



21 Carrington Road Marrickville NSW 2204
PO Box 604 Marrickville NSW 1475
Tel: (02) 9559 5299
Fax: 02 9559 1669
Web: www.absec.org.au

Committee Secretary
House of Representatives Standing Committee on Social Policy
PO BOX 6021
Parliament House
Canberra ACT

11 May 2018

Re: Inquiry into Local Adoption

Please find attached the submission of the Aboriginal Child, Family and Community Care State Secretariat (AbSec). This issue is of particular importance to Aboriginal communities, given the ongoing disproportionate impact of statutory child protection systems nationally on Aboriginal children and young people, their families and communities. AbSec joins with our colleagues, the Queensland Aboriginal and Torres Strait Islander Peak (QATSICPP) and SNAICC – National Voice for our Children in making a submission to this Inquiry on behalf of our children, families and communities. We stand together in asserting that adoption orders are not appropriate for our children in out-of-home care.

As detailed in our submission, AbSec is strongly opposed to the coerced adoption of Aboriginal children by statutory child protection systems. Adoption orders are characterised by the absence of key safeguards to ensure the safety and wellbeing of Aboriginal children. They fail to uphold an Aboriginal child's fundamental rights to family, community and culture, and the importance of these connections to our lifelong wellbeing and resilience. They are not in the best interests of our children.

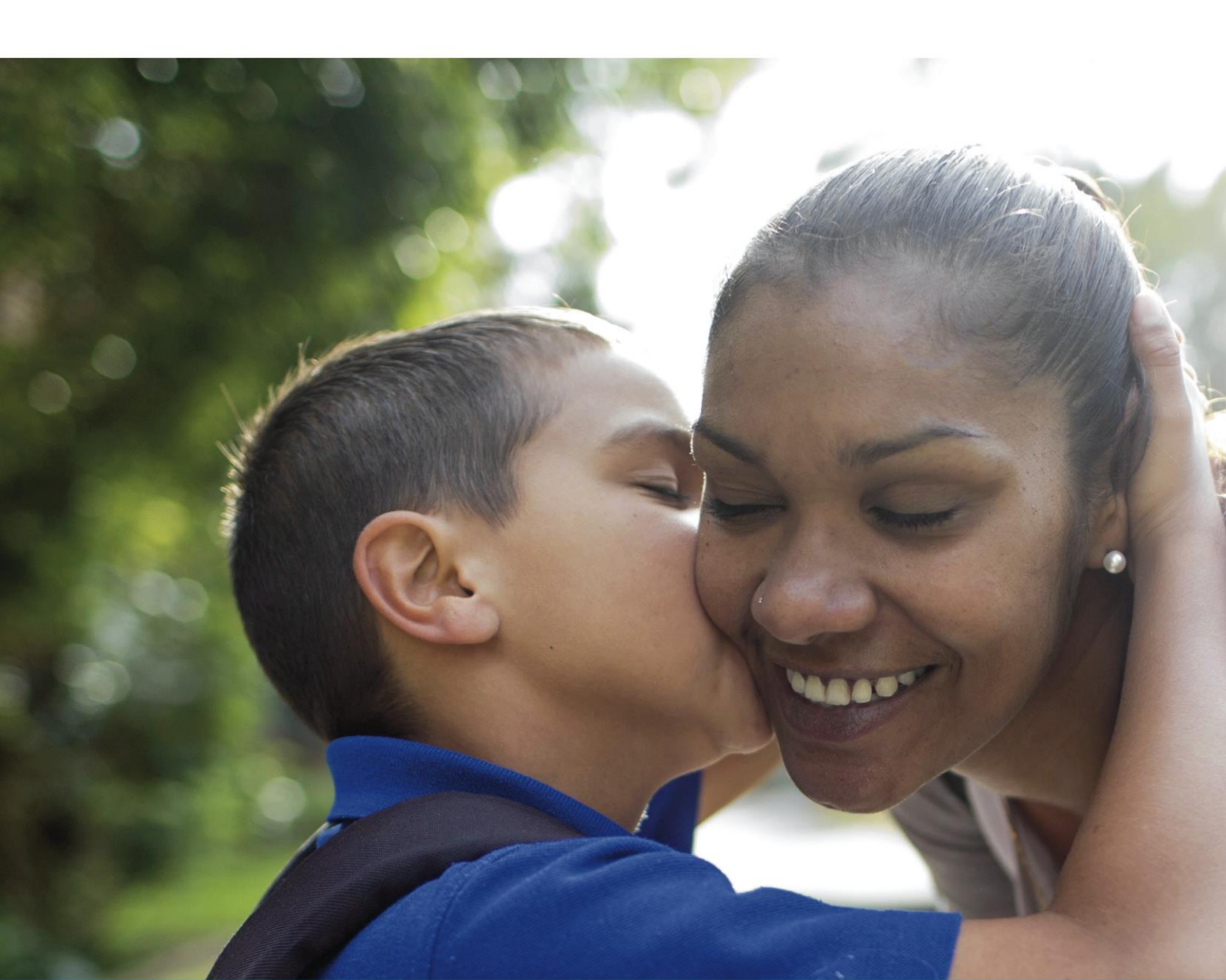
In particular, it must be noted that past policies of the forced separation of Aboriginal children and young people from their families, communities, culture and Country is regarded as a key contributor to this ongoing over-representation. It is not a solution.

AbSec, alongside QATSICPP and SNAICC, call for the development of Aboriginal and Torres Strait Islander community-led approaches to the care of our children, including the development of a permanency framework that implements in full the Aboriginal and Torres Strait Islander Placement Principles (prevention, partnership, placement, participation and connection). We demand urgent action to safeguard the rights of our children, achieving a more appropriate statutory child protection system that has truly learned the hard lessons of the past.

Yours sincerely,

Tim Ireland
Chief Executive Officer

Encl.



Inquiry into Open Adoption AbSec Submission

May 2018



About AbSec

The Aboriginal Child, Family and Community Care State Secretariat (AbSec) is the peak Aboriginal child and family organisation in NSW. AbSec is committed to advocating on behalf of Aboriginal children, families, carers and communities, and to ensure they have access to the services and supports they need to keep Aboriginal children safe and provide them the best possible opportunities to fulfil their potential through Aboriginal community controlled organisations.

Central to this vision is the need to develop a tailored approach to Aboriginal child and family supports delivering universal, targeted and tertiary services within communities that cover the entire continuum of support and reflect the broader familial and community context of clients. Such services and supports would operate to mitigate risk factors or vulnerabilities thereby reducing the need for more intensive or invasive interventions.

Our vision is that Aboriginal children and young people are looked after in safe, thriving Aboriginal families and communities, and are raised strong in spirit and identity, with every opportunity for lifelong wellbeing and connection to culture surrounded by holistic supports. In working towards this vision, we are guided by these principles:

- acknowledging and respecting the diversity and knowledge of Aboriginal communities;
- acting with professionalism and integrity in striving for quality, culturally responsive services and supports for Aboriginal families;
- underpinning the rights of Aboriginal people to develop our own processes and systems for our communities, particularly in meeting the needs of our children and families;
- being holistic, integrated and solutions-focused through Aboriginal control in delivering for Aboriginal children, families and communities; and
- committing to a future that empowers Aboriginal families and communities, representing our communities, and the agencies there to serve them, with transparency and drive

Published May 2018

© Aboriginal Child, Family and Community Care State Secretariat (AbSec)

This publication is copyright. Reproduction of this material from this proposal should obtain permission from the publishers.

