/bringing\\_them\\_home\\_report.pdf](http://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf)

- Binaal Billa Family Violence Prevention Legal Service (Forbes )
- Central Australian Aboriginal Family Legal Unit Aboriginal Corporation (Alice Springs HO, Tennant Creek)
- Family Violence Legal Service Aboriginal Corporation (Port Augusta HO, Ceduna, Pt Lincoln)
- Many Rivers Family Violence Prevention Legal Service (Kempsey)
- Marninwarnitkura Family Violence Prevention Unit WA (Fitzroy Crossing)
- Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service (Alice Springs, NPY Tri-state Region)
- Queensland Indigenous Family Violence Legal Service (Cairns HO, Townsville, Rockhampton, Mount Isa, Brisbane)
- Southern Aboriginal Corporation Family Violence Prevention Legal Service (Albany)
- Thiyama-li Family Violence Service Inc. NSW (Moree HO, Bourke, Walgett)
- Warra-Warra Family Violence Prevention Legal Service (Broken Hill)
- Western Australia Family Violence Legal Service (Perth HO, Broome, Carnarvon, Kununnura, Geraldton, Kalgoorlie, Port Hedland)

### About the Family Violence Prevention Legal Services (FVPLS) Program

FVPLSs provide frontline legal assistance services, early intervention/prevention and community legal education activities to Aboriginal and Torres Strait Islander victim/survivors of family violence.

FVPLSs were established over 16 years ago, in recognition of:

- the gap in access to legal services for Aboriginal and Torres Strait Islander victims/survivors of family violence and sexual assault;
- the high number of legal conflicts within Aboriginal and Torres Strait Islander Legal Services (ATSILS); and
- high rates of family violence in Aboriginal and Torres Strait Islander communities.

The Australian Government funding for FVPLS in over 31 rural and remote locations will cease in June 2015. Any future funding is subject to the outcomes of a competitive tender process under the Indigenous Advancement Strategy. FVPLS Services will not be notified of the outcomes of the tender until March 2015.

FVPLSs have adopted holistic, wrap-around service delivery models that prioritise legal service delivery while recognising and addressing the multitude of interrelated issues that our clients face. The primary function of FVPLSs is to provide legal assistance, casework, counselling and court support to Aboriginal and Torres Strait Islander adults and children who are victim/survivors of family violence. FVPLS lawyers provide legal assistance in the areas of family violence law, child protection, family law and victims of crime assistance. FVPLSs also provide culturally safe community legal education and early intervention/prevention activities.

Ninety per cent of FVPLS clients are Aboriginal and Torres Strait Islander women and children. Family violence is complex and the issues our clients face are complex. As well as family violence driven homelessness, our clients live with intergenerational trauma, removal of children, discrimination, poverty, mental health issues, disability, lower levels of literacy and numeracy, as well as a range of other cultural, legal and non-legal issues.

FVPLSs play an important role within the child protection system, representing the needs and interests of clients to child protection agencies and in the courts, which frequently includes concerns about the safety and wellbeing of their children. FVPLSs are also uniquely placed to support child protection agencies to understand their obligations to Aboriginal and Torres Strait Islander children. This may include helping to identify what is needed for reunification with a parent, identifying and facilitating the assessment of appropriate kinship care placements and/or implementing other strategies to ensure Aboriginal and Torres Strait Islander children have opportunities to maintain connections with their communities and culture.

Adequate resourcing for culturally safe and specialist legal assistance services, such as FVPLSs and other vital support services, is essential to enable these services to provide effective, preventative advice and intensive support.

FVPLSs are important, experienced and specialist legal assistance service providers delivering critical services to highly disadvantaged Australians with complex, multiple legal and socio-legal needs.

### Indigenous Advancement Strategy

In the 2014-15 Federal Budget, it was announced that more than one hundred and fifty Indigenous programs under the responsibility of the Department of Prime Minister and Cabinet (PM&C) would be 'rationalised' into five high level program streams under the Prime Minister's *Indigenous Advancement Strategy*. Under the strategy, \$534.4 million will be cut from Indigenous Affairs over the next five years.

In December 2013, responsibility for the National FVPLS Program was shifted from the Attorney General's Department (AGD) to the PM&C. The three other legal assistance services, Legal Aid, Community Legal Centres and Aboriginal and Torres Strait Islander Legal Services, all remained in AGD. No rationale was given for the shift, creating uncertainty as to whether FVPLSs would continue to be recognised by Government as frontline legal services and as a national program.

The new funding Guidelines for the *Indigenous Advancement Strategy* were released on 8 August 2014. The Guidelines state that the Government intends for much of the funding to be available through 'open competitive grant rounds' which closed on 17 October 2014. Under these Guidelines, FVPLSs are no longer regarded by Government as a standalone program or as a core service model that includes legal assistance services.

The Indigenous Advancement Strategy does not commit to funding specialist frontline legal services such as those provided by the FVPLS program. FVPLSs were instead required to each make individual applications for funding as one of many potential activities under one of five programs, such as the 'Safety and Wellbeing Programme'. The 'Safety and Wellbeing Programme' allows for funding of activities that aim to prevent family violence or support victims of family violence.

Without a direct allocation of funds to FVPLSs however, frontline services provided by the FVPLS program are at high risk through this tender and through any future tendering under the Indigenous Advancement Strategy.

It means that FVPLSs have to compete with over one hundred and fifty former programs for funding and new competitors including large care organisations, territory and state governments and programs for family violence perpetrators.

Even if organisations apply to deliver the FVPLS service model and are assessed as eligible, the Guidelines indicate that the 'priorities' of decision makers may still determine whether any funding is available, or whether the funding is committed to competing activities.

This situation builds incentives for aspiring applicants to compromise the FVPLS service model. They might do this, for example, by cutting costs associated with paralegal support that complements the provision of legal representation and advice, addresses non-legal needs of victims/survivors and ensures the program is holistic, appropriate and effective.

