THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IIC/CLIC/Rhvk:1997628

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.

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 . or
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Yours sincerely,

Richard Harvey
President

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IIC/FLC/JEvk:953429

7 August 2015

Family Law Council Secretariat
C/- Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

By email:

Dear Professor Rhoades,

Family Law Council Reference - Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems

I write on behalf of the Indigenous Issues Committee of the Law Society of NSW ("IIC"). The IIC represents the Law Society on Indigenous issues as they relate to the legal needs of people in NSW and includes experts drawn from the ranks of the Law Society's membership.

The IIC understands that the Attorney-General, Senator the Hon George Brandis QC, has asked the Family Law Council to report on ways of improving responses to families with complex needs who use the family law system. The IIC thanks the Family Law Council for the opportunity to provide comments.

The IIC notes that the first two questions in the reference are:

1. The possibilities for transferring proceedings between the family law and state and territory courts exercising care and protection jurisdiction within current jurisdictional frameworks.
2. The possible benefits of enabling the family courts to exercise the powers of the relevant state and territory courts including children's courts, and vice versa, and any changes that would be required to implement this approach, including jurisdictional and legislative changes.

While the Family Law Council has asked a further six specific questions to guide submissions, the IIC's comments are provided in a more general form.

This submission is made in relation to Indigenous[1] children and families, and is informed by the NSW-based experience of the IIC's members.

[1] In this submission, the terms "Aboriginal", "Aboriginal and Torres Strait Islander" and "Indigenous" are used interchangeably.

SUMMARY OF THE IIC'S RECOMMENDATIONS

The IIC's recommendations are made in relation to the improvement of outcomes for Indigenous children and families through changes in current practice and procedure, as well as in relation to matters that require legislative amendment or longer term reform. These recommendations are summarised below.

Current practice and procedure

(1) The NSW Department of Family and Community Services ("FACS") should develop relationships and improve its engagement, with Aboriginal service providers pursuant to s 12 of the *Children and Young Persons (Care and Protection) Act 2008* (NSW).

(2) Where matters involving Indigenous children and families have been initiated and heard in the Children's Court or Local Court:

A. The Children's Court should be assisted to make more fulsome contact orders, including orders for cultural contact. This will be greatly assisted by FACS engaging with Aboriginal service providers, and will require the Children's Court to make specific orders for cultural contact beyond establishing identity.

B. The Children's Court should consider allocating partial parental responsibility for contact to family or kinship members, even if the child has been placed with an Aboriginal carer who is not from that child's nation or language group.

C. If the parties consent, the Children's Court should consider transferring matters to the Family Courts.

D. Local Court Magistrates should be encouraged to use their family law jurisdiction to make family law style orders in relation to contact, particularly in rural and regional areas. The Judicial Commission of NSW should be encouraged to meet any ongoing education needs of Magistrates, including cultural education.

E. The progress of Legal Aid NSW's Care Alternative Dispute Resolution Program should be monitored as it has the potential to bring together considerations of care and family jurisdictions.

(3) Where matters involving Indigenous children and families have not been commenced in the Children's Court:

A. At the early intervention stage, FACS should be required to take reasonable steps to inform Indigenous families of family law options at the early intervention stage, which might include filing in the Family Courts and seeking family law style contact orders at that forum. FACS should consider developing meaningful relationships with Aboriginal organisations to assist in this process.

B. Consideration should be given to vesting the Children's Court with family law powers where an order is being transferred to another state.

Matters requiring legislative amendment or longer term reform

(1) Consideration should be given to amending s 69ZK of the *Family Law Act 1975* (Cth) to require consent only where parental responsibility has been allocated to the Minister.

(2) Consideration should be given to the establishment of a specialist court for Aboriginal children, particularly in regional areas. The proposal might be referred for detailed consideration to a law reform commission.

1. Background: current issues for Indigenous children and families in the care and protection jurisdiction

The IIC notes that Aboriginal and Torres Strait Islander children were the subject of a child protection substantiation at eight times the rate of non-Indigenous children in 2012-2013.[2] According to the Australian Institute of Health and Welfare ("AIHW"), Aboriginal and Torres Strait Islander children are represented in out-of-home care at ten times the rate of non-Indigenous children across Australia.[3] According to the AIHW:

> At 30 June 2013, there were 13,952 Aboriginal and Torres Strait Islander children in out-of-home care, a rate of 57.1 per 1,000 children. These rates ranged from 22.2 per 1,000 in the Northern Territory to 85.5 per 1,000 in New South Wales...Nationally, the rate of Indigenous children in out-of-home care was 10.6 times the rate for non-Indigenous children. In all jurisdictions, the rate of Indigenous children in out-of-home care was higher than for non-Indigenous children, with rate ratios ranging from 3.9 in Tasmania to 16.1 in Western Australia.[4]

Further, "[t]he rate of Aboriginal and Torres Strait Islander children placed in out-of-home care has steadily increased since 2009, from 44.8 to 57.1 per 1,000 children."[5]

Given this over-representation, the IIC's comments are informed by the desire to secure better outcomes for Aboriginal children and families.

The IIC notes that there are children in unsafe situations where their removal is warranted. However, in the IIC's experience, children may be unnecessarily removed from family and kin through a combination of factors that can adversely affect the outcomes for both Aboriginal children and their families when proceedings are brought in the Children's Court. These are explained in more detail below.

1.1. Low levels of trust and engagement between Indigenous people and FACS

In the IIC's view, early intervention and engagement is a strategy that would likely address some of the drivers leading to the removal of Indigenous children. The IIC notes that meaningful and collaborative early intervention and engagement would require measures such as the closer involvement of Aboriginal service providers (and not just services identified as out-of-home care providers); better use of care and safety plans; and the availability of legal representation at earlier stages, such as in relation to parental responsibility contracts.

However, the IIC understands that there is a historical distrust between Indigenous people and the NSW Department of Family and Community Services ("FACS"). In the IIC's experience, this distrust may result in sub-optimal consequences for process and outcome. For example, once FACS has intervened, parents may not nominate other kin or family members who may be suitable carers due to overwhelming issues of shame involved. The IIC notes further that in some instances, the fear of FACS also makes family members reluctant to nominate as carers as there are concerns that FACS might become involved in their own family if something were to happen while a family member's child is in their care.

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[2] AIHW, *Child Protection Australia 2012-13*, at 25 available at: http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129548164 (accessed on 22 October 2014)
[3] Cited in Judy Cashmore, 'Children in the out-of-home care system', in *Families, policy and the law: Selected essays on contemporary issues for Australia*, Alan Hayes and Daryl Higgins, (eds), AIFS http://www.aifs.gov.au/institute/pubs/fpl/fpl15.html
[4] Note 2 at 51.
[5] Ibid.

Further, the IIC notes that there is a potential for conflict with FACS being the investigative and removal body, as well as the key (and for some services, the only) referrer to therapeutic services. This is not unique to FACS or NSW but is consistent with the type of child and family welfare systems that have developed in each of the Australian states and territories. Australian child and family welfare systems are identified as child protection systems.[6] Key characteristics of how child protection systems address child protection can be seen in the table below:

CHARACTERISTIC	CHILD PROTECTION SYSTEM
Framing the problem of child abuse	The need to protect child from harm
Entry to services	Single entry point; report or notification by third party
Basis of government intervention and services provided	Legalistic, investigatory in order to formulate child safety plans
Place of services	Separated from family support services
Coverage	Resources are concentrated on families where risks of (re-)abuse are high and immediate
Service approach	Standardised procedures; rigid timelines
State-parent relationship	Adversarial
Role of the legal system	Adversarial; formal; evidence-based
Out-of-home care	Mainly involuntary

Table 1. Characteristics of the 'child protection' orientation to child protection[7]

Seeing these general features of a child protection system may help to explain the "culture" of the Children's Court and the problems identified by the IIC that are outlined later in the submission. The IIC notes that this arrangement will not address the low levels of engagement with early intervention services.