AbSec can be found on the land of the Gadigal people at:

21 Carrington Road, MARRICKVILLE NSW 2204

Phone: (02) 9559 5299

E-mail: reception@absec.org.au

Website: www.absec.org.au

Facebook: on.fb.me/AbSec

Twitter: [@AbSecNSW](https://twitter.com/AbSecNSW)

Contents

Inquiry into local adoption	4
Introduction.....	4
A Human Rights Framework.....	7
The Royal Commission into Institutional Responses to Child Sexual Abuse.....	10
Adoption in Out-of-Home Care	13
The Aboriginal and Torres Strait Islander Child Placement Principles	15
Other Evidence.....	17
The Way Forward.....	19
Conclusion.....	23

Inquiry into local adoption

On Tuesday, 27 March 2018 the Committee adopted an inquiry into local adoption in accordance with the terms of reference referred by the Hon Dr. David Gillespie MP, Assistant Minister for Children and Families.

The House of Representatives Standing Committee on Social Policy and Legal Affairs will inquire into and report on approaches to a nationally consistent framework for local adoption in Australia, with specific reference to:

1. stability and permanency for children in out-of-home care with local adoption as a viable option; and
2. appropriate guiding principles for a national framework or code for local adoptions within Australia

In undertaking its inquiry, the Committee will have regard to relevant legislative frameworks within Australia.

Introduction

Enduring supportive relationships are an essential element of development, including resilience in the face of adversity. Placement instability affects too many children and young people in out-of-home care, and there is a need to focus greater efforts on providing children who are unable to remain with their families with a secure and stimulating environment to support positive developmental outcomes. As a result of this instability, adoption from care has been advocated, and is the focus of this inquiry.

AbSec does not support the adoption of Aboriginal children through the existing processes of the statutory child protection system in our jurisdiction, New South Wales. It is our view that such an approach fails to safeguard the best interests of Aboriginal children and young people in out-of-home care. Rather, new, Aboriginal-led approaches to the care and protection of Aboriginal children is needed. We call on governments to engage with Aboriginal communities in the spirit of partnership, enabling Aboriginal-led solutions to the challenge of permanency. It is our hope this might be achieved through the work of Fourth Action Plan for Protecting Australia's Children, however until an appropriate framework is established, AbSec supports SNAICC's call for an immediate moratorium on the adoption of Aboriginal children from care.

In general, AbSec welcomes the opportunity to participate in government inquiries regarding the statutory child protection and out-of-home care systems, given the critical need to achieve better outcomes for children and young people at risk of harm. Statutory child protection systems disproportionately intervene in the lives of Aboriginal children and young people, and yet the voices of Aboriginal communities are routinely marginalised as governments determine what is in the best interest of our children and young people.

Following recent public comments regarding the intent to increase adoption of Aboriginal children and young people from out-of-home care by non-Indigenous families, AbSec is deeply concerned that will again be the case, with Aboriginal community opposition to the forced adoption of our children through the statutory child protection system dismissed as governments again assert that they know what is best for our children.

There remains a deep and enduring resistance from governments to enable Aboriginal self-determination with respect to the care and protection of Aboriginal children, despite acknowledgements that government approaches continue to fail¹.

Spanning from the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* which provided the *Bringing Them Home* report more than 20 years ago, through to the more recent *NSW Child Protection Inquiry* (report released March 2017) and *Royal Commission into the Protection and Detention of Children in the Northern Territory* (report released December 2017), numerous recommendations have been proposed to improve child protection and out-of-home care service provision to Aboriginal children and young people and their families. In particular, the principle of Aboriginal self-determination, understood as the collective right of Aboriginal peoples to determine, through our own processes, the systems, supports and frameworks that operate to promote the safety, welfare and wellbeing of our children, has been consistently identified as fundamental in improving outcomes. Despite this, it, and many other recommendations to strengthen Aboriginal families and communities so our children can thrive, continue to gather dust on the shelves of legislators and decision makers. Indeed, the ever-increasing disproportionate intervention of statutory systems in the lives of Aboriginal children and families stands as an indictment of the persistent failure of governments to meaningfully implement these recommendations for the safety, welfare and wellbeing of Aboriginal children and young people.

Now, faced with this growing issue, government attention returns to the failed “solutions” that contributed to the problem in the first place – the forced separation of Aboriginal children and young people from their families, communities, culture and Country.

In 2008 the Parliament stood to embrace “a future where this Parliament resolves that the injustices of the past must never, never happen again.” And yet, while Aboriginal communities continue to call for a greater voice in decisions that affect our children, our families and our communities, governments again propose the permanent legal removal of our children as a “new” solution.

It is for this reason that many in the Aboriginal community see the Apology, given just a decade ago, as an empty gesture.

Similarly, the National Apology for Forced Adoptions, delivered in 2013, reflected on the lasting impacts of this policy on identity and belonging. Again, government’s resolved to never repeat these practices and learn the lessons of family separation; to uphold and protect the fundamental rights of children.

While we acknowledge that current practices, both with respect to the forced separation of Aboriginal children from their families and forced adoption of children more broadly has changed in many important respects, AbSec is not reassured that governments have learned the lessons of the past. Governments continue to invest significantly more in separating children from their families than supporting families at risk². Child protection agencies such as Family and Community

¹ NSW Parliament Legislative Council General Purpose Standing Committee No. 2 (2017) *Child Protection*,

² Productivity Commission (2018) Report on Government Services 2018, see: <https://www.pc.gov.au/research/ongoing/report-on-government-services/2018/community-services/child-protection>

Services in NSW continue to shift their practice culture from exclusionary, authoritative practice to inclusive, participatory practice that works with families with dignity and respect. While these efforts must be commended, there remains a significant way to go.

AbSec also acknowledges recent remarks from Federal Children’s Minister Dr David Gillespie³, noting that while adoption might be considered for Aboriginal children and young people in out-of-home care, it will never again be forced upon families and communities. However, recent proposed legislative changes in NSW have sought to further dispense with the need to gain parental consent for the adoption of a child in the statutory care of the Minister, or to take reasonable steps to even inform families of an upcoming adoption of their child underscore the significant risks that lie down this path, and a range of other proposal that “streamline” adoption by further marginalising their families⁴. It is AbSec’s view that the coercive nature of the statutory child protection system suggests that any such permanent orders are more often than not forcibly imposed on families, rather than being entered into with the free, prior and informed consent of children and their families.

AbSec further notes the Minister’s comments regarding the placement hierarchy within the Aboriginal and Torres Strait Islander Child Placement Principle that prioritises placements within the child’s family, kin and community, suggesting that where this is not possible, non-Indigenous carers should be able to care for and presumably adopt that child⁵. Given the persistent challenges in the recruitment of Aboriginal carers⁶, the likely impact of this approach remains that, if permitted, a significant number of Aboriginal children and young people are at risk of being permanently severed from their family, community and culture.

AbSec acknowledges that Aboriginal people have diverse views about the systems and processes that should apply with respect to the care and protection of Aboriginal children and young people. Like any population, diverse views should be encouraged, however the way forward must be determined through appropriate Aboriginal governance processes that represent the collective voice of Aboriginal communities.