It encourages Aboriginal organisations and communities to compete with each other for funding, rather than work together to respond sensitively and effectively to family violence in Aboriginal and Torres Strait Islander communities.

The outcomes of this competitive process will not be known until March 2015.

Given these concerns, and given recognition by the Productivity Commission that FVPLSs are in fact essential, core legal assistance services,<sup>3</sup> the National Secretariat wrote a formal request to the Department in August seeking a direct allocation of funding to the FVPLS Program. There is discretion under the guidelines to grant this request but it was refused just prior to the opening of the tender.

The continued uncertainty has a substantial impact on FVPLSs frontline service provision, most significantly on maintaining trust in Aboriginal and Torres Strait Islander communities. In particular, preceding funding announcements in March next year, victims/survivors of family violence will not know whether FVPLSs will be available to assist them for the entirety of their legal matters and may feel themselves at risk if they proceed without this knowledge. This uncertainty also makes it difficult to recruit and retain qualified and experienced staff, especially in regional and remote locations.

Crucially, the evidence is clear that impacts on the provision of support to Aboriginal and Torres Strait Islander victims/survivors of family violence can be expected to have flow on impacts on the rates of Aboriginal and Torres Strait Islander children in out of home care. Given historical and contemporary experiences of the removal of Aboriginal and Torres Strait Islander from their families, this situation is nothing less than devastating for individuals, families and communities and for the nation as a whole.

It is absolutely imperative that these impacts are not only prevented in the future, but that action is taken to ensure that existing impacts are addressed and reversed as far as possible.

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<sup>3</sup> Productivity Commission, *Access to Justice Arrangements Draft Report*, 2014, 29, 34 & 677.

Our response to each of the terms of reference are provided below:

**A. Drivers of the increase in the number of children placed in out of home care, types of care that are increasing and demographics of the children in care**

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Aboriginal and Torres Strait Islander children are significantly over-represented in the child protection system across Australia. Nationally, compared with non-Indigenous children, Aboriginal and Torres Strait Islander children are:

- eight times as likely to be the subject of substantiated child abuse and neglect;
- ten times as likely to be on care and protection orders; and
- Almost eleven (10.6) times more likely to be in out-of-home care.<sup>4</sup>

The rate of Aboriginal and Torres Strait Islander children in the child protection system – and in out-of-home care in particular - is increasing at disproportionate rates.

The out-of-home care rate for Aboriginal and Torres Strait Islander children increased from 44.8 to 57.1 per 1,000, whereas the non-Aboriginal and Torres Strait Islander rate increased from only 4.9 to 5.4 per 1,000. The overall increase in all out-of-home care placements is driven by the increase of Aboriginal and Torres Strait Islander children.<sup>5</sup>

Between 2009 and 2013, the rate of Aboriginal and Torres Strait Islander children on care and protection orders increased from 43.8 to 59.2 per 1,000, while the rate for non-Aboriginal and Torres Strait Islander children remained more or less stable.<sup>6</sup>

The over-representation of Aboriginal and Torres Strait Islander children in child protection and out-of-home care cannot be separated from past policies of forced removals and intergenerational trauma. This history is not in the past. As removals continue, albeit under contemporary laws, so too does trauma continue, and so too does Aboriginal and Torres Strait Islander children's dislocation from family, community and culture continue. As of 30 June 2013, 13,914 Aboriginal and Torres Strait Islander children were in out of home care,<sup>7</sup> compared to 2,785 children when the *Bringing Them Home* Report was released in 1997.<sup>8</sup>

It is clear from this data that mainstream services and systems still fail to understand and adequately address the relationship between past and contemporary forms of Aboriginal and Torres Strait Islander child removal. Access to culturally appropriate legal and associated supports together with Aboriginal and Torres Strait Islander-driven initiatives to address systemic change will be key to removing barriers to Aboriginal and Torres Strait Islander families accessing the justice system and engaging meaningfully with child protection authorities and Courts.

We understand the primary drivers for the increasingly high rates of Aboriginal and Torres Strait Islander children in out-of-home care – and in non-kinship care specifically- to be:

1. Family violence;
2. Homelessness, drug and alcohol use, mental health concerns and poverty;

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<sup>4</sup> Australian Institute of Health and Welfare, *Child Protection Australia 2012-3*, 25, 43 and 55.

<sup>5</sup> Ibid, 55.

<sup>6</sup> Australian Institute of Health and Welfare, *Child Protection Australia 2012-3*, 43.

<sup>7</sup> Productivity Commission, *Report on Government Services 2014- Indigenous Compendium*, 15.11.

<sup>8</sup> SNAICC Report, *Whose Voice Counts- Aboriginal and Torres Strait Islander participation in child pretention decision-making, 2013*, available at <http://www.snaicc.org.au/uploads/rsfil/03197.pdf>.

3. Limited resourcing for effective early intervention and prevention, including targeted support services for victims/survivors of family violence;
4. Understanding and application of the Aboriginal Child Placement Principle;
5. Specific legislative and accountability mechanisms.

These drivers are each discussed in turn below.

Without effective action and resourcing, we anticipate that the rate of Aboriginal and Torres Strait Islander children in out-of-home care will continue to increase.

### Family violence as a driver of high and increasing rates of out-of-home care

In the experience of the National Forum, family violence is the key driver for the removal of Aboriginal and Torres Strait Islander children from their families.

Aboriginal and Torres Strait Islander people, overwhelmingly women and children, are disproportionately over-represented as victims/survivors of family violence. Aboriginal and Torres Strait Islander women are 31 times more likely to be hospitalised<sup>9</sup> and ten times more likely to die from violent assault than other Australian women.<sup>10</sup>

The over-representation of Aboriginal and Torres Strait Islander women as victims/survivors of family violence leads in turn to the over-representation of Aboriginal and Torres Strait Islander children in child protection systems and, ultimately, placement in out-of-home care. Factors contributing to family violence – such as homelessness, drug and alcohol use, mental health, imprisonment and poverty – in turn become factors that contribute to increasing rates of child protection notifications and removal of Aboriginal and Torres Strait Islander children.

