Aboriginal Family Violence Prevention & Legal Service Victoria
Standing Firm Against Family Violence

Submission to the Commission for Children and Young People Inquiry into the Child Protection Permanency Amendments

28 November 2016

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Introduction/Executive Summary

The Aboriginal Family Violence Prevention and Legal Service Victoria ('**FVPLS Victoria'**) welcomes the opportunity to provide this submission to the Commission for Children and Young People's inquiry into the *Children, Youth & Families (Permanent Care & other Matters) Amendment Act 2014* (**'the Permanency Amendments'**).

While FVPLS Victoria supports the over-arching goals of the Permanency Amendments, namely creating greater stability for children within the child protection system and avoiding unnecessary 'case drift', the actual detail and operation of the Permanency Amendments has been to the detriment of Aboriginal children's best interests.

The Permanency Amendments have had a range of adverse unintended consequences which, in FVPLS Victoria's view, outweigh and undermine the intended purpose of the amendments. The Permanency Amendments are an attempt to resolve a complex systems problem with legislation and, as such, they were flawed from the outset.

Specifically, FVPLS Victoria is of the view that the Permanency Amendments have:

- A disproportionate and destructive impact on Aboriginal children and families;
- Limited the capacity of the Children's Court to make orders in the best interests of Aboriginal children – namely to tailor orders to the specific needs and circumstances of individual children and their families;
- Imposed inappropriate barriers on the ability of Aboriginal victims/survivors of family violence – predominantly mothers – to achieve reunification with their children in a safe, stable and permanent home free from violence. This includes limited support provided by DHHS for Aboriginal families;
- Reduced accountability and transparency of the actions and decisions of the Department of Health and Human Services (**'DHHS'**);
- Imposed inappropriate constraints on the cultural rights and wellbeing of Aboriginal children, including the right to maintain a connection with their culture and identify through safe and regular contact with parents and kin; and
- Limited the capacity of Aboriginal children and their families, including victims/survivors of family violence, to have meaningful involvement in case planning and decision making concerning Aboriginal children.

The Permanency Amendments have a direct and disproportionate impact on Aboriginal children and upon Aboriginal family violence victims/survivors – predominantly mothers. Aboriginal children in Victoria are 12.3 times more likely

to be on care and protection orders in comparison with non-Aboriginal children.[1] Victorian Aboriginal children are also 12.9 times more likely to be in out-of-home care.[2]

The rate of Aboriginal child removal is now higher than at any time since white settlement.[3] Between 2013 and 2015, there was a 59% increase in the number of Victorian Aboriginal children in out-of-home care.[4] As at September 2016, there were more than 1700 Aboriginal children and young people in out-of-home care in Victoria – almost 20 per cent of the total number, despite representing less than 1% of the general population. [5]

This alarming over-representation is being driven by family violence. Recent data indicates that family violence, in combination with parental drug and alcohol abuse, is the leading cause of Aboriginal children being removed from their families and entering the out of home care system.[6] Specifically, findings from Taskforce 1000 undertaken by the Victorian Commissioner for Aboriginal Children and Young People indicate that family violence is the primary driver in up to 88% of Aboriginal children entering out of home care,[7] with the majority of this understood to be male-perpetrated violence against women and children.[8] In other words, family violence is both a feature and a cause of the removal of almost 9 out of 10 Aboriginal children currently in out of home care in Victoria.

The Permanency Amendments fail to adequately take into account the reality and dynamics of family violence underlying the incidence of Aboriginal child protection involvement. Particularly, the 12 and 24 month time limits on family reunification orders. This rigid time frame belies an unrealistic and punitive

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[1] Australian Institute of Health and Welfare, *Child Protection Australia 2014-15*, 2016, page 44 table 4.4 available at http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129554973.

[2] Australian Institute of Health and Welfare, *Child Protection Australia 2014-15*, 2016, page 54, table 5.4 available at http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129554973.

[3] Commission for Children and Young People, *Annual Report 2013-14*, Victorian Government, Sept 2014, page.37 available at http://www.ccyp.vic.gov.au/downloads/annual-reports/ccyp-annual-report-2014.pdf.

[4] Commission for Children and Young People, 2016, *'Always Always was always will be Koori children - systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria*, p 5, available at http://www.ccyp.vic.gov.au/downloads/always-was-always-will-be-koori-children-inquiry-report-oct16.pdf

[5] Commission for Children and Young People, 2016, *'Always Always was always will be Koori children - systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria*, p 3, available at http://www.ccyp.vic.gov.au/downloads/always-was-always-will-be-koori-children-inquiry-report-oct16.pdf

[6] Commission for Children and Young People, 2016, *'Always Always was always will be Koori children - systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria*, p 47, available at http://www.ccyp.vic.gov.au/downloads/always-was-always-will-be-koori-children-inquiry-report-oct16.pdf

[7] Ibid.

[8] Royal Commission into Family Violence R(Victoria), Report and Recommendations, 2016, p 25, available at: https://www.rcfv.com.au/MediaLibraries/RCFamilyViolence/Reports/RCFV_Full_Report_Interactive.pdf. See also: Commission for Children and Young People, *Annual Report 2014-15*, p. 25 available at: http://www.ccyp.vic.gov.au/downloads/annual-reports/CCYP-annual-report-2014-2015-without-financials.pdf

approach to family violence victims dealing with deep-seated, often intergenerational, trauma which cannot be resolved quickly in accordance with arbitrary and abbreviated timelines.

Aboriginal women are 34 times more likely to be hospitalised for family violence[9] and 10 times more likely to die from violent assault.[10] Despite significant under-reporting,[11] Aboriginal Victorians are nearly eight times more likely to be involved in a police family violence incident than non-Aboriginal Victorians.[12] As outlined in FVPLS Victoria's submission to the Royal Commisison into Family Violence, Aboriginal victims/survivors of family violence – predominantly women - face strong deterrents to reporting family violence and a range of barriers to accessing justice and safety for themselves and their children.

Earlier, intensive and long-term supports are needed for Aboriginal women to deal with family violence victimization and achieve stability such that they can safely resume the care of their children. Lengthy waiting lists for services (up to 6 months or more), delayed referral to services, mistrust in the system, systemic racism, lack of emergency and stable affordable housing, and high demand for under-resourced culturally safe support options are common features experienced by our clients. The Permanency Amendments have hamstrung the Children's Court discretion to take into account such factors when it is in the best interests of the child to do so.