We call on governments nationally to engage with Aboriginal communities, their community controlled organisations and relevant peak bodies in genuine partnership, respecting the right of Aboriginal self-determination and supporting “Indigenous decision-making carried into implementation”⁷ across the continuum of support for Aboriginal children, families and communities. It is our strong view that pursuit of failed approaches such as adoption that sever the spirit of our children will likely only succeed in further perpetuating these challenges, passing them on to a new generation. Rather, AbSec suggests that governments engage with and support

³ ABC News, 13 March, 2018, Children’s Minister calls for adoption of more Indigenous kids in care, available at: <http://www.abc.net.au/news/2018-03-13/minister-calls-for-indigenous-adoption/9544482>, accessed 8 May 2018

⁴ Family and Community Services (2017) *Shaping a Better Child Protection System – Discussion Paper*. See: https://www.facs.nsw.gov.au/__data/assets/pdf_file/0009/441495/FACS-Discussion-Paper-Shaping-a-Better-Child-Protection-System.PDF

⁵ ABC News, 13 March, 2018, Children’s Minister calls for adoption of more Indigenous kids in care, available at: <http://www.abc.net.au/news/2018-03-13/minister-calls-for-indigenous-adoption/9544482>, accessed 8 May 2018

⁶ Arney, F., Iannos, M., Chong, A., McDougall, S., and Parkinson, S. (2015) Enhancing the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Policy and practice considerations. CFCA Paper No. 34

⁷ Human Rights and Equal Opportunity Commission (1997) *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families.*, see: https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf

the myriad approaches for stability and belonging being developed by our communities, and work alongside communities to strengthen the enabling environment for the emergence of Aboriginal community-led universal, targeted and intensive family supports aimed at providing all Aboriginal children and young people with the opportunity to thrive, surrounded by holistic supports.

A Human Rights Framework

AbSec is committed to a rights-based approach to child and family welfare, informed by the *Convention on the Rights of the Child* and the *Declaration on the Rights of Indigenous Peoples*. These two international instruments, endorsed by Australia, provides the foundation for legislation, policy and practice with respect to Aboriginal children, their families and communities.

The *Convention on the Rights of the Child* (CRC) identifies children and young people as right-holders, and outlines the obligations of states and other parties in safeguarding the rights of children and young people. With respect to child protection, the CRC includes the child's right to be raised by their parents ("unless separation is necessary for the best interests of the child") (Article 9), the right of children to express their views and have them given due weight (Article 12), and the obligation to provide appropriate supports to children and their carers to meet the child's needs and protect them from harm, focused on the best interests of the child (Articles 18 and 19). Article 20 outlines the obligations of the state to children and young people deprived of their family, including special protection and assistance, and alternate care which may include foster care or adoption, however such solutions will have due regard for the cultural rights of the child. Further, Article 21 identifies that where adoption is permitted by States Parties, the best interests of child shall be the paramount consideration.

The best interest principle (Article 3) plays a key role in a full understanding of the rights of the child (see references above), and is therefore considered a general principle of the CRC. This principle emphasises the indivisible and interdependent nature of the rights articulated in the Convention, noting that "interpretations of the best interests of children or use of the principle cannot trump or override any of the other individual rights guaranteed by other articles in the Convention"⁸, and should reflect both immediate and long-term considerations. As a general principle, an understanding of the best interests and the appropriate assessment thereof is central to the implementation of the CRC.

Article 25 requires that States "recognise for every child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement". This periodic review is considered an essential safeguard to protect against the abuse of the state, ensuring that where states take responsibility for the care of a child, intervening in the child's right to their family, appropriate steps are taken to uphold the rights of the child⁹. To uphold this right, reviews should include all aspects of the child's care, placement, and the views of the child with sufficient regulatory to secure the child's safety and welfare.

⁸ Ibid. pp. 35

⁹ UNICEF (2015) *Implementation Handbook for the Convention on the Rights of the Child*

Finally, the CRC explicitly emphasises the rights of minorities or indigenous peoples, asserting that “a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language” (Article 30). Noting that this Article may seem redundant in consideration of the full Convention and the indivisible nature of the rights contained therein, the *Implementation Handbook for the Convention on the Rights of the Child* goes on to assert that “the overwhelming evidence of serious and continuing discrimination against minority and indigenous populations justifies mention of their rights in a separate article, to make certain that States pay adequate attention to them”, as well as that such rights may also include rights not addressed in the CRC “such as relationship with territory”¹⁰. The language of this Article is also noteworthy, requiring States to “take positive measures both in terms of its own actions and against the acts of other persons in the country, in order to protect the minority group’s cultural identity, language or religion”¹¹. A State Party is therefore “under and obligation to ensure that the existence and exercise of this right are protected against their denial or violation”¹².

In further clarifying the intent of this Article, the Committee on the Rights of the Child noted “... although Indigenous children are disproportionately affected by specific challenges such as institutionalisation... [they] are not sufficiently taken into consideration in the development and implementation of policies and programs for children”¹³. The Committee on the Rights of the Child go further to note that “the State, representing the dominant majority, sometimes believes that full integration is in their best interests, regardless of the effect this may have on their culture. Forced integration is a breach of rights and the Committee has recommended that States with significant indigenous populations adopt enforceable legislation to protect their rights”.

The application of the CRC with respect to Indigenous children and young people is further discussed by the Committee on the Rights of the Child in General Comment No 11. This discussion notes that Indigenous children “require special measures in order to enjoy their rights”, seeking to provide guidance on the appropriate implementation of the CRC with respect to Indigenous children. It notes that many of the articles in the CRC, including the principle of best interest (Article 3) and the right to culture and language (Article 30) are to be understood as both individual and collective rights, acknowledging in particular the collective nature of the enjoyment of cultural rights. As such, Indigenous communities must participate in the determination of the best interests of Indigenous children, including the meaningful participation of Indigenous children themselves. Specifically, the Committee notes:

“In States parties where indigenous children are overrepresented among children separated from their family environment, specially targeted policy measures should be developed in consultation with indigenous communities in order to reduce the number of indigenous children in alternative care and prevent the loss of their cultural identity. Specifically, if an indigenous child is placed in care outside their community,

¹⁰ Ibid, pp. 455.

¹¹ Ibid. pp. 456

¹² Committee on the Rights of the Child (2009) General Committee Comment No. 11, *Indigenous children and their rights under the Convention*

¹³ UNICEF (2015) *Implementation Handbook for the Convention on the Rights of the Child*, pp. 460

*the State party should take special measures to ensure that the child can maintain his or her cultural identity*¹⁴.

Further guidance is provided by the Committee in General Comment 14¹⁵, reiterating an understanding of best interests as both an individual and collective right. While best interests with respect to an individual child must be assessed on the basis of specific circumstances, collective decisions, such as those made by legislators, “must be assessed and determined in light of the circumstances of the particular group and/or children in general”¹⁶, noting that in both cases, determination must reflect the full respect for all rights contained in the Convention. The Committee also notes the flexibility of the concept, allowing its evolution alongside knowledge of child development, but warns this also leaves room for misuse. “

“The flexibility of the concept of the child’s best interests allows it to be responsive to the situation of individual children and to evolve knowledge about child development. However, it may also leave room for manipulation; the concept of the child’s best interests has been abused by Governments and other State authorities to justify racist policies, for example; by parents to defend their own interests in custody disputes; by professionals who could not be bothered, and who dismiss the assessment of the child’s best interests as irrelevant or unimportant.”¹⁷

While adoption is noted in the Convention on the Rights of the Child with respect to children deprived of their family environment, the *Implementation Handbook for the Convention on the Rights of the Child*¹⁸ notes that the committee took a neutral stance, and deliberately stopped short of urging adoption in out-of-home care, noting it as one of a range of options that may or may not be suitable in pursuit of the best interests of children deprived of their family environment. Importantly, the obligation on States to provide “special protection and assistance” and the ongoing periodic review of their treatment and circumstances remains, regardless of the type of legal order pursued.