To provide a further example, the IIC notes that useful and effective early intervention schemes exist. However, access to these programs for Aboriginal families is restricted in a number of ways.

The New Parent and Infant Network[8] ("Newpin") is one preventative and therapeutic program that works intensively with parents and families facing potential or actual child removal. In the IIC's experience, this has been a very effective program. Previously, other organisations were able to make referrals to Newpin.

However, due to a change in funding arrangements, FACS is now the only referral agency. In the IIC's experience, FACS will generally not make a referral until children have already been removed. The IIC considers that this approach is counter-intuitive on a number of levels. Referrals should be made to therapeutic, early intervention programs before removal in order to prevent removal. Further, given the historical relationship of distrust between Aboriginal people and FACS, the effectiveness of this service is, in the

[6] Other countries with child protection systems are the UK, US and Canada. These types of child and family welfare systems differ from those identified as 'family service' and 'community caring' systems of child and family welfare (See Nancy Freymond and Gary Cameron, 2006, *Towards Positive Systems of Child and Family Welfare: International Comparisons of Child Protection, Family Service and Community Caring Systems,* University of Toronto Press). These other types of child and family welfare systems apply different approaches to the characteristics outlined in Table one on this page.

[7] Table adapted from Rhys Price Robertson, Leah Bromfield and Alistar Lamont, 2014, 'International approaches to child protection. What can Australia Learn?', CFCA Paper No. 23, p.4 https://aifs.gov.au/cfca/sites/default/files/publication-documents/cfca-paper23.pdf, last accessed 15 May 2015)

[8] See http://www.newpin.org.au/

IIC's view, significantly reduced by removing the ability of Aboriginal-community controlled organisations to make referrals.

1.2. Inadequate access to legal assistance

The IIC notes that there is often inadequate access to legal assistance for Indigenous families in Children's Court proceedings and concerns of procedural fairness may arise. This is particularly true in regional and remote areas where there are not many private practitioners, and many of those practitioners may be conflicted out of acting for families.

In the IIC's view, the availability of proper representation may prevent the unnecessary placement of children into out-of-home-care, and for extended periods of time.

1.3. Different imperatives in the Children's Court and the Family Courts

The IIC notes that there are different imperatives guiding the approach and culture of the Children's Court to those that guide the Family Court and Federal Circuit Court ("Family Courts"). The Children's Court applies care and protection legislation, which provides for state intervention into family life when it is necessary for the safety, welfare and well-being of the child.[9] The *Family Law Act 1975* by contrast provides a mechanism for families to have their own disputes resolved.

Further, the *Family Law Act* expressly sets out in s 60B(2)(b) that a child has the right to contact, subject to the contact not being contrary to the child's best interest. However, there is no such strongly expressed right to contact in the care and protection jurisdiction.[10]

These variations taken together present a particular dynamic in proceedings in the Children's Court, part of which is that parents are often placed in the defensive position of denying that anything has gone awry with the care and therefore safety of children. If they are unsuccessful in that argument, they are not then able to resile from that position, and are therefore in a difficult position to seek meaningful contact. In the IIC's experience it can be very difficult to secure arrangements for meaningful contact and cultural connection through Children's Court processes. Once removal has occurred, there may be inadequate support for kinship placements, and inadequate support for maintaining cultural connection between children and their families and connection to 'country'.

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[9] The *Children and Young Persons (Care and Protection) Act 1998* is structured around State Intervention being triggered by there being existing current concerns about the child being at risk of significant harm (see sections 23,24,25,30) but the State only responding when it determines that it can make an impact on the future care and protection of the child (see sections 34, 71)

[10] The IIC notes that while the *Children and Young Persons (Care and Protection) Act 2008* provides in s 86 that the Court may make contact orders, the IIC notes that Roderick Best argues that in the Children's Court, instead of a right to contact, there is only arguably a rebuttable presumption that contact must exist:

> ...in NSW it has been said that section 9(2)(f) gives rise to an entitlement to consider that contact should exist unless the safety, welfare and well-being of the child would otherwise be jeopardised. Even when this is not accepted the Children's Court has applied the rebuttable presumption as to the value of contact which was earlier developed in private law proceedings. This effectively imports a rebuttable presumption that contact must exist and so shifts the onus of proof onto whoever is alleging that contact must be restricted in some fashion.

Roderick Best, "Jurisdictional issues in child protection – moving towards a unified system of child protection," A paper presented to the Australasian Institute of Judicial Administration Conference on Child Protection in Australia & New Zealand, 5-7 May 2011, Brisbane at 9.

By way of comparison, the IIC's experience is that in proceedings in the Family Courts, there is less focus on the "wrongness" or culpability of the parents' position which allows more potential for meaningfully addressing risk and structuring appropriate contact.

1.4. Contact and cultural connection

While the IIC's primary focus remains the safety and best interests of children, the IIC submits that maintaining family and cultural connection must be part of the consideration of whether an action is in fact in the best interests of the child.

The Committee notes that a principle underpinning the Wood Inquiry was that:

> All Aboriginal children and young people in out-of-home care should be connected to their family and their community, while addressing their social, emotional and cultural needs.[11]

In the Committee's experience, cultural connection is vital for an Indigenous child's resilience. The Committee holds the strong view that cultural contact plans should be made as part of court-ordered arrangements, and children should have meaningful contact with their families, and families from their own Indigenous nations. The Committee notes that some out-of-home-care providers recruit Indigenous people to run internal "cultural contact programs." In the Committee's view, this arrangement is neither culturally safe nor sufficient as culture is nurtured within culturally appropriate, lived experiences.

Cultural contact must be provided for a significant and substantial time with the purpose of establishing a meaningful relationship with parents, family and community; beyond the establishment of identification. The Committee notes that structured and positive engagement can assist to establish a positive cultural connection, and nurture the understanding in children that culture is a positive aspect of their lives and something they should feel proud of.

Children have a right to enjoy their own culture and to use their own language (Article 27, *International Covenant on Civil and Political Rights,* Article 30, *Convention on the Rights of the Child*).[12]

The IIC notes further that the 1997 *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families,*[13] (the "Bringing them

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[11] James Wood, 2009, *Report of the Special Commission of Inquiry into child protection services in NSW,* NSW Department of Premier and Cabinet, at v, available online: http://apo.org.au/node/2851 (accessed 5 November 2014).

[12] Article 27 of the *International Covenant on Civil and Political Rights* states:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 30 of the *Convention on the Rights of the Child* states:

> In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or 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, to profess and practise his or her own religion, or to use his or her own language.

See also Articles 11, 12 and 31 of the *UN Declaration of the Rights of Indigenous Peoples.*

[13] National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997). "Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres

Home Report") recommended that there be national standards set in state and territory legislation, which included the factors to be considered in determining the best interests of an Indigenous child. The Bringing them Home Report recommended that national standards legislation provide that the initial presumption is that the best interest of the child is to remain within his or her Indigenous family, community and culture (recommendation 46a). Further, recommendation 46b provided that in determining the best interests of an Indigenous child, the decision maker must also consider:

1. The need of the child to maintain contact with his or her Indigenous family, community and culture,
2. The significance of the child's Indigenous heritage for his or her future well-being,
3. The views of the child and his or her family, and
4. The advice of the appropriate accredited Indigenous organisation.

1.5. The IIC's submissions

The IIC submits that there are innovations in practice and procedure that could be undertaken within the structures that currently exist in respect of the Children's Court, Family Courts and the Local Court ("the Courts") that may result in better outcomes for Aboriginal children and families.