In our submission to the Victorian Parliamentary Inquiry into the *Children, Youth and Families Amendment (Restriction on the Making of Permanent Care Orders) Bill 2015* FVPLS Victoria wrote:[13]

> *"FVPLS Victoria maintains that protection of Aboriginal children's safety and wellbeing (including physical, emotional, psychological, spiritual and cultural safety) will not be achieved by the current Bill or by the 2014 Amendments. Instead, what is needed is a suite of targeted, evidence-based processes to*

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[9] The Australian Productivity Commission, Overcoming Indigenous Disadvantage - Key Indicators 2014, 2014, page 4.93, table 4A.11.22 available at http://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/key-indicators-2014/key-indicators-2014-report.pdf

[10] Australian Institute of Health and Welfare, *Family Violence among Aboriginal and Torres Strait Islander people*, 2006, page 66 avaliable at http://www.aihw.gov.au/publication-detail/?id=6442467912

[11] Matthew Willis, 'Non-disclosure of violence in Australian Indigenous communities', Trends & issues in crime and criminal justice No. 405 (2011) Australian Institute of Criminology available at http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi405.html.

[12] Royal Commission into Family Violence (Victoria), Report and Recommendations, 2016, p 36, available at: https://www.rcfv.com.au/MediaLibraries/RCFamilyViolence/Reports/RCFV_Full_Report_Interactive.pdf

[13] FVPLS Victoria, 2015, Submission to the Victorian Parliamentary Inquiry into the *Children, youth and Families Amendment (Restrictions on the Making of Permanent Care Orders) Bill 2015,* p 12, available at: http://www.fvpls.org/images/files/FVPLS%20Victoria%20Submission%20to%20the%20Inquiry%20into%20the%20Children,%20Youth%20and%20Families%20Amendment.pdf.

reduce family violence and family-violence driven child protection involvement in Aboriginal communities. [14] *This includes strengthened commitment to and resourcing of culturally safe and targeted early intervention, prevention work (including community legal education) for Aboriginal communities, as well as increased investment in frontline legal services for Aboriginal victims/survivors of family violence. "*

The rate, causes and impacts of contemporary Aboriginal child removal must be considered in light of past policies of colonization, assimilation and oppression, including the Stolen Generations. It is pertinent to recognise that Victoria, more than any other state or Territory in Australia, has the highest proportion of Aboriginal people directly affected by the Stolen Generations.[15] FVPLS Victoria lawyers regularly assist clients whose families have experienced successive generations of child removal. The intergenerational trauma and destructive impact of fractured culture, identity and kinship structures that this experience metes cannot be over-stated.

In recognition of this history, the DHHS is bound by a number of statutory obligations towards Aboriginal children. As part of Australia, Victoria is also bound by the United Nations Convention on the Rights of the Child and the Victorian Charter of Human Rights and Responsibilities which also contain specific rights and duties for the protection of Aboriginal children and their families.

In this context, it is critical that the Courts, including through the advocacy of appropriately resourced Aboriginal Community Controlled Organisations, have the power and authority to hold the DHHS accountable to its obligations towards Aboriginal children and their family. This is especially important with regard to completion and review of Cultural Support Plans, the level of Aboriginal family and community input into case planning and permanency decision-making, and the ability of the Court to tailor orders to the specific needs and circumstances of each child, including attaching conditions for contact and specifying carers on final orders.

[14] For further detail, see FVPLS Victoria's submission to the Royal Commission into Family Violence available at:
http://www.fvpls.org/images/files/FVPLS%20Victoria%20submission%20to%20Royal%20Commission%20-%20FINAL%20-%2022Jun15.pdf

[15] Department of Planning and Community Development, 'Victorian Aboriginal Affairs Framework 2013–2018—Building for the Future:
A Plan for "Closing the Gap" in Victoria by 2031' (2012) 7. See also Royal Commission into Family Violence (Victoria), 2016, Report and Recommendations Chapter V, p. 10, available at:
http://www.rcfv.com.au/MediaLibraries/RCFamilyViolence/Reports/Final/RCFV-Vol-V.pdf

RECOMMENDATIONS

Rights and interests of Aboriginal children

1. Implementation of a mandatory Child Protection Notification Referral System for Aboriginal families which ensures that, upon a child protection Notification concerning an Aboriginal child progressing to the stage of allocation to a worker or issuing of Protection Application, whichever is the earliest, FVPLS Victoria (or another Aboriginal Community Controlled Organisation where appropriate) is immediately notified and the primary parent is also immediately referred to FVPLS Victoria (or another appropriate legal assistance provider where required) and informed of the importance of obtaining independent legal advice at the earliest opportunity. Such a system should be developed in consultation with FVPLS Victoria and other Aboriginal Community-Controlled organisations including careful consideration of informed consent, privacy and confidentiality.

2. Amendment of section 167 of the *Children, Youth and Families Act* to provide an explicit exemption for Aboriginal children such that Permanent Care and/or Long Term Out of Home Care is to be preferred over adoption, and adoption reserved as a matter of last resort to be pursued only where the Court is satisfied that all other options have been fully explored.

3. Insertion of a statutory minimum number of contact visits for the purposes of maintaining identity for all Aboriginal children in out of home care placements outside of the kinship system.

4. Strengthened accountability mechanisms within child protection agencies to protect and promote the cultural rights of Aboriginal children and to increase Departmental compliance with statutory obligations towards Aboriginal children and families.

    a. Including legislative protections where appropriate, such as provision of a power to the Children's Court and the Victorian Civil and Administrative Tribunal not to make any orders until the Court is satisfied that all of the Aboriginal rights and placement principles have been meaningfully incorporated into the application before the Court.

5. Implementation and concomitant resourcing of the recommendations contained in the final report of Taskforce 1000;

6. Increased investment in culturally safe community legal education and early intervention prevention programs to increase the Aboriginal communities' awareness of their legal rights, understanding of the child protection system and capacity to resolve protective issues before they

escalate to the point of child protection intervention and removal to permanent out of home care. This must include tailored programs targeting Aboriginal victims/survivors of family violence, women and children.