The *Declaration of the Rights of Indigenous Peoples* (DRIP) outlines the fundamental human rights of Indigenous peoples, consistent with other international instruments such as the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both of which affirm the fundamental right of all peoples to self-determination; to “freely determine their political status and freely pursue their economic, social and cultural development. Within the preamble, the DRIP recognises “in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child”. In addition to the collective right to self-determination (Article 3) and self-government (Article 4), Indigenous peoples have the right to participate in decisions that would affect our rights, through representatives appointed by our own processes, and to maintain and develop our own indigenous decision-making institutions (Article 18). This includes the right to determine priorities and strategies for development, including social programs, and to administer these programs

¹⁴ Committee on the Rights of the Child, General Comment No. 11, pp. 11.

¹⁵ Committee on the Rights of the Child, General Comment No. 14

¹⁶ Ibid, paragraph 32

¹⁷ Ibid, paragraph 34

¹⁸ UNICEF (2015) *Implementation Handbook for the Convention on the Rights of the Child*, pp. 460

through our own institutions. Importantly, Indigenous peoples have the right to not be subjected to the forced assimilation and destruction of culture, including “any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities”, forced population transfer or forced assimilation or integration (Article 8).

In summary, a rights-based framework provides minimum standards or obligations to uphold the best interests of children and young people, including recognition of both individual and collective rights, and reflecting the indivisible and interdependent nature of the rights contained within the Convention. With respect to Indigenous children, such frameworks emphasise the importance of cultural rights, enjoyed “in community” with others of their cultural group, and the need for decisions to safeguard children’s connection to and enjoyment of their right to family (including extended family and kin), community and culture. The importance of this right for Aboriginal children was reiterated through the explicit inclusion of Article 30, noting the propensity with which majority governments have marginalised full enjoyment of the cultural rights of Indigenous children, often under a misguided or manipulated understanding of the best interests principle. Rather, Indigenous peoples themselves are best placed to determine the best interests of their children, with the Committee urging special measures to ensure the cultural rights and identity of Indigenous children, particularly within the child welfare context.

“Cultural identity is not just an add-on to the best interests of the child. We would all agree that the safety of the child is paramount. No child should live in fear. No child should starve. No child should live in situations of neglect. No child should be abused. But if a child’s identity is denied or denigrated, they are not being looked after. Denying cultural identity is detrimental to their attachment needs, their emotional development, their education and their health. Every area of human development which defines the child’s best interests has a cultural component. Your culture helps define HOW you attach, HOW you express emotion, HOW you learn and HOW you stay healthy.”¹⁹

Critically, this must be pursued in partnership with Indigenous communities, and acknowledging the right of Indigenous self-determination, empowering Aboriginal families and communities collectively to retain shared responsibility for the care and wellbeing of their children.

Where children are unable to remain at home, they are entitled to special protection and support, including the periodic review of their treatment and placement. These provisions require governments to take targeted action, including the establishment of minimum standards, to ensure the immediate and long term safety and wellbeing of children and young people.

The Royal Commission into Institutional Responses to Child Sexual Abuse

The recent *Royal Commission into Institutional Responses to Child Sexual Abuse* (the Royal Commission) explored the out-of-home care sector and implications for the ongoing safety and wellbeing of children and young people in this sector. The Royal Commission noted the instability of placements in out-of-home care as one risk factor that contributed to the potential risk of harm

¹⁹ Bamblett, M., and Lewis, P. (2006) “A vision for Koorie Children and Families: Embedding Rights, Embedding Culture”, *Just Policy: A Journal of Australian Social Policy*, Edition 41, September 2006, cited in Bamblett, M., Harrison, J., and Lewis, P. (2010) *Proving Culture and Voice Works: Towards Creating the Evidence Base for Resilient Aboriginal and Torres Strait Islander Children in Australia*, *International Journal of Child and Family Welfare*, Vol. 13, No. 1-2, March-June 2010, 98-113, pp.

in care. However, a range of risks were also identified as being characteristic of the very nature of care provided, delivered in private settings and intended to foster close, personal relationships between children and their carers. These risks included:

- “unsupervised, one-on-one access to a child
- providing intimate care to a child or an expectation of a certain level of physical contact
- the ability to influence or control aspects of a child’s life
- authority over a child, particularly in situations with significant control such as a residential setting
- responsibility for young children
- opportunity to become close with a child and/or their family.”²⁰

The Royal Commission also noted additional issues, including the higher likelihood that children removed from their families and community networks may lack key external supports that promote safety and disclosure in instances of harm. The Royal Commissioner notes yet further child and family/parental factors that may contribute to the apparent risk or safety of a child in home-based settings, including foster care and adoption. It notes that while screening and authorisation processes attempt to mitigate these risks, they are not “foolproof” and may not assess key risks posed by prospective carers. As such, in addition to strengthened screening processes, the Royal Commission also notes that “regular supervision of placements by skilled and experienced caseworkers is an essential means of mitigating risks in home-based settings”²¹.

The Royal Commission commented specifically on the out-of-home care needs of Aboriginal children and young people, emphasising in particular the critical role of culture in their ongoing safety, welfare and wellbeing. Survivors reported that separation from family and community undermined their opportunity to disclose abuse. Further, the Royal Commission noted the inadequate attention paid in all statutory child protection systems to the importance of culture in keeping Aboriginal children safe, and placements with non-Indigenous families was associated with reduced likelihood of contact with family and reduced likelihood of restoration. The Royal Commission argued:

“All children in out-of-home care face heightened risk of child sexual abuse. Aboriginal and Torres Strait Islander children, who are already over-represented in out-of-home care, are likely to face more risk factors and less protective factors than non-Indigenous children. Within frameworks that prioritise the safety of children, there is a need to reduce the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care – starting with adherence to legislation that requires the diligent implementation of the Aboriginal and Torres Strait Islander Child Placement Principle.

Initiatives to promote safety in out-of-home care, including home-based settings, included:

²⁰ Royal Commissioning into Institutional Responses to Child Sexual Abuse (2017), Vol.12, pp. 170

²¹ Ibid, pp. 203

- improved data processes, including about the safety and wellbeing of children in out-of-home care
- the establishment of child safe standards included within a mandatory accreditation scheme,
- monitoring and enforcement of standards
- strengthened processes of carer screening and authorisation, including a high standard of assessment and focus on suitability, including motivation to care, understanding of keeping children in out-of-home care safe, willingness to work cooperatively with OOHC agencies, facilitate and encourage birth family contact, and accept regular caseworker visits and supervision
- regular review of carers, including the views of children themselves
- strengthening the capacity of carers and caseworkers to support children, including response to complex trauma and associated behavioural challenges that may threaten safety and stability
- implementation of trauma-informed care
- sharing information to identify, prevent and respond to incidents and risks of harm

With respect to placement instability, the Royal Commission identified that poorly matched placements, insufficient information provided to carers, and insufficient ongoing support to carers meet the specific and often complex needs of children and young people all contributed to placement instability. Kinship carers in particular tended to be particularly neglected by statutory systems in the supports provided, despite the clear benefits for children in kinship/relative care, and the demographic characteristics of this cohort.

