



Law Council
OF AUSTRALIA

Implementing the successor plan to the National Framework for Protecting Australia's Children

Department of Social Services

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to its Family Law Section, Indigenous Legal Issues Committee, Indigenous Incarceration Working Group, Access to Justice Committee, Migration Law Committee of its Federal Litigation and Dispute Resolution Section, and the Law Society of New South Wales, for assistance in the preparation of this submission.

Executive Summary

1. The Law Council of Australia (**Law Council**) appreciates the opportunity to provide a submission to the Department of Social Services (**DSS**) in response to the Consultation Paper on Implementing the Successor Plan to the National Framework for Protecting Australia's Children 2009-2020 (**the National Framework**).¹
2. It welcomes the emphasis in the Consultation Paper on addressing the over-representation of Aboriginal and Torres Strait Islander children in the child protection system, as a specific strategic priority. The Law Council notes concerning trends particularly in out-of-home care, where rates of removals are increasing and compliance with best practice placement principles show little improvement, and the risk this contributes to these children entering the criminal justice system. It emphasises the systemic nature of the issues that create vulnerable children and families, and the importance of investment in specialist, child-friendly legal services, wraparound services and protective infrastructure such as stable housing. Specifically, the Law Council makes the following recommendations of key priority areas for the DSS to consider in implementing the Successor Plan to the National Framework:
 - compliance with the Aboriginal and Torres Strait Islander Child Placement Principle (**ACPP**) should be better monitored and implemented, such as through the development of national minimum standards of best practice and intensive training for caseworkers led by Aboriginal and Torres Strait Islander community-controlled organisations. This should also include compliance reporting and oversight, with analysis of the instances in which children are not being placed according to kinship ties in order that evidence-based improvements can occur;
 - publicly-funded specialist legal assistance services for children and their families, particularly in remote areas and for civil matters, should be lifted to adequate levels;
 - courts dealing with children should be adequately resourced to prevent delays and child-friendly pilot programs that adopt a less formal approach to proceedings should be evaluated and, where successful, expanded;
 - investment in front-end, preventative support services and infrastructure is critical, and emphasis should be placed on the provision of parenting programs to build the skills of families in the first instance (where children are not at immediate risk of harm, such as for notifications of neglect), prior to orders or removals being considered;
 - particular effort should be made in training and resourcing staff in out-of-home care to defuse situations and divert children away from the criminal justice system wherever possible, including through facilitating access to mental health or broader crisis support, and additional investments. This should particularly be the case where a child does not pose a serious risk to health or safety;
 - the qualifications and resources of In-Home-Care (**IHC**) workers should be assessed for adequacy, and upskilling and funding provided where necessary for this essential service;
 - the implementation plan should explicitly address as a strategic priority the need for programs that support young people upon their release from child protection placements;

¹ Department of Social Services, *Consultation Paper: Implementing the Successor Plan to the National Framework for Protecting Australia's Children 2009-2020* (June 2021) <[dss-engage-discussion-paper-3-june.pdf](#)> ('**Consultation Paper**').

- the Migration Regulations 1994 (Cth) should be amended to allow children classified as Undocumented Maritime Arrivals in the care of the State to apply for a permanent visa without the need for Ministerial intervention (such a visa is necessary to access social, health and welfare services); and
- consideration (subject to privacy concerns) should be given to developing a national centralised network or database to guide the sharing of information about the safety, welfare, and wellbeing of families and children across sectors and legal jurisdictions, to strengthen the interface between services and prevent siloed decision-making. This information should be culturally competent, emphasising where systemic disadvantage exists and including any cultural plans developed for a child.

Background and Preliminary Comments

3. The Law Council understands that the National Framework represents a ‘high-level’, ‘long-term’ collaboration between Commonwealth, State and Territory governments and non-government organisations, as endorsed by the Council of Australian Governments (**COAG**), to ensure the safety and wellbeing of Australia’s children.² The ultimate aim under the National Framework is ‘to deliver a substantial and sustained reduction in levels of child abuse and neglect over time’.³ It was introduced in 2009 to provide national leadership and common goals to focus government and non-government efforts; to coordinate the implementation of State and Territory reforms with Australian Government programs, policies and payments; and to better enable the different levels of government to work together in areas of shared responsibility.⁴ It also emphasised a public wellbeing framework, expanding responsibility for the protection of children beyond child welfare services to broader services.⁵
4. Commonwealth, State and Territory Governments all have a role to play under the National Framework. While State and Territory Governments are responsible for the statutory child protection systems, including the support provided to children in out-of-home care, the Australian Government delivers a range of support and services to children and families – including the universal support that helps families raise their children safely and securely; targeted early intervention services for children and families, including intensive parenting services; targeted services for vulnerable individuals such as in the areas of mental health, intensive employment assistance, and transition support for young people leaving care; and a range of services for families at higher risk of disadvantage such as those in Aboriginal and Torres Strait Islander communities.⁶
5. The Consultation Paper explains that the Succession Plan to the National Framework is centred around one key ‘Vision’, ‘Goal’ and ‘Target Cohort’.⁷ The central ‘Vision’ is that ‘children in Australia reach their full potential by growing up in safe and caring homes, free from harm and neglect’.⁸ In order to achieve this vision, the ‘Goal’ of the Succession Plan is ‘to make significant and sustained progress in reducing the rates of child abuse and neglect and its intergenerational impacts’.⁹ Children and families

² Department of Social Services, ‘National Framework for Protecting Australia’s Children 2009-2020’, *Families and Children* (website, 27 April 2018) <https://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/protecting-children-is-everyones-business?HTML#sec1_3>.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Consultation Paper, 2.

⁸ Ibid.

⁹ Ibid.

who are experiencing disadvantage or vulnerability are the 'Target Cohort', which is framed as comprising the following priority groups:¹⁰

- Aboriginal and Torres Strait Islander children and young people;
- children and families with multiple and complex needs;
- children and young people experiencing, or who have experiences, abuse or neglect, including children in out-of-home care and young people leaving out-of-home care and transitioning to adulthood; and
- children and young people with disability, or their parents or carers with disability.

6. There are also four 'Strategic Priorities' identified in the Consultation Paper, which are each linked to separate Consultation Questions on pages 11 to 13. These Strategic Priorities are:¹¹

- addressing the over-representation of Aboriginal and Torres Strait Islander children in child protection systems;
- a national approach to early intervention and targeted support for children and families experiencing vulnerability or disadvantage, which includes strengthening the interface between services across jurisdictions including disability, early childhood education and care, health and mental health, drug and alcohol, domestic violence, justice, housing, and employment service systems;
- improved information sharing, data development and analysis; and
- strengthening child and family sector workforce capability.