7. Strengthened cultural awareness and family violence sensitisation training for child protection workers developed in partnership and consultation with the Aboriginal community and specialist, Aboriginal organisations with expertise in child protection and family violence.

Case Planning

8. DHHS be mandated to provide written notice to all parties and, where represented, their legal representative, 14 days in advance of case planning meetings.

9. The Child Protection Manual be amended to specify that parties be permitted to have their legal representative attend case planning meetings.

10. The Act be amended to provide jurisdiction to the Children's Court to order a review of a case plan (including Cultural Support Plan) upon application by a party.

11. We support the following recommendation of the Women's Legal Service Victoria with regard to Case Plan reviews:

> *"Recommendation 2: That the Victorian Government considers a clear process for case plan reviews that provides oversight of the process to the Children's Court, including:*
>
> • *A required timeframe for response, for example 30 days.*
>
> • *Where a case plan review is not provided, the applicant for review could apply for an order to the Children's Court for a review to be completed by a particular date."*

Cultural Support Plans

12. Imposition of a requirement on the Department that all case plan reviews must include comprehensive review of the cultural support plan, including consultation with parties' legal representative (where represented) and where appropriate the Aboriginal Commissioner for Children and Young People.

13. Victoria Legal Aid give consideration to extending aid eligibility for case plan review applications in relation to children on all orders or, alternatively, to parties in matters where the child is Aboriginal (and thus required to have a Cultural Support Plan included within their Case Plan).

14. Subject to advice, investigation of a role for the Commissioner for Aboriginal Children and Young People to intervene as a 'friend of the Court' in matters concerning Aboriginal children in order to provide independent oversight and ensure sufficient evidence and submissions are put to the Court about the cultural rights, needs and circumstances of individual children.

Investment in the Provision of Services

15. The Department provide greater investment to support services to ensure families, Aboriginal victims/survivors of family violence in particular, have sufficient opportunity to address protective issues within the set twelve or twenty four month time limits.
    a. This must include increased funding and accessibility for Aboriginal Community Controlled Organisations and other culturally competent services to address the level of need for Aboriginal families engaged in the child protection system, including legal services, family violence services, mental health, trauma counselling, drug and alcohol support, housing and services supporting financial and socio-economic security.

16. Aboriginal Community Controlled Organisations be funded and supported to build capacity to comply with and fulfil the aspirations of the Aboriginal Child Placement Principle and Aboriginal decision making principles under the Act to protect and promote the cultural and human rights of Aboriginal children and families engaged in the child protection system, in a robust and independent manner.

17. Increased financial and other support for foster carers, especially Aboriginal kinship carers, including provision of education and training with regard to caring for Aboriginal children experiencing the trauma of family violence and removal.

    a. This could include access to existing or development of new emergency and short-term financial packages to assist in the care and recovery of children.[16]

Court Power to Tailor Orders and Make Conditions

18. Reinstatement of the Children's Courts power to tailor orders to the specific circumstances of each case.

19. Reinstatement of the Children's Courts power to attach conditions to final orders.

20. Repeal of the cap (four times per year) on parental access visits for children on permanent care orders and provision of explicit court power to include contact conditions on final orders.

[16] Aged care packages and family violence Flexible Support Packages are an example of such mechanisms.

21. FVPLS Victoria supports the following recommendations of the Law Institute of Victoria –

    (i) *the reinstatement of the ability of the Children's Court to tailor final orders to the individual needs and circumstances of each child and his or her family;*

    (ii) *fairer outcomes for children and their families, particularly so that the specified time-frames for reunification are not being exceeded against the interests of children and their families when no remedial input or allocated protective worker is available;*

    (iii) *protection of the right of the child to have contact with their parent or persons significant to them when in Out of Home Care (OoHC) through court ordered contact;*

    (iv) *security of placement where possible, through the nomination of a specific carer or OoHC in certain orders;*

    (v) *allowing the Children's Court to order that siblings be placed together;*

    (vi) *full participation of children in legal decision-making.*

About FVPLS Victoria

Established over 14 years ago, FVPLS Victoria is an Aboriginal Community Controlled Organisation which provides culturally safe and holistic assistance to Aboriginal and Torres Strait Islander[17] victims/survivors of family violence and sexual assault. FVPLS Victoria provides frontline legal assistance and early intervention/prevention, including through providing community legal education to the Aboriginal community, the legal, Aboriginal and domestic violence sectors. With support from philanthropic sources, FVPLS Victoria also undertakes policy and law reform work to identify systemic issues in need of reform and advocate for strengthened law and justice outcomes for Aboriginal victims/survivors of family violence and sexual assault.

FVPLS Victoria is open to Aboriginal men, women and children who have experienced or are at risk of family violence or sexual assault, as well as non-Aboriginal carers of Aboriginal children who are victims/survivors of family violence. FVPLS Victoria is not gender specific, however at last count 93% of our clients were Aboriginal women and their children.

In 2015-16, FVPLS Victoria's services impacted more than 6,000 people across Victoria.

FVPLS Victoria's legal services include advice, court representation and ongoing casework in the areas of:

- child protection;
- family violence intervention orders;
- family law;
- victims of crime assistance; and
- where resources permit, other civil law matters connected with a client's experience of family violence such as: police complaints, housing, Centrelink, child support and infringement matters.

FVPLS Victoria has a holistic, intensive client service model where each client is assisted by a lawyer and paralegal support worker to address the multitude of interrelated legal and non-legal issues our clients face. FVPLS Victoria's paralegal support workers, many of whom are Aboriginal women, provide additional emotional support, court support and referral to ensure the client is linked into culturally safe counseling and support services to address the underlying social issues giving rise to the client's legal problem and experience of family violence. This may include for example assistance with housing, drug and alcohol misuse, social and emotional wellbeing, parenting, financial and other supports.

As an Aboriginal Community Controlled Organisation, FVPLS Victoria is directed by an Aboriginal Board and has a range of systems and policies in place to ensure we provide culturally safe services in direct response to community need.

[17] Hereafter referred to as 'Aboriginal'.

Child protection is one of FVPLS Victoria's core legal service areas. Through our child protection clients (typically Aboriginal mothers), we receive daily insight into the experiences and barriers faced by Aboriginal families navigating the child protection system, including the impacts of the Permanency Amendments.