The IIC further submits that there are matters for reform that the Family Law Council might consider that involve the jurisdiction of the Courts, specifically in respect of Aboriginal children and families.

The IIC's views and submissions are set out in more detail below.

2. Innovation within existing structures: practice and procedure

2.1. Better involvement of Aboriginal services in both Children's Court and Family Court proceedings

The IIC notes that s 12 of the *Care and Protection (Children and Young Persons) Act 1988* (NSW) ("*Care Act*") provides:

> Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Minister, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under this Act that concern their children and young persons.

Given this, the Committee notes that Aboriginal organisations are entitled to be involved with the FACS decision making process at an early stage. In the Committee's view, there is significant potential for reducing the numbers of Aboriginal children entering the out-of-home-care system if Aboriginal-controlled services were more involved with the FACS decision making process at an early stage. This would contribute to FACS' understanding of how it could meet the needs of Aboriginal families better (for example, by connecting with trauma or mental health services), thereby preventing removal, or providing for meaningful pathways to restoration. In the IIC's experience, most Aboriginal community organisations are unaware of this legislative entitlement, and therefore their involvement has been limited.

Strait Islander Children from their Families" available online:
http://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf
(accessed 24 February 2015)

The IIC notes that this would require building the capacity of Aboriginal organisations through education, to highlight to these organisations the potential significance of their impact, and the scope of their influence. Further, if these organisations were provided with community legal education to understand the difference in the care and family law jurisdictions, they would be better placed to identify matters appropriate for referral to the family law jurisdiction; which can result in better outcomes for Aboriginal families.

Facilitating the greater engagement by FACS with Aboriginal organisations does not necessitate that those organisations be brought under the out-of-home-care umbrella. There may be an advantage in having Aboriginal organisations independent of FACS in the process.

As noted above, there is a historical relationship of distrust between Aboriginal people and FACS, and its associated agencies. This will be difficult to resolve, and in the IIC's view, better outcomes for Aboriginal people will result if they are serviced by agencies outside of FACS. Funding Aboriginal services to operate as out-of-home-care providers may create divisive mistrust in Aboriginal communities.

In the IIC's view, there should be more Aboriginal-specific services available particularly at the early intervention stage, and more pathways to engagement with therapeutic services without the involvement of FACS. Aboriginal parents and families should be connected with Aboriginal-controlled organisations, or organisations that are partnered with Aboriginal-controlled organisations. Aboriginal parents should be supported by an intensive case management approach, and in order to avoid a repeating process, the focus of the services must be focused on trauma and healing.

2.2. More structured contact orders by the Children's Court

While the IIC understands the reasons why the approach taken by the Children's Court to contact is different to that of the Family Courts, the IIC submits that it is still within the power of the Children's Court to make contact orders that provide for contact that is commensurate with risk, and to provide for contact with the purpose of establishing a meaningful relationship with parents and family; beyond the establishment of identification. The IIC notes that structured and positive engagement can assist to establishing positive cultural connection, and nurture the understanding in children that culture is a positive aspect of their lives. As noted above, while safety is the primary consideration, the best interests analysis includes the right to culture and family.

At a minimum, the IIC submits that FACS should prepare written contact plans that provide a high level of specificity. Structured contact plans, reinforced by orders, are necessary for "difficult" parents in high conflict situations. The IIC notes that these contact plans should be regularly communicated and updated.

The IIC's view also is that contact plans for Indigenous children should specifically contemplate and make orders that provide for cultural contact. If cultural contact plans are part of the court orders, FACS will be obliged to implement these orders. The IIC submits that it is open to the Children's Court to create specific policy to ensure that cultural contact plans are part of the care plan. For example, the Children's Court President could instruct Magistrates to require that care plans for Aboriginal children be accompanied by cultural contact plans that are capable of establishing meaningful relationships with the child's parents, family and/or nation.[14] The IIC notes that if cultural

[14] The Committee notes that this issue is tied to the issue of joining grandparents to the application, and the availability of grants of Legal Aid to joinder applications.

contact plans are court-ordered, there will be a positive obligation on FACS to identify family members who can fulfil that cultural role. The IIC also notes that non-Aboriginal parents are often given supervised contact outside of FACS offices.

In this regard, the IIC notes that there is much scope for meaningful cultural contact plans. For example, even though a parent may not have capacity for full parental responsibility, there may still be a range of ways in which they can have meaningful contact.

Further, the IIC proposes for consideration a system of foster care similar to open adoptions. Under this proposed model, contact plans would include acknowledgement of the child's cultural heritage such as the child's family of origin and nation.[15] Further, there would be court-ordered arrangements for cultural contact and parents would be able to secure more meaningful contact with their children in out-of-home-care.

The IIC submits that the level of contact available to parents should be commensurate with the risk. If, for example, the parents' issues leading to the removal of the child are mental health issues and, for example, they have psychotic episodes every three to four years, then a child should be able to see his/her parents when the parents are well.

In the IIC's view, parents are more likely to accept having their children in out-of-home-care if contact is commensurate with the reasons why the removal took place.

Alternatively, out-of-home-care arrangements could be supported with family law-style orders to manage contact with parents in the family law jurisdiction. The advantage of this proposal is that the time constraints that exist in the care and protection jurisdiction do not appear in the family law jurisdiction. This allows time for parents to regain control over their lives through engagement with therapeutic services, and children are kept safe and connected by placing them with kin. The IIC suggests that if FACS has built strong networks with Aboriginal organisations, appropriate matters could be referred through these organisations to the family courts by Aboriginal organisations; and be appropriately resourced to provide support for these families. This point is taken up further in section 2.4 below.

2.3. Partial parental responsibility allocations

The IIC notes that the Court is able make orders for the partial allocation of parental responsibility. Even if the Court is of the view that parental responsibility should be allocated to the Minister, if there is a suitable adult in that child's kinship structure available, the Court could make an order that parental responsibility for culture be given to that family or kin member. The IIC's view is that the Court should consider making these orders even if that child has been placed with an Aboriginal carer not of his or her own nation. As culture is ontological and there is an enormous diversity between Aboriginal language groups and nations, the IIC considers that children are only able to be meaningfully taught their culture by their own family, language group or nation.

The IIC notes that the allocation of the cultural aspect of parental responsibility to the kinship carer would also provide due process for kinship carers: if FACS sought to end that placement, a court order would be required.

[15] The IIC notes that such information is recorded (meant to be recorded) in a child or young person's "life book" which they develop while they are entering care, or while they are in care. This book is meant to be a record of their life (including family history) that they carry with them during their time in care and once they get out of care. It is useful to distinguish the information recorded in a "life book" from recording that information in the actual contact plans.

2.4. Family law pathways

The IIC considers that, in appropriate matters and for the reasons set out above in relation to contact, better outcomes could be secured for Aboriginal children and families if matters regarding contact were referred to the Family Courts at the early intervention stage (such as when parental responsibility contracts are being drawn up).

For the reasons set out above in relation to better contact arrangements, the IIC suggests that it would assist if FACS was required, at the early intervention stage, to take reasonable steps to advise the kin and family of the child of their entitlement to take family law proceedings. The IIC acknowledges that there are practicalities associated with FACS advising extended family and kin members of access to the family law jurisdiction which may need to be considered more closely. Given the relationship of distrust and fear that can exist between FACS and the Aboriginal community, the IIC suggests consideration will need to be given to processes to assist FACS to meaningfully provide this information. The IIC suggests that FACS would be assisted by developing relationships that would allow genuine engagement with Aboriginal organisations. These relationships would assist FACS with, among other things, identifying relevant family and kin members, particularly in regional areas.