7. The Law Council understands that the current consultation complements a significant body of previous and ongoing work undertaken by Families Australia, the Secretariat of National Aboriginal and Islander Child Care (**SNAICC**) and the Aboriginal and Torres Strait Islander Leadership Group established under the current National Framework for Protecting Australia's Children 2009-2020.¹² Further, the DSS will engage in targeted consultations with priority groups, with children and families having direct representation through discussions conducted by the National Children's Commissioner.¹³ The current consultation is therefore an opportunity to seek broader views to inform the development of the first of two five-year implementation plans expected to be launched in November 2021.¹⁴

8. The Law Council notes that many of the Consultation Questions are directed specifically at users of the child protection system, service providers, and peak bodies of the priority groups identified, including Aboriginal and Torres Strait Islander peoples and organisations.¹⁵ The Law Council responds to the consultation in terms intended to assist the DSS with its deliberations as much as possible, noting, however, that it is not an Aboriginal and Torres Strait Islander representative body, nor a representative body of any of the other priority groups identified in the Consultation Paper. In particular, it does not purport to provide a definitive view on issues that are more appropriately dealt with by Aboriginal and Torres Strait Islander stakeholders according to the principle of self-determination. It offers observations at the national and federal level on legal policy aspects of several of the Strategic Priorities and

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid, 1.

¹³ Ibid, 1 and iii.

¹⁴ Ibid.

¹⁵ Ibid, 11-13.

Consultation Questions, guided as much as possible by the Aboriginal and Torres Strait Islander members of its committees and other legal practitioners with experience related to the child protection system or the priority groups.

Strategic Priorities

Addressing the Over-Representation of Aboriginal and Torres Strait Islander Children

9. At a systemic level, there are concerning trends regarding the over-representation of Aboriginal and Torres Strait Islander children in contact with child protection systems, and particularly in out-of-home care. The Law Council emphasises that out-of-home care is a known pathway into the criminal justice system, increasing a child's risk of coming into contact with police and having behaviours that would normally be addressed by parents within the home upgraded to the purview of the state, including the courts.¹⁶ The over-representation of Aboriginal and Torres Strait Islander children in out-of-home care should be considered part of the overall national picture as to why there is a disproportionate incarceration of this group, both as children and adults. The legal and justice sector therefore has a vested interest in addressing this 'care to crime' pathway.
10. The Productivity Commission has released eight reports in its Overcoming Indigenous Disadvantage (OID) series. This series illustrates systemic barriers to productivity faced by Aboriginal and Torres Strait Islander peoples throughout Australia, which 'have been transmitted across generations through the trauma caused by colonisation, and subsequent government policies'.¹⁷ Its most recent report, published in 2020, emphasises that Aboriginal and Torres Strait Islander children experience greater vulnerability to entering child protection services, irrespective of the underlying prevalence of abuse and neglect.¹⁸
11. The report notes that Aboriginal and Torres Strait Islander children are far more likely than non-Indigenous children to come into contact with child protection services.¹⁹ In 2018-2019, around 16 per cent of Aboriginal and Torres Strait Islander children received a child protection service, compared with two per cent of non-Indigenous children.²⁰ Although substantiation rates for all children have increased over the past decade, claims of abuse and neglect of Indigenous children continue to be substantiated at 'around six times the rate' of those of non-Indigenous children.²¹ If neglect alone is considered, the comparative substantiation rate doubles:

*In 2018-19, Aboriginal and Torres Strait Islander children were 12 times as likely to be subject to a substantiation for neglect than non-Indigenous children, which is double their overrepresentation for all other forms of maltreatment.*²²

¹⁶ Law Council of Australia, *Children and Young People* (Justice Project, 2018) 56

<<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Children%20and%20Young%20People%20%28Part%201%29.pdf>>.

¹⁷ Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2020 – Report* (December 2020), 3.5 <<https://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2020/report-documents/oid-2020-overcoming-indigenous-disadvantage-key-indicators-2020-report.pdf>>.

¹⁸ *Ibid.*, 4.118: 'That is, if the prevalence was the same for Aboriginal and Torres Strait Islander children and non-Indigenous children, Aboriginal and Torres Strait Islander children would still be more likely to enter and be overrepresented in the system.'

¹⁹ *Ibid.*, 4.112.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*, 4.113.

12. Indigenous children also fare worse at later stages of the process. For example, once a substantiation of abuse or neglect occurs, Indigenous children are more likely than non-Indigenous children to be placed on a care and protection order or in out-of-home care.²³ The OID series 2020 report notes that this situation is worsening rather than improving: ‘the rate of placement in out-of-home care has remained relatively stable since 2004-05 for non-Indigenous children, but has nearly tripled for Aboriginal and Torres Strait Islander children’.²⁴
13. Submissions to the Law Council’s Justice Project in 2017 highlighted similar statistics and projections, with the National Aboriginal and Torres Strait Islander Legal Services (**NATSILS**) noting that removals of Indigenous children were predicted by the Australian Institute of Family Studies ‘to triple by 2035’, and Family Matters branding the situation ‘an escalating national crisis’.²⁵
14. This is despite the existence of a third option which may often be relevant in response to a substantiation, whereby child protection services can engage family support services, including programs to develop parenting skills and address maltreatment, rather than implementing a care and protection order or out-of-home care placement.²⁶ The Law Council realises there are circumstances in which a child’s removal is the only realistic option and an important safety measure. However, in other cases there could be a greater emphasis on early intervention through targeted, culturally competent family support.
15. The Justice Project further identified that:

*Once in the child protection system, there are additional challenges for Aboriginal and Torres Strait Islander children, including lack of access to and use of interpreters, and the loss of community ties and cultural connections due to the lack of essential services in remote communities.*²⁷
16. The high and disproportionate rate of child removal affecting Aboriginal and Torres Strait Islander communities and families has previously been identified by the Law Council’s expert advisory Indigenous Legal Issues Committee as a matter of critical importance, which must attract the strongest, most culturally competent national leadership in order to address its root causes.²⁸
17. The Law Council accordingly welcomes the emphasis given to this issue in the context of the National Framework for Protecting Australia’s Children, as well as in the National Agreement on Closing the Gap adopted in July 2020 by the COAG.²⁹ Target 12 of the latter agreement states: ‘By 2031, reduce the rate of over-representation of Aboriginal and Torres Strait Islander children in out-of-home care by 45 per cent’.³⁰ However, these outcomes will not be reached without detailed frameworks for

²³ Ibid, 4.114.

²⁴ Ibid.

²⁵ Law Council of Australia, *Children and Young People* (Justice Project, 2018) 50

<<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Children%20and%20Young%20People%20%28Part%201%29.pdf>>.

²⁶ Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2020 – Report* (December 2020), 4.114 <<https://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2020/report-documents/oid-2020-overcoming-indigenous-disadvantage-key-indicators-2020-report.pdf>>.

