



Family is Culture: Independent Review of Aboriginal and Torres Strait Islander Children and Young People in OOHC in NSW

December 2017



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

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Introduction

The Aboriginal Child, Family and Community Care State Secretariat (AbSec) welcomes the opportunity to contribute our views, on behalf of our members and stakeholders, to the Independent Review of Aboriginal and Torres Strait Islander Children and Young People in out-of-home care. AbSec is the