Impacts on Outcomes for Children (Term of Reference One)

In our submission to the Victorian Parliamentary Inquiry into the *Children, Youth and Families Amendment (Restriction on the Making of Permanent Care Orders) Bill 2015* FVPLS Victoria wrote:[18]

> *"We are profoundly concerned that the [*Children, Youth & Families (Permanent Care & other Matters) Amendment Act 2014*] will have a disproportionate and devastating impact on Aboriginal children as the most vulnerable and over-represented cohort within the child protection system. We anticipate that the [*Children, Youth & Families (Permanent Care & other Matters) Amendment Act 2014*] will fast-track the increased removal of Aboriginal children from their families and communities, compounding what is already being referred to as a 'new stolen generation'.*
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> *This will only serve to reinforce the existing barriers for Aboriginal victims/survivors of family violence terrified of disclosing family violence for fear of losing their children. This increased deterrent to Aboriginal victims/survivors reporting violence and seeking help will lead to reduced safety and protection of vulnerable Aboriginal children through:*
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> - *increasing the likelihood of victims/survivors and their children remaining in violent situations;*
> - *compounding the already high Aboriginal out-of-home care rates;*
> - *exacerbating Aboriginal children's cultural dislocation and associated emotional, psychological and spiritual harm; and*
> - *contributing to the over-representation of Aboriginal children in the juvenile justice system."*

As the Permanency Amendments have only been in force for eight months, it is too soon to accurately measure whether there has indeed been an increase in Aboriginal children going into permanent out of home care that is directly attributable to the Permanency Amendments. However, FVPLS Victoria's lawyers and paralegal support workers have observed a number of worrying trends associated with the Permanency Amendments which we anticipate will have an impact on outcomes for Aboriginal children and which run counter to the objectives of the Permanency Amendments.

These trends include:

- The new time limits for Family Reunification Orders placing increased stress on FVPLS Victoria clients, predominantly Aboriginal women experiencing or recovering from family violence. For clients experiencing poor mental health and self-worth following family violence, and/or drug

[18] FVPLS Victoria, 2015, Submission to the Victorian Parliamentary Inquiry into the *Children, youth and Families Amendment (Restrictions on the Making of Permanent Care Orders) Bill 2015,* p 6, available at: http://www.fvpls.org/images/files/FVPLS%20Victoria%20Submission%20to%20the%20Inquiry%20into%20the%20Children,%20Youth%20and%20Families%20Amendment.pdf.

and alcohol addiction including as a self-medicating coping mechanism to deal with family violence and other trauma, this increased stress can have a direct bearing on their capacity to address protective concerns and satisfy DHHS and/or the Court of their capacity to resume care of their children. It therefore has an indirect impact on children and their potential outcomes.

- Increased time spent in litigation and an increasingly interventionist Court approach in cases where the DHHS has delayed or failed to provide services to the family. In practice, this scenario has required the Children's Court, working against a ticking clock, to grant additional adjournments in order to bring the DHHS back before the Court and force compliance before time limits for family reunification expire and the Court loses its power to compel action by the DHHS.

- In the months leading up to the commencement of the Permanency Amendments, DHHS caseworkers appeared to be holding off on filing applications for Permanent Care Orders so that they could be issued after the capped contact provisions of the Permanency Amendments took effect.

- A less strength-based approach taken by some child protection caseworkers towards clients. This situation is being permitted by a context of reduced legal recourse for parties and the Courts to hold the DHHS accountable.

Case study

Jaya was working towards being reunified with her three children who were placed on Family Reunification Orders ('FRO') and had been in out of home care for almost two years. Jaya and the children were having regular positive contact and Jaya was engaging well with services to address the DHHS' concerns.

A few months before the 24 month time limit on the FRO was due to expire, Jaya admitted that she occasionally used a small amount of cannabis. DHHS also discovered the children had nits after a contact visit with Jaya. The worker deemed these two factors to be a breach of the FRO and issued a breach application with the Court.

Had the breach been proven it would have derailed Jaya's progress towards reunification just months before the FRO was due to expire, leaving the Children's Court with no choice but to make a permanent care order resulting in Jaya losing her children permanently.

Fortunately, with the assistance of her FVPLS Victoria lawyer, Jaya was able to satisfy the Court that the orders had not been breached.

FVPLS Victoria have written extensively about our concerns with an inappropriately punitive and judgmental approach taken towards Aboriginal

victims/survivors of family violence – predominantly mothers – in the child protection system[19] and Aboriginal family more broadly[20]. Indeed, this concern was picked up and highlighted by the Royal Commission into Family Violence in its final report.[21] Without a shift in this institutional culture it is difficult to see how the Permanency Amendments could not compound the already disproportionate rate of Out of Home Care and cultural dislocation for Aboriginal children. For example, our practitioners have not seen any shift in:

- DHHS' approach to Aboriginal victims/survivors of family violence, for example placing the full burden of scrutiny and responsibility upon the non-violent parent (typically the mother) to keep her children safe in the face of family violence. This fails to recognise that both mother and child are victims and that often the most effective way of protecting those children from violence is to provide culturally safe, specialist and effective assistance to the mother and equip her with the supports necessary to safely care for her children free from violence;

- The frequent failure of some DHHS case workers to provide timely referral to essential services such as public housing and advocate to the office of housing for victims/survivors of family violence to be placed on the priority housing list; and

- DHHS' rigid requirements for kinship carers, for example there has been no relaxing of automatically negative assessments based on old (minor) criminal records or low level cannabis use.

Case Study
Stacey is a twenty nine year old Aboriginal woman. She lives in regional Victoria and cares for her cousin, Darren's four children who were removed from their father due to his ice addiction and associated violent criminal offending. The eldest children are on Permanent Care Orders to Stacey but the youngest daughter, Kel, who had only recently been removed, was placed with Stacey subject to a Care By Secretary Order.