²⁷ Law Council of Australia, *Children and Young People* (Justice Project, 2018) 50-51

<<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Children%20and%20Young%20People%20%28Part%201%29.pdf>>.

²⁸ Letter from the Law Council of Australia President, Arthur Moses SC, to the Minister for Indigenous Australians, the Hon Ken Wyatt AM MP, 12 July 2019.

²⁹ Australian Government, *National Agreement on Closing the Gap* (July 2020)

<https://www.closingthegap.gov.au/sites/default/files/2021-05/ctg-national-agreement_apr-21.pdf>.

³⁰ Ibid, 34-35.

implementation, including clear commitments from the Australian Government. The Law Council therefore makes the following recommendations for priority action at the national level, the majority of which are highly relevant to Aboriginal and Torres Strait Islander children.

Aboriginal and Torres Strait Islander Child Placement Principle

18. The Law Council considers that the ACPP should be better implemented, including through compliance reporting and oversight, with analysis of the instances in which children are not being placed according to kinship ties followed by targeted, evidence-based investment to improve outcomes where possible.
19. The ACPP began thirty years ago, its key purpose being to ensure that Aboriginal and Torres Strait Islander children subject to out-of-home care are placed wherever possible with their family, kin or community in order to preserve connection to their family, community, culture and country.³¹ Most importantly, the ACPP originated from 'an Aboriginal community-led movement',³² with the National Framework for Protecting Australia's Children adopting it following development and advocacy by grassroots organisations. In recognising that Aboriginal and Torres Strait Islander peoples are best placed to participate in decisions concerning Aboriginal and Torres Strait Islander children, the ACPP reflects the core content of the principle of self-determination, which is that Aboriginal and Torres Strait Islander peoples 'should have some control over the decisions that are made about their lives'.³³
20. While the ACPP 'has been adopted by all jurisdictions in legislation and policy',³⁴ it may suffer from a lack of implementation in practice. The Australian Institute of Health and Welfare has reported that, between 2019-2020, 63 per cent of Indigenous children in out-of-home care were living with relatives, kin or other Indigenous caregivers.³⁵ This percentage has not significantly improved over the past five years, sitting at a similar level in 2017.³⁶ Rates also differ across states and territories.

³¹ Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2020 – Report* (December 2020), 4.116 <<https://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2020/report-documents/oid-2020-overcoming-indigenous-disadvantage-key-indicators-2020-report.pdf>>. See also Australian Institute of Health and Welfare, *Child Protection Australia 2019-2020* (AIHW Report, Cat no CWS 78, Canberra, 2021) 55 <<https://www.aihw.gov.au/getmedia/c3b0e267-bd63-4b91-9ea6-9fa4d14c688c/aihw-cws-78.pdf.aspx?inline=true>>.

³² Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2020 – Report* (December 2020), 4.116 <<https://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2020/report-documents/oid-2020-overcoming-indigenous-disadvantage-key-indicators-2020-report.pdf>>.

³³ Megan Davis, 'To Bind or not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17. See also Australian Government, Attorney-General's Department, 'Right to Self-Determination: Public Sector Guidance Sheet' (website, undated) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-self-determination>>. The Attorney-General's Department indicates that, at a minimum, the right to self-determination entails the entitlement of peoples to have control over their destiny and to be treated respectfully. The right to self-determination is articulated in article 3 of the United Nations Declaration on the Rights of Indigenous Peoples, which Australia formally announced its support for on 3 April 2009. See United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007).

³⁴ Australian Institute of Health and Welfare, *Child Protection Australia 2019-2020* (AIHW Report, Cat no CWS 78, Canberra, 2021) 54 <<https://www.aihw.gov.au/getmedia/c3b0e267-bd63-4b91-9ea6-9fa4d14c688c/aihw-cws-78.pdf.aspx?inline=true>>.

³⁵ *Ibid.*

³⁶ Letter from the Law Council of Australia President, Arthur Moses SC, to the Minister for Indigenous Australians, the Hon Ken Wyatt AM MP, 12 July 2019 citing Australian Institute of Health and Welfare, *Child Protection Australia 2016-2017* (AIHW Report, Cat no CWS 63, Canberra, 2018) 48 <<https://www.aihw.gov.au/getmedia/66c7c364-592a-458c-9ab0-f90022e25368/aihw-cws-63.pdf.aspx?inline=true>>. 'Across Australia, in 2016–17, 68% of Indigenous children were placed with relatives/kin, with other Indigenous caregivers, or in Indigenous residential care—this percentage is similar to that reported in previous years.'

Queensland, for example, records less than 50 per cent of Indigenous children in out-of-home care as living with family, kin or community.³⁷ In the Northern Territory, the figure is less than 40 per cent, however, the Australian Institute of Health and Welfare is careful to note the following data complexity:

For the Northern Territory, counts of children living with Indigenous or non-Indigenous relatives or kin or other Indigenous caregivers only include children for whom the process of making a placement decision was considered by caseworkers to be in accordance with the Aboriginal and Torres Strait Islander Child Placement Principle. This means there may have been a higher number of Indigenous children living with relatives, kin or other Indigenous caregivers than is presented here. All children who were not considered to be placed in accordance with the Aboriginal and Torres Strait Islander Child Placement Principle are included in the 'in another care arrangement' category, regardless of who they were placed with.³⁸

21. Nevertheless, the existence of these findings is concerning, considering that the Royal Commission into the Protection and Detention of Children in the Northern Territory heard concerns from Aboriginal communities a number of years ago 'about the lack of involvement they have with the child protection system' and 'the importance of developing local and culturally appropriate initiatives that protect children'.³⁹ The Commission found that 'the Northern Territory Government has a major shortage of available foster and kinship care placements' and 'has systemically failed to identify and use kinship carers for Aboriginal children'.⁴⁰ It reported that 'training in understanding Aboriginal kinship systems and culturally appropriate kinship care is not adequate for the purpose of kinship care placement and must be significantly improved'.⁴¹ As a result, 'too few Aboriginal children in out-of-home care in the Northern Territory are placed with kinship carers'.⁴²
22. During the Justice Project consultation and submission process, the Law Council similarly found that:

Stakeholders also reported that some child protection officials had little cultural competence or knowledge of Aboriginal and Torres Strait Islander family relationships or kinship systems within communities and failed to observe the Aboriginal and Torres Strait Islander Child Placement Principle. The Family Law Service in Kalgoorlie had serious concerns about the lack of cultural competency of child protection staff and the lack of communication between child protection services and Aboriginal families and communities. As a result, they believed that some children are being removed on insufficient grounds and files are being too quickly closed without sufficient investigation of all available and alternative

³⁷ Australian Institute of Health and Welfare, *Child Protection Australia 2019-2020* (AIHW Report, Cat no CWS 78, Canberra, 2021) 56 <<https://www.aihw.gov.au/getmedia/c3b0e267-bd63-4b91-9ea6-9fa4d14c688c/aihw-cws-78.pdf.aspx?inline=true>>.