If a Children's Court Magistrate has already made a decision about placing the child, the Magistrate could then make directions that contact be decided by family court pathways.

The IIC notes the view of the Chief Justice of the Family Court and the Chief Federal Magistrate (as he was then), that:

> In child protection proceedings where contact between parents arises as an incidental matter it is difficult to see an objection in principle to this being determined in a state child protection court. Once a child protection issue has been determined however, the state court's jurisdiction in what is otherwise a federal family law issue should cease.[16]

If parties can agree on contact arrangements, FACS does not need to be further involved unless the child is actually at risk. The IIC considers this arrangement to be useful particularly as children get older (and as parenting capacity may improve), family law pathways provide good potential for reviewing the continued appropriateness of arrangements. As noted previously, the IIC's view is that contact should be commensurate with risk, but in its experience, due to its different perspective, in the Children's Court, the contact orders made are likely to be minimal and only for the purposes of establishing identity. For this reason, Family Courts are more likely to make adequate contact arrangements.

The IIC suggests that if the parties consent, the matter could be transferred to the Family Court for the making of contact orders.

The IIC observes that the Australian Law Reform Commission ("ALRC") recommended that:

> Where a child protection agency investigates child abuse, locates a viable and protective carer and refers that carer to a family court to apply for a parenting order, the agency should, in appropriate cases:

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[16] D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168,* 25 June 2010 as cited in Australian Law Reform Commission, *Family Violence –A National Response,* October 2010, ALRC Report 114, available online: http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114_WholeReport.pdf (accessed 10 July 2015). The report is referred to hereafter as "ALRC Family Violence Report").

(a) Provide written information to a family court about the reasons for the referral;
(b) Provide reports and other evidence; or
(c) Intervene in the proceedings.[17]

The IIC agrees with parts (a) and (b) of this recommendation, but where a viable and protective carer has been located, the IIC has reservations in relation to part (c) for the reasons set out in more detail in section 3.2 below. However, the IIC notes that in practice, FACS would rarely refer matters to the Family Courts in this way.

2.5. Engage the family law jurisdiction of the Local Courts

In its 2010 Family Violence Report, the ALRC also recommended that when a matter is before a children's court, such court should have the same powers to make decisions under the *Family Law Act* as do Local Courts.[18] The IIC does not disagree in principle with this recommendation. However, the IIC notes also the concerns raised to the ALRC by some stakeholders. These included a concern that adding *Family Law Act* proceedings to the list of matters to which the Children's Court Magistrates must attend, would add significantly to their tasks.[19] The IIC notes also that given the "many significant and fundamental differences"[20] between care and protection and family law legislation, an alternative may be to encourage and facilitate the Local Court to exercise the powers it already has to make decisions under the *Family Law Act.*

The IIC understands that, particularly in regional and remote locations, some Magistrates in Local Courts already do exercise their family law jurisdiction in more innovative ways if those courts are not, for example, supported by Family Relationship Centres. Local Court Magistrates could deal with a matter in relation to the protection issues, and when those issues have been resolved could then list the matter in that Magistrates family law list, and make orders properly informed by the matters raised in relation to the protection issues. The IIC submits that this approach could avoid the entrenched dynamic present in the Children's Court, discussed above. It may facilitate parents to accept risk factors, but still be in the position to work towards more fulsome contact orders. Further, the Local Court has the power to close the court in order to provide for the necessary privacy and opportunity for appropriate discussions to be had without public attention.

The IIC suggests that Local Court Magistrates should be encouraged to use their family law jurisdiction. The IIC notes that in the Family Violence Report, the ALRC's view was that Local Courts rarely exercise their family law powers, and that the reluctance of Magistrates to do so may be due to the perception that they lack the requisite expertise.[21] While the IIC acknowledges these concerns, the IIC understands that some Local Court Magistrates do already exercise their family law jurisdiction. The IIC notes that particular knowledge and expertise is also required in relation to making appropriate cultural contact orders. In this regard, the IIC understands that some Magistrates have worked for significant periods of time in areas with large populations of Indigenous people, and may, for example, run sentencing circles. The IIC suggests also that the Judicial Commission of NSW is in the position to provide for any ongoing educational needs for Magistrates, including in relation to cultural competency.

2.6. Care Alternative Dispute Resolution program

[17] ALRC Family Violence Report, note 16, Recommendation 19-3 at 928
[18] ALRC Family Violence Report, note 16, at [19.139].
[19] Berry Street Inc, *Submission FV 163,* 25 June 2010; N Ross, *Submission FV 129,* 21 June 2010 cited in the ALRC Family Violence Report, note 16, at [19.130].
[20] D Bryant and J Pascoe submission, note 16.
[21] ALRC Family Violence Report, note 16 at [19.131].

The IIC notes that in the Family Violence Report, the ALRC was of the view that more work should be done to explore the current and potential use of dispute resolution models in the context of the intersection of care and protection, and family law. The ALRC's view was that:

> flexible dispute resolution processes which can facilitate collaboration across socio-legal service systems, and jurisdictional divides, may offer significant potential for seamless and effective resolution of intersecting child protection and parenting issues relating to the same family. This may be particularly valuable in cases involving family violence.[22]

The IIC understands that Legal Aid NSW has established a new Care Alternative Dispute Resolution Program for parties seeking contact after final orders have been made, or seeking to vary a contact order.

The model is non-litigation focused, and invites parties to come to an agreement about arrangements for children. There is a focus on ensuring the voices of the children will be heard in these matters. To this end Legal Aid provides representation for all children who are subject of the contact dispute. Legal assistance will also be available for parties attending subject to means testing and a "significant disadvantage" test.

The IIC considers that this program offers the potential for establishing detailed contact arrangements and cultural contact, which would ideally be expressed as appropriate orders. The benefit of this program may be the flexibility to revisit contact orders as the child gets older and as parents develop greater parenting capacity.

The IIC recommends that the Family Law Council monitors the progress of this program.

3. Matters for reform

3.1. Amend section 69ZK of the Family Law Act

The IIC submits that the improvement of outcomes for Aboriginal children and families would be assisted by amending section 69ZK(1) of the *Family Law Act*. Section 69ZK(1) provides as follows:

> **Child welfare laws not affected**
>
> (1) A court having jurisdiction under this Act must not make an order under this Act (other than an order under Division 7) in relation to a child who is under the care (however described) of a person under a child welfare law unless:
>
> (a) the order is expressed to come into effect when the child ceases to be under that care; or
>
> (b) the order is made in proceedings relating to the child in respect of the institution or continuation of which the written consent of a child welfare officer of the relevant State or Territory has been obtained.

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[22] ALRC Family Violence Report, note 16, at [23.137]. The IIC notes that the accompanying Recommendation 23-13 made by the ALRC at 1091 is that:

> The Australian Government Attorney-General's Department and state and territory governments should collaborate with Family Relationship Services Australia, legal aid commissions and other alternative dispute resolution service providers, to explore the potential of resolving family law parenting and child protection issues relating to the same family in one integrated process.

Currently, consent is required from the Minister (or welfare officer) to allow a matter to proceed where Children's Court orders are in place.

The IIC submits that this provision should be amended to require consent only where parental responsibility has been allocated to the Minister. The IIC's view is that this would facilitate contact, and would avoid a rehearing of a substantial issue (and forum shopping) where parental responsibility is granted to someone other than the Minister, and bring some finality to the process.