[19] See FVPLS Victoria, 2015, Submission to the Victorian Royal Commission into Family Violence, pp 15-18 and 53-57, available at http://www.fvpls.org/images/files/FVPLS%20Victoria%20submission%20to%20Royal%20Commission%20-%20FINAL%20-%2015Jul15.pdf; FVPLS Victoria, 2014, Submission to Senate Inquiry into Out of Home Care available at http://www.fvpls.org/images/files/FVPLS%20Victoria%20Submission%20to%20the%20Senate%20Inquiry%20into%20Out%20of%20Home%20Care.pdf; FVPLS Victoria, 2015, Submission to Parliamentary Inquiry into the *Children, Youth and Families Amendment (Restriction on the Making of Permanent Care Orders) Bill 2015*, available at http://www.fvpls.org/images/files/FVPLS%20Victoria%20Submission%20to%20the%20Inquiry%20into%20the%20Children,%20Youth%20and%20Families%20Amendment.pdf

[20] See FVPLS Victoria, 2010, *2010 Policy Paper Series - Paper 3: Improving accessibility of the legal system for Aboriginal and Torres Strait Islander victims/survivors of family violence and sexual assault* available at http://www.fvpls.org/images/files/FVPLS%20Policy%20Paper%203.pdf.

[21] Royal Commission into Family Violence (Victoria), Report and recommendations, 2016, p 175 https://www.rcfv.com.au/MediaLibraries/RCFamilyViolence/Reports/RCFV_Full_Report_Interactive.pdf

After seeing Stacey at a public event, Darren became enraged, assaulted her and threatened to kill her. Stacey fled to a refuge in metropolitan Victoria close to other family supports. The elder children travelled with her, but the DHHS placed Kel with an unrelated, non-Aboriginal foster carer in the region despite Stacey wanting to resume care of Kel so Kel could be with her family and maintain a strong connection to her culture.

The DHHS then failed to facilitate safe contact between Stacey, Kel and her siblings. Stacey explained that she was fearful of returning to the regional centre where Kel (and Darren and his extended family) lived because of Darren's threats. However, she was told by DHHS that returning and staying in town for contact was the only option because Kel had to be no more than 30 minutes away from his new carer at any one time.

Stacey essentially had to choose between seeing Kel or putting herself – and Kel – in danger.

FVPLS Victoria understands that DHHS case workers work in extremely difficult conditions. They are subject to high and complex file loads, under-resourcing, high staff turnover and, in some instances, insufficient training. It is likely that this contributes to an atmosphere of reluctance, even resistance, to facilitate regular child-parent contact or engage with parties' legal representatives given a perceived view that this may increase the case workers' workload. However, FVPLS Victoria is of the view that where early, meaningful and informed involvement by family members is encouraged through legal representatives then this will actually assist the DHHS to do its job and increase the likelihood of more positive outcomes, realistic and workable case plans and quality cultural support plans. This would also reduce the likelihood of future litigation on appeal or judicial review application relating to case planning decisions or Court outcomes.

It must be noted that while the Permanency Amendments were modelled on NSW law, the NSW legislation was only viable because its introduction was accompanied by a greater focus and investment in early intervention, including through funding and legislative amendments. This does not appear to have been the case in Victoria.

In this context, reinstatement of the Courts power to impose conditions and tailor Orders to each family is essential. The Court's power to consider the unique circumstances of each case is a critical element in allowing Aboriginal families and their legal representatives to hold child protection accountable and enforce their rights, including the cultural rights of Aboriginal children.

Timeliness of Permanent Outcomes (Term of Reference Two)

Again, given the Permanency Amendments have only been in force for eight months, it is too soon to accurately measure changes in permanent outcomes.

FVPLS Victoria wishes to stress however that the timeliness of outcomes is only one aspect of achieving stability for children. The quality of outcomes (whether they are in the best interests of the child) must be the over-riding consideration. It is critical that an urge for timely resolution does not pre-empt decisions about the outcome to be sought, jeopardising the capacity of the system to meet the best interests of Aboriginal children.

The Permanency Amendments impose a new requirement on DHHS to prepare a case plan at the outset of a case, with that case plan directed at one of the permanency objectives. This necessarily involves a decision as to whether or not family reunification is desirable and likely. FVPLS Victoria is concerned that this requirement, together with the new time limits for family reunification, may lead to premature decisions being made which then influence the direction and outcome of the case. Hasty decisions made in a vacuum of information may not be revisited when new information comes to hand.

The experiences of our clients indicate that the views of DHHS caseworkers formed early in a case (for example the attitude towards a parent or perceived capacity of a parent to change) are often carried through the life of the case, having a strong bearing on the ultimate outcome of the case. This is problematic in circumstances where that initial view is being made in circumstances of limited evidence and information, an unrepresented parent unaware of their rights, or potentially a parent appearing to behave in an 'uncooperative' manner due to fear, mistrust and wariness of the inherent and vast power differential between Aboriginal parents and the DHHS.

Cultural Supports and Planning for Aboriginal Children in Out of Home Care (Term of Reference Three)

Cultural Support Plans

FVPLS Victoria welcomes the Permanency Amendments' requirement for all Aboriginal children within the child protection system to have a Cultural Support Plan and for Cultural Support Plans, as part of Case Plans, to be created at the earliest opportunity. This offers some recognition of the importance of protecting and promoting Aboriginal children's cultural rights and the significant systemic failures in this regard to date.[22] However, as outlined above, this is a legislative solution incapable of fully addressing a widespread and systemic problem.

Compliance with the requirement to complete Cultural Support Plans continues to vary widely across the regions. FVPLS Victoria has observed that since the commencement of the Permanency Amendments, in some regions, cultural support plans are being completed within the required timeframe. This is heartening in light of previous damning audits of DHHS compliance with statutory obligations to prepare Cultural Support Plans – specifically a 2013 audit which found that only 8% of Aboriginal children required by law to have a Cultural Support Plan had one in place[23] and, more recently, Taskforce 1000's finding that 25% of children on guardianship orders had no cultural support plan in place.[24] Notwithstanding the recommendations and public criticism arising from these findings, FVPLS Victoria continues to see systemic failures across a number of regions of Victoria where cultural support plans not being completed within the statutory timeframe.