AbSec agrees with the Royal Commission that home-based care, by their very nature, include some risks with respect to the potential for sexual, physical or other abuse and maltreatment of children and young people in alternate care. We are committed to the implementation of critical safeguards, such as those suggested by the Royal Commission and outlined above, to ensure that children and young people are safe and well cared for, including critical supports to children and their carers to meet complex needs that may arise. In NSW, the importance of these supports are regulated by the Office of the Children's Guardian, who oversees the accreditation of out-of-home care agencies and their ongoing practice. However, with the exception of carer authorisation processes (which are known to be insufficient and must be supplemented by ongoing monitoring and supports), these safeguards are deliberately denied to children on permanent care orders such as adoption. This places children and young people at an unacceptable risk of ongoing harm.

AbSec also notes the Royal Commission's suggestion for improved data processes to strengthen accountability and to establish a clear and transparent understanding of the risks facing children

and young people in out-of-home care. However, children on third-party orders such as adoption are technically no longer considered to be in out-of-home care, despite being placed on that order through the actions of the statutory child protection system. This statistical approach provides even less accountability and transparency with respect to the safety, welfare and wellbeing of children placed on adoption orders. Rather, it could be seen as a deliberate action of the state to defer responsibility for the growing number of children in care, removing key monitoring and oversight mechanisms and failing to transparently report on numbers, let alone more in-depth reviews of their circumstances following an adoption order being made. AbSec is deeply concerned about the lack of transparency for the long-term safety, welfare and wellbeing of children and young people placed by statutory child protection system into adoption, both as individuals and collectively as a subgroup of the broader out-of-home care population.

Adoption in Out-of-Home Care

Stable, caring and supportive relationships between a child and important adults in their lives plays a significant role in positive developmental outcomes, particularly those exposed to early adversity²². The importance of placement stability is certainly not the issue at question, but rather the proposed solutions to achieving placement stability, in the context of enduring, supportive relationships between a child and adults in their life, including those that provide the day-to-day care, but also extending to other key adults in their family and community. While permanent care orders such as adoption propose a legalistic solution to this challenge, AbSec is of the view that such an approach also carries significant risks to the long-term safety, welfare and wellbeing of children and young people, specifically due to the nature of these orders, including their permanence. We seek to disentangle the often conflated legal frameworks for permanency from the (in our view) more important developmental frameworks, which emphasise a broader set of relational and environmental factors for consideration, as well as the existing evidence of the appropriate safeguards to ensure children in out-of-home care are safe and adequately supported, regardless of the nature of their legal order. Legal orders that are unable to meaningfully implement and monitor the effectiveness of these safeguards are inappropriate and represent a failure of governments to meet their statutory responsibilities to the safety, welfare and wellbeing of Aboriginal children and young people deprived of their family environment.

Rather, AbSec agrees with evidence provided to the Senate Inquiry into OOHC care noting that stability should not be conflated with legal permanence, and can be achieved through other types of orders²³. AbSec believes that the current instability experienced by many children and young people in OOHC care is not due to a lack of legal permanence or a lack of commitment from foster or kinship carers in the absence of a legal order, but rather a failure of the child protection system to provide the necessary supports that empower families and communities to meet the changing needs of children and young people in OOHC care over the course of their development. This view is consistent with those of the Royal Commission outlined above. This includes monitoring and meaningful mechanisms to ensure the rights of children are protected and realised in their

²² National Scientific Council on the Developing Child (2015) *Supportive Relationships and Active Skill-Building Strengthen the Foundations of Resilience: Working Paper 13*. <http://www.developingchild.harvard.edu>

²³ Australian Senate Community Affairs References Committee (2015) *Out of home care*, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/out_of_home_care/Report

alternate care, including their right to safety, culture, care and dignity. This is further informed by the voices of children and young people in OOHC care who have consistently emphasised the importance of consistent positive relationships, particularly the role of caseworkers in providing support and advocacy for children and young people and those that care for them²⁴.

AbSec is concerned rather that the lack of oversight associated with adoption orders place Aboriginal children and young people at increased risk, and include practices that are not consistent with conceptualisations of child-safe organisations and systems. We know that while the vast majority of kinship and foster carers do an exemplary job in often challenging circumstances to promote the safety, welfare and wellbeing of children in OOHC, too many children remain exposed to experiences of abuse and neglect in care. We also know that as a result of their previous experiences of maltreatment and relationship dysfunction, children in OOHC are more vulnerable to abuse, including sexual abuse and exploitation. Children in OOHC are also more likely to be isolated from protective networks (for example disengaged from schools, have troubled relationships with protective adults) reducing the likelihood of disclosures or harm being discovered. While steps are taken to guard against such risk (such as Working With Children Checks and the Carers Register) it is important that the system acknowledges the frailties of these processes and ongoing challenges in the adequate assessment of carers. As such, ongoing features that provide vulnerable children a safety net are essential to protecting children in alternate care from ongoing abuse and neglect, recognising potential risks early and responding appropriately where harm has occurred.

This was a key area of concern in the recent Royal Commission into Institutional Responses to Child Sexual Abuse, outlined above.

We feel that the absence of these elements from adoption and other similar orders place children in OOHC at an unacceptable risk of possible future harm, and fail in the State's responsibility for the ongoing periodic review of their placement, treatment and ongoing care.

In addition to safety concerns, adoption orders are also not well suited to supporting carers to meet the developmental needs of children in OOHC. This includes practical supports, access to specialised clinical and therapeutic supports and carer training in addition to ongoing financial supports. This is in recognition of the specialised therapeutic care required to support children and young people to recover from their early traumatic experiences and develop resilience. In particular, caseworkers provide a critical layer of support for both children and young people and their carers to proactively manage the changing therapeutic and developmental needs of children and young people in OOHC, providing trauma-informed therapeutic supports as well as supporting young people and their carers to navigate the often fragmented systems that young people in OOHC may interact with (such as the education, health and justice systems) to achieve positive outcomes for those in OOHC. However, while some adoption from out-of-home care models include limited financial supports, the arguably more important therapeutic and practical supports are conspicuously absent. As noted above, the Royal Commission reported that the absence of these supports was associated with placement instability and increased risks for children and young people.

²⁴ CREATE Foundation 'Hear our Voice' forum, Sydney NSW; Ministerial Out-of-home care forum, 19 October 2015, Australian Technology Park, Redfern NSW

The Aboriginal and Torres Strait Islander Child Placement Principles

The Aboriginal and Torres Strait Islander Child Placement Principles represent an important set of further safeguards to uphold the best interests of Aboriginal and Torres Strait Islander children and young people, in response to the devastating effects of forced removals on our communities and to guard against their repetition. The ATSICPP is understood to include 5 interrelated elements to guide legislation, policy and practice with respect to the care and protection of Aboriginal and Torres Strait Islander children and young people.

- “prevention: protecting children’s right to grow up in family, community and culture by redressing the causes of child protection intervention
- Partnership: ensuring the participation of community representatives in service design, delivery and individual case decisions
- Placement: placing children in out-of-home care in accordance with the established ATSICPP placement hierarchy
- Participation: ensuring the participation of children, parents and family members in decisions regarding the care and protection of their children
- Connection: maintaining and supporting connections to family, community, culture and country for children in out-of-home care”²⁵

NSW reports one of the highest rates of compliance with the ACYPPP in Australia²⁶, however it should be noted that focusing on these figures oversimplifies the intent of the ATSICPP to a simple placement hierarchy, and does not examine whether an appropriate process is followed to identify Aboriginal children and engage relevant family and community members in decision-making about the placement of Aboriginal children and their ongoing connection to family, community and culture. Existing research in other jurisdictions demonstrates that few cases comply with this broader conceptualisation of the ATSICPP²⁷, and while equivalent data does not currently exist in NSW, it is likely that similar issues persist here too. Concerns about the implementation of the ATSICPP were consistently noted in the recent NSW Parliamentary Child Protection Inquiry. However, there is currently no existing framework with respect to the full compliance of statutory authorities with the ATSICPP. In the absence of such a framework, and confidence in its full implementation, the provision of permanent care orders such as adoption is likely to perpetuate the impacts of past practices, including the long-term impacts experienced by Aboriginal children and young people themselves²⁸.