The ALRC notes, in its discussion about matters that involve both child protection and family law proceedings and potentially conflicting orders, that section 69ZK(1) recognises that the Commonwealth Parliament does not have legislative competence in child protection matters, and the Family Courts therefore defer to orders under state legislation.[23]

3.2. Referring child protection powers to Family Courts

In its Family Violence Report, the ALRC was "disinclined to recommend that federal family courts should have a general power to join a state child protection agency as a party."[24]

The ALRC was also:

> ...disinclined to recommend a general reference of child welfare powers to family courts. However, a limited reference of powers to enable the courts to make orders giving parental rights and duties to a child protection agency where there is no other viable and protective carer for a child is supported. A power to join a state child protection agency in this very limited class of cases is also recommended.[25]

The IIC agrees with these views in relation to Indigenous matters. Given the longstanding distrust with which FACS is regarded by many Aboriginal people, the IIC suggests that Aboriginal families are unlikely to proactively commence proceedings in the Family Courts if they are aware that FACS could generally be joined as a party. The IIC notes that the Federal Circuit Court established an Indigenous Access to Justice Committee in 2012 (now known as the Indigenous Access to Justice RAP Working Group) to explore improvements in access to justice for Indigenous people. One of the actions proposed in the Federal Circuit Court's Reconciliation Action Plan 2014-2016 is a proposal to trial Indigenous circuit courts in Redfern and La Perouse[26] with a view to encouraging family law pathways prior to FACS intervention as an alternative to Children's Court proceedings. The IIC understands that there is currently work being undertaken to build community awareness and collaboration to support this initiative, and is concerned that this work may be undermined if Aboriginal families form the impression that FACS can be generally joined to proceedings.

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[23] ALRC Family Violence report, note 16, at [10.49]
[24] ALRC Family Violence Report, note 16, at [19.99]
[25] ALRC Family Violence Report, note 16 at [19.98]
[26] Federal Circuit Court of Australia, *Reconciliation Action Plan 2014-2016,* available online: http://www.federalcircuitcourt.gov.au/pubs/html/reconciliation%20Action%20Plan.html (accessed 18 May 2015)

3.3. Vesting Children's Court with family law powers

The IIC would not necessarily be opposed to amending the *Family Law Act* to provide the Children's Court the same powers as Local Courts, which is Recommendation 19-4 of the ALRC's Family Violence Report.[27]

However, the IIC reiterates its concerns that this approach may not in fact result in improved outcomes for Aboriginal children and families (particularly given the existing approach to cultural contact in the Children's Court), without additional resourcing and training of Children's Court Magistrates in relation to issues relating to rights and culture for Aboriginal children and families. The IIC notes that currently, the NSW care and protection legislation only allows for contact orders for 12 months,[28] and the orders made are usually bare or minimum orders[29]. Further, the Children's Court and the parties in the state jurisdiction do not have the benefit of Commonwealth-funded services that support the making and observance of meaningful contact orders.

The IIC suggests that there may be benefit in the Children's Court having limited cross vesting of powers where an order is being transferred to another State. The present transfer arrangements require consent from the receiving State. Usually consent will only be given to a bare order allocating parental responsibility. For example, if a NSW care order is to be transferred because the child will live with an aunty in Queensland.

Often it is clear that a contact order is required and on occasions the Secretary will undertake to make such an application in the Federal Circuit Court. If the Children's Court can make these orders at the same time as the transfer order it will be better for all parties and avoid further delay and expense. The only complication will be the difficulty of the interstate party (aunty in the example above) being properly heard and represented.

3.4. Establishing specialist court for Aboriginal children

The IIC submits that the Family Law Council may wish to consider the possibility of establishing a specialist court for Aboriginal children, particularly in regional areas.

The IIC submits that the key difference between this proposal and the suggestion to amend the *Family Law Act* to provide Children's Courts the same powers as Local Courts is an opportunity to avoid the culture in the Children's Court, which in the IIC's experience may have unnecessarily adverse effects on Aboriginal families. The IIC submits also that creating a specialist court for Aboriginal children would be an opportunity to create a new environment that might reset the dynamic existing in the Children's Court. Parents may not feel compelled to deny the existence of risk, which may provide more meaningful opportunities to tailor appropriate contact arrangements.

The IIC notes that even if there was only just one specialist court established, this court would be in the position to comprehensively consider and produce valuable precedents on matters such as cultural contact.

The IIC acknowledges that close consideration of the details would be required to support this proposal. For example, it may be useful to consider the experiences of tribal courts in the USA (noting salient structural differences). The IIC submits that if this

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[27] ALRC Family Violence Report, note 16, at 928.

[28] Section 86(6), Children and Young Persons (Care and Protection) Act 2008

[29] Section 86(1)(a), Children and Young Persons (Care and Protection) Act 2008

recommendation is to be taken up, it would be appropriate to refer this issue to an organisation such as the ALRC or NSW Law Reform Commission.

The IIC thanks you for the opportunity to provide comments. Any questions can be directed to Vicky Kuek, policy lawyer for the Committee, on or

Yours sincerely,

Michael Tidball
Chief Executive Officer

Our ref: CLIC/CLC/IIC/HRC:RHas1829558

14 February 2020

Mr John Cattle
Acting Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email:

Dear Mr Cattle,

Council of Attorneys-General Age of Criminal Responsibility Working Group Review

Thank you for the opportunity to contribute to a Law Council submission to the Council of Attorneys-General ("CAG") Working Group Review into the age of criminal responsibility ("the Review").

The Council of the Law Society considered this issue in 2019. By majority, the Council adopted the position that New South Wales should raise the minimum age of criminal responsibility from 10 to 14 years and remove *doli incapax*.

In reaching this decision, the Council considered a number of factors including the limitations of *doli incapax*, the disproportionate impact of the present age of criminal responsibility on Indigenous children, developmental and cognitive considerations, recommendations from relevant stakeholder groups, and alternatives to a criminal law response for children aged 10-13. These factors are outlined in further detail below, along with some additional matters raised by the CAG Review.

1. Limitations of *doli incapax*

The minimum age of criminal responsibility ("MACR") in NSW is currently 10 years of age, pursuant to s 5 of the *Children (Criminal Proceedings) Act 1987* (NSW). In addition, there is a rebuttable presumption under common law, known as *doli incapax*, that a child aged 10-13 does not possess the necessary knowledge to have criminal intention. This approach to the MACR and operation of *doli incapax* is replicated in all other jurisdictions across Australia.

The availability of *doli incapax* at common law for children aged 10-13 has traditionally been an argument against raising the MACR.[1] However, there are a number of limitations in relation to the application of *doli incapax* in NSW.

[1] Wendy O'Brien and Kate Fitz-Gibbon, 'The minimum age of criminal responsibility in Victoria (Australia): examining stakeholders' view and the need for principled reform' (2017) *Youth Justice*, 17(2),12.

1.1. Process of applying *doli incapax*

In each criminal proceeding, the potential rebuttal of the presumption of *doli incapax* is not considered until the court hearing. Due to the processes and delays in our criminal justice system, a determination by a court on this issue can take weeks, and often months. As a result, many children aged 10-13 are enmeshed in the criminal justice system for lengthy periods of time – including in custody, if bail is denied – for matters that are ultimately dismissed by the court or withdrawn by police at the time of hearing. Often, despite the relevance of *doli incapax*, a young person will not defend a matter to avoid the court process. As outlined at part 4 below, contact with the criminal justice system in early adolescence can have long-term negative effects on a child's education and development. Studies also show that the younger a child is when they have their first contact with the criminal justice system, the higher the chance of future offending.[2]

*Case study: Zac**

Zac is first charged by the police at 10 years of age. He is charged on a number of occasions over the next few years and placed on bail. Zac spends 132 days in custody in relation to these charges. All charges are dismissed on the basis of doli incapax.

** This case study is based on a matter that Law Society members had direct experience with. All names have been changed.*

1.2. Prejudicial evidence

In a review of children in the legal process, the Australian Law Reform Commission found that "*doli incapax* can be problematic for a number of reasons".