Importantly, reporting violence can lead to increased exposure to the child protection system. If children are present and witnessing violence they can be assessed as ‘at risk’. In fact, in some jurisdictions a formal notification to child protection agencies is mandated during any police attendance at a family violence incident at which children are present. In the experience of FVPLSs this can impact on victims/survivors reporting incidents of family violence, as the child protection interventions that often follow are too often experienced as disempowering and/or traumatic.

The National Aboriginal and Torres Strait Islander Women’s Alliance (NATSIWA) have pointed out that the relatively recent inclusion of ‘witnessing’ in definitions of emotional abuse may have led to an increase in the number of Aboriginal and Torres Strait Islander children coming to the attention of the child protection system and being placed in out-of-home care:

The following factors suggest that there may be unintended consequences, with a deepening of the inequity experienced by *Indigenous* families as a result of this change: increased notifications and investigations; police being the main source of notifications; increased substantiations of emotional abuse and a 9% increase in children being placed in out-of-home care in 2009-2010 ... Even if notifications are not substantiated when investigated, and children are not removed, the impact of increasing numbers of notifications and investigations on the stability and functioning of Aboriginal and Torres Strait Islander families - many of whom have

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<sup>9</sup> Commonwealth of Australia, *Overcoming Indigenous Disadvantage Key Indicators 2011 Report*, 4.1.24.

<sup>10</sup> Australian Institute of Health and Welfare, *Family violence among Aboriginal and Torres Strait Islander peoples*, 2006, 71.

been affected by policies of forcible removal (Stolen Generations) – requires further investigation.<sup>11</sup>

Without adequate and well-targeted support to victims/survivors of family violence at this point of intervention, notifications to child protection agencies are likely to create adverse outcomes for both parties and lead to increasing rates of preventable child removal. The alternative would be immediate access to safe alternatives, which requires at minimum safe and secure housing, adequate financial resources and other support to address the impacts of family violence on victims/survivors.

Similarly, effective early intervention and prevention for family violence can also be seen as early intervention and prevention for the involvement of child protection agencies and the removal of children into out-of-home care.

It is absolutely critical that child protection is recognised as a legal issue for victims/survivors of family violence (see more on this below). Supporting the legal and non-legal needs of victims/survivors of family violence and other activities that assist in addressing family violence are essential precursors to reducing the over-representation of Aboriginal and Torres Strait Islander children in the child protection system.

#### Homelessness as a driver of high and increasing rates of out-of-home care

Lack of safe and adequate housing is a significant barrier for Aboriginal and Torres Strait Islander parents, particularly mothers fleeing family violence, to continue or resume caring for their children after child protection involvement. Aboriginal and Torres Strait Islander women are 15 times more likely to seek assistance from crisis homelessness services than non-Aboriginal and Torres Strait Islander people.<sup>12</sup> One in ten Aboriginal and Torres Strait Islander women used a specialist homelessness service in 2012-13.<sup>13</sup>

From the experience of FVPLSs, the prospect of homelessness may result in women not reporting violence and/or staying with a violent partner, putting the safety of their children and themselves at risk. This can ultimately lead to interaction with the child protection system and more Aboriginal and Torres Strait Islander children in out-of-home care.

In addition, as noted above, the act of reporting violence can also bring a victim/survivor and her children into contact with the child protection system. Homelessness is not a safe option for victims/survivors of family violence or their children which means these notifications may lead to child removal in circumstances where the primary cause is that a mother is unable to provide safe and stable housing for her child(ren).

A report released by the Indigenous Legal Needs Project in Victoria points out that access to appropriate housing can be a determining factor in reunification prospects with children in out-of-home care. However, the processes for obtaining housing are 'not easy to negotiate and they

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<sup>11</sup> The National Aboriginal and Torres Strait Islander Women's Alliance, *Submission to the Senate Finance and Public Administration References Committee Inquiry into Domestic Violence in Australia*, 2014, 19.

<sup>12</sup> Australian Institute of Criminology, *The Relevance of Family Violence to Indigenous Women's Offending*, 2010, 28.

<sup>13</sup> Australian Institute of Health and Welfare, *Homelessness among Indigenous Australians*, 2014.

can be doing all the right things in the world but until there is a physical house they are not going to allow the kids back. So the interaction between systems is so frustrating.<sup>14</sup>

Rather than relieving pressures on affordable housing services and specialist homelessness shelters, recent policy decisions, particularly in the 2014-15 Federal Budget will instead detrimentally impact Aboriginal and Torres Strait Islander families and their ability to find safe and affordable places to live with their children. In addition, defunding of the National Rental Affordability Scheme (NRAS), which aimed to address the shortage of affordable housing, will worsen the housing crisis and decrease housing options for victims of family violence and their children. The end of NRAS will mean that some 12,000 affordable dwellings which were to be constructed will no longer proceed. This will put added pressure on the community and crisis housing sectors including homelessness services.

### Mental health and substance use as a driver of high and increasing rates of out-of-home care

Family violence also has broad ranging impacts on the mental and physical health and wellbeing of Aboriginal and Torres Strait Islander victims/survivors and impacts their capacity to protect and safely parent their children. Women who experience family violence and/or sexual assault are more likely to experience mental illness<sup>15</sup> and a range of adverse health impacts, including severe psychological distress, depression, suicidal tendencies and alcohol and drug misuse<sup>16</sup>.

Women who have experienced family violence and/or sexual assault are also more likely to have alcohol problems and to use non-prescription drugs than other women. One study resulting from interviews with 150 Australian women in the late 1990s found that for some women the only way they reported being able to cope with the violence was to find comfort in alcohol and drugs.<sup>17</sup>

FVPLS clients regularly inform their legal representatives that their alcohol or drug use became a problem following their experiences of family violence and/or sexual assault. Often this is in the context of self-medicating or attempting to escape negative feelings and memories of violence and assault. It is also common for women to be introduced to problematic drug use by an abusive partner.