Similarly, there remain significant concerns about the quality and implementation of cultural care and support plans for Aboriginal children in OOH, including the extent to which they retain and build on the child’s connection to family, community and culture. Again, existing evidence suggests that the implementation of cultural support plans can be as low as 10%²⁹, or, where they are present, be of poor quality that does not provide a meaningful cultural connection for

²⁵ Queensland Aboriginal and Torres Strait Islander Child Protection Peak (2018) *Permanency Reform Working Group Presentation*

²⁶ AIHW (2015) *Child Protection Australia 2013-14*

²⁷ Commission for Children and Young People and Child Guardian (2013) *Indigenous Child Placement Principle: Audit Report 2012/13*, The State of Queensland

²⁸ See for example *Bringing Them Home*, or Fernandez. E., et al (2016) *No Child Should Grow Up Like This: Identifying Long Term Outcomes of Forgotten Australians, Child Migrants and the Stolen Generations*. Kensington: University of New South Wales

²⁹ Jackomos, A. (2014) *International Human Rights Day Oration: Linking our past with our future: How cultural rights can help shape identity and build resilience in Koori kids*. 4 December 2014

Aboriginal children³⁰. Similarly, while care plans include a commitment to maintaining a child's connection to their family, community and culture through cultural care and support plans, there is no clear mechanism to monitor or ensure compliance once a guardianship order is finalised, leaving Aboriginal children vulnerable to cultural dispossession³¹.

As noted above, a feature of permanent care orders such as adoption orders is that there is no legal mechanism to ensure compliance or to address practice issues regarding the ATSI CPP, including ongoing connection to family, community and culture. Together, this emphasises the significant risks these orders present for Aboriginal children, families and communities, including the very real risk of disconnection and cultural dispossession.

Another significant concern for Aboriginal people is the timely and accurate identification of Aboriginal children. Ongoing challenges in the timely and accurate identification of Aboriginal children open the possibility that Aboriginal children may unknowingly be placed for adoption prior to being identified as Aboriginal, again contributing to the cultural dispossession of Aboriginal people. For example, it has been reported that "in the majority of NSW cases where Aboriginal children in OOHC care have been adopted since 2011, their Aboriginal heritage became known after placement and during the adoption process and/or the children were of an age to give consent to their own adoption"³², identifying two significant issues. First, given the absence of a reliable process to accurately identify Aboriginal children at entry to the child protection system, permanent placement decisions may be made without due diligence and proper consideration of the child's cultural needs, or proper assessment of the best interests of the child.

Second, but related to this, the issue of consent may be compromised with respect to children asked about adoption where they have not been placed in accordance with the ATSI CPP, and whose cultural rights and needs have been neglected by governments throughout their time in OOHC. While AbSec respects the rights of young people to make decisions about their own lives, AbSec is concerned about the context in which such decisions are made in the absence of a meaningful cultural connections in the lived experience of Aboriginal children and young people in OOHC care, reflecting the ongoing failure of the child protection system to protect the cultural rights of Aboriginal children in its care. This failure to uphold the rights of Aboriginal children may compromise their capacity to make an informed decision regarding a permanent legal order that may deny them important cultural connections and safeguards where these cultural rights have already been systematically denied to them.

In summary, the ATSI CPP provides a minimum standards framework for the provision of child and family services, including statutory child protection, with respect to Aboriginal children and young people. However, despite a clear legislative mandate, compliance with the five interrelated elements of the ATSI CPP remains poor, contributing to the increasing over-representation of Aboriginal children and families and the poorer outcomes achieved for Aboriginal children and young people across the statutory system. The imposition of adoption orders is likely to significantly exacerbate these issues. The absence of meaningful monitoring and oversight

³⁰ Commission for Children and Young People and Child Guardian (2013) *Indigenous Child Placement Principle: Audit Report 2012/13*, The State of Queensland

³¹ Cripps, K. and Laurens, J. (2015) 'Protecting Indigenous children's familial and cultural connections: reflections on recent amendments to the Care and Protection Act 2007 (NT)', *Indigenous Law Bulletin* Vol. 8(17)

³² Family and Community Services (2015) Issues Paper – Establishing an Institute of Open Adoption

processes, as well as meaningful mechanisms to ensure ongoing involvement of Aboriginal families and communities in decision making and connection to family, community, culture and Country represent significant risks to the safety and wellbeing of Aboriginal children and young people.

As such, AbSec does not consider adoption as it is currently conceptualised and administered to be in the best interests of Aboriginal children and families.

Other Evidence

Adoption has been promoted as a solution for children in out-of-home care in recent years in the UK, with around 5000 children adopted annually from care³³. A recent report by the British Association of Social Workers, *The Role of the Social Worker in Adoption – ethics and human rights: An Enquiry*³⁴ engaged with a range of stakeholders including predominantly social workers but also adopted people, birth families and adoptive parents regarding their experiences of adoption. The report raised a number of significant concerns about adoption practice, and the need for deeper consideration of adoption practice through a human rights and ethical lens. Rather, the high profile promotion of adoption as “a public ‘good’ and the ‘right’ decision”³⁵ inhibited key ethical debates about adoption practice and its relative merits compared to other care options “that do not involve the removal of birth family and other connections so starkly from children’s lives”. The focus on adoption became a ‘runaway train’, shifting practice and reducing commitment of statutory authorities and services family preservation and restoration work.

Key issues raised in the report include the lack of implementation of adoption plans, including limited support for both birth families and adoptive families to participate in contact arrangements. Social workers also noted that despite significant efforts prior to adoption orders to emphasise the importance of contact and other features to lifelong identity (such as their name), post-adoption adoptive parents were able to unilaterally alter these intentions or veto contact orders, without meaningful redress.

The report particularly noted the broader social context of adoption practice, and its disproportionate impact on disadvantaged and marginalised families. Further, the enquiry cautioned against an overly optimistic view of adoption as a “happy ever after” narrative. This view minimises the complex issues associated with adoption for all parties, silencing the experiences of grief and loss experienced by many adopted children and adults, as well as birth parents, and leave adoptive parents unable to access key support needed to raise their adopted children. The impact on sibling groups was also noted, which may contribute to disconnection and loss of sibling relationships, including those born after the adoption order is made.

Finally, other issues included the use and misuse of power by social workers as a key issue, as well as access to important supports and services to address the underlying risk issues and preserve their families. Similarly, birth parents felt disempowered in court processes that they felt were biased against them from the outside, moving inexorably towards removal and

³³ Featherstone, B., Gupta, A., and Mills, S. (2018) *The Role of the Social Worker in Adoption – ethics and human rights: An Enquiry*, British Association of Social Workers, available at: <https://www.basw.co.uk/adoption-enquiry/>

³⁴ *ibid*

³⁵ *Ibid*, pp. 11

adoption. There was also a critical need for ongoing supports for both adoptive and birth parents post adoption, including contributing to adoption breakdowns which have serious consequences for children and young people. Issues were also raised about the transparency of adoption outcomes, including adoption breakdowns and the narrow definitions applied that fail to consider the lifelong nature of these orders.