³⁸ Ibid.

³⁹ Royal Commission into the Protection and Detention of Children in the Northern Territory, *Issues Paper: Child Protection* (2017) 5. Cited in Law Council of Australia, *Children and Young People* (Justice Project, 2018) 51 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Children%20and%20Young%20People%20%28Part%201%29.pdf>>.

⁴⁰ Royal Commission into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations* (2017) 22. Cited in Law Council of Australia, *Children and Young People* (Justice Project, 2018) 51 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Children%20and%20Young%20People%20%28Part%201%29.pdf>>.

⁴¹ Ibid.

⁴² Ibid.

options. The Family Law Service raised further concerns that Aboriginal children are frequently being placed with non-Aboriginal families in Perth and siblings are being separated. Similarly, the Aboriginal Legal Rights Movement stated that Aboriginal children are often not placed with Aboriginal families and the kinship care program in South Australia is often not observed, but the reasons for this are unclear. Inappropriate foster care arrangements can lead to children self-placing and acting out, potentially leading to engagement with police and the criminal justice system. Victoria Legal Aid in Mildura also noted the reactive nature of decisions to remove Aboriginal children, attributing the problem partly to a lack of cultural awareness, inadequate training, a misunderstanding of the problem and under-resourcing.⁴³

23. The Law Council recognises that these findings were made based on 2017 consultations, and that there may have been additional efforts to overcome such issues in the intervening period. Nevertheless, these were messages which were consistently heard at that time amongst Indigenous stakeholders working in the justice system, and should prompt investigation as to how such matters are currently dealt with.
24. The Law Council notes that the New South Wales out-of-home care system was recently comprehensively reviewed, with the *Family is Culture* report published in October 2019. Chapter 16 considered the ACPP, outlining 'concerns about a lack of compliance' as well as 'the lack of comprehensive data required to adequately measure compliance and make recommendations about training and data collection to address these issues'.⁴⁴ The report found that:

*It is difficult to ascertain with any precision the reason why the ACPP is not complied with in practice. It is in all likelihood a combination of factors, including but not limited to a lack of: institutional and individual accountability in relation to implementation of the principle; sanctions for non-compliance; guidance around the implementation of the principle in practice; cultural awareness and confidence among FACS caseworkers; and an institutional culture that does not value genuine partnership with the Aboriginal community.*⁴⁵

25. The *Family is Culture* report further noted that in interpreting the statistics regarding placement of Aboriginal children with either a relative, kinship carer or Aboriginal carer, caution must be applied due to a lack of comprehensive data from which to draw a true picture of the child's treatment within the system:

In particular, it is not correct to say that a placement demonstrates 'compliance with the ACPP', or even the placement element of the ACPP, simply because it falls within one of the paragraphs of s 13 of the Care Act. A particular limitation with this data is there is no evidence to show whether or not the placement has been arrived at after a proper application of the hierarchy – that is, whether a child's placement was

⁴³ Law Council of Australia, *Children and Young People* (Justice Project, 2018) 53

<<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Children%20and%20Young%20People%20%28Part%201%29.pdf>>.

⁴⁴ Megan Davis, *Family is Culture: Independent Review of Aboriginal Children and Young People in OHC* (Review Report, Sydney, October 2019) xxxvi, 252-253.

⁴⁵ *Ibid*, 254.

*made after it was determined that he or she could not be placed 'higher' on the hierarchy.*⁴⁶

26. Further, the report highlighted concerns regarding 'widespread and systemic non-compliance in practice with the statutory requirement to consult with a child's family or kinship group and appropriate organisations before placing the child with a person under s 13(d)⁴⁷ – that is, 'a suitable person approved by the Secretary after consultation', which is likely to be a non-Indigenous carer.⁴⁸
27. The New South Wales Government provided a formal response to the *Family is Culture* report on 7 July 2020, stating that it 'has carefully considered the recommendations made in the report', many of which 'are currently being addressed by reforms through the Department of Communities and Justice'.⁴⁹ Initiatives currently underway aimed at upholding the ACPD include redesigning the Caseworker Development Program and providing intensive family preservation and restoration services, and will be driven by a newly established Aboriginal Outcomes Taskforce within the Department.
28. Recommendations 71 to 82 of the *Family is Culture* report relate to the ACPD, and might form a template for nationwide minimum standards of review of out-of-home care systems. These recommendations include that guidance and training on the ACPD, developed and delivered in partnership with Aboriginal community organisations and designed to complement and extend the existing resources from SNAICC, which are considered best practice, should be provided to caseworkers – including ongoing, interactive programs and testing on how to apply the elements of the ACPD to cases in practice.⁵⁰
29. Further, they include that the relevant Department should engage with Aboriginal stakeholders and community members to design and implement a system of data collection and reporting around elements of the ACPD.⁵¹ In particular, the data should address: Aboriginal children's contact with their Aboriginal birth parents, siblings (including half-siblings) and extended family, kin and community; Aboriginal children's placement with siblings (including half-siblings); and cultural planning for Aboriginal children in care, including information on who participated to develop a child's cultural plan, and what these cultural plans contain in relation to the elements of the ACPD.
30. The *Family is Culture* report noted that the 'compliance rubric' created by the Victorian Commission for Children and Young People, which comprises 20 'compliance points' mapped to the ACPD elements, is one example of how to adequately define and measure what constitutes compliance with the ACPD – however, ultimately, all states and territories should consult with Aboriginal and Torres Strait Islander stakeholders in designing their systems.⁵²
31. In December 2017, the Victorian Government invested significantly in measures to address the overrepresentation of Aboriginal and Torres Strait Islander children in out-of-home care, allocating \$33.6 million to a new model of kinship identification and

⁴⁶ Ibid, 275.

⁴⁷ Ibid, 278-279.

⁴⁸ Ibid, 273.

⁴⁹ New South Wales Government, *Response to the Family is Culture Review Report* (7 July 2020) <<https://www.facs.nsw.gov.au/download?file=784517>>.

⁵⁰ Megan Davis, *Family is Culture: Independent Review of Aboriginal Children and Young People in OOHC* (Review Report, Sydney, October 2019), 256.

⁵¹ Ibid, 258.

⁵² Ibid, 257.

care, and signing a funding agreement with Aboriginal community-controlled organisations relating to the management of Aboriginal children, which included:

*\$13.3 million to support Aboriginal community-controlled organisations to assume legal guardianship over children in out-of-home care. It also contains \$8.6 million to expand the Aboriginal children in care program to transfer management of children to Aboriginal organisations.*⁵³

32. As the Justice Project noted at the time, this agreement is noteworthy as the first example of the state handing the guardianship of Aboriginal children in care back to Aboriginal communities,⁵⁴ and, depending on its subsequent evaluation and results, may provide a future roadmap for what is possible provided the appropriate resources are devoted to the issue.