> For example, it is often difficult to determine whether a child knew that the relevant act was wrong unless he or she states this during police interview or in court. Therefore, to rebut the presumption, the prosecution has sometimes been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible. In these circumstances, the principle may not protect children but be to their disadvantage.[3]

2. Recommendations from organisations and experts in Australia

A number of organisations and experts in Australia have recommended raising the MACR to 14 years. These include the Office of the NSW Advocate for Children and Young People, the National Children's Commissioner, the Royal Australasian College of Physicians, the Australian Medical Association, National Aboriginal and Torres Strait Islander Legal Services, Australian Indigenous Doctors' Association, the Lowitja Institute, UNICEF Australia, and the Human Rights Law Centre.

A range of other experts, organisations and inquiries have recommended the MACR be adjusted to either 12 years, or "at least 12 years", with retention of *doli incapax*. These include: the Royal Commission into the Protection and Detention of Children in the Northern Territory; the NSW Children's Court; Jesuit Social Services; and Bob Atkinson AO, APM, in a 2018 report to the Queensland government.[4]

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[2] Australian Institute of Health and Welfare, *Young people returning to sentenced youth justice supervision 2014–15* (2016), Juvenile justice series no. 20. Cat. no. JUV 84.
[3] Australian Law Reform Commission, *Seen and heard: priority for children in the legal process (ALRC Report 84)* (November 1997).
[4] Bob Atkinson AO, *Report on Youth Justice* (June 2018), 13.

3. Disproportionate impact on First Nation children

Data from the NSW Bureau of Crime Statistics and Research ("BOCSAR") illustrates that between the ages of 10 and 12, the proportion of Aboriginal Australians making their first contact with the NSW criminal justice system is between 30 and 56 times higher than that of non-Aboriginal Australians. For children aged 13, the ratio of Aboriginal to non-Aboriginal criminal justice system contact is around 7:1.[5] The Australian Institute of Health and Welfare *Youth Justice in Australia 2017-18* report found that of the 49 children aged 10-13 either in detention or under community supervision in NSW on an average day during the year under review, a total of 31 – or 63% – were Indigenous. The equivalent figures in 2016-17 and 2015-16 were 59% and 62% respectively.[6]

Raising the MACR may help ameliorate the disproportionate impact of the current law on Aboriginal and Torres Strait Islander children in Australia. However, a change in the MACR should not occur in isolation; it would need to be accompanied by increased capacity for needs-based, non-criminal law responses to behaviour which currently constitutes 'offending' for children aged 10-13. For examples of evidence-based programs of this nature, including those tailored to meet the needs of Indigenous children, see section 6 below.

We further note that the MACR is one of several intersecting factors that contribute to adverse outcomes for Indigenous children and young people. A 2011 report by the Parliamentary Standing Committee on Aboriginal and Torres Strait Islander Affairs found that "contact with the criminal justice system represents a symptom of the broader social and economic disadvantage faced by many Indigenous people in Australia". The Standing Committee identified several aspects of disadvantage that contribute to the overrepresentation of Indigenous juveniles and young adults in the criminal justice system including individual family dysfunction, connection to community and culture, health, education, employment, and accommodation.[7]

4. Developmental and cognitive considerations

4.1. Rates of development

While the mental development of each child takes place at a different rate, there is widespread recognition of the developmental immaturity of children and young people compared to adults. Evidence indicates the early adolescent brain is malleable as it transitions from childhood, gradually increasing its ability for adult level reasoning. Developmental immaturity can also affect a number of areas of cognitive functioning including impulsivity, reasoning and consequential thinking.[8] Research studies have found that "law and order" morality is generally not achieved until mid-teens,[9] and logical thinking and problem-solving abilities develop considerably between the ages of 11 and 15.[10]

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[5] Don Weatherburn and Stephanie Ramsey, 'Offending over the life course: Contact with the NSW criminal justice system between age 10 and age 33' (April 2018), *NSW Bureau of Crime Statistics and Research Bureau Brief*, Issue paper no. 132, 5.
[6] Australian Institute of Health and Welfare, *Youth Justice in Australia 2017–18* (2019) Cat. no. JUV 129, table S128a.
[7] Parliament of Australia Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time - Time for Doing: Indigenous youth in the criminal justice system* (June 2011), Chapter 2. Available at: <https://www.aph.gov.au/Parliamentary_Business/Committees/Committees_Exposed/atsia/sentencing/report/chapter2>.
[8] Nicholas Lennings and Chris Lennings 'Assessing Serious Harm under the Doctrine of Doli Incapax: A Case Study' (2014), *Psychiatry, Psychology and Law*, 21(5), 794.
[9] UK Houses of Parliament – Parliamentary Office of Science and Technology, 'Postnote: Age of Criminal Responsibility' (June 2018), 3.
[10] Michael Lamb and Megan Sim, 'Developmental factors affecting children in legal contexts' (2013) *Youth Justice*, 13(2), 131-144.

During the early adolescent phase of brain development, children are also apt to make decisions using the amygdala, the part of the brain connected to impulses, emotions and aggression.[11] In addition, children aged 10–13 years are particularly vulnerable to peer pressure.

As well as being a time of developmental vulnerability, early adolescence also presents a unique window of opportunity for prevention and early intervention to address spirals of negative behavioural and emotional patterns.[12] The fact that an adolescent's brain is still developing creates the conditions to leverage change for an enduring impact. As a result, prevention and intervention methods are especially significant in this transition period. It is critical, therefore, that children in early adolescence are steered away from the criminal justice system and instead integrated into positive programs to shape social, emotional, psychological, and neurodevelopmental behaviours. Rehabilitation and intervention – rather than incarceration – are instrumental to creating positive trajectories in early adolescence.[13]

4.2. Mental Health Disorders and Cognitive Disability

In a 2017 publication, Professor Chris Cunneen of UNSW reviewed relevant research and found that:

> Young people within youth justice systems have significantly higher rates of mental health disorders and cognitive disabilities when compared with general youth populations. They are also likely to experience co-morbidity, that is co-occurring mental health disorders and/or cognitive disability, usually with a drug or alcohol disorder. Australian research suggests that these multiple factors, when not addressed early in life, compound and interlock to create complex support needs.[14]

Professor Cunneen also referred to the 2015 NSW Young People in Custody Health Survey, which found that 83% of young people in detention were assessed as having a psychological disorder, with a higher proportion for Indigenous children than non-Indigenous children, depending on the type of disorder.[15] This figure is several times greater than the rate for children living in the community: the 2015 Australian Child and Adolescent Survey of Mental Health and Wellbeing found 14% of 4 to 17 year-olds assessed as having a mental disorder.[16] In addition, some 18% of young people in custody in NSW have cognitive functioning in the low range (IQ < 70) indicating cognitive disability, and various studies have shown that between 39-46% of young people in custody in NSW fall into the borderline range of cognitive functioning (IQ 70-79).[17]

There is also evidence to suggest that young people in the youth justice system have a range of other impairments often associated with cognitive disability, including: speech, language and communication disorders; ADHD; autism spectrum disorders; FASD; and acquired/traumatic brain injury.[18] Research suggests that many Indigenous young people in

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[11] Australian Government, 'The amazing, turbulent, teenage brain' (20 February 2017). Available at: <https://www.learningpotential.gov.au/the-amazing-turbulent-teenage-brain>.
[12] UNICEF Office of Research – Innocenti, *The Adolescent Brain: A second window of opportunity* (2017), 15.
[13] Ibid 33.
[14] Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility, Research Report' (2017), *Comparative Youth Penality Project UNSW*. <Available at http://cypp.unsw.edu.au/node/146>.
[15] Justice Health & Forensic Mental Health Network and Juvenile Justice NSW, *2015 Young People in Custody Health Survey: Full Report* (2017).
[16] Lawrence et al, *The Mental Health of Children and Adolescents: Report on the second Australian Child and Adolescent Survey of Mental Health and Wellbeing*, Commonwealth of Australia, (2015).
[17] Cunneen, above n 14.
[18] Ibid.