Moreover, even where Cultural Support Plans have been completed, their quality is highly variable. Sadly, in FVPLS Victoria's experience, this situation has not improved following the commencement of the Permanency Amendments. In our submission to the Victorian Parliamentary Inquiry into the *Children, Youth and*

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[22] See, for example, statistics concerning failures to abide by the statutory obligations to create Cultural Support Plans as referenced below. See also findings of Taskforce 1000 that 86% of Aboriginal children in out of home care are managed by non-Aboriginal agencies, and over 60% of are in non-Aboriginal placements notwithstanding the DHHS' statutory obligation to comply with the Aboriginal Placement Principle. Commission for Children and Young People, 2016, *'Always Always was always will be Koori children - systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria*, p 10, available at http://www.ccyp.vic.gov.au/downloads/always-was-always-will-be-koori-children-inquiry-report-oct16.pdf

[23] Department of Human Service, Information about cultural support plans for child protection clients, 2013, page 2, available at http://www.dhs.vic.gov.au/__data/assets/word_doc/0012/898878/Informationabout-cultural-support-plans-for-child-protection-clients.doc.

[24] Commission for Children and Young People, 2016, *'Always Always was always will be Koori children - systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria*, p 10, available at http://www.ccyp.vic.gov.au/downloads/always-was-always-will-be-koori-children-inquiry-report-oct16.pdf

Families Amendment (Restriction on the Making of Permanent Care Orders) Bill 2015 we wrote:[25]

> *"Of those children who do have cultural plans in place FVPLS Victoria has observed that the quality of those plans is often poor and incapable of generating meaningful connection to and enjoyment of culture and identity for Aboriginal children. For example, cultural plans have been sighted which simply recite information such as the geographical boundaries of the child's traditional country or a list of famous Aboriginal people but fail to set out actual steps to be taken to allow the child to interact with peers, community and cultural events. Other plans may state a child attend a NAIDOC event once a year but provide no ongoing or regular connection, learning or engagement with culture and community. Such plans are wholly inadequate and must be strengthened."*

We note that the *Always Was, Always Will Be* report produced by the Commissioner for Aboriginal Children and Young People following Taskforce 1000 contains important commentary on the minimum requirements of an adequate cultural support plan.

In addition, FVPLS Victoria is concerned that in broadening the pool of children required to have Cultural Support Plans in place, the Permanency Amendments were not accompanied by sufficient additional resources, training and/or machinery to allow the DHHS and Aboriginal Community Controlled Organisations implicated in the requirements to undertake this new workload.

The supposed protections for Aboriginal children within the Permanency Amendments are being undermined by ongoing systemic issues with the Court's capacity to receive quality evidence and advice about the best interests of Aboriginal children, including what is required to meet their cultural rights and needs. In this context, early referral to culturally safe and holistic legal representation from services like FVPLS Victoria is critical in holding the DHHS to account and advocating for Aboriginal children's cultural rights and needs.

Earlier referral to culturally safe legal representation through services like FVPLS Victoria and involvement of legal representatives in case planning could alleviate some of these issues and ensure that the Department, the Children's Court – and ultimately Aboriginal children – receive the benefit of culturally appropriate information, options and oversight.

FVPLS Victoria reiterates the recommendation made in our submissions to the Royal Commission into Family Violence and the Family Law Council reference on Families With Complex Needs that Victoria should implement a mandated and enforceable process for ensuring that FVPLS Victoria is immediately notified when

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[25] FVPLS Victoria, 2015, Submission to the Victorian Parliamentary Inquiry into the *Children, youth and Families Amendment (Restrictions on the Making of Permanent Care Orders) Bill 2015,* p 10, available at: http://www.fvpls.org/images/files/FVPLS%20Victoria%20Submission%20to%20the%20Inquiry%20into%20the%20Children,%20Youth%20and%20Families%20Amendment.pdf.

an Aboriginal client comes into contact with child protection authorities and that client is also immediately advised of the need to obtain independent legal advice at the earliest opportunity. Such a process would mirror the custody notification system which currently exists in the criminal law jurisdiction in Victoria and forms part of the response to the issue of Aboriginal deaths in custody and over-incarceration. Given the high and escalating rates of child removal among Victorian Aboriginal families, we believe such a response is justified. Such a requirement, along with appropriate resourcing of FVPLSs to respond to demand, would be an important step in reducing the devastatingly high rates of child protection and child removal in Aboriginal families and holding the DHHS accountable to its obligations.

We note that when previously proposed by FVPLS Victoria, this recommendation was looked upon favourably by the Royal Commission into Family Violence which wrote in its final report:

> ***"Legal advice for Aboriginal and Torres Strait Islander families***
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> *Given the high number of child removal rates of Aboriginal and Torres Strait Islander families in Victoria, and the high proportion of cases involving family violence where children have been removed from their family, we note the value of a culturally appropriate service being involved when Child Protection is considering intervening with Aboriginal and Torres Strait Islander children.*
> *…*
>
> *So far as parents are concerned, Child Protection staff are required to advise of the availability of legal assistance, encourage parents to seek legal advice, and direct them to services such as FVPLS Victoria and Victoria Legal Aid. However, this is not a formal referral or notification and requires the parent to initiate contact.*
>
> *We consider that DHHS, together with ACSASS and FVPLS Victoria, should investigate ways of ensuring that parents receive legal assistance and formal referrals to culturally appropriate legal service providers."*[26]

[26] Royal Commission into Family Violence (Victoria), Report and Recommendations, 2016, p. 196-197, available at: https://www.rcfv.com.au/MediaLibraries/RCFamilyViolence/Reports/RCFV_Full_Report_Interactive.pdf

Case Planning and Case Plan Reviews

With respect to case planning more generally, FVPLS Victoria is strongly of the view that Aboriginal children's needs would be better met through a more transparent and accountable case planning process. This requires greater capacity for parents, through their legal representatives where appropriate, to be involved in case planning and the Children's Court having the power to order case plan reviews as required.

Presently, case planning practices vary widely across DHHS officers and practitioners. In some regions, parties and their legal representatives are consulted. In other regions, DHHS case workers provide minimal notice to parents of case planning meetings and refuse parties' requests for their legal representatives to attend. This is of special concern for Aboriginal clients for whom the colonial history of oppression, stolen generations and systemic racism have a continued legacy in ongoing mistrust and fear of the DHHS and over-representation of Aboriginal children in out of home care. Given, Aboriginal children stand to suffer egregious psychological and emotional harm from being disconnected from culture and identity, Aboriginal clients must be supported to be involved in case planning and permitted to have legal advocates assist in this process.