These factors can impact the parenting capacity of victims/survivors and draw them to the attention of child protection authorities. It can also negatively impact their ability to seek safety and effectively address and/or manage their own needs or the needs of their children.

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<sup>14</sup> Australian Indigenous Legal Needs Project, *The civil and family law needs of Indigenous people in Victoria*, 2013, 42.

<sup>15</sup> National Mental Health Commission, *The Mental and Social and Emotional Wellbeing of Aboriginal and Torres Strait Islander Peoples, Families and Communities*, 2013, 16-17.

<sup>16</sup> Golding J, 'Intimate partner violence as a risk factor for mental disorders: a meta-analysis', *Journal of Family Violence*, 1991, vol 14, 112.

<sup>17</sup> Australian Domestic & Family Violence Clearinghouse, *Alcohol issues in domestic violence*, 2005, 6. See also above n 3.

## Imprisonment as a driver of high and increasing rates of out-of-home care

Many incarcerated Aboriginal and Torres Strait Islander women have been victims of physical and sexual assault at some time in their lives. In addition it is clear there are high levels of ongoing family violence which are also connected to their offences and convictions.<sup>18</sup>

Importantly, it is estimated that at least 80 per cent of the Aboriginal and Torres Strait Islander women in prison are mothers to dependent children.<sup>19</sup>

Imprisonment, self-medication through drug and alcohol and victimisation through family violence (including sexual assault) all contribute to mothers coming into contact with the child protection system and, for too many, the removal of their children. This results in further placements into out-of-home care which, in turn, increases the likelihood of Aboriginal and Torres Strait Islander children entering juvenile justice and/or the adult prison system. The impacts of this intergenerational cycle are understood and experienced by many as the new stolen generation.

## Poverty as a driver of high and increasing rates of out-of-home care

Victims/survivors of family violence must have access to adequate financial resources and economic security to seek, reach and maintain safety. This has been well demonstrated elsewhere. Providing this support to mothers who have experienced family violence has flow on benefits for their children and reduces the costs and impacts of out-of-home care and subsequent pathways through juvenile justice and imprisonment.

Recent changes to welfare payments will negatively impact on Aboriginal and Torres Strait Islander families, including women and children escaping violence, leaving them at greater risk of poverty and child protection intervention.

Victims' compensation has been recognised as a crucial mechanism for ensuring victims/survivors of family violence have sufficient economic means to escape and recover from family violence, which minimises their vulnerability to further violence,<sup>20</sup> yet many of the clients that attend FVPLSs are not aware of their entitlements. The value of legal advocacy is a critical mechanism to ensure victims/survivors can claim the protections and entitlements needed to achieve financial security, thereby ensuring they have the means to escape violence and access safety.<sup>21</sup>

## Resourcing for effective early intervention and prevention, including targeted support services

For Aboriginal and Torres Strait Islander victims/survivors, culturally safe services are best positioned to respond holistically and provide effective short and long-term assistance. However the success of initiatives to address these issues is directly related to levels of resourcing.

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<sup>18</sup> Victorian Department Of Justice, *Victorian Aboriginal Justice Agreement - Phase 2, 2006* available at [http://multimedia.justice.vic.gov.au/comms/Koori/resources/Victorian\\_Aboriginal\\_Justice\\_Agreement/p\\_hase2/index.html](http://multimedia.justice.vic.gov.au/comms/Koori/resources/Victorian_Aboriginal_Justice_Agreement/p_hase2/index.html)

<sup>19</sup> Behrendt, L., Cunneen, C. & Liebesman, T, *Indigenous legal relations in Australia*, Melbourne, Oxford University Press, 2009.

<sup>20</sup> Ibid. See also above n 1, 48.

<sup>21</sup> Ibid.

The complicated nature of the system together with the significant powers exercised by the state with respect to Aboriginal and Torres Strait Islander children necessitate strengthened legal services for Aboriginal and Torres Strait Islander people specifically in the area of child protection law. Processes to ensure earlier access to legal assistance and information about rights are critical to address significant knowledge and power differentials within the child protection system.

We see through FVPLS casework the difference that proactive, early legal advice and representation can make. This includes, for example, ensuring that clients understand their rights and the legal process. This means they are better empowered to cooperate with child protection authorities to address protective concerns before they escalate to child removal.

Alternatively, where Aboriginal and Torres Strait Islander parents are not able to care for their children, early legal advice and representation can ensure that appropriate kinship placements are identified and children remain connected to extended family, community and culture.

This means child protection must be recognised as a legal issue for victims/survivors of family violence. Reports released through the Legal Needs Project across Queensland, Victoria, Northern Territory and New South Wales have shown broader patterns across jurisdictions, including:

- There is a significant unmet need for assistance with child protection law. This includes a lack of understanding of the law and what rights parents have in the system, as well as lack of access to legal advice and representation;
- Women more likely to seek assistance than men on child protection issues;
- Departments responsible for child protection do not always follow their own procedures and/or act in accordance with their obligations;
- There is a widespread sense of injustice and disempowerment and of inadequate care, consultation and accountability around departmental practices.<sup>22</sup>

Some of the reports also identified a pattern in which departmental staff actively discourage parents from learning their legal rights or accessing legal advice and representation. According to focus groups participants who were surveyed in Queensland as part of the Legal Needs Project, “departmental staff discourage clients to seek legal advice, they much prefer that those families are more vulnerable”.<sup>23</sup>

Aboriginal and Torres Strait Islander victims/survivors continue to face these and other barriers to accessing legal advice and representation and responding confidently to the requirements of the child protection system. Historically, both the legal and child protection systems have been used against Aboriginal and Torres Strait Islander people, and there is considerable mistrust and fear of both systems in Aboriginal and Torres Strait Islander communities.

