



# Family is Culture Community Report Card

**NOVEMBER 2022**

PREPARED BY



## Acknowledgement

AbSec - NSW Child, Family and Community Peak Aboriginal Corporation (AbSec) and the Aboriginal Legal Service (NSW/ACT) Limited (ALS) acknowledge the Traditional Custodians of the lands on which we work and we pay our respects to Elders past, present and emerging. We acknowledge the Stolen Generations and the impacts of colonisation on Aboriginal and Torres Strait Islander peoples. We are committed to assisting them on their journey towards healing and we recognise the resilience, strength and pride of the Aboriginal and Torres Strait Islander communities.

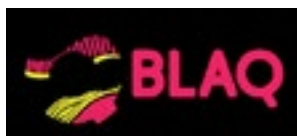
## Supporters

The ALS and AbSec would like to thank all of those who have supported our work on this report card, particularly the University of Technology Sydney Jumbunna Institute for Indigenous Education and Research, and the Public Interest Advocacy Centre (PIAC).

This Community Report Card is published with the support of:



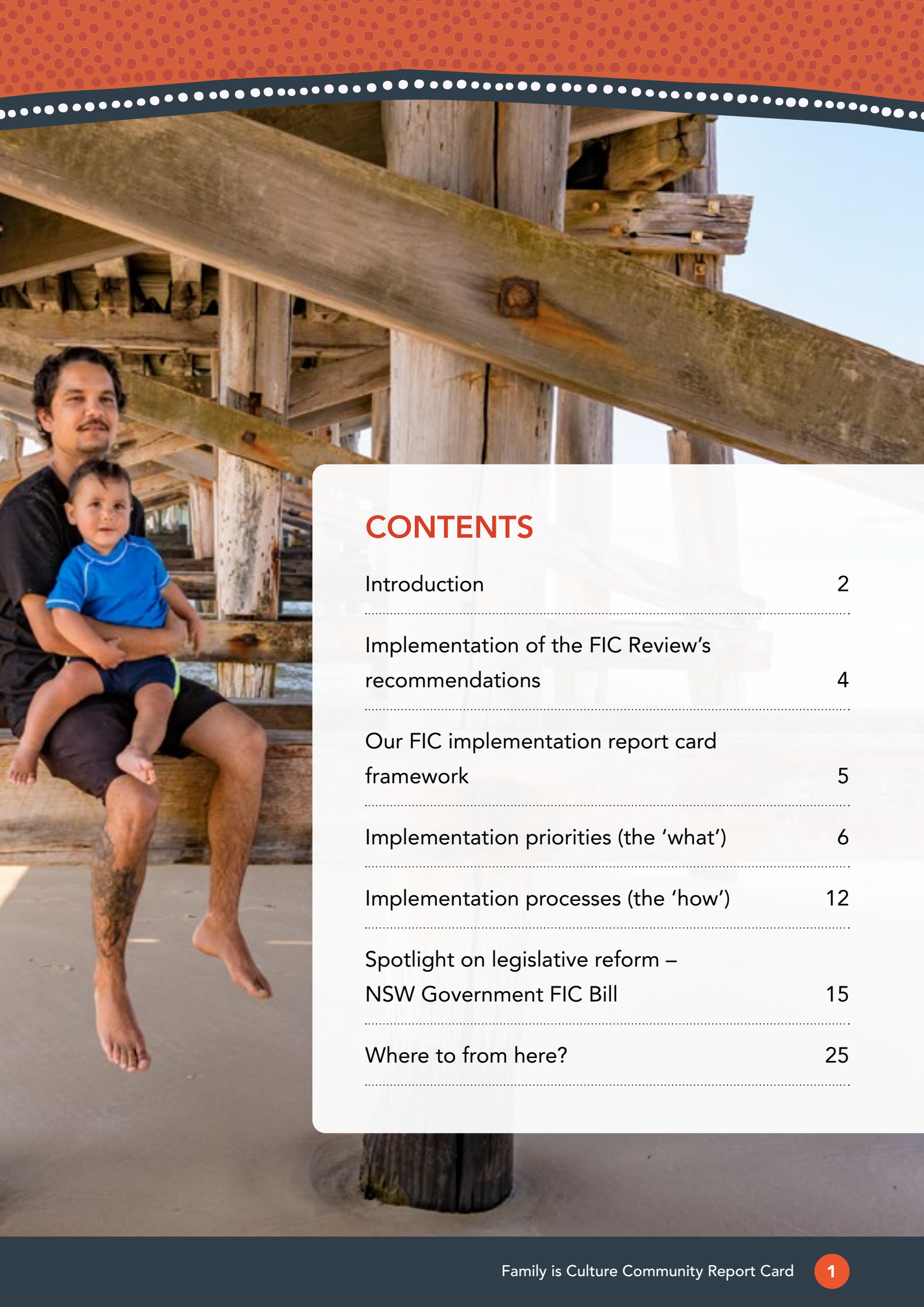
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## Introduction

AbSec and the ALS have developed this report card to provide an independent, Aboriginal community perspective on the NSW Government's implementation of the *2019 Family Is Culture (FIC) Review Report recommendations*.

This October 2022 edition has a focus on legislative reform and the Children and Young Persons (Care and Protection) Amendment (Family is Culture) Bill 2022. It also provides other key updates and commentary on the NSW Government's attempts to progress FIC implementation during 2022.





This report card is based on our FIC implementation framework, *Honouring Family Is Culture: NSW Aboriginal Community Monitoring and Reporting Framework*. Honouring Family is Culture considers both the substance of what the NSW Government has implemented, along with the process through which it has been implemented. Our analysis is informed by the NSW Government's most recent *Family is Culture Progress Report (August 2021)*, its *Family is Culture legislative recommendations Discussion Paper (April 2022)* and its *Family is Culture legislative recommendations Consultation Findings Report (September 2022)*. Our analysis is also informed by our experiences engaging in the implementation processes of the Department of Communities and Justice (DCJ).

As immediate priorities, AbSec and ALS are calling for:

- ⑥ **An overarching FIC implementation plan mutually agreed by ALS, AbSec and DCJ, with clear targets, timeframes and accountabilities, and which reflects community priorities for implementation.**
- ⑥ **A FIC Aboriginal community and stakeholder strategic engagement plan, mutually agreed by ALS, AbSec and DCJ (including planning for consultations on the next phase of FIC legislative reforms).**
- ⑥ **A monitoring and quality assurance process to oversee FIC implementation, mutually agreed by ALS, AbSec and DCJ.**

Aboriginal peoples have been raising strong, healthy children for millennia. We are experts in bringing up happy, healthy and resilient Aboriginal children, who are made stronger by the richness of their culture. Aboriginal children, families and communities have the right to live in thriving communities, connected to culture and Country. We repeat our call in Honouring Family is Culture for the NSW Government to hear and respect our expertise and rights as provided in the FIC Review Report.

The 2019 FIC Review was the largest, most comprehensive, independent, Aboriginal-led review of Aboriginal children in the NSW child protection system. Together, the Report's findings and recommendations provide a roadmap to transforming the child protection system in NSW to address the disproportionate impact on Aboriginal children and families, improving outcomes for Aboriginal children and young people and supporting families. It provides the evidence and actions needed to achieve the Closing the Gap target of reducing the over-representation of Aboriginal children in out-of-home care (OOHC) by 45% by 2031.

## Implementation of the FIC Review's recommendations

Implementation of FIC recommendations requires well-resourced structural reform founded on self-determination and accountability.

The NSW Government's most recent progress report to August 2021<sup>1</sup> showed a lack of real progress aligned with the intent of the review's findings and recommendations in the two years after the release of the FIC Report. Implementation of FIC recommendations has been piecemeal, and pre-existing government-led priorities and reform initiatives have been repositioned by the government as a response to FIC findings and recommendations. Many have failed to embody the spirit or intent of the findings and recommendations.

This reflects the lack of a definitive political commitment from the NSW Government to implement all 126<sup>2</sup> recommendations through a clear and resourced implementation plan developed in genuine partnership with Aboriginal communities and their community-controlled organisations and peak bodies.

This lack of meaningful action was confirmed by the Office of the Children's Guardian (OCG) *Special Report on the FIC Review* released in April 2022. The report found that the government's progress in relation to key reforms arising from the FIC Review are not meeting the expectations of many stakeholders.

Our assessment as of November 2021 in *Honouring Family is Culture* continues to describe our view of the NSW Government's approach to FIC implementation:

*The FIC Review's calls for structural reform to the child protection system, built upon the foundations of self-determination and accountability, along with its recommendations for legislative and policy change to support better practice, have been either sidelined, overlooked or watered down.*

*Critically, the NSW Government has failed to adequately engage or empower Aboriginal communities and stakeholders to partner as key decision-makers in the FIC Review's implementation.*

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1 NSW Government (2021) *Family Is Culture Progress Report - August 2021*

2 The report made 126 recommendations, although due to a numbering error recommendation 93 was used against two separate recommendations and thus only 125 recommendations appear numbered in the report.

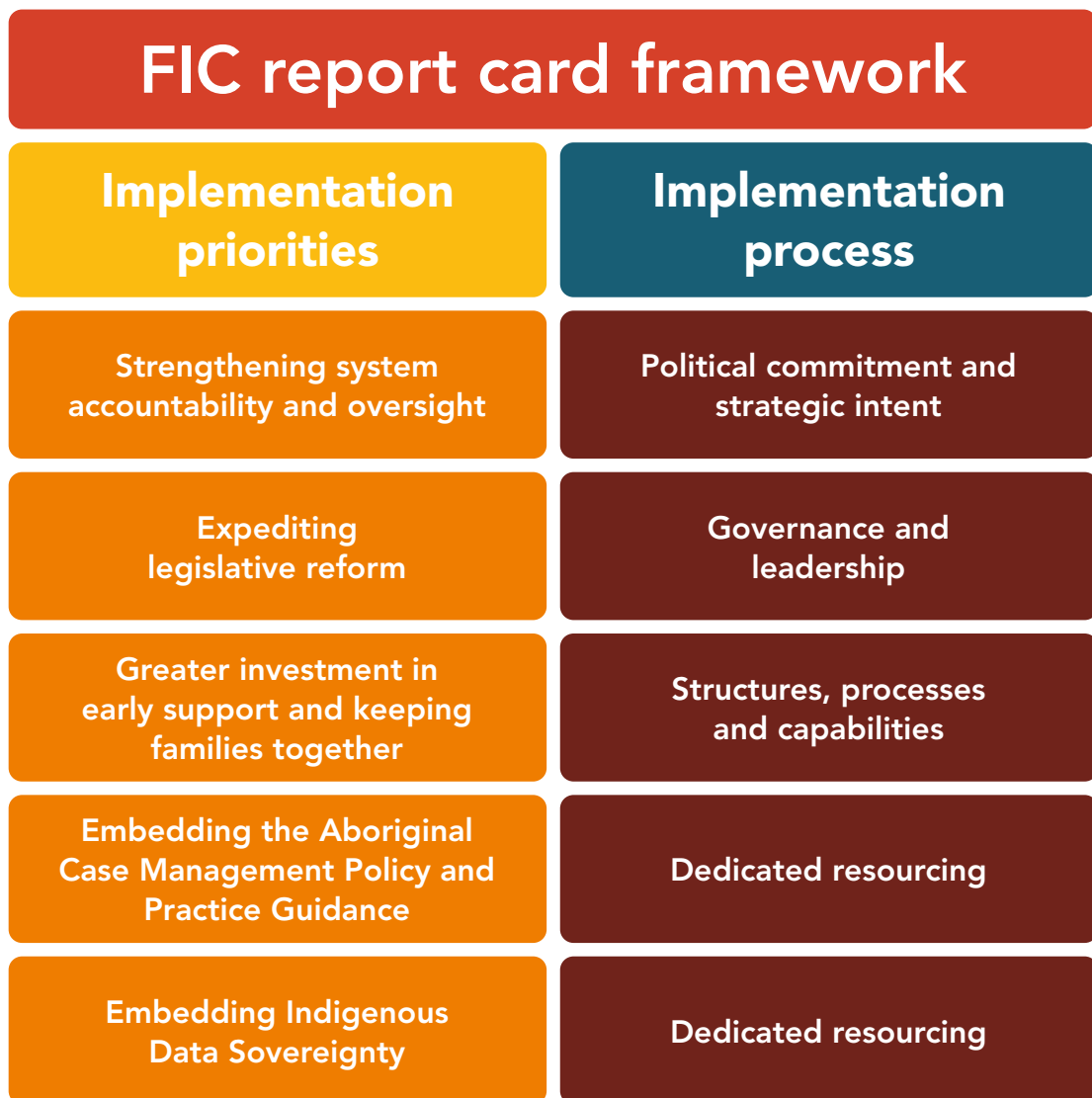
## Our FIC implementation report card framework

Honouring Family is Culture outlined our framework for assessing the NSW government’s implementation of FIC, focused on two main dimensions (see Figure 1):

- ⑥ Implementation priorities (the ‘what’)
- ⑥ Implementation processes (the ‘how’)

This approach is informed by our communities’ identified priorities for implementation of FIC and our analysis of the key requirements and enablers for implementing systemic change.

**Figure 1.** FIC report card framework

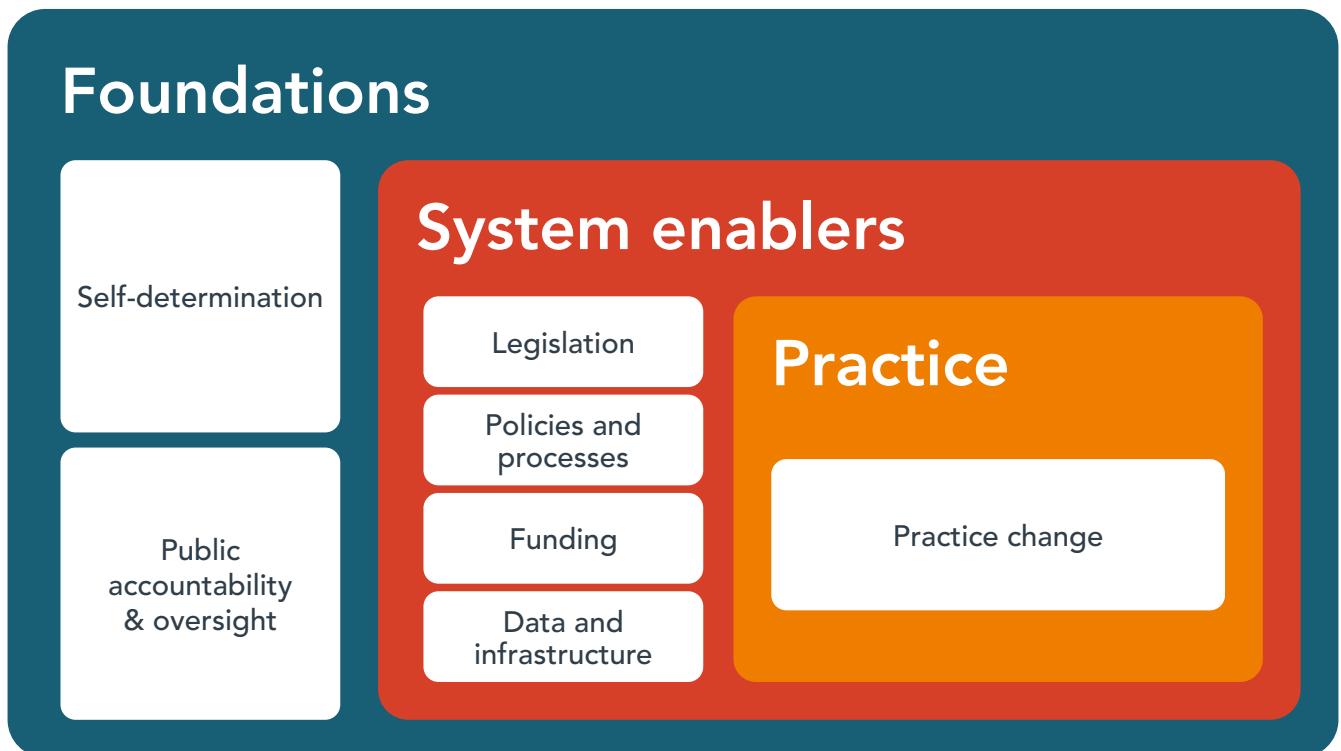


## Implementation priorities (the 'what')

Implementation priorities must be determined by Aboriginal people and communities

Aboriginal people and communities must determine the priorities for improving outcomes for Aboriginal children and their families if reform efforts are to be successful. Through our engagement with Aboriginal communities and stakeholders, AbSec and the ALS have identified five community-led priority areas for implementation. Underpinning these priorities is the need for the NSW Government to take a holistic view of the FIC Review Report findings and recommendations to transform child protection systems and practice. This requires an organised approach centred on the critical reform pillars called for by the FIC Review – self-determination, and public accountability and oversight, while recognising that systems change is needed to create the enabling environment for impactful and sustained practice change. This organising approach is illustrated in Figure 2.

**Figure 2.** Organising approach for the FIC recommendations





The following table provides our analysis of progress organised according to the Honouring Family is Culture framework against the five community-led priority areas for implementation as of November 2022, three years after the release of the FIC Report.

PRIORITY AREA	STATUS	COMMENTARY
<p><b>Strengthening system accountability and oversight</b></p> <hr/> <p><b>Strengthening system accountability and oversight</b>, including establishing an independent commission with at least one Aboriginal Commissioner and an Aboriginal Advisory Body appointed in consultation with the Aboriginal community.</p> <p><i>FIC recommendations – ALS and AbSec perspective: 4, 5, 9, 10-14, 16, 18, 62, 68, 75, 79, 83, 100, 102.</i></p> <p><i>FIC recommendations – DCJ perspective: 8, 9, 10, 11, 12, 15, 17, 18, 19, 20, 25, 26, 28, 48, 54, 64, 65, 71, 76, 88, 89, 90, 91, 92, 94, 102, 112, 113, 117, 121, 122, 123.</i></p>		<ul style="list-style-type: none"> <li>» The OCG special report on FIC recommended stronger governance and more effective oversight of key FIC reforms. Aboriginal communities and stakeholders have repeatedly identified the need for oversight and accountability mechanisms at the local level.</li> <li>» Only two DCJ Districts have a local process to inform FIC implementation alongside community stakeholders via advisory groups called Aboriginal Knowledge Circles. There is also a statewide Aboriginal Knowledge Circle. Government-led advisory bodies such as Aboriginal Knowledge Circles were not recommended by FIC. These processes require further work where they exist.</li> <li>» The NSW Government has scheduled the establishment of a new Child Protection Commission (recommendation 9) for further consultation as part of their legislative reform process but has not yet made a commitment to establishing a Commission.</li> <li>» There has been limited progress on implementation of other recommendations in this priority area.</li> </ul>
<p><b>Expediting legislative reform</b></p> <hr/> <p><b>Expediting legislative reform</b> to strengthen safeguards for Aboriginal children and young people and their families.</p>		<ul style="list-style-type: none"> <li>» Following advocacy by AbSec and ALS, the NSW Minister for Families and Communities brought forward the Government’s initial commitment to consider legislative reform from 2024 and introduced a Bill this year. This Bill is limited in its implementation of the FIC findings and recommendations (discussed in more detail below). If the NSW Government had partnered with ALS, AbSec and Aboriginal communities, throughout the process, we could have supported the development of a Bill that genuinely implemented the FIC recommendations and had a considerably greater impact on the goal of addressing the ongoing over-representation of Aboriginal children in OOHC.</li> </ul>

PRIORITY AREA	STATUS	COMMENTARY
<p><b>Expediting legislative reform (continued)</b></p> <p><i>FIC recommendations – ALS and AbSec perspective: 8, 9, 11, 12, 15, 17, 19, 20, 25, 26, 28, 48, 54, 64, 65, 71, 76, 94, 102, 112, 113, 117, 121, 122, 123.</i></p> <p><i>FIC recommendations – DCJ perspective: 8, 9, 10, 11, 12, 15, 17, 18, 19, 20, 25, 26, 28, 48, 54, 64, 65, 71, 76, 77, 88, 89, 90, 91, 92, 94, 102, 112, 113, 117, 121, 122, 123.</i></p>		<ul style="list-style-type: none"> <li>» The NSW Government has yet to commit to a process and timeframes for the remaining legislative recommendations. It has proposed further consultations in 2023 for some recommendations: 9 (A New Child Protection Commission), 12 (Publishing Final Judgments), 15 (Public Interest Defence), 25 (Early Intervention Support), 28 (Notification Service), 64 (Known Risks of Harm from Removal), and 122 (New Agency to Run Litigation). The Government has stated that it does not intend to change current policy settings for another three recommendations: 11 (Not-For-Profit OOHC Providers), 20 (Accrediting OOHC Agencies) and 121 (Adoption).</li> <li>» The NSW Government did not accept our advice that recommendations 15 (Public Interest Defence), 25 (Early Intervention Support) and 64 (Known Risk of Harm from Removal) could and should have been legislated this year. The Government also rejected the findings of FIC which made clear that existing policy settings are not sufficient for recommendations 11 (Not-For-Profit OOHC Providers), 20 (Accrediting OOHC agencies) and 121 (Adoption), which is why the recommendations requiring legislative action were made.</li> </ul>
<p><b>Early support and keeping families together</b></p> <hr/> <p><b>Early support and keeping families together</b>, at least equal to the proportion of Aboriginal children in the child protection system and directed through an Aboriginal commissioning framework.</p>		<ul style="list-style-type: none"> <li>» While there have been some developments in this priority area, there has been very limited progress on its specific FIC recommendations.</li> <li>» Early intervention funding is less than half of the level committed to in DCJ's Aboriginal Outcomes Strategy.</li> <li>» Some preliminary steps have been taken to shift funding from crisis to prevention and early intervention under the CTG 2022-2024 Implementation Plan. However, this is still in its early stages of planning three years after the release of FIC and there has been little focus on the need for a response to be tailored for and with Aboriginal children, families and communities.</li> </ul>

PRIORITY AREA	STATUS	COMMENTARY
<p><b>Early support and keeping families together (continued)</b></p> <p><i>FIC recommendations – ALS and AbSec perspective: 21, 22, 23, 24, 27-34, 36-38, 40, 42-47, 50-53, 55, 56-58, 105, 107-111.</i></p> <p><i>FIC recommendations – DCJ perspective: 21, 22, 23, 24, 38.</i></p>		<ul style="list-style-type: none"> <li>» In the recent budget, the NSW Government announced CTG funding to the ALS for a state-wide family advocacy service to reduce the rate of removals, and a project for an Aboriginal organisation to expand the Aboriginal commissioning model. An Aboriginal commissioning approach may be used for Aboriginal Family Preservation services in future. There are concerns that government-led approaches continue to dominate so that implementation may fail to adequately appreciate the critical role of community control and governance within the proposed Aboriginal commissioning model.</li> <li>» An Aboriginal Family Preservation Framework has continued to be developed, led by AbSec and DCJ. However, further resourcing and reinvestment in Aboriginal community-controlled services that keep families together remains critical.</li> </ul>
<p><b>Embedding the Aboriginal Case Management Policy and Practice Guidance</b></p> <hr/> <p><b>Embedding the Aboriginal Case Management Policy and Practice Guidance</b>, including the establishment of Aboriginal Community Controlled Mechanisms, Community Facilitators and Aboriginal Family Led Decision-Making.</p> <p><i>FIC recommendations – ALS and AbSec perspective: 27, 39, 72, 73, 77, 81, 85, 86, 93, 97-101, 103, 104, 107.</i></p> <p><i>FIC recommendations – DCJ perspective: 6, 7, 27, 81, 97, 98, 106, 107.</i></p>		<ul style="list-style-type: none"> <li>» The OCG Special report recommended the ACMP is urgently embedded, with additional funding along with staff training and support. In the recent budget, the NSW Government announced CTG funding to AbSec to support state-wide Aboriginal Community Controlled Mechanisms. Funding is not yet available for Aboriginal Community Facilitators or Aboriginal Family Led Decision-Making.</li> <li>» Two years after the ACMP was endorsed by DCJ, 2022 saw the beginning of real progress on implementation. DCJ began a project to fully implement the ACMP by starting in one District and using lessons learned to guide next steps. Two further Districts are being identified for the next stage of this ‘test and learn’ approach. DCJ is working in partnership with AbSec on this project, which has an emphasis on local community control and transforming child protection practices.</li> </ul>



PRIORITY AREA	STATUS	COMMENTARY
<p><b>Embedding Indigenous Data Sovereignty</b></p> <hr/> <p><b>Embedding Indigenous Data Sovereignty</b>, establishing the systems, structures and processes to enable communities to collect, own and use their data.</p> <p><i>FIC recommendations – ALS and AbSec perspective: 1, 2, 3, 23, 35, 41, 49, 63, 69, 70, 74, 75, 79, 83, 84, 96, 106.</i></p> <p><i>FIC recommendations – DCJ perspective: 1, 2, 3.</i></p>		<ul style="list-style-type: none"> <li>» DCJ advised AbSec that Indigenous Data Sovereignty and Governance (IDS&amp;G) projects would be delayed for a number of reasons including an upcoming whole-of-government approach. This demonstrated that DCJ continues to approach IDS&amp;G through a government-led lens where Government acts as the data holder and gatekeeper, rather than approaching IDS&amp;G through a community-led lens based in the sovereignty of Aboriginal communities.</li> <li>» In the recent budget, the NSW Government announced CTG funding for a whole-of-government Priority Reform 4 (Shared Access to Data) project, to be directed to the Coalition of Aboriginal Peak Organisations and Government partners. However, there is no reason for this work to hold up implementation of FIC recommendations. Further, the NSW Government has not provided Aboriginal communities with access to local data.</li> <li>» DCJ has scoped far fewer recommendations under this focus area than ALS and AbSec, suggesting that it sees IDS&amp;G separately to general work relating to the interpretation and use of Aboriginal data.</li> </ul>

A photograph of a man with a beard and short hair, wearing a light blue shirt, smiling and looking down at a young boy. The boy is seen from the side, wearing a blue and white striped shirt. The background is a plain, light-colored wall. The top of the page has a decorative border with a pattern of white dots on a dark blue background, which transitions into a red background with a white dot pattern.

## INDIVIDUAL RECOMMENDATIONS

### *The implementation of the Individual recommendations must be independently audited or reviewed*

In addition to the FIC Review Report's 126 systemic recommendations, the FIC Review made 3,018 recommendations relating to 616 case files reviewed by the FIC team, after reviewing the files of all 1,144 Aboriginal and Torres Strait Islander children and young people in OOHC between 1 July 2015 and 31 June 2016.

AbSec, ALS and Aboriginal communities have had very limited oversight of the steps taken by DCJ to implement these individual recommendations. High-level updates have been provided to the Aboriginal Knowledge Circle.

We are not confident that the individual recommendations have been adequately implemented due to this lack of transparency and the poor implementation of the systemic recommendations.

We believe that this process and its outcomes need to be independently audited or reviewed. The Aboriginal children, young people and families have a right to justice based on the findings of the FIC Review.

## Implementation processes (the 'how')

Aboriginal stakeholders and communities must be empowered and engaged as key decision-makers in implementation processes

**How** the FIC review recommendations are implemented is equally as important as what gets implemented. This is why FIC's recommendations were founded in its two key pillars of change: self-determination, and public accountability and oversight. Aboriginal stakeholders and communities must be empowered and engaged as key decision-makers in implementation processes and these processes must be transparent and accountable.

The following table details our assessment of how the NSW Government is implementing FIC in collaboration with Aboriginal stakeholders and communities, against the key process elements identified in Honouring Family is Culture.

PROCESS ELEMENT	STATUS	COMMENTARY
<p><b>Political commitment and strategic intent</b></p> <hr/>		<ul style="list-style-type: none"> <li>» The NSW Government has not given a strong public commitment to fully implementing all 126 FIC recommendations. It has made limited progress on FIC implementation and has not yet put in place the three overarching strategic priorities of AbSec and the ALS: a mutually developed implementation plan, a mutually developed community and stakeholder engagement plan, and a mutually developed monitoring and evaluation framework to oversee effective FIC implementation.</li> <li>» Some political will was demonstrated through the introduction of the NSW Government's FIC Bill, but the Bill does not adequately address the FIC findings and recommendations it states it implements (discussed in more detail below). There is not yet agreement on the process or timeframes for implementation of outstanding legislative recommendations.</li> <li>» 2023 will clarify if the NSW Government and DCJ will demonstrate genuine political commitment and put in place a strategic approach to implementation in partnership with Aboriginal communities.</li> </ul>



PROCESS ELEMENT	STATUS	COMMENTARY
<p><b>Governance and leadership</b></p> <hr/>		<ul style="list-style-type: none"> <li>» The NSW Government created the Deputy Secretary, Transforming Aboriginal Outcomes position which established some high-level leadership and responsibility for implementing FIC within DCJ. This is positive, but continues to demonstrate a government-led approach to change.</li> <li>» DCJ invited AbSec and ALS to join the Executive Working Group, the decision-making body for FIC implementation. However, it has been government-led and lacks a genuine partnership approach. Key issues, such as legislative reform, were not brought to the group. Nearly half of the meetings in 2022 have been cancelled or postponed. Similarly, the Aboriginal Outcomes Taskforce supporting FIC implementation has not been operational for most of 2022, and until October 2022 was entirely comprised of government representatives. This has not prevented the NSW Government from promoting these processes as essential elements of FIC implementation, demonstrating that the ritualism that FIC identified continues to characterise NSW Government approaches.</li> <li>» 2023 will clarify if the NSW Government and DCJ can commit to strong governance and leadership, including genuine partnership with Aboriginal communities and organisations, to oversee FIC implementation.</li> </ul>
<p><b>Structures, processes and capabilities</b></p> <hr/>		<ul style="list-style-type: none"> <li>» The NSW Government has made limited progress on developing a planned approach to FIC implementation.</li> <li>» Of particular concern, DCJ's efforts have been wholly internal. While internal processes have been developed somewhat during 2022, there has not been significant DCJ-wide commitment. There is limited overarching planning to ensure partnership with Aboriginal communities or accountability for implementation and timeframes.</li> <li>» Individual FIC project implementation remains piecemeal and ad-hoc. DCJ lacks processes and structures to genuinely partner with Aboriginal communities and stakeholders in individual project development and implementation.</li> </ul>

PROCESS ELEMENT	STATUS	COMMENTARY
<i>Structures, processes and capabilities (continued)</i>		<ul style="list-style-type: none"> <li>» Lack of processes and structures has meant that engagement with ALS and AbSec is often an ‘afterthought’, where relevant decisions have already been made and are not able to be revisited or influenced. This was the case for example with the Government’s FIC Bill that has been introduced (discussed in more detail below). AbSec and ALS must be engaged to drive a partnership approach focused on shared decision-making and alignment with Aboriginal community priorities and aspirations.</li> </ul>
<b>Dedicated resourcing</b>		<ul style="list-style-type: none"> <li>» Implementation of the recommendations is constrained by lack of additional funding.</li> <li>» Some internal reallocation of funds has been made to support implementation of some recommendations, and the peaks have secured a small amount of funding through CTG. However, this remains largely piecemeal and inadequate, demonstrating a lack of genuine commitment to implementing the FIC recommendations.</li> </ul>
<b>Monitoring and reporting</b>		<ul style="list-style-type: none"> <li>» DCJ has taken some steps internally to develop a monitoring and evaluation framework to assess FIC implementation. However, there has been no Aboriginal community oversight or input into monitoring and reporting. DCJ has signalled plans for Aboriginal communities to have a role in reviewing recommendations identified as completed, but the process for this has not yet been put in place.</li> <li>» DCJ progress reports have been delayed, with no update since the August 2021 report, which lacked sufficient detail about the status of many of the recommendations for communities to have oversight. Regular, detailed reports are critical for transparency and accountability of the NSW Government’s efforts towards implementation of the FIC recommendations.</li> </ul>



## Spotlight on legislative reform – NSW Government FIC Bill

The NSW Minister for Families and Communities recently introduced a Bill in NSW Parliament seeking to implement what DCJ's *Family is Culture legislative recommendations Consultation Findings Report (September 2022)* calls the 'first phase' of FIC legislative reform. This development brings forward the NSW Government's previous commitment to a FIC legislative review by two years, from 2024, and is a direct result of AbSec and ALS advocacy in this area. Prior to the release of *Honouring Family is Culture*, DCJ did not intend to change this timeline.

The NSW Government's 2022 Bill was announced after the introduction of a private members' FIC Bill to NSW Parliament. This earlier FIC Bill was developed through a multi-staged process of engagement between the Greens, ALS, AbSec and other Aboriginal community stakeholders. It passed in the Legislative Council in March 2022 after our advocacy and engagement with members of Parliament. The NSW Government did not support this Bill at any stage of the process and claimed the Bill had not been adequately consulted upon.

AbSec provided advice to the Minister through the Aboriginal Knowledge Circle in March 2022 about a process for legislative review and our recommendations for the first phase of reform. We acknowledged that some of the 25 FIC recommendations could be progressed quickly by the end of 2022, while some others would require more in-depth development, with a goal of full implementation of these additional provisions by the end of 2023.



The process the Government used to engage with us and Aboriginal communities more generally fell well short of our expectations, and fell well short of the partnership and shared decision making that is required by the *National Agreement on Closing the Gap*. Below are some of the particular concerns that arose during the process.

## **The community consultation process and Discussion Paper were developed according to a Government agenda, without engagement with us, and did not accurately represent FIC's findings or recommendations**

Without prior engagement with AbSec or ALS, DCJ released a [Discussion Paper](#) and initiated a consultation process in late April, just prior to the Easter long-weekend. Of particular concern, the Executive Working Group was not consulted or informed that DCJ would be taking these steps, although DCJ had invited ALS and AbSec to be members of this purported decision-making body overseeing FIC implementation.

AbSec raised concerns with DCJ that the DCJ Discussion Paper did not accurately represent the findings or recommendations of FIC and was framed in favour of the NSW Government's pre-determined reform agenda. In many cases, the Discussion Paper argued that existing processes were adequate and did not require significant legislative change, despite the fact that the FIC recommendations were made following the Review's examination of these processes. The Discussion Paper did not acknowledge that this was the context of the FIC recommendations.

ALS and AbSec requested an inclusive community consultation process, and a transparent approach to analysis of the consultation findings and reporting to the Minister, including the public release of submissions. After we raised our concerns with DCJ, they agreed to AbSec presenting at the consultation sessions and to transparency about the submission and review process.

Due to our concerns about the framing of the issues and consultation questions in the DCJ Discussion Paper, ALS and AbSec, in partnership with UTS Jumbunna and the Public Interest Advocacy Centre, released a [Briefing Paper](#) to present an alternate community perspective and more accurately represent the findings and recommendations of FIC regarding the need for legislative reform.

## **DCJ consultations required greater transparency and genuine community involvement**

Between April and May, DCJ conducted seven in-person community consultation sessions: Coffs Harbour, Dubbo, Lake Macquarie, Little Bay, Penrith, Redfern and Wollongong. All sessions could be attended virtually. The sites and dates were identified by DCJ.

The five consultation sessions that AbSec and ALS observed were heavily attended by DCJ staff. Our view is these sessions were not inclusive or supportive of families, carers or young people with experience of the system, or adequately engaged with Aboriginal community-controlled organisations. Many participants raised concerns that the sessions were tokenistic. We are deeply concerned by this criticism given the importance of the issues.

DCJ also called for written submissions. These submissions were not published, so there is little transparency regarding who the Government has listened to in developing the content of the Bill.

## **We should have been involved in submission review and advice provided to Cabinet**

The AbSec and ALS joint submission to the NSW Government's consultation on the Bill made 26 recommendations, including reiterating our earlier advice to the Minister for a two stage review process to be completed by the end of 2023, with 16 FIC recommendations progressed this year and the remaining 9 to be implemented next year.

Despite our efforts to meaningfully engage with DCJ, there was a concerning lack of transparency about how the consultation feedback would inform advice to the Minister, as well as the cultural competency of that advice. ALS and AbSec requested to be involved in reviewing and analysing the consultation feedback to provide an opportunity for partnership and shared decision making, however this did not occur. ALS and AbSec were not involved in the advice DCJ provided to the Minister and Cabinet and do not know what was advised, nor how faithfully this advice represented the views of Aboriginal stakeholders who had the opportunity to be consulted.

In addition, in June 2022 AbSec was advised that DCJ's Transforming Aboriginal Outcomes unit was not involved in developing the advice to the Minister. Instead, this advice was being developed by the Child and Family unit, which raises significant concerns about the cultural competency and FIC expertise of the advice that was provided.

## **We should have been involved in developing the initial draft Bill**

After the DCJ advice to Cabinet, AbSec and ALS were not informed about the timing for developing a Bill or approached to be involved in that process. We were alerted to the possible introduction of a Bill following the release of the DCJ Consultation Findings Report. This prompted ALS and AbSec to write to the Minister for Families and Communities and Minister for Aboriginal Affairs requesting a copy of the Bill be provided for our input. It was only after sending this letter that we received a copy of the draft Bill.

The draft Bill that ALS and AbSec were provided was significantly progressed, having been previously provided to non-Indigenous institutional stakeholders such as the Children's Court and NSW Legal Aid for review and comment. We were initially given three business days to review the draft and provide comments, a rushed process for complex legislation that did not allow for engagement with community members. Community engagement by ALS and AbSec was also impossible because of confidentiality provisions imposed by the NSW Government.

After we pointed out the failure to properly engage around the process, the Bill's progression was delayed slightly, and four review sessions were held with DCJ and the Minister's office over the period of a week to hear our concerns about the Bill and our suggestions for revisions. Despite this concession, many of our concerns and proposed changes were refused by the NSW Government, demonstrating little genuine commitment to shared decision making with Aboriginal communities and peak bodies.

This was not adequate consultation. Our voices as peak Aboriginal community-controlled organisations were marginalised in a government-led process, which is not an acceptable way to develop impactful policy for Aboriginal communities or legislation that will have significant and potentially life-changing impacts on communities. We had very little opportunity to shape the proposed legislation.



We do not believe the Bill as drafted accurately captures or implements the legislative reforms as outlined in the recommendations of FIC. We are concerned that the NSW Government has designed a Bill that deviates from the findings and intent of FIC to fundamentally transform the child protection system, watering down recommendations in a way that reduces the obligations and accountability of the Government to support families and drive real change.

**Our views on the Bill’s alignment with each of the FIC recommendations it purports to implement is assessed in the table below.**

FIC RECOMMENDATION	STATUS	COMMENTARY
<p><b>Recommendation 17:</b> The NSW Government should amend the <i>Ombudsman Act 1974 (NSW)</i> to enable the NSW Ombudsman to handle complaints in matters that are (or could be) before a court, in circumstances where doing so would not interfere with the administration of justice.</p>		<ul style="list-style-type: none"> <li>» We consider this recommendation adequately implemented by the Bill. However, without implementation of recommendation 9 (A New Child Protection Commission) oversight of the child protection system will continue to be inadequate.</li> <li>» The Bill introduces a new sub-section 13(6) into the <i>Ombudsman Act 1974 (NSW)</i> which clarifies the Ombudsman’s jurisdiction to investigate the child protection system even if the conduct is or is likely to become the subject of court or other proceedings.</li> </ul>
<p><b>Recommendation 19:</b> The NSW Government should amend the <i>Advocate for Children and Young People Act 2014 (NSW)</i> or otherwise legislate to ensure that a parliamentary committee monitors and oversees the out-of-home care functions of the Office of the Children’s Guardian.</p>		<ul style="list-style-type: none"> <li>» We consider this recommendation adequately implemented by the Bill.</li> <li>» The Bill introduces a new sub-section 37(1)(b)(iii) into the <i>Children and Young People Act 2014 (NSW)</i>, extending the Parliamentary Joint Committee on Children and Young People’s oversight of the OGC to its functions in relation to OOHHC.</li> </ul>
<p><b>Recommendation 26:</b> The NSW Government should amend the <i>Care Act</i> to require the Department of Communities and Justice to take active efforts to prevent Aboriginal children from entering into out-of-home care.</p>		<ul style="list-style-type: none"> <li>» We are deeply concerned by the inadequacies with the implementation of ‘active efforts’ in the Bill, although the NSW Government has positioned ‘active efforts’ as the Bill’s centrepiece reform. The Bill seeks to define ‘active efforts’ and thread that concept through a number of other key provisions.</li> <li>» Our view is that the way the principle has been defined is not consistent with the established standard of ‘active efforts’ that FIC recommended. Further, the inclusion of specific actions such as Parent Responsibility Contracts, which may be implemented in coercive ways that hold parents responsible for systemic issues, directly contradicts the recognised intent of the ‘active efforts’ standard to clarify the Government’s responsibility to provide purposeful, thorough and timely supports to families.</li> </ul>



FIC RECOMMENDATION	STATUS	COMMENTARY
<p><i>Recommendation 26 (continued)</i></p>		<p>The Bill presents existing alternative actions in the current legislation and reframes them as ‘active efforts’.</p> <ul style="list-style-type: none"> <li>» If the principle were more appropriately defined, the Bill nonetheless would not create any consequences for a failure by the Secretary to fulfil the duty to make ‘active efforts’.</li> <li>» We therefore do not think that the Bill’s implementation of ‘active efforts’ will drive practice change or have a meaningful impact on the numbers of Aboriginal children being removed from their families.</li> <li>» We had suggested to the NSW Government a much more robust definition of ‘active efforts’. We had also suggested that the duty be given ‘teeth’ by making it a legislative pre-condition to bringing an application to the Children’s Court, giving the Children’s Court the power to dismiss an application where the duty had not been complied with and/or allowing the Children’s Court to make a formal declaration of non-compliance, at the request of a parent, carer or other family member. This advice was not taken in the preparation of the Bill.</li> </ul>
<p><b>Recommendation 48:</b> The NSW Government should repeal s 106A(1)(a) of the <i>Care Act</i>.</p>		<ul style="list-style-type: none"> <li>» We consider this recommendation partially implemented by the Bill.</li> <li>» The Bill does not repeal sub-section 106A(1)(a) as recommended by FIC. However, it largely implements the intent by amending a different part of s106A so that there is no longer a presumption that a child is in need of care and protection if their parent or carer has previously had a child removed. This removes the aspect of s106A(1)(a) that was most problematic and was contributing to the high rates of newborn removals identified by FIC.</li> <li>» Section 106A(1)(a) otherwise remaining means that evidence of prior removals will still be admissible, and in practice, this will be in the context of historical information relevant to the proceedings.</li> <li>» Decisions are made in the Children’s Court on the balance of probabilities and often on the judicial exercise of balancing risk based on the evidence filed. Because of this, there continues to be the potential that historical and irrelevant information admitted as a result of this provision might continue to disproportionately affect Aboriginal families.</li> </ul>

FIC RECOMMENDATION	STATUS	COMMENTARY
<p><b>Recommendation 54:</b> The NSW Government should amend the <i>Care Act</i> to require the Department of Communities and Justice to consider specific alternatives prior to removal. Such specific alternatives could include Parent Responsibility Contracts, Parent Capacity Orders, and Temporary Care Arrangements.</p>		<ul style="list-style-type: none"> <li>» We have some concerns around the implementation of this recommendation in the Bill.</li> <li>» The Bill incorporates specific alternatives such as Parent Responsibility Contracts, Parent Capacity Orders, and Temporary Care Arrangements into the new 'active efforts' principle in the Bill. They are incorporated as a type of 'active effort'.</li> <li>» While we welcome the Bill encouraging the use of these specific alternatives, consistent with the FIC recommendation, we have two concerns about the way this has been done. The first is that FIC recommended 'active efforts' and considering use of alternatives to be two distinct things that DCJ had to do. Combining them into one principle confuses this and arguably places a lower burden on DCJ. As noted above, it also undermines the core intent of 'active efforts', which is focused on the obligation of Government agencies to meaningfully assist families to prevent removals.</li> <li>» The second concern is that, as with the new 'active efforts' principle more generally, there are no consequences for DCJ not complying with the provision. We are concerned that in the absence of consequences for non-compliance, the Bill's implementation of this recommendation will not drive practice change and will not lead to increased use of these alternatives.</li> </ul>
<p><b>Recommendation 65:</b> The NSW Government should amend s 7 of the <i>Care Act</i> to enable a court exercising criminal jurisdiction, with respect to a child, to require the attendance of a delegate of the Secretary of the Department of Communities and Justice in circumstances where the Secretary has parental responsibility of the child.</p>		<ul style="list-style-type: none"> <li>» We consider this recommendation adequately implemented by the Bill.</li> <li>» The Bill amends s7 within the <i>Children (Protection and Parental Responsibility) Act 1997</i> (NSW) to empower a court exercising criminal jurisdiction with respect to a child to require the attendance of the Secretary or Minister or their representative, including a person from an OOHHC agency, where the state has parental responsibility for the child.</li> </ul>

FIC RECOMMENDATION	STATUS	COMMENTARY
<p><b>Recommendation 71:</b> The New South Wales Government should amend the <i>Care Act</i> to ensure that its provisions adequately reflect the five different elements of the Aboriginal Child Placement Principle, namely, prevention, partnership, participation, placement and connection.</p>		<ul style="list-style-type: none"> <li>» We consider this recommendation partially implemented by the Bill.</li> <li>» The Bill creates a new Aboriginal and Torres Strait Islander Children and Young Persons Principle, which must be applied whenever a person is making a child protection decision. The new principle, set out in s12A(2), utilises the language of the Aboriginal and Torres Strait Islander Child Placement Principle as expressed by SNAICC, with the important exception that the <i>prevention</i> element omits reference to redressing the causes of child protection intervention. This omission is another way in which the Bill falls short of implementing the intention of FIC and the transformational systemic changes that are needed.</li> </ul>
<p><b>Recommendation 76:</b> The New South Wales Government should, in partnership with relevant Aboriginal community groups and members, develop regulations about identifying and 'deidentifying' children in contact with the child protection system as Aboriginal for inclusion in the Children and Young Persons (Care and Protection) Regulation 2012 (NSW).</p>		<ul style="list-style-type: none"> <li>» We consider this recommendation partially implemented by the Bill.</li> <li>» The Bill introduces a new s264(1A)(b) which allows regulations to be introduced in relation to processes to be used when identifying children and young persons as Aboriginal or Torres Strait Islander persons for the purposes of administering the Act. This enables the making of the regulations recommended by FIC.</li> <li>» This is a first step in properly implementing this recommendation. The actual implementation of this recommendation will now depend on the process for developing the regulations to be made under this new provision. The NSW Government has stated that they are committed to working closely with AbSec and ALS on the development of these regulations, but the process has not yet been agreed.</li> </ul>
<p><b>Recommendation 94:</b> The NSW Government should ensure that the NSW Civil and Administrative Tribunal has jurisdiction to review a decision not to authorise a carer.</p>		<ul style="list-style-type: none"> <li>» We consider this recommendation adequately implemented by the Bill.</li> <li>» The Bill amends s245 to provide that the NSW Civil and Administrative Tribunal has jurisdiction to review a decision not to authorise a carer.</li> </ul>

FIC RECOMMENDATION	STATUS	COMMENTARY
<p><b>Recommendation 112:</b> The NSW Government should amend s 83 of the <i>Care Act</i> to allow the Children’s Court of NSW a more active role in ensuring restoration is a preferred placement.</p>		<ul style="list-style-type: none"> <li>» We are concerned by the inadequacies with the implementation of recommendation 112 in the Bill.</li> <li>» While the Bill suggests a number of positive changes to s83 and the introduction of a new s83A, we do not think any of these changes provide a significantly more active role for the Court in ensuring that restoration is a preferred placement, beyond empowering the Court to request certain information from DCJ.</li> </ul>
<p><b>Recommendation 113:</b> The NSW Government should amend s 83 of the <i>Care Act</i> to expressly require the Children’s Court of NSW to consider the placement of an Aboriginal child with a relative, member of kin or community, or other suitable person, if it determines that there is no realistic possibility of restoration within a reasonable period.</p>		<ul style="list-style-type: none"> <li>» We have some concerns around the implementation of this recommendation in the Bill.</li> <li>» In addition to the introduction of section 83A (discussed above), the Government’s Bill amends section 10A in order to implement recommendation 113.</li> <li>» However, the inclusion of the principle of ‘active efforts’ where the Court is providing evidence that they are not restoring a child or young person, fails to go the step further that is required. This step would involve requiring the Court to consider the principle before accepting the Secretary’s long term plans for children and expressly rejecting those plans on the basis of failing to make ‘active efforts’.</li> </ul>
<p><b>Recommendation 117:</b> The NSW Government should amend s 79(10) of the <i>Care Act</i> to ensure that it is linked to service provision that would support Aboriginal parents to have their children restored to their care.</p>		<ul style="list-style-type: none"> <li>» We have some concerns around the implementation of this recommendation in the Bill.</li> <li>» Instead of amending s79(10), the Government’s Bill inserts instead s79AA, providing for special circumstances that warrant the allocation of parental responsibility and therefore the involvement of DCJ for a longer period.</li> <li>» It does not expressly require the service provision be culturally appropriate and/or targeted to build on the strengths of Aboriginal families and support them to have their children restored to their care. It fails to capture the intent of the FIC recommendation.</li> </ul>



FIC RECOMMENDATION	STATUS	COMMENTARY
<p><b>Recommendation 123:</b> The NSW Government should amend the Care Act so that, as in s 4(2) of the Uniform Evidence Acts, the rules of evidence do not apply unless: (i) a party to the proceeding requests that they apply in relation to the proof of a fact and the court is of the view that proof of that fact is or will be significant to the determination of the proceedings; or (ii) the court is of the view that it is in the interests of justice to direct that the laws of evidence apply to the proceedings.</p>		<ul style="list-style-type: none"> <li>» We have some remaining concerns around the implementation of this recommendation in the Bill.</li> <li>» The Bill introduces a new s93(3) giving the Children’s Court discretion that the rules of evidence apply, if proof of a fact will be significant to the determination of the proceedings. The Bill does not include the second of the ‘tests’ recommended by FIC, that the Court can order that the rules of evidence should apply if it would be in the interests of justice. While we think a broader test would have been better, we think the provision is adequate, although not as strong as it could have been.</li> </ul>

The legislative reform process misrepresented the findings, recommendations and intent of the FIC Review Report and marginalised the voices of Aboriginal communities and community-controlled organisations in favour of government priorities and non-Indigenous institutional stakeholders.

This flawed process resulted in a Bill that inadequately addresses the FIC recommendations the NSW Government and DCJ claim it implements. Many of the key recommendations, even where supported, have been reframed or significantly diminished in implementation.

In our view, these amendments are unlikely to result in the significant change needed to achieve our shared goal of addressing the ongoing over-representation of Aboriginal children in out-of-home care. They do not honour Family is Culture, or the Aboriginal children and families whose experiences informed the FIC Review Report and recommendations.

Excluding ALS and AbSec throughout the consultation, advice and Bill development processes deprived Aboriginal communities and peak bodies of the opportunity to shape the reforms. Early involvement, and listening to our advice, could have shaped a Bill that properly implemented FIC’s findings and recommendations – a Bill that would have a meaningful impact.

## Where to from here?

We have provided advice to members of Parliament that amendments to better align the Bill with the FIC recommendations would improve the quality and impact of the Bill. Three amendments were agreed to in the Legislative Council. While minor, these amendments are positive and we appreciate the work of members of Parliament to introduce these changes. However, we are disappointed that, overall, members of Parliament and the NSW Government had little appetite for making real improvements to the Bill.

We are now looking toward the next stage of legislative reforms and we are seeking commitments from the NSW Government regarding timeframes and a comprehensive partnership process. This needs to be supported by a considered, strategic, Aboriginal community-led community and stakeholder engagement plan. The next stage of legislative reforms present an opportunity for the NSW Government and Parliament to do better, and properly involve Aboriginal communities in the development of these vital changes.

The flawed process and poor outcomes of the FIC legislative reform process is representative of the government-led implementation of the FIC recommendations more broadly. We continue to advocate for DCJ and the NSW Government to align the way they work with the FIC pillars of reform: self-determination, and public accountability and oversight. Reform efforts must also be aligned with the NSW Government's commitment under the National Agreement on Closing the Gap to work in partnership and genuinely share decision making with Aboriginal communities. Aboriginal communities must lead this work for it to effectively make real change.

### As immediate priorities, AbSec and ALS are calling for:

- ④ An overarching FIC implementation plan mutually agreed by ALS, AbSec and DCJ, with clear targets, timeframes and accountabilities, and which reflects community priorities for implementation.
- ④ A FIC Aboriginal community and stakeholder strategic engagement plan, mutually agreed by ALS, AbSec and DCJ (including planning for consultations on the next phase of FIC legislative reforms).
- ④ A monitoring and quality assurance process to oversee FIC implementation, mutually agreed by ALS, AbSec and DCJ.

**Only when Aboriginal communities are making decisions about FIC implementation will we see real progress on implementing FIC holistically and ending the over-representation of Aboriginal children in out-of-home care. Our communities know what is needed – *it is time for the NSW Government to listen.***

# Our communities know what is needed...