Legal Services for Children and Families

33. The Law Council emphasises that ‘the growing number of Australian children receiving child protection services has driven up legal need for these children and their families’.⁵⁵ In addition, children facing vulnerability or disadvantage have a greater prevalence of legal problems but low engagement with or trust in authorities and therefore high rates of legal need. At the same time, it is conscious that such children and families are unlikely to be able to afford legal advice and representation.
34. This gap is best addressed through publicly-funded specialist legal assistance services – including legal services linked to the provision of other basic needs, which children facing vulnerability or disadvantage are more likely to access (eg housing, food and transport).⁵⁶
35. While, as discussed below, recent budget announcements in related spaces are welcome, the Law Council reiterates the importance of sustained adequate investment in specialist legal services for children, especially in remote areas and jurisdictions where they have previously been reported as lacking, including as follows during the Justice Project:

*Despite the fundamental role specialist, child-friendly legal assistance services play in ensuring access to justice for children and young people, there remains a gap in availability of such services, and a lack of lawyers with specialist skills to deal with children and young people, particularly in the child care and protection jurisdiction. This gap is particularly acute in rural, regional and remote (‘RRR’) communities, and in Tasmania and the Northern Territory, which do not have specialist legal services for children and young people. Lack of access to specialist legal advice as well as specialist children’s courts can result in inequitable outcomes for children and young people in RRR areas.*⁵⁷

⁵³ Calla Wahlquist, ‘Victoria pledges record funds to keep Indigenous children in community care’, *The Guardian* (online, 26 April 2018) <<https://www.theguardian.com/australia-news/2018/apr/26/victoria-pledges-record-funds-to-keep-indigenous-children-in-community-care>>. Cited in Law Council of Australia, *Children and Young People* (Justice Project, 2018) 54 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Children%20and%20Young%20People%20%28Part%201%29.pdf>>.

⁵⁴ *Ibid*, 55.

⁵⁵ Law Council of Australia, *Children and Young People* (Justice Project, 2018) 5 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Children%20and%20Young%20People%20%28Part%201%29.pdf>>.

⁵⁶ *Ibid*, 4, 7.

⁵⁷ *Ibid*, 4.

36. In particular, significant gaps in legal assistance for civil matters have been identified, including legal or other representatives for children in care and protection matters.⁵⁸
37. In this context, independent legal advice and representation provides an important safeguard and accountability measure, ensuring that public decision-making is made according to the law, and with proper regard to a family's circumstances. It helps to ensure that such decisions are not made on the basis of flimsy or wrong evidence, and where the ACPP has been enshrined into law, reflect this requirement. Specialist legal advice available for children also provides a 'first call' avenue for children who may be subject to abuse or neglect to seek advice about their legal situation, with a view to eg, making a complaint in an empowered manner, or seeking compensation.
38. The Productivity Commission has previously found that legal assistance funding for civil matters, especially domestic violence and care and protection matters, 'has not kept pace with increasing costs and demand'.⁵⁹ It described legal assistance in these areas as 'not comprehensive' and observed that the 'gap in independent lawyer services for children [was] especially worrying'.⁶⁰ This has resulted in 'a growing "justice gap" for the disadvantaged', whereby people do not have the resources to take legal action to defend their rights.⁶¹
39. The Justice Project also heard that a key concern from numerous stakeholders 'is that there is little independent scrutiny of child protection removal decisions, and families often have little effective means of challenging removal decisions'.⁶²

*The Tasmanian Commissioner for Children and Young People highlighted that there is no recourse for children in civil and administrative tribunals regarding out-of-home care decisions, no access to an external body, no right of appeal regarding decisions and no independent advocates for children. An associated concern is that children do not have an independent or external body to whom they can make complaints about their care arrangements. The Western Australian Commissioner for Children and Young People submitted that many children and young people in out-of-home care face numerous barriers to speaking up.*⁶³

40. This was particularly acute in remote areas, with the Justice Project citing findings by the Royal Commission into the Protection and Detention of Children in the Northern Territory:

The NT Royal Commission highlighted the high levels of unmet legal need with respect to civil matters and child care and protection matters, especially in regional areas. It observed the practical difficulties of legal practice in the child protection jurisdiction in the NT as a result of remoteness. Remoteness 'impacts on almost every facet of the practicalities of legal practice, from getting instructions, appearing in proceedings, participating in mediation, accessing interpreters and receiving adequate funding'. The Royal Commission reported that the cost of travel for parents and families involved in child protection matters is often beyond their means. For example, a return trip to Katherine from

⁵⁸ Ibid, 28.

⁵⁹ Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 2014).

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Law Council of Australia, *Children and Young People* (Justice Project, 2018) 47

<<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Children%20and%20Young%20People%20%28Part%201%29.pdf>>.

⁶³ Ibid, 47-48.

a particular client's community would cost approximately \$560 or \$280 per adult, which is an entire fortnight payment of Newstart Allowance for one adult. Limited access to technology also makes it difficult to undertake many legal tasks remotely, including taking instructions and settling court documents. As a result of these challenges, parents and family members often do not participate in proceedings, especially in Alice Springs, and final court orders are frequently 'made in litigation in which a parent may not have had a meaningful opportunity to participate'.⁶⁴

41. In family law cases, the separate interests of children are commonly met by the appointment of an Independent Children's Lawyer (ICL), who, while not acting strictly on behalf of the child, is tasked with ensuring that all evidence relevant to that child's best interests, including the child's wishes, is put before the court.⁶⁵
42. The 2021-2022 Federal Budget provided welcome additional funding of \$310 million through the National Legal Assistance Partnership, including for women's legal centres under the Women's Safety Package and dedicated legal assistance services for people with mental health issues.⁶⁶ The Law Council recognises that this will in many cases have positive flow-on effects for the safety and security of children. In addition, the Commonwealth has made recent investments in state and territory legal assistance sectors, such as a funding boost in July 2020 to support the frontline services of Community Legal Centres, Legal Aid, and the Aboriginal Legal Service in New South Wales, with approximately \$5 million, \$6 million and \$4 million respectively allocated across these organisations to enhance capacity, including for the delivery of child protection services.⁶⁷
43. However, the Law Council emphasises that essential funding for specialist, child-friendly legal services must be maintained at an appropriate level to ensure that parties applying to courts to secure proper and safe arrangements for the care and protection of children can do so with the benefit of legal advice and support. Funding via Legal Aid for the appointment of ICLs must also be maintained to ensure children have the benefit of independent advocacy on their behalf in jurisdictions linked to their welfare.
44. It suggests an independent mapping of legal need in this area and an evaluation of the extent to which existing legal assistance services, including with the additional levels of Commonwealth funding, meet this need.