detention have hearing and language impairments that are not diagnosed and their behaviour is misinterpreted as non-compliance, rudeness, defiance or indifference.[19]

Professor Cunneen has argued:

> Raising the minimum age of criminal responsibility will in itself not solve all the problems associated with the criminalisation of people with mental health disorders and/or cognitive impairments. However, it will open a door to firstly, not criminalising young children with mental health disorders and/or cognitive impairments and entrenching them at an early age in the juvenile justice system; and, secondly, provide the space for a considered response as to how these young people should be responded to in the community.[20]

5. International approaches

5.1. The approach in other jurisdictions

Countries around the world have different approaches to the age of criminal responsibility, both through statute and the common law. The UN Committee on the Rights of the Child ("UN CROC") stated in 2019 that "over 50 States parties have raised the minimum age following ratification of the [*Convention on the Rights of the Child*], and the most common minimum age of criminal responsibility internationally is 14".[21] An earlier study of 90 countries found that 68 had a minimum age of criminal responsibility of 12 or higher, with the most common age being 14 years.[22] To cite some specific examples: the minimum age is 12 years in Canada and the Netherlands; 13 years in France; 14 years in Austria, Germany, Italy, and many Eastern European countries; 15 years in Denmark, Finland, Iceland, Norway and Sweden; 16 years in Portugal, and 18 years in Belgium and Luxembourg.

England, Wales and Northern Ireland have set the MACR at 10 years of age,[23] and abolished the *doli incapax* presumption in 1998. A range of stakeholders – including the Equality and Human Rights Commission and the UN Committee on the Rights of the Child – have criticised the approach to the MACR in England, Wales, and Northern Ireland, and called for it to be raised.[24] The approach in the United States – the only UN Member State that is not a party to the *Convention on the Rights of the Child* ("CRC") – differs by state. 33 states set no minimum age, and of the states that do, North Carolina has the lowest at six years, while 11 states have the highest age at 10 years.[25]

5.2. Recommendations from international bodies

The CRC requires States Parties to establish a MACR, though does not specify a particular age.[26] The UN CROC has sought to provide additional guidance on the issue. In its General Comment 24 on children's rights in the child justice system, the UN CROC encouraged States

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[19] Ibid.
[20] Ibid.
[21] UN Committee on the Rights of the Child, *General comment No. 24 (2019) on children's rights in the child justice system,* CRC/C/GC/24 (18 September 2019), 6.
[22] Nean Hazel, 'Cross-national comparison of youth justice' (2008), Young Justice Board for England and Wales. Available at: <http://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf>.
[23] Australian Institute of Health and Welfare, *Comparisons between Australian and International Youth Justice Systems: 2015-2016* (Youth Justice Fact Sheet no 93) 1.
[24] Helen Pidd et al, 'Age of criminal responsibility must be raised, say experts' (5 November 2019), *The Guardian* <https://www.theguardian.com/society/2019/nov/04/age-of-criminal-responsibility-must-be-raised-say-experts>.
[25] Juvenile Justice Geography, Policy, Practice & Statistics, 'Jurisdictional boundaries' (2020), <http://www.jjgps.org/jurisdictional-boundaries>.
[26] *UN Convention on the Rights of the Child* (1989) art 40(3)(a).

parties "to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age".[27] This follows the July 2019 report of the Independent Expert leading the UN global study on children deprived of liberty, Professor Manfred Nowak, which recommended that "States should establish a minimum age of criminal responsibility, which shall not be below 14 years of age."[28]

In November 2019 the UN CROC adopted concluding observations in relation to Australia's compliance with the CRC. The Committee recommended Australia "raise the minimum age of criminal responsibility to an internationally accepted level and make it conform with the upper age of 14 years, at which *doli incapax* applies".[29] The previous two times that the UN CROC reviewed Australia's compliance with the CRC – in 2005[30] and 2012[31] – it similarly recommended that Australia raise its minimum age of criminal responsibility "to an internationally acceptable level".

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice state that the age of criminal responsibility "shall not be fixed at too low an age level" and emphasise the need to consider the emotional, mental and intellectual maturity of children.[32] Similarly, the United Nations Guidelines for the Prevention of Juvenile Delinquency ("UN Guidelines") provide that conduct contravening "overall social norms and values is often part of the maturation and growth process" and will abate as children transition into adulthood. The UN Guidelines note that labelling young persons as 'deviants' or 'delinquents' will often increase the development of a pattern of undesirable behaviour in young people.[33]

6. Programs and frameworks that may be required if the age of criminal responsibility is raised

Any upwards shift in the MACR in NSW would need to be accompanied by increased capacity for needs-based, non-criminal law responses to behavior, which currently constitutes 'offending' for children aged 10-13.[34] These alternatives to incarceration and non-custodial sentences serve a vital purpose, as research has shown that children who first encounter the justice system by the age of 14 are more likely to experience all types of supervision in their later teens, particularly the most serious type – a sentence of detention (33% compared to 8% for those first supervised at older ages).[35] We note that if the MACR is increased, there should be cost savings in the criminal justice system, which could be used to scale up evidence-based alternatives to incarceration and non-custodial sentences for children aged 10-13.

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[27] UN Committee on the Rights of the Child, *General comment No. 24 (2019) on children's rights in the child justice system,* CRC/C/GC/24 (18 September 2019), 6.
[28] UN General Assembly, *Global study on children deprived of liberty: Note by the Secretary-General*, 74th session, A/74/136 (11 July 2019), 20.
[29] UN Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, 82nd session, CRC/C/AUS/CO/5-6 (1 November 2019) 14.
[30] UN Committee on the Rights of the Child, *Consideration of reports submitted by States Parties Under article 44 of the Convention: Concluding Observations - Australia* (20 October 2005), CRC/C/15/Add.268.
[31] UN Committee on the Rights of the Child, *Consideration of reports submitted by States parties under Article 44 of the Convention – Concluding observations: Australia* (28 August 2012), CRC/C/AUS/CO/4.
[32] *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (1985), r 4.1.
[33] Ibid r 5(e).
[34] Bob Atkinson AO, *Report on Youth Justice from Bob Atkinson AO, APM, Special Advisor to Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic and Family Violence* (8 June 2018), Queensland Government, 105.
[35] Youth Justice Coalition, 'Policing Young People in NSW: A Study of Suspect Targeting Management Plan' (25 October 2017), 11. <https://www.piac.asn.au/2017/10/25/policing-young-people-in-nsw-a-study-of-the-suspect-targeting-management-plan/>.