In addition, institutionalised and individual racism and discrimination has left Aboriginal and Torres Strait Islander community members reluctant to seek mainstream legal assistance. Appropriate cultural awareness training of mainstream services can go some way to

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<sup>22</sup> Above n 15, 9, 42, 43, 66, 79; Indigenous Legal Needs Project, *The Civil and Family Law Needs of Indigenous people in Queensland*, 2014, 26, 34, 35; Indigenous Legal Needs Project, *The Civil and Family Law Needs of Indigenous people in New South Wales*, 2013, 11; Indigenous Legal Needs Project, *The Civil and Family Law Needs of Indigenous people in Northern Territory*, 2013, 14, 22, 66.

<sup>23</sup> Indigenous Legal Needs Project, *The Civil and Family Law Needs of Indigenous people in Queensland*, 35.

ameliorating this issue. However, due to the degree of mistrust and intergenerational trauma many Aboriginal and Torres Strait Islander people will still be unlikely to access mainstream services. Culturally safe, specialist and Aboriginal community controlled legal services therefore remain vital.

Broad-based early intervention and prevention support is also critical to reducing the numbers of Aboriginal and Torres Strait Islander children in the child protection system. The utilisation and strengthening of culturally appropriate early resolution processes for Aboriginal and Torres Strait Islander children is imperative, which must contain legal safeguards and appropriate screening for family violence and safety concerns.

Adequate resourcing for culturally safe and specialist legal assistance services, such as FVPLSs and other vital support services, is essential to enable these services to provide effective, preventative advice and intensive support.

### Understanding and application of the Aboriginal Child Placement Principle – driver of placements in non-kinship care

All jurisdictions have adopted the Aboriginal Child Placement Principle in both legislation and policy. The Aboriginal Child Placement Principle provides the following order of preference for the placement of Aboriginal and Torres Strait Islander children:

- With the child's extended family
- Within the child's Aboriginal and Torres Strait Islander community
- With other Aboriginal and Torres Strait Islander people

This principle rightly prioritises the placement of Aboriginal and Torres Strait Islander children with kin and/or community in order to ensure their cultural connection and identity.

Nationally, 68% of Aboriginal and Torres Strait Islander children are placed with relatives/kin, other Indigenous caregivers or in Indigenous residential care.<sup>24</sup> This means that for 32% of Aboriginal and Torres Strait Islander children the Aboriginal Child Placement Principle has not been applied and the children are placed with unrelated, non-Aboriginal and Torres Strait Islander carers or institutions.

The Australian Institute of Health and Welfare points out that the Principle is only one of the many considerations being taken into account when making decisions about the placement of Aboriginal and Torres Strait Islander children:

*Where placement options outlined in the Principle are not optimal for a child's safety and wellbeing, the child may be placed in an alternative care arrangement, this is usually only done after extensive consultation with Aboriginal and Torres Strait Islander individuals and/or organisations.<sup>25</sup>*

However, NATSIWA surveyed its Board, NATSIWA members and other relevant agencies to review the implementation of the *National Plan to Reduce Violence against Women and their Children*. When these respondents were asked whether they believed Child Protection authorities adhered to the Child Placement Principle when placing children in out-of-home care, only 20% believed this often happened, with the remainder saying sometimes (30%), not often (40%) and not at all (10%).<sup>26</sup>

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<sup>24</sup> Australian Institute of Health and Welfare, *Child Protection Australia 2012-13*, 52.

<sup>25</sup> Australian Institute of Health and Welfare, *Child Protection Australia 2012-13*, p. 52 (emphasis added)

<sup>26</sup> Above n 12, 18.

NATSIWA also point out that ‘there is a serious shortage of culturally appropriate placements to accommodate Aboriginal and Torres Strait Islander children, making it increasingly difficult to implement the Aboriginal Child Placement Principle.<sup>27</sup> The shortage of Aboriginal and Torres Strait Islander foster carers is recognised and acknowledged.

However, in the experience of the National Forum, consultation with Aboriginal and Torres Strait Islander individuals and/or organisations is in fact limited and is often not adequate to identify all potential parties able to take care of the child. See more below regarding FVPLSs experience with consultations taking place.

### Specific legislative and accountability mechanisms

Some legislative and procedural provisions specific to the best interests of Aboriginal and Torres Strait Islander children are in place, yet require strengthening. In addition, the National Forum is aware that the implementation of existing measures is not occurring as it should, and that mechanisms for accountability also require strengthening and more consistent application.

For example, FVPLSs practitioners on the ground regularly assist Aboriginal and Torres Strait Islander families where the relevant Department has failed to comply with Aboriginal and Torres Strait Islander Placement Principles and/or requirements concerning the preparation of cultural support plans. Similarly, there may be provisions in place (for example Aboriginal Family-led Decision Making meetings) but there are often significant delays in these occurring which limits their effectiveness.

Culturally appropriate legal advocacy has an important contribution to make to effective and system-wide accountability.

Courts can also have an important role in ensuring compliance and accountability. However, the National Forum is concerned that legislative reforms in some jurisdictions (e.g. NSW and Victoria) may operate to remove judicial oversight by removing the obligation to return to the Court during the life of long-term and permanent care orders even where the child’s placement is being changed.

The National Forum is also concerned that the legislative reforms in these jurisdictions may result in increased numbers of Aboriginal and Torres Strait Islander children in permanent out-of-home care placements. For example, there are proposed changes to legislation enabling courts to order permanent protection orders if there “appears to be no realistic prospect” of the child being able to return to their parent within the next 12 months and there are no other care arrangements available.<sup>28</sup> These reforms fail to recognise that every family is unique and that imposing rigid time frames for making decisions for something as important and complex as the permanent protection of a child is not appropriate.

These conditions will affect the most vulnerable in our community, particularly Aboriginal and Torres Strait Islander mothers, who have experienced intergenerational trauma and are often victims of family violence. There needs to be an acknowledgment that overcoming trauma and disadvantage is a long process, and requires ongoing support. It should not be the priority of the

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<sup>27</sup> Ibid, 6.

<sup>28</sup> *Children and Young Persons (Care and Protection) Act 1998 NSW, Children Youth and Families (Permanent Care and Other Matters) Bill 2014* Victoria.

governments to put children in long-term care but rather to return them to their family when it is appropriate and safe to do so.