Broader Justice Services for Children and Families

45. The Law Council's Family Law Section emphasises that chronic underfunding of the family law jurisdiction – namely, the Family Court of Australia, the Federal Circuit Court of Australia, and the Family Court of Western Australia – is harming children who come into contact with the family law system. Despite the system being based on the best interests of the child, and the tireless work of judicial officers, family consultants, registrars and court staff, a long-term lack of adequate funding of the jurisdiction means children will have experienced extended exposure to a system that fails to deliver timely resolution of important disputes between their parents and carers.

⁶⁴ Ibid, 31.

⁶⁵ Ibid, 14.

⁶⁶ See, eg, Attorney-General's Department, *Enhanced legal and workplace services to support Australians* (Portfolio Overview, 11 May 2021) <https://www.ag.gov.au/system/files/2021-05/portfolio-overview_0.pdf>.

⁶⁷ See, eg, New South Wales Communities and Justice, 'Covid-19 \$15.6M boost to legal support services' (media release, 12 July 2020) <[https://www.dcj.nsw.gov.au/news-and-media/media-releases/covid-19-\\$15.6m-boost-to-legal-support-services](https://www.dcj.nsw.gov.au/news-and-media/media-releases/covid-19-$15.6m-boost-to-legal-support-services)>.

46. Insufficient resourcing, including of the numbers of judicial officers, family consultants and registrars, has led to backloads of filings and the inability of the system to properly deal with urgent matters impacting children and their care. It can take weeks, if not months, for decisions to be made in relation to urgent and interim matters relating to children, and, in some registries of the courts, up to three years for a trial and final determination, as to where a child should live and how much time they should spend with their parents or other important people in their lives. The delays can lead to children being separated from parents or other important people or continuing to spend time with people who are a risk to them. Similarly, vulnerable children and their families, such as those experiencing disadvantage or at risk of family violence, must wait within the system.
47. Most importantly, jurisdictions tasked with determining arrangements for children, including the family law jurisdiction, must be adequately resourced if the stated goal of the successor plan to protect children by reducing the rates of child abuse and neglect is to be achieved.
48. The Law Council acknowledges and welcomes the 2021-2022 Federal Budget announcement that the Commonwealth Government will provide \$123.8 million over four years to support the reform of the family law system and improve access and safety for children and families.⁶⁸ It suggests an independent evaluation of the extent to which this investment successfully addresses the issues of delay and overwork canvassed above.
49. In addition, the format of courts and the provision of support services should be appropriately adapted to children, culturally safe and trauma informed.
50. As suggested in the Justice Project:

Children often experience age-related communication barriers in court as their social communication skills, vocabulary and language skills are underdeveloped compared to adults. This is particularly the case for children and young people with low literacy, a mental health condition, cognitive or intellectual impairment, an oral language disorder, or those who speak English as a second language, including some Aboriginal and Torres Strait Islander peoples. One measure to assist children and young people with acute communication barriers to navigate and participate in the adversarial justice system is the use of communication or registered intermediaries. At present, communication intermediaries are inconsistently used across Australia. As such, state and territory governments should consider supporting the expansion and evaluation of communication intermediary schemes across all jurisdictions, involving qualified, trained and remunerated communication intermediaries who provide impartial and independent advice to the judicial system regarding the person's communication needs.⁶⁹

51. In 2019, the Federal Circuit Court Australia launched the Indigenous List Pilot, a measure implemented to enhance access to justice measures for Aboriginal and Torres Strait Islander peoples, which was anecdotally well-received and supported in the Northern Territory, particularly in Alice Springs. The pilot as applied in the Northern Territory entailed Judge Young adopting a less formal approach to proceedings, where

⁶⁸ Law Council of Australia, 'Significant funding for Federal Courts applauded' (media release, 12 May 2021) <<https://www.lawcouncil.asn.au/media/media-statements/significant-funding-for-federal-courts-applauded>>.

⁶⁹ Law Council of Australia, Children and Young People (Justice Project, 2018) 4 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Children%20and%20Young%20People%20%28Part%201%29.pdf>>.

both parties agreed that the pilot was appropriate. Instead of the formal structures of the traditional court room, under the pilot program, the Judge sat at eye level with the parties and utilised culturally appropriate language and explored avenues to reduce conflict. Other pilot sites included Adelaide, Darwin and Sydney.

52. A similar pilot with less formal courts was implemented and trialed in the Kimberley by the late, former Chief Judge of the Family Court of Western Australia, His Honour Stephen Thackray, with great success, before his retirement – but has not continued due to lack of funding.
53. Due to COVID-19 the option for face-to-face court events has recently been greatly limited. It is hoped that the Indigenous List Pilot will become available to Aboriginal and Torres Strait Islander parties again, to provide greater choice and agency in decision making that is the best fit for their family. On the advice of its Family Law Section, the Law Council recommends that this list be trialed in other regions, including Far North Queensland and Western Australia, once face to face court events, particularly in regional areas, can more readily occur. It should also be independently evaluated towards the end of the pilot, with a view to rolling it out more generally, if it is found to be successful.
54. The Law Council also supports Recommendation 45 of the Australian Law Reform Commission's final report, *Family Law for the Future – An Inquiry into the Family Law System*, that the Federal Government should ensure the availability of Indigenous Liaison Officers in court registries where they are required.⁷⁰ It supports the allocation of immediate funding to re-employ Indigenous Liaison Officers in the Northern Territory, Far North Queensland and Western Australia with a progressive roll-out in other states and metropolitan registry areas.

Early Intervention Support and Services

55. The Law Council considers it essential that governments invest in front-end services and infrastructure, in order to address the pathways that lead children and their families into contact with the child protection system. These pathways are often based in the systemic disadvantage and barriers to productivity that Aboriginal and Torres Strait Islander peoples across Australia face, including intergenerational poverty, physical and mental health issues, lack of education, and lack of social stability and security.⁷¹
56. The Justice Project heard from stakeholders that one solution to overrepresentation of Aboriginal and Torres Strait Islander children in the child protection system 'poses increasing both the availability of early intervention services, and the cultural sensitivity and responsiveness of these services' – but that 'increasing funding for services is a necessary part of this action'.⁷² Proactive rather than reactive service investment requires significant output in the short term and long-term commitment, as well as bipartisan support for planning and consistency. However, the evidence base arising from pilot programs applying locally tailored, therapeutic approaches to social problems is promising, pointing to strong improvements in outcomes and net savings

⁷⁰ Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (ALRC Report 135, April 2019) <<https://www.alrc.gov.au/publication/family-law-report/>>.

⁷¹ See Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2020 – Report* (December 2020) <<https://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2020/report-documents/oid-2020-overcoming-indigenous-disadvantage-key-indicators-2020-report.pdf>>.