These issues, while unfolding in a different jurisdiction and context than adoption in Australia, are nevertheless illustrative of a range of concerns held by Aboriginal communities with respect to the adoption of their children. First, statutory authorities disproportionately impact on Aboriginal families and communities, and adoption in this context reinforces this inequality, particularly given the limited efforts on behalf of governments to overcome the broader structural and social disadvantage impacting Aboriginal families.

Second, despite the insistence of adoption advocates on the differences between past practices of 'closed' adoption and the 'open' standards today, there remain no meaningful avenues for birth families to hold adoptive families to adoption plans and contact agreements once an order is made. Rather, adoptive parents are free to unilaterally cancel contact arrangements, change the child's name and otherwise freely exercise full parental rights of the child without regard to the birth family or the child's identity. Children may therefore be raised in fundamentally similar circumstances to closed adoption, with limited or no contact with or knowledge of their birth parents. Similarly, cultural plans intended to foster connection to culture and community may not be implemented, denying Aboriginal children their fundamental human rights and access to a key factor to foster resilience and wellbeing.

Finally, similar concerns about the feeling of powerlessness and disempowerment of Aboriginal families within the system have been expressed over a long period of time. Aboriginal families have noted issues of moving goal posts and mystifying statutory processes that undermine their capacity to address the issues and preserve or restore their families. It appears a key theme of the above report is that the strong lobbying regarding the positives of adoption, and the power imbalances affecting already marginalised families contribute to a system that is focused on achieving adoption rather than providing supports to families and preserving, where possible, the child's right to their family.

With these points in mind, AbSec reflects on the points raised by Lord Justice McFarlane, giving the Bridget Lindley OBE Memorial Lecture in 2017, *Holding the Risk: the balance between child protection and the right to family life*³⁶. Lord Justice McFarlane emphasised the current dearth of evidence regarding the long term outcomes of contemporary adoption, given the lack of transparency in adoption practice and the absence of robust feedback and accountability measures post-adoption.

“Without sound, wide-ranging research as to outcomes, and without detailed individual feedback as to the progress of particular cases, it is difficult, indeed logically impossible, for judges to have confidence that the current balance between child

³⁶ Lord Justice McFarlane (2017) *Holding the Risk: the balance between child protection and the right to family life*, available: <https://www.judiciary.gov.uk/wp-content/uploads/2017/03/lecture-by-lj-mcfarlane-20160309.pdf>

protection and human rights, which favours a massive erosion of the right to family life because it is “necessary” to do so to protect the child, is indeed justified”³⁷

Adoptions of Aboriginal children from care have also been a focus of past practice for Indigenous children internationally. AbSec notes worrying parallels between the current advocacy of adoption from care for Aboriginal children and young people, including a focus on their adoption outside their family, community and culture, and the practice in Canada of the 1960s. While programs such as the Adopt Indian Metis Program in Saskatchewan during that period were focused on achieving permanent homes for First Nations children who would otherwise have remained in foster care³⁸, the impact was that many were removed from their families and communities and placed with non-Indigenous families. This practice had a devastating impact on First Nations children, their families and communities, which continue to be felt today and is subject to a proposed \$800m settlement to survivors. High breakdown rates were also reported, attributed to the “unique experience Indigenous children have in Canada encountering racist stereotypes and what they call the lack of support for white parents to be able to act as a buffer for their children”³⁹. More recently, governments are proposing more collaborative approaches alongside Indigenous people, shifting the orientation of the systems to prevention and preservation, and providing more authority to First Nations in child welfare, as well as strengthening data process⁴⁰.

The Way Forward

In short, AbSec does not support the use of adoption orders for Aboriginal children and young people as a collective within the current statutory child protection system. We assert that the unjust practices of the past must never again occur, and that the care and protection of Aboriginal children is best achieved through holistic processes embedded within community and culture.

Given the significant and enduring impact of adoption orders, and the significant risks they present to the rights, safety and wellbeing of Aboriginal children, AbSec and our communities have deep concerns regarding their use for Aboriginal children, particularly where administered by non-Aboriginal processes. Such processes, and the failure to appropriately consider the cultural rights of Indigenous children in child welfare practice continues to have a devastating effect on our children, families and communities. That is not to say that culture trumps other considerations of safety or relationships and attachment, but rather that it is our responsibility, as communities and governments, to uphold the best interests of Aboriginal children, which must be understood through a cultural lens. Orders that are unable to guarantee full enjoyment of these rights, and fail in our basic obligation to ensure that children and young people are safe and secure in those placements, cannot be considered to be in the best interests of Aboriginal children.

Aboriginal communities do not want to see paralysis and inaction in the safety, welfare and wellbeing of our children. Indeed, we demand action. But that action cannot simply be a

³⁷ *ibid*

³⁸ <http://www.cbc.ca/news/indigenous/creator-of-sixties-scoop-adoption-program-says-it-wasn-t-meant-to-place-kids-with-white-families-1.4584342>

³⁹ <http://www.cbc.ca/news/indigenous/finding-cleo-episodes-4-5-sixties-scoop-parents-1.4573034>

⁴⁰ <https://www.aadnc-aandc.gc.ca/eng/1516992510783/1516992531751>

restatement of past policies, a repeat of past mistakes. Our action must respond urgently to the needs of Aboriginal children, families and communities in a way that clearly demonstrates that governments have learned from past failures. In particular, governments must start listening to Aboriginal communities, through their own representatives, and providing greater authority to Aboriginal communities themselves about the design and delivery of services and systems, including the types of orders best suited to Aboriginal children and young people, founded on the principle of self-determination. These must be supported by robust data and oversight processes, driven by Aboriginal communities themselves. Aboriginal community controlled organisations, and their peak bodies such as AbSec, have developed and continue to refine frameworks for a holistic, culturally embedded Aboriginal child and family service system. The Family Matters Building Blocks and Roadmap provides a clear outline of the way forward. Governments must partner with and support these community-led solutions, matched with proportionate investment, rather than investing in government-led strategies that continue to fail.

While AbSec is not supportive of adoption for Aboriginal children and young people in out-of-home care, we agree that there is a need for significant reform to address the needs of Aboriginal children and young people, including the stability of important relationships that are developmentally important and promote the safety and resilience of Aboriginal children and young people. In fact, our opposition to adoption orders are directly related to the high value we place on enduring relationships, including to family, community and culture in promoting safety and lifelong wellbeing.

“Permanency measures tend to reflect an underlying assumption that a child in out-of-home care experiences a void of permanent connection that needs to be filled by the application of permanent care orders. This understanding is flawed in its failure to recognise that children begin their out-of-home care journey with a permanent identity that is grounded in cultural, family and community connections. This is not changed by out-of-home care orders. Inflexible legal measures to achieve permanent care may actually serve to sever these connections for Aboriginal and Torres Strait Islander children, in breach of their human rights, and break bonds that are critical to their stability of identity while they are in care and later in their post-care adult life”⁴¹

In our view, this future approach must be built on the foundational principles of self-determination (as outlined in *Bringing Them Home*), and the full implementation of the ATSICPP.