Legal reform that is driven by Aboriginal and Torres Strait Islander organisations to ensure more proactive judicial oversight function with respect to Aboriginal and Torres Strait Islander children in the child protection system communities might also strengthen outcomes and provide broader accountability beyond court processes.

## **B. The outcomes for children in out-of-home care (including kinship care, foster care and residential care) versus staying in the home;**

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### Outcomes from Out-of-Home Care – Residential Care and Non-Aboriginal Foster Care

Aboriginal and Torres Strait Islander children who are removed from their families and communities, whether placed in residential care or in an unrelated/non-Aboriginal and Torres Strait Islander foster care placements, are at increased risk of adverse outcomes. Those outcomes may include:

- cultural dislocation and disconnection leading to poor psychological, social and emotional health and wellbeing as they grow older, including for example social isolation and problems with their sense of identity, belonging and self-esteem;
- increased risk of abuse whilst in care;
- increased risk of offending and involvement with the juvenile justice system;
- increased likelihood of drug and alcohol misuse; and
- increased likelihood of having their own children removed.

A recent study in one jurisdiction found that the majority of high-use legal aid clients had been the subject of child protection proceedings in childhood.<sup>29</sup> The Australian Institute of Health and Welfare notes that ‘child abuse youth offending and injury hospitalisation can be interrelated and have implications for the safety of the children involved’. In a study in NSW it was found that 90% of young Aboriginal offenders who were 16 when they first appeared in court, went on to reoffend.<sup>30</sup> Data of this kind is not uncommon, and highlights the pathway from out-of-home care to juvenile justice to adult incarceration.

It is also consistent with the on-the-ground experiences of FVPLS Services, which are accessed frequently by young mothers - seeking legal assistance following the removal of their children - who themselves grew up in out-of-home care and/or were the subject of child protection proceedings as children.

Given this evidence, and the disparities in expenditure on out-of-home care versus staying in the home,<sup>31</sup> the onus must be shifted so that evidence is required that increased safety and other improved outcomes can be achieved for children who are removed compared to providing support for children staying in the home.

In addition, it is critical to ensure that where Aboriginal and Torres Strait Islander children are placed in out-of-home care, the Department is accountable to and can demonstrate outcomes in relation to the maintenance of family and cultural connections over their lifetime.

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<sup>29</sup> Legal Aid NSW, *High service users at Legal Aid NSW: Profiling the 50 highest users of legal aid services*, 2013, 3.

<sup>30</sup> Australian Institute of Health and Welfare, *Indigenous Child Safety*, 2014, 2 & 17.

<sup>31</sup> *Office of Northern Territory Coordinator-General for Remote Services Report- June 2011 to August 2012*, 2012, 128.

## Outcomes of Kinship Care

It has been argued there is little research on the outcomes of kinship care.<sup>32</sup> The National Forum would support the expansion of sensitive and culturally appropriate research in this area. However, as a priority much more is required to ensure the supports provided to kinship carers are equitable, adequate and appropriate.<sup>33</sup> Assessing outcomes will always be limited unless these factors – and relative expenditure across different models of care – are taken into account. The same qualifier must be applied to comparisons of outcomes between children in out-of-home care and children staying in the home.

The Aboriginal Child Placement Principle formally recognises the critical role that formal and informal models of kinship care have in supporting the best interests of Aboriginal and Torres Strait Islander children. In addition, for many Aboriginal and Torres Strait Islander families and communities:

...engaging in traditional cultural practices and reclaiming a sense of cultural identity is the key to alleviating Aboriginal disadvantage and regaining their rightful place in broader Australian society. In this sense, Aboriginal culture is strength, and acts as a protective force for children and families.<sup>34</sup>

Even without appropriate levels of support, kinship care has been demonstrated to be associated with “greater stability of care, more contact with parents and other family members, less trauma in separation from parents, and less stigma”.<sup>35</sup> Yet Aboriginal and Torres Strait Islander caregivers are more likely to be older, single, in poorer health, and caring for more children than non-Aboriginal caregivers.<sup>36</sup>

It is therefore essential to increase the financial and non-financial support to caregivers of Aboriginal and Torres Strait children. Commensurate support includes financial assistance, housing and transport assistance as well as training and other resources to recognise and respond to children’s experiences of trauma.<sup>37</sup>

The specific support and cultural awareness needs of non-Aboriginal and Torres Strait Islander kinship carers must also be addressed, as they can play a crucial role in facilitating or blocking a child’s access to the Aboriginal and Torres Strait Islander community.

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<sup>32</sup> Jeremy Sammut, 2011, *Do Not Damage and Disturb: On Child Protection Failures and the Pressure on Out of Home Care in Australia*, Available online at <http://www.cis.org.au/images/stories/policy-monographs/pm-122.pdf>, p20.

<sup>33</sup> See for example: Child Safety Commissioner, *‘It is the story of all of us: Learning from Aboriginal communities about supporting family connection’*, State of Victoria 2011.

<sup>34</sup> Department of the Prime Minister and Cabinet [PM&C], 2012; Secretariat of National Aboriginal and Islander Child Care [SNAICC] & Innovative Resources, 2009; SNAICC, 2011; Victorian Aboriginal Child Care Agency [VACCA], 2013.

<sup>35</sup> Child Safety Commissioner, *‘It is the story of all of us: Learning from Aboriginal communities about supporting family connection’*, State of Victoria 2011, 6.

<sup>36</sup> *Ibid*, 4.

<sup>37</sup> *Ibid*, 4.

### **C. Current models for out-of-home care, including kinship care, foster care and residential care**

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The National Forum does not deliver or have expertise in relation to specific models of out-of-home care. However, please refer to the considerations expressed above about the importance of placement principals and kinship care and the need for judicial oversight and accountability.

See also below regarding the importance of consultation with Aboriginal and Torres Strait Islander families, communities and organisations, especially in the identification of care arrangements and development of cultural plans or equivalent.