⁷² Law Council of Australia, *Children and Young People* (Justice Project, 2018) 54 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Children%20and%20Young%20People%20%28Part%201%29.pdf>>.

across sectors. Given that out-of-home care is known to be a significant pathway into the criminal justice system,⁷³ robust early intervention in the child protection space could have a significant downstream impact, including reducing the very substantial expenses governments incur accommodating children in juvenile detention, and the corresponding loss of productivity. Consideration could be given in this regard to the Bourke justice reinvestment trials, which are designed to respond to community needs in a preventative and holistic manner, improving outcomes and creating better coordinated support for vulnerable families and children.⁷⁴ This includes with respect to youth disengagement, and levels of family violence and separation. While no data has been published specific to rates of child removals, preliminary assessment of the trials has shown significant reductions in domestic and family violence, re-offending and youth offending, as well as improved school attendance and retention, along with an overall positive economic impact on the community and savings for the government.⁷⁵

57. While the levers in many preventative policy areas, such as healthcare and education, sit with state and territory governments, there are specific areas in which the Australian Government assumes or shares responsibility. In particular, the Law Council has in the past welcomed federal investment in access to justice, housing and mental health support, particularly in remote areas. In its 2021-2022 Pre-Budget submission, the Law Council recommended:

*The Australian Government should ensure that the new Closing the Gap justice targets are backed by appropriate resourcing including for access to justice initiatives, particularly for Aboriginal community-controlled legal services and preventative approaches spanning a wide range of health, housing, youth engagement, disability and broader services.*⁷⁶

58. Notably in its 2021-2022 Budget, the Australian Government allocated significant funding to women's legal services addressing issues of domestic and family violence (\$129 million over four years), as well as \$60 million over four years for legal assistance support to people experiencing mental health conditions, which the Law Council supported as 'a step in the right direction' in 'improving the lives of marginalised and vulnerable communities' including Aboriginal and Torres Strait Islander children.⁷⁷
59. However, affordable social housing remains in low supply across the country, with stakeholders suggesting the allocation in the 2021-2022 Budget falls well short of the necessary infrastructure spending.⁷⁸ While state and territory governments have primary responsibility for housing and homelessness, the Australian Government's

⁷³ Ibid, 55-57.

⁷⁴ See Just Reinvest New South Wales, *Justice Reinvestment in Bourke* (website, undated) <https://www.justreinvest.org.au/justice-reinvestment-in-bourke/>.

⁷⁵ See KPMG, *Impact Assessment* (27 November 2018) <<https://www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf>>.

⁷⁶ Law Council of Australia, Submission to the Treasury, *2021-2022 Pre-Budget Submission* (8 February 2021) 6 <<https://www.lawcouncil.asn.au/publicassets/0765d4a9-8a6a-eb11-9439-005056be13b5/3957%20-%202021-22%20Pre-Budget%20Submission.pdf>>.

⁷⁷ Law Council of Australia, 'Funding boost welcome for legal services supporting women and those experiencing mental health issues' (Media Release, 12 May 2021) <<https://www.lawcouncil.asn.au/media/media-releases/funding-boost-welcome-for-legal-services-supporting-women-and-those-experiencing-mental-health-issues>>.

⁷⁸ See, eg, Jessica Sier, 'Federal Budget fails to address Australia's housing shortage and homelessness, experts say', *The Guardian* (online, 14 May 2021) <<https://www.theguardian.com/australia-news/2021/may/14/federal-budget-fails-to-address-australias-housing-shortage-and-homelessness-experts-say>>.

contribution under the National Housing and Homelessness Agreement is also important. It is worth reviewing how investment in this area may contribute to the stabilisation of families who are in crisis, including those who are facing family violence, helping to prevent against the downstream removal of certain children into out-of-home care.

Relevance of In-Home-Care

60. The Law Council suggests that the potential for IHC to assist in achieving the goal of the successor plan could be better canvassed in the Consultation Paper.
61. IHC is a type of government-subsidised child care service which provides support to families who have no alternative option for child care, such as those who work non-standard hours, are geographically isolated, or have children with challenging and complex needs. The target users of IHC services include children with disabilities, Aboriginal and Torres Strait Islander children living in rural, regional or remote areas or who have difficulty in traditional care institutions, and other children exposed to multiple vulnerabilities and risk factors.
62. During the COVID-19 pandemic, IHC has also provided necessary care for children of essential workers such as health care professionals, police officers and other first responders, children in families where a carer is undergoing treatment for serious illness, as well as families on remote properties contributing to Australia's farming and agricultural industry. IHC has higher proportions of vulnerable children, highlighted by the higher rates of Additional Child Care Subsidy as a proportion of total subsidy: 18.7 per cent compared to 0.46 per cent for Family Day Care and 0.82 per cent overall.⁷⁹
63. The Consultation Paper has found, in line with contemporary neurobiological research, that the first five years of a child's life are crucial to their development and in shaping other outcomes in later life.⁸⁰ Without IHC, many children in the priority groups identified in the Consultation Paper may have no access to early childhood education and quality, regulated care, contrary to the priorities of the successor plan.
64. Members of the Law Council's constituent bodies advise that, particularly for families living in RRR areas, there is a scarcity of IHC educators who are appropriately qualified and sufficiently remunerated to travel to remote locations. Due to the complexity of the needs of many families requiring IHC services, upskilling IHC educators is therefore a matter of priority. IHC educators often face complex and high-risk circumstances when working in the home. Their work environment may change from day to day and present new and unforeseen risks. Educators may work irregular or long hours, sometimes working overnight with adult residents also sleeping in the home. They may be working with children with complex needs who require additional medical, psychological, or educational skills and expertise, beyond that obtained through an early childhood qualification. It suggests that the adequacy of current service provision be reviewed.

Relevance of Exit Strategies and Transition Support

65. The Law Council further suggests that the implementation plan should explicitly address as a strategic priority the need for programs that support young people upon their release from child protection placements, including with accessing income support payments, education and employment and long-term accommodation. The

⁷⁹ Australian Government Department of Education, Skills and Employment, *Early Childhood Education and Care Relief Package Four Week Review: Summary Report* (2020) 7.