There are a range of evidence-based programs already being employed in Australia to divert early adolescent children from the criminal justice system. These programs often help children and families to work together to address the underlying risk factors that lead to offending behaviour, and include:

- New Street Adolescent Services, an early intervention program delivered by NSW Health targeted to address harmful sexual behaviours displayed by children aged 10-17 years.[36] This program has an evidence-informed model of operation that involves working with the entire family unit. A 2014 evaluation of New Street Services by KPMG found that the service has achieved significant outcomes with young people and their families, with positive impacts for both individuals and the child protection system as a whole.[37] The evaluation included a cost benefit analysis, which identified a "significant net [economic] benefit attached to the completion of New Street compared to all alternative scenarios".[38]
- Youth on Track, a program delivered by the NSW Department of Communities and Justice, is an early intervention scheme for children aged 10-17 years that identifies and responds to young people at risk of long-term involvement with the criminal justice system. Through the program, the Department of Justice funds non-government organisations (Mission Australia, Social Futures and Centacare) to deliver the scheme in six locations across NSW. A 2017 review of Youth on Track prepared by Cultural & Indigenous Research Centre Australia the Department of Justice found that "Youth on Track is contributing to enhanced social outcomes for many clients. The success of the scheme appears to relate to the application of strong evidence of 'what works' in interventions to address the individual criminogenic risk factors of the young person."[39]

There are a number of other programs specifically tailored to meet the needs of Indigenous children, including:

- Junaa Buwa! and Mac River, residential rehabilitation centres for young people who have entered, or are at risk of entering, the juvenile justice system and have a history of alcohol and other drug use. These services take a holistic approach including case management addressing mental, physical, social, and inter and intra-personal challenges. At Junaa Buwa! more than 80% of clients are Aboriginal and Torres Strait Islander young people, and there is a similar client profile at Mac River.
- The Maranguka Justice Reinvestment project in Bourke is an example of a community-led system of working across communities and sectors and is delivering promising results promising results across many domains in young people's lives including justice, education and health. An impact assessment of the project by KPMG in 2018 found that the project had led to a 38% reduction in charges across the top five juvenile offence categories, among other benefits.[40]
- The Tiwi Islands Youth Development and Diversion Unit offers young people aged 10-17 the opportunity to forgo a criminal record in exchange for agreeing to comply with beneficial voluntary conditions such as participating in a youth justice conference, issuing apologies to the victim, attending school, and undertaking community service. Qualitative data has showed that this program is useful in reconnecting young people

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[36] NSW Health, 'New Street Services' (September 2018). Available at: <https://www.health.nsw.gov.au/parvan/hsb/Pages/new-street-services.aspx>.

[37] KPMG, *Evaluation of New Street Adolescent Services Health and Human Services Advisory* (March 2014). Available at: https://www.health.nsw.gov.au/parvan/hsb/Documents/new-street-evaluation-report.pdf

[38] Ibid 64.

[39] Circa, *Youth on Track Social Outcomes Evaluation* (April 2017). Available at: <http://www.youthontrack.justice.nsw.gov.au/Documents/circa-evaluation-final-report.pdf>.

[40] KPMG, 'Marunguka Justice Reinvestment Project: Impact assessment' (27 November 2018). <http://www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf>.

to cultural norms and the nature of the program was seen to be culturally 'competent' and directly addressed the factors that contribute to offending behaviour, such as substance misuse, boredom and disengagement from work or education.[41] Young people who engaged in the program credited it for helping them recognise wrongdoing and adopt strategies to stay out of the criminal justice system.[42]

- Panyappi Indigenous Youth Mentoring Program (from South Australia) is an early intervention program targeting Indigenous youths aged between 10 to 18 years old who are at risk or are in the early stages of contact with the youth justice system. The program employs full-time mentors with low caseloads to allow mentors to engage intensively and comprehensively with the youths and build voluntary relationships of trust.[43] These mentors help to facilitate the transition of youths into the community and enable them to move towards independence by developing or providing them with access to educational, training and recreational services.[44] An evaluation of the program found the frequency and severity of the offending by participants in the program had significantly decreased, and there were a range of other benefits to participants, including stronger family relationships and better connections with school.[45]

Australia can also look beyond its borders in developing alternatives to incarceration for early adolescent children. In Finland, the youth justice system is premised on the belief that crime is a social problem that cannot be resolved by restricting the liberty of individuals.[46] Young offender intervention occurs through the child welfare system, which prioritises the best interests of the child.[47] A wide range of measures are available depending on the seriousness of the issue and the underlying problems in the child's life. This may include a series of discussions with the child offender and their family. In cases of greater seriousness, more extensive open care measures may be required such as economic and social support for the parents, or psychological, psychiatric, substance abuse and educational support programs for the child.[48]

7. Additional matters raised by the CAG Review

7.1. Best practice for protecting the community from anti-social or criminal behaviours committed by children who fall under the minimum age threshold

If the age of criminal responsibility were to be raised to 14, there may be a very small cohort of children below that age who engage in anti-social behavior, causing injury to themselves or unacceptable adverse consequences to others in the community, and for whom programs of the nature outlined at section 6 are insufficient. For these rare cases, a specialised service and treatment-based approach should be available, in the community where possible, but only on a compulsory basis as a last resort.

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[41] Bodean Hedwards et al, 'Indigenous youth justice programs evaluation' (Special report, Australian Institute of Criminology, 2014) 37 <https://aic.gov.au/publications/special/005>.
[42] Ibid.
[43] Viciki-Ann Ware, 'Mentoring programs for Indigenous youth at risk' (Resource sheet no. 22, Closing the Gap Clearinghouse, Australian Institute of Health and Welfare, 2013) 12.
[44] Tom Calma, 'Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues' (Australian Human Rights Commission, 2008) 29.
[45] Just Reinvest, 'Examples of promising interventions for reducing offending, in particular Indigenous juvenile offending' (2013).
[46] Laura S Abrams, Sif P Jordan and Laura A Montero, 'What is a Juvenile? A Cross-National Comparison of Youth Justice Systems' (2018) 18(2) *Youth Justice*, 119.
[47] Tapio Lappi-Seppälä, 'Alternatives to Custody for Young Offenders: National Report on Juvenile Justice Trends (Finland)' (2011) *International Juvenile Justice Observatory*, 1-2.
[48] Ibid 18.

The Law Society notes that in Portugal, a range of educational measures are available for children under the age of criminal responsibility (which is set at 16) who commit an offence qualified by the penal law as a crime. The criteria for the educational measures rely on the young person's needs and the seriousness of the offence.[49] Options available under the country's Educational Guardianship Law include an admonition, reparations, educational supervision, and attendance of training programs. For the most serious cases, custodial measures are available, where the child attends educational, training, employment, sports and leisure activities, and receives psychological assessment if required. The custodial facilities are classified as "open", "semi-open" or "closed"; only children aged 14 and over can be placed in closed facilities.[50]

7.2. Whether the MACR should be raised for all types of offences

The CAG Review queries whether "the age [of criminal responsibility] should be raised for all types of offences". The Law Society is of the view that the MACR should be raised from 10 to 14 in NSW for all offences. Creating exemptions from a higher MACR for certain offences would be inconsistent with the arguments outlined at sections 1, 3 and 4 above.

7.3. Additional issues

Law Society members have emphasised the critical and protective role that education plays in supporting children who are at risk of offending or have displayed offending behaviour. In this regard, we note that the 2015 NSW Young People in Custody Health Survey ("YPICHS") stated that:

> Education plays a critical role in a child's health and wellbeing, with low levels of education associated with a range of adverse psychosocial and health outcomes. Moreover, poor school attendance and engagement is a well-documented risk factor for childhood and adolescent antisocial behaviour, offending and contact with the criminal justice system, and further recidivism.

Of the young people who participated in the YPICHS, 94% had been suspended from school on at least one occasion prior to entering custody, and 56% had been expelled at least once. To mitigate the demonstrated impact that exclusion from school has on children, schools should be provided with an equitable distribution of services, according to need, to enable them to support the continuing engagement and attendance of children.

Should you have any questions or require further information about this submission, please contact Andrew Small, Acting Principal Policy Lawyer, on (02) or email

Yours sincerely,

Richard Harvey
President

[49] International Juvenile Justice Observatory, *Alternatives To Custody For Young Offenders: National Report On Juvenile Justice Trends* (2013) <http://www.oijj.org/sites/default/files/baaf_portugal1.pdf>.
[50] Ibid.