### **D. Current cost of Australia's approach to care and protection;**

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The Report on Government Services Australia identifies expenditure on child protection and out-of-home care services in 2012-2013 was \$3.2 billion. The expenditure on out-of-home care specifically was \$2.1 billion or 64.3 percent.<sup>38</sup>

Economic modelling by KPMG shows that violence against women and their children cost the Australian economy \$13.6billion in the 2008-9 financial year<sup>39</sup> and 14.7USD in 2012. This later figure equated to "roughly 1.1% of Australia's GDP for every man, woman and child" or 6,500USD **per person per year**.<sup>40</sup> Unless effective action is taken, the cost of violence against women and children is projected to increase to \$15.6billion in 2021-22.<sup>41</sup>

KMPG projected that the specific annual national cost of violence against Aboriginal and Torres Strait Islander women will increase to \$2.2billion in the year 2021-22.<sup>42</sup>

This does not include costs incurred in relation to children who witness violence, and projected to reach \$1.6billion.<sup>43</sup> A figure was not calculated for Aboriginal and Torres Strait Islander children, other data on Aboriginal and Torres Strait Islander family violence and children in child protection services shows very clearly these costs will be high, and grossly disproportionate relative to population.

### **E. Consistency of approach to out-of-home care around Australia;**

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As noted above, National Forum does not have expertise in relation to specific models of out-of-home care, or the level of consistency across jurisdictions. Concerns regarding the consistency of approach generally apply to the application of and accountability for statutory obligations in relation to Aboriginal and Torres Strait Islander children, which are addressed under other sections. The Indigenous Legal Needs Project is also identifying consistent themes across jurisdictions.

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<sup>38</sup> Productivity Commission, *Report on Government Services- Child Protection Services*, 2014, 15.16.

<sup>39</sup> KPMG, *Cost of Violence against Women*, Paper presented at White Ribbon International Conference Sydney Australia 13th – 15th May 2013.

<sup>40</sup> Ibid.

<sup>41</sup> Braaf, R, and Meyering, B (2011) *Seeking Security: Promoting women's Economic Wellbeing Following Domestic Violence*, Australian Domestic Violence Clearing House, University of New South Wales.

<sup>42</sup> Above n 40.

<sup>43</sup> Chan, A and Payne, J (2013) *Homicide in Australia: 2008–09 to 2009-10 National Homicide Monitoring Program annual report*. Canberra. Australian Institute of Criminology, 19.

<[http://www.aic.gov.au/media\\_library/publications/mr/21/mr21.pdf](http://www.aic.gov.au/media_library/publications/mr/21/mr21.pdf)>

This includes identification of the need for early intervention and prevention to raise awareness of legal rights in relation to child protection, and for increased access to legal advice and representation. As Aboriginal and Torres Strait Islander organisations providing legal education, advice and representation in this area, FVPLS Services have a unique role to play in improving consistency and outcomes across jurisdictions. This includes work with the relevant Departments ensuring they are aware of their statutory obligations and know how to apply them.

In addition, providing broader early intervention and prevention activities and wrap-around service responses for victim/survivors of family violence supports strengthened and resilient families and promotes healthy relationships and reduces the resource requirements necessitated by a greater intensity of child protection service involvement.

#### **F. What are the supports available for relative/kinship care, foster care and residential care**

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As identified above, the National Forum is most concerned about the consistently lower levels of support available for kinship carers as opposed foster carers. We believe that financial status must not be a barrier to the best interests of the child, including in particular where a family or community member is otherwise available to care for an Aboriginal and Torres Strait Islander child.

While levels of support vary across jurisdictions, if a person accepts the care of a child with a *child protection* order, they will be recognised as a formal carer and the child protection authority in their state or territory will give this carer regular payments for everyday costs, case management support, training and respite. If that child has special needs, they might get higher rates as well as help with education, respite and health costs.<sup>44</sup>

In contrast, if a person has the care of a child *with or without a family law* order, they might instead only be eligible for a carer card, respite or other related support.<sup>45</sup>

This circumstance works against the objectives of the Aboriginal Child Placement Principle and effective early intervention and prevention for Aboriginal and Torres Strait Islander children and families who come into contact with the child protection system.

The lack of resourcing and identification pathways for relative/kinship care is contrary to aims of finding Aboriginal and Torres Strait Islander kin and other carers who are best placed to support cultural and other needs of Aboriginal and Torres Strait Islander children unable to live with their parents and keep children connected to their cultural identity, families and communities. This also means it is contrary to aims of reducing the ongoing and devastating community impacts of inter-generational cycles of Aboriginal and Torres Strait Islander child removal.

#### **G. Best practice in out-of-home care in Australia and internationally**

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Victoria is the first jurisdiction to have a Commissioner for Aboriginal Children and Young People. This role has considerable practical and symbolic value and should be considered in other jurisdictions. The Victorian Commissioner for Aboriginal Children and Young People, Andrew Jackomos, is currently implementing *Taskforce 1000* which sets out to investigate each of the approximately 1000 cases of Aboriginal and Torres Strait Islander children in the child

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<sup>44</sup> See [http://raisingchildren.net.au/articles/grandparents\\_law\\_money.html](http://raisingchildren.net.au/articles/grandparents_law_money.html)

<sup>45</sup> *Ibid.*

protection system in Victoria. This work has already played a key role in demonstrating the role of family violence in child protection cases.<sup>46</sup>

## **H. Consultation with individuals, families and communities affected by removal of children from the home**

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The *Whose Voice Counts* report<sup>47</sup> in 2013 identified reforms needed to ensure the voices of Aboriginal and Torres Strait Islander communities count when decisions are made for their children. It proposes stronger models of cultural advice and support, as well as delegation and transfer of decision-making authority as potential solutions.

As noted above, throughout the jurisdictions surveyed through the Indigenous Legal Needs Project it was found that the responsible departments had failed to comply with legislative requirements for consultation. This includes implementation of formal processes that support consultation with appropriate family members, such as Aboriginal Family Decision Making conferences and the development of cultural support plans.<sup>4</sup>

A Cultural Support Plan is an individually tailored plan for Aboriginal and Torres Strait Islander children in care. It should be in place across all models of out-of-home care, but most especially in non-Aboriginal kinship care or non-kinship care. It contains information about their traditional links and family connections in order to maintain a strong sense of identity and belonging. A good cultural support plan should include the names of all members of the child's family, elders and significant persons, supporting Aboriginal and Torres Strait Islander children to maintain family and cultural connections over their lifetime.<sup>48</sup> To do this well, effective identification and consultation with individuals is required, to ensure at minimum that the people listed are appropriate for purpose and understand and agree to what is expected of them.

### **Case Study – Consultation with Aboriginal and Torres Strait Islander Family Members**

Thomas had been in the child protection system since infancy and was placed with non-related, non-Aboriginal and Torres Strait carers. Despite the Department's statutory obligations regarding the cultural needs and placement of Aboriginal and Torres Strait Islander children, no cultural support plan had been contemplated.

Thomas' mother contacted the FVPLS Service for advice about whether an Aunty could be considered as a potential carer for the child. At this point, the Child Protection proceedings had already commenced and decisions were being made by the Court without having regard to cultural considerations.

The FVLPS lawyer:

- alerted the Department to the failure to prepare a cultural support plan;
- advocated for an Aboriginal Family Led Decision Making (AFDM) Conference;
- nominated relatives to be invited to the AFDM; and
- suggested points for discussion and potential inclusion in Thomas' cultural support plan.

The outcomes of the AFDM included the completion of a detailed cultural support plan which led to:

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<sup>46</sup>Victorian Government Indigenous Affairs Report 2007-08, 47.

<sup>47</sup> SNAICC Report, *Whose Voice Counts- Aboriginal and Torres Strait Islander participation in child protection decision-making*, 2013, available at <http://www.snaicc.org.au/uploads/rsfil/03197.pdf>.

<sup>48</sup> Child Safety Commissioner, *'It is the story of all of us: Learning from Aboriginal communities about supporting family connection'*, State of Victoria 2011, pp 7-8.

- Thomas having regular access with his close family members who had previously been unknown to the Department;
- Thomas learning about his family history, language and traditional cultural practices, spending regular time with other Aboriginal and Torres Strait Islander children from his community and visiting his traditional country and participating in cultural events.

FVPLS's involvement ensured that Thomas gained the security and support of his family members and finally had his own cultural needs addressed, as was his right. The FVPLS Service empowered Thomas and his family members to engage in the process and provided the opportunity to be involved in decisions made in relation to Thomas.

## **I. Extent of children in out-of-home care remaining connected to their family of origin**

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See above regarding the National Forum's significant concerns about the lack of appropriate cultural planning, decision making and accountability mechanisms to ensure Aboriginal and Torres Strait Islander children in out-of-home care are supported to remain connected to their family, community and culture of origin.

In addition, FVPLSs demonstrates that too many of the key stakeholders have a superficial understanding of cultural connections and the implications for Aboriginal and Torres Strait Islander children. Maintaining cultural connections requires much more than attending events during NAIDOC but requires sustained access to the Aboriginal and Torres Strait Islander community and supporting family members. It is essential that governments appropriately resource culturally safe programs that work with children to meaningfully and effectively re-establish and maintain cultural links.

Commonwealth and State Governments must urgently recognise the importance of fostering cultural connections for Aboriginal and Torres Strait Islander children.

## **J. Best practice solutions for supporting children in vulnerable family situations including early intervention.**

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A 2013 Discussion Paper, *Our Children Our Dreaming*,<sup>49</sup> calls for a more just approach for Aboriginal and Torres Strait Islander children and families and identifies strategies needed to address it. The paper points out for example that statutory child protection services are too narrow in scope, designed to identify and respond to harm rather than preventing harm from occurring in the first place. Failure to invest in prevention and early intervention services results in more children and families unnecessarily entering further and further into the child protection system. The paper also shows that the cost effectiveness of investing in early intervention and prevention is clear, yet the largest increases occur in expenditure on child protection and out-of-home care.

The *Our Children, Our Dreaming* paper echoes the *Bringing Them Home* Report, supporting principles of self-determination and the transfer of responsibilities for children's safety and wellbeing to Indigenous peoples. Our families and communities must be supported and empowered to provide for the safety of our children<sup>50</sup>. Aboriginal and Torres Strait Islander community controlled organisations are best placed to work with and support children and

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<sup>49</sup> Healing Foundation, *Our Children, Our Dreaming: A Call for a More Just Approach For Aboriginal and Torres Strait Islander Children and Families*, 2013, 3, 9.

<sup>50</sup> *Ibid*, 9.

their families when children are at risk. This is also supported by the *Whose Voice Counts* report.<sup>51</sup>

The National Forum recommends further development of best practice guidelines for departments responsible for child protection in each jurisdiction. This must include and ensure consistent implementation of Aboriginal and Torres Strait Islander child placement principles with provisions that require referral of Aboriginal and Torres Strait Islander families for culturally safe legal assistance.

The National Forum calls for sustained commitments to culturally safe Aboriginal and Torres Strait Islander services that provide dedicated child protection legal assistance to Aboriginal and Torres Strait Islander children in and at risk of entering the care and protection system. This is in light of our experience that independent, confidential legal services that are not connected or partnered with agencies involved in the child protection system is important to ensure that Aboriginal and Torres Strait Islander adults and children can and will access the legal services they require.

Commonwealth and State and Territory Governments should also acknowledge the impact of family violence on child protection notifications and interventions by continuing to fund FVPLSs as proven, effective and supportive interventions for victims within the process.

The National FVPLS program currently provides legal assistance with child protection matters directly to Aboriginal and Torres Strait Islander victims/survivors of family violence and with additional resources could achieve a great deal more.

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<sup>51</sup> Above n 48.