To this end we have recommended that:

- DHHS should be mandated to provide written notice to a party and, where represented, their legal representative, 14 days in advance of case planning meetings; and
- Parties should be permitted to have their legal representative attend case planning meetings.

In addition, FVPLS Victoria strongly supports the view that the Children's Court should have the power to order case plan reviews. Presently, pursuant to the Permanency Amendments, the Children's Court has no jurisdiction to compel the DHHS to review a case plan and therefore no jurisdiction to compel the DHHS to prepare, review or update a Cultural Support Plan. Instead, should a party wish to challenge a case plan or a failure to review a case plan, they must lodge an application with the Victorian Civil and Administrative Tribunal **('VCAT')** under administrative law. This is a wholly inefficient process. It requires VCAT, as a new Tribunal, to expend Tribunal time hearing evidence on the facts of the case when the Children's Court is already familiar with the matter and with the workings of the Department. Parents are typically required to give oral evidence before the Tribunal – something that would rarely be required in such matters before the Children's Court due to the evidence already before the Children's Court in the substantive matter. The examination and cross examination of parties at the Tribunal can then lead to further unnecessary litigation where the DHHS subpoena that evidence and seek to introduce it into the Children's Court in furtherance of their position in the substantive matter.

As an important related matter, albeit outside of the powers of this inquiry, FVPLS Victoria supports the extension of Victoria Legal Aid (**'VLA'**) grant funding for case

plan review applications. Currently, parties are only eligible for a VLA grant of aid to appeal a case plan for a child on a Family Reunification Order. This should be extended to all orders, but is especially important for Aboriginal children on Care by Secretary Orders as there is otherwise no legal recourse to compel review of a Cultural Support Plan. As outlined above, capacity to invoke Court oversight for Cultural Support Plans is crucial in light of ongoing failures to comply with legislative requirements concerning the completion of Cultural Support Plans and issues with the quality and capacity of Cultural Support Plans to provide an accountable and transparent mechanism to hold the DHHS to account for its statutory obligation to promote the cultural rights of Aboriginal children.

We therefore recommend that:

- The Act be amended to provide jurisdiction to the Children's Court to order case plan reviews upon application by a party; and
- Victoria Legal Aid give consideration to extending aid eligibility for case plan review applications in relation to children on all orders or, alternatively, to parties in matters where the child is Aboriginal (and thus required to have a Cultural Support Plan included within their Case Plan).

Improved accountability with respect to case planning and appropriate avenues of legal recourse for parties seeking review of a Case Plan are critical in the context outlined above where the Permanency Amendments are arguably contributing to an impetus to make premature decisions about the desirability and likelihood of family reunification.

Impacts on Child Protection and Other Services (Term of Reference Four)

While it is difficult to measure direct impacts of the Permanency Amendments at this early stage, they have the potential to impact a wide range of services – putting additional pressures on an already under-resourced and over-stretched sector. This includes legal services, Aboriginal Community Controlled Services, support services, public housing and indeed the DHHS itself. The time limit for family reunification, for example, puts added pressure on DHHS caseworkers, legal representatives, and support services from housing to family violence counseling to drug and alcohol services to ensure clients are provided with services faster and outcomes through service provision achieved faster. In a sector where waiting lists can range from a few weeks to six months or more – and public housing up to two years – this is essentially setting families up to fail. Without a significant funding boost to meet the level of need, vulnerable families are always going to struggle to turn their lives around to the satisfaction of the DHHS within a twelve or even 24 month period.

As outlined above, the added requirement to produce earlier Case Plans and a vastly increased number of Cultural Support Plans has not been met with concomitant increases in the DHHS capacity to meet this workload.

The ticking clock on family reunification and curtailed capacity to hold the DHHS accountable via application to the Children's Court also places an additional burden on legal services representing parents in child protection matters, such as FVPLS Victoria. Clients have become more stressed and cases have become more time-intensive and time sensitive for their legal practitioners. This means that for legal services such as FVPLS Victoria who provide holistic, ongoing child protection casework, lawyers have significantly more work to undertake between court dates to ensure that clients remain on track to meet the DHHS' requirements and that all representations by the DHHS are acted on promptly so that no time is lost to the detriment of the client.

For clients without representation from a culturally safe legal service such as FVPLS Victoria the impacts are even more drastic and clients again set up to fail. Aboriginal women in prison are a prime example. FVPLS Victoria lawyers have observed many mothers who serve time in prison (including on remand in circumstances where they subsequently do not receive a custodial sentence) who have no contact with their children during their time in prison. If the woman's sentence is twelve months or more, she then falls foul of the family reunification time limit and must establish compelling circumstances and likely reunification prospects to obtain a further twelve month timeframe to achieve reunification. This is a difficult task where the woman has had no opportunity to maintain her relationship with the children whilst in prison or take steps to address protective concerns due to limited access to services within prison. The bulk of child protection intakes FVPLS Victoria sees through our prison outreach program are Aboriginal women from the regions for whom DHHS is not facilitating contact

because of distance, unwilling or unable to transport children to Melbourne to ensure vital family (and cultural connections) are maintained.

Unintended Consequences (Term of Reference Five)

A highly detrimental consequence of the Permanency Amendments is the way in which they are compounding the fraught relationship between Aboriginal communities – particularly Aboriginal victims/survivors of family violence - and the child protection system. This is particularly unfortunate at a time when Victoria is striving to implement historic family violence reforms following the Royal Commission into Family Violence. As outlined above, many Aboriginal victims/survivors of family violence – predominantly women – are reluctant to report family violence for fear of losing their children. This fear is not unfounded in a context where Aboriginal children are being removed at disproportionate and record levels, with family violence by far the leading driver. Indeed, FVPLS Victoria clients have instructed our lawyers that their violent partners or family members make explicit threats to report them to child protection and have their children taken away if they go to the police.

Our lawyers have observed that in some cases, a client's increased fear of DHHS, and the operation of the Permanency Amendments' time limits on family reunification, is manifesting in behavior interpreted by case workers as hostility, dishonesty or lack of cooperation. This interpretation can then negatively influences the caseworker's decisions about whether issues reach the threshold for a Protection Application, whether parents have the capacity to address protective concerns, the level and quality of DHHS facilitated child-parent contact, and the viability of family reunification. Through reducing Court oversight of the DHHS, the Permanency Amendments have increased the power imbalance between Aboriginal families and the DHHS.