⁸⁰ Consultation Paper, 3.

critical importance of these strategies and supports was explained as follows in the Justice Project:

Inadequate exit strategies and lack of transition support for children and young people leaving government institutions, such as out-of-home care, juvenile detention and mental health facilities, increases the risk of homelessness, entrenched disadvantage and contact with the juvenile justice system. A well-planned exit strategy and the provision of critical supports, including safe and secure accommodation, education, health care, job training, throughcare programs and timely legal advice, can help break the cycle of disadvantage, recidivism and homelessness for children exiting state care. Given the vulnerability of children at the point of transition from the child protection and juvenile justice systems, there is a need to invest in better exit strategies and transitional support services and to consider extending these support structures for children and young people transitioning out of state care beyond the age of 18 years.⁸¹

Vulnerable Groups of Refugee and Asylum Seeker Children

66. The National Framework does not currently discuss migrant groups who may be at risk and require particular consideration with respect to child protection issues.
67. In this context, the Law Council notes that a permanent visa is essential for migrant children without parental or family support as it entitles them to necessary social and financial support services such as Medicare, Centrelink and the National Disability Insurance Scheme (**NDIS**).
68. Most migrant children who find themselves in the care of a State or Territory Government Welfare Authority (**STGWA**) in Australia, are eligible to apply for a subclass 802 onshore permanent child visa under the 'Vulnerable Child Provisions'.⁸² Put briefly, a child must satisfy the Department of Home Affairs (**DHA**) that they are under 18, being supported by a STGWA, and meet character requirements to be granted a permanent child visa.
69. However, there is a small, yet extremely vulnerable cohort of migrant children who are falling through the gaps and being left without appropriate care and social support services. These are asylum seeker and refugee children who arrived in Australia by boat and have subsequently either been removed from their parents' care, or their parents have relinquished care of them.
70. Children who arrive in Australia by boat, or are born in Australia to parents who arrived by boat are considered 'Unauthorised Maritime Arrivals' (**UMA**) under section 5AA of the *Migration Act 1958* (Cth) (**the Migration Act**). All UMA are barred under section 46A of the Migration Act from lodging any visa other than a Safe Haven Enterprise Visa (**SHEV**) or Temporary Protection Visa (**TPV**). This 'bar' may be lifted personally by the Minister for Home Affairs if they consider it to be 'in the public interest'.
71. A member of the Migration Law Committee of the Law Council's Federal Litigation and Dispute Resolution Section has received enquiries relating to a growing number of UMA children who have either been removed from their parents' care, or whose parents have relinquished care (sometimes leaving their children unaccompanied in Australia). These children often end up in the care of a STGWA, in foster or

⁸¹ Law Council of Australia, *Children and Young People* (Justice Project, 2018) 5-6

<<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Children%20and%20Young%20People%20%28Part%201%29.pdf>>.

⁸² Migration Regulations 1994 (Cth), Sch 2 Reg 802.216 of Schedule 2.

independent living arrangements. In a number of cases, these children experience a variety of vulnerabilities including being culturally and linguistically diverse, English as a second language, intellectual or physical disabilities, illness and trauma or other mental health issues as a result of their boat journey, persecution in their home country or difficulties in settling in Australia.

72. These children and young people need as many social and financial supports as possible to be able to lead independent and fulfilling lives. However, because of the operation of section 46A of the Migration Act, these children are unable to make a valid application for the subclass 802 visa and are effectively excluded from accessing this visa which was designed to protect vulnerable children.
73. Given the legal complexities of these matters, and the vulnerabilities of the children affected, Ministerial Intervention requests should not be the only pathway for this cohort of children. Instead, the Regulations should be amended to allow UMA children in the care of a STGWA to be able to lodge valid 802 applications without the need for Ministerial Intervention.
74. Appropriate training should also be provided to child safety workers to identify potential migration issues with young people with whom they are working.

Improved Awareness, Collaboration and Information Sharing Across National Frameworks, Jurisdictions, Sectors and Services

75. The Law Council considers that training for frontline child protection staff on the full range of services available to eligible children and families under legislative and policy frameworks such as the NDIS and IHC schemes is essential. These frameworks often span various jurisdictions, including disability, early childhood education and care, health and mental health, drug and alcohol, domestic violence, justice, housing, and employment service systems. A centralised source or database of information which is consistent and easily accessible may also be helpful in preventing siloed decision-making and strengthen the interface between services across sectors and jurisdictions, as per the second strategic priority of the Consultation Paper.
76. In its *Family Law for the Future – An Inquiry into the Family Law System*, the Australian Law Reform Commission considered options for ‘closing the jurisdictional gap’.⁸³ It made two recommendations, which, subject to privacy concerns being addressed and sensitive information redacted, the Law Council considers could have relevance and application to the successor plan, as follows:

Recommendation 2: The Australian Government should work with state and territory governments to develop and implement a national information sharing framework to guide the sharing of information about the safety, welfare, and wellbeing of families and children between the family law, family violence, and child protection systems. The framework should include:

- *the legal framework for sharing information;*
- *relevant federal, state, and territory court documents;*
- *child protection records;*
- *police records;*
- *experts’ reports; and*

⁸³ Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (ALRC Report 135, April 2019) <<https://www.alrc.gov.au/publication/family-law-report/>>.

- *other relevant information.*

Recommendation 3: The Australian Government, together with state and territory governments, should consider expanding the information sharing platform as part of the National Domestic Violence Order Scheme to include family court orders and orders made under state and territory child protection legislation.⁸⁴

77. Consideration might also be given to ‘national bench books’, which link related jurisdictions, such as the family law jurisdiction, to best practice approaches when dealing with children in contact with the child protection system, including how child protection matters intersect with family law matters. This would provide one comprehensive resource with respect to the varying legislation across jurisdictions relating to child protection and assist in educating practitioners who work across child protection, family law and domestic violence. The Law Council is aware of the *National Domestic and Family Violence Bench Book*, which includes information and helpful resources with respect to vulnerable groups and provides an educational resource to practitioners in identifying relevant issues that may arise in a domestic violence matter.⁸⁵ This could provide a template for a national bench book with respect to child protection matters, including sections specific to different groups of disadvantaged or vulnerable children.
78. Finally, implementation of the successor plan should link in detail to related reports and recommendations, including the Royal Commission into the Protection and Detention of Children in the Northern Territory, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, and the Royal Commission into Institutional Responses to Child Sexual Abuse.

Further Addressing the ‘Care to Crime’ Drift

79. The Law Council is acutely aware in this context that there is, as discussed, an established ‘care to crime’ drift occurring in which children placed in out-of-home care are more likely to subsequently enter the criminal justice system. This can, in certain scenarios, involve a child’s poor behaviour which may result in police being called and charges laid against the child, eg for property damage – whereas, if the same behaviour had occurred in a home or school setting, it would have been dealt with by parents or teachers outside the justice system.
80. The Law Council realises that staff in out-of-home care are often working in difficult situations and under pressure. It suggests that particular effort should be made in training and resourcing staff in out-of-home care to defuse situations and divert children away from the criminal justice system wherever possible, including through facilitating access to mental health or broader crisis support, and additional investments. This should particularly be the case where a child does not pose a serious risk to health or safety.

⁸⁴ Ibid.

⁸⁵ Australasian Institute of Judicial Administration, *National Domestic and Family Violence Bench Book* (online, 2020) <<https://aija.org.au/publications/national-domestic-and-family-violence-bench-book/>>.