In the first instance, AbSec concurs with the Royal Commission that the best way to prevent institutional harm is to prevent their entry to the institution. The ATSICPP includes prevention as a core element. AbSec has advocated for a holistic, Aboriginal community controlled model that takes a public health approach, investing in communities to deliver tailored and culturally embedded universal, secondary and tertiary supports. AbSec notes that current investment is heavily skewed towards the out-of-home care system⁴², arguably both reflecting and contributing to the increasing numbers of children in out-of-home care. Significantly greater investment in

⁴¹ Queensland Aboriginal and Torres Strait Islander Child Protection Peak (2017) *Submission Response: Child Protection Reform Amendment Bill 2017*.

⁴² Report on Government Services (2018)

holistic Aboriginal child and family services is needed. Consistent with the ATSI CPP, the design and delivery of these services must be community controlled.

Where Aboriginal children must enter alternate care to ensure their immediate safety, the ATSI CPP again suggest the development of Aboriginal community-led approaches that appropriately safeguard the rights of Aboriginal children. These should include those mechanisms recommended by the Royal Commission as best practice in promoting the ongoing safety and wellbeing of children and young people placed in home-settings through the statutory system, including ongoing monitoring of placements, robust assessment of carers and ongoing monitoring thereof, the provision of specialised supports, training and trauma-informed care, and ongoing connection to family, community and culture. Legal orders that are unable to provide meaningful mechanisms for the monitoring and enforcement of the types of supports recommended by the Royal Commission are demonstrably not suitable, and not in the best interests of children and young people in need of care and protection.

AbSec further suggests that the recommendations of *Bringing Them Home*⁴³ be revisited, in partnership with SNAICC and other relevant Aboriginal community controlled organisations and peak bodies, to consider their implementation. Some of the approaches recommended in *Bringing Them Home* remain relevant and compelling today, almost 21 years later. This includes:

- the establishment of a social justice package of Indigenous families and children (Recommendation 42),
- the adoption of a binding national framework for self-determination regarding the wellbeing of Indigenous children, including the “transfer of legal jurisdiction in relation to children’s welfare, care and protection, adoption and/or juvenile justice to an Indigenous community, region or representative organisation” (Recommendation 43)
- the establishment of minimum standards of treatment of Indigenous children, including the presumption that the best interests of the child is to remain within their Indigenous family, community and culture, and that considerations of best interest must include the need to maintain contact with their Indigenous family, community and culture, adherence to the ATSI CPP and other provisions as relevant.

Bringing Them Home notes that adoption is to be considered a last resort, and must not be made unless it is in the best interests of the child. This is in the context of the consideration of best interests includes a presumption that Indigenous children are to remain within their Indigenous family, community and culture and are to maintain contact with their Indigenous family, community and culture. Further, this should also be understood within the context of the principle of self-determination, and the opportunity to transfer legal jurisdiction including for adoption to Indigenous mechanisms. Such an approach is broadly consistent with the *Indian Child Welfare Act* (ICWA) in the United States of America.

An additional consideration arising from ICWA is the concept of active efforts. Aboriginal community organisations including the Queensland Aboriginal and Torres Strait Islander Child

⁴³ Human Rights and Equal Opportunity Commission (1997) *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families.*, see: https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf

Protection Peak and AbSec have encouraged adoption of similar provisions within their respective jurisdictions. AbSec has recently embedded provisions closely related to and inspired by the active efforts provisions within ICWA into the draft Aboriginal Case Management Policy and Guidelines developed by AbSec in partnership with Family and Community Services and the sector⁴⁴.

Briefly, the active efforts provisions require that decisions regarding Indigenous children, and particularly long-term care orders, must demonstrate that “active efforts” have been undertaken to achieve the preservation or restoration of children with their family. Active efforts are defined in the regulations and guidance materials⁴⁵. Specifically, active efforts are “affirmative, active, thorough and timely”, and must include active assistance through the steps of a case plan towards preservation or restoration, and provided consistent with the prevailing social and cultural conditions of the child’s community, and in partnership with the family, extended family, and community.

1. *“Conducting a comprehensive assessment of the circumstances of the Indian child’s family, with a focus on safe reunification as the most desirable goal;*
2. *Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;*
3. *Identifying, notifying and inviting representatives of the Indian child’s Tribe to participate in providing support and services to the Indian child’s family and in family team meetings, permanency planning, and resolution of placement issues;*
4. *Conducting or causing to be conducted a diligent search for the Indian child’s extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child’s parents;*
5. *Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child’s Tribe’*
6. *Taking steps to keep siblings together whenever possible;*
7. *Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety and welfare of the child;*
8. *Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child’s parents or, when appropriate, the child’s family, in utilising and accessing those resources;*

⁴⁴ See www.absec.org.au for relevant information. The Aboriginal Case Management Policy and Rules and Practice Guidance are in their final stages of development with preparations for implementation.

⁴⁵ See Bureau of Indian Affairs (2016) *Guidelines for Implementing the Indian Child Welfare Act*, US Department of the Interior

9. *Monitoring progress and participation in services;*
10. *Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;*
11. *Providing post-reunification services and monitoring*"⁴⁶

Conclusion

Adoption orders lack critical safeguards and oversight mechanisms to uphold the best interests of Aboriginal children and young people in out-of-home care. This includes critical features such as those recommended by the *Royal Commission into Institutional Responses to Child Sexual Abuse* intended to mitigate the inherent risks of home-based care environments for children deprived of their family, and in need of trauma-informed care to promote healing. Experiences of adoption in the UK, as well as experiences of the forced removal of Indigenous children from their families, communities and culture, both here and abroad, emphasise the limitations and risks of adoption as an approach to out-of-home care, and the risks conferred to already vulnerable children and young people by this approach.

Aboriginal children and young people who are deprived of their families for their own care and protection need, and are entitled to, specialised care and ongoing supports. This responsibility cannot be deferred. There must be transparency and accountability, including ongoing periodic review of their placement and treatment, and ongoing support to meet their developmental and cultural needs. Legal orders that are unable to provide these safeguards are, by definition, not fit for purpose, and not in the best interests of Aboriginal children and young people.

The presence of stable and enduring caring relationships is essential for development. If Aboriginal children in out-of-home care are to thrive, we must foster such relationships and connections to family, community and culture, recognising it as a source of strength. These connections should not be pruned back by statutory child protection intervention, but rather nurtured and strengthened to provide the firm foundations for future growth. Aboriginal communities themselves are best placed to develop and implement such approaches, consistent with the principle of self-determination. AbSec urges governments to engage with Aboriginal peoples, through their community controlled organisations and relevant peaks and other representative bodies to develop an appropriate permanency framework for Aboriginal children and young people, and support Aboriginal communities to implement it.

This framework will likely embed the ATSICPP into the very foundations of Aboriginal child and family systems, drawing from existing evidence and recommendations including those in *Bringing Them Home*, as well as international experiences such as the 'active efforts' provisions in the *Indian Child Welfare Act*. Not only will such provisions and associated investment in Aboriginal community controlled holistic services be more likely to effectively divert "at risk" Aboriginal children and families from entry to the statutory system in the first instance, but will also contribute to the effective and sustained restoration of Aboriginal children to their families. Such an approach is consistent with the best interests of Aboriginal children and young people, and

⁴⁶ 25 CFR §23.2, quoted in Bureau of Indian Affairs (2016) *Guidelines for Implementing the Indian Child Welfare Act*, US Department of the Interior, pp. 41-42

remains long overdue. Without meaningful structural change, the number of Aboriginal children deprived of their family environment by statutory child protection authorities (regardless of the type of order they are placed on) is likely to triple by 2035⁴⁷.

⁴⁷ See www.familymatters.org.au