As outlined above, the combination of the new requirement to produce case plans at the outset of a matter and the mandatory time limits are, in some cases, leading to premature decision by the DHHS about the viability of family reunification. Specifically, decisions may be made before there is sufficient information or engagement by family members of significance to the child's care and welbeing. The capacity to revisit these decisions is limited in a context where DHHS case workers are overworked, have high turnover, are subject to statutory time limits and, in some offices, an institutional culture with limited cultural competency and a tendency to view parents and their legal representatives in an excessively combative and adversarial way.

In this context, the importance of ensuring Aboriginal parents, especially victims/survivors of family violence, receive early referral to culturally safe and sufficiently specialized legal services, like FVPLS Victoria, must be understood. Once a Protection Application has been issued or a child apprehended, parents face an up hill battle to satisfy the DHHS of their capacity to turn things around. Preventative legal advice and assistance to understand, negotiate with and advocate to the DHHS is required from the very first contact. This is also the time that engagement with support services should begin and culturally appropriate referrals can be made. It is for this reason that FVPLS Victoria has recommended above that there be a mandatory notification system of referral for Aboriginal families to FVPLS Victoria (or another Aboriginal Community Controlled

Organisation where required) at the point the matter is allocated to a worker or a Protection Application made, whichever is the earliest.

Another vital issue for Aboriginal children is the cap on parental contact for children on permanent care orders. The Permanency Amendments removed the Children's Court's power to attach conditions to final orders relating to things such as contact. Now, pursuant to the Permanency Amendments, children on permanent care orders are allowed no more than four contact visits with family per year. The Children's Court has no discretion to consider the appropriateness or otherwise of this arbitrary cap in an individual case. This has an especially detrimental impact on Aboriginal children, especially those placed in out of home care with non-Aboriginal carers, for whom parental contact is often a key way they can remain connected to their Aboriginal culture and identity. This is especially so in a context, as outlined above, where there are persistent ongoing issues with the production of timely and meaningful Cultural Support Plans. It arguably represents a violation of international human rights law concerning children's cultural rights.

In addition, the annual cap on contact visits may be leading to a de-prioritisation by DHHS caseworkers of facilitating regular contact before a matter reaches the stage of final orders due a misconceived view that investing resources in promoting that relationship would be redundant were the child to end up on a permanent care order.

In some cases, children are moved through multiple different carers and their relationship with one or other parent, despite having been removed, may be one of the only stable relationships in their life. As a result of the Permanency Amendments, however, the Children's Court would be unable to take such circumstances into account and a child on a permanent care order would automatically lose that stability.

Access to culture, stability of identity and the cultivation of a stable sense of belonging ought be seen as intrinsic aspects of stability that compliment the supposed goals of the Permanency Amendments. It is important to take a broader view of 'stability' which is supposedly at the heart of the permanency amendments. Over and above stable living arrangements, a nuanced understanding of stability in the best interests of Aboriginal children must necessarily incorporate capacity to form stable cultural identity and ongoing connection to culture, family contact (where safe) sibling relationships and regular contact, continuity of education, continuity of peer group, town/suburb etc.

Prior to their abolition by the Permanency Amendment, conditions on final orders represented an important means of holding the DHHS to account for its obligations towards the vulnerable children in its care.

Likewise, FVPLS Victoria supports the view espoused by Victoria Legal Aid and others that the requirement to name a carer on Protection Orders should be reintroduced. Currently, pursuant to the Permanency Amendments, the DHHS can

move a child's placement without warning or consultation, and the parties have no recourse to the Courts to seek an explanation or to challenge that decision. This is of particular concern for Aboriginal children in a context of persistent and systemic failures to abide by the Aboriginal Child Placement Principle. Taskforce 1000 found that 86% of Aboriginal children in out of home care are management by a non-Aboriginal agency, 60% are in non-Aboriginal placements and 40% are separated from their siblings.[27] Were Protection Orders required to specify the child's carer then in the case of a child's placement breaking down or the DHHS proposing to change a placement, the parties would be required to return to Court and the matter could be fully negotiated and/or judicially determined in an informed, transparent and accountable way.

[27] Commission for Children and Young People, 2016, *'Always Always was always will be Koori children - systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria*, p 10, available at http://www.ccyp.vic.gov.au/downloads/always-was-always-will-be-koori-children-inquiry-report-oct16.pdf.

Barriers to Permanent Care Orders (Term of Reference Six)

As outlined in the body of this submission above, there are a number of barriers to permanent care orders.

The Permanency Amendments impose timelines on families and their ability to achieve reunification, but fail to recognise that the system also needs time limits and checks and balances on the DHHS if it is to function for the benefit of vulnerable children. The onus within the system is for families to prove they have addressed the DHHS' concerns but the child protection system does not take responsibility for providing the necessary supports nor demonstrating that the potential harms of remaining with family outweigh the harms associated with removal and out of home care. The well-worn path from out of home care to homelessness, juvenile offending and substance abuse is well known. Within two years of aging out of out-home-care, one third to one half of all children are homeless.[28] This is a shocking statistic, especially in light of the fact that this trajectory is occurring in circumstances where the DHHS is standing in the shoes of the parent.

In addition, significant investment and attention must be focused on supporting kinship carers and encouraging greater numbers of Aboriginal foster carers. Similarly a far greater investment and focus must be provided to early intervention including adequately resourcing the community sector to respond to the needs of vulnerable Aboriginal families at risk of child protection intervention. As the provider of choice to Aboriginal people, Aboriginal Commmunity Controlled Organisations must be prioritized and the self-determination of Aboriginal communities recognized and supported.

[28] Council to Homeless Persons, 2014, *Leaving Care Proposals* available at: http://chp.org.au/wp-content/uploads/2014/12/CHP-leaving-care-proposal.pdf. See also Department of Families, Housing, Community Services and Indigenous Affairs, 2010, *Transitioning from Out of Home Care to Independence: A national priority under the National Framework for Protecting Australia's Children 2009 - 2020* available at: https://www.dss.gov.au/sites/default/files/documents/trans_to_ind.pdf; McDowall, J., 2009, Create Report Card 2009, transitioning from care: tracking progress, Create Foundation, www.create.org.au/files/file/ReportCard-2009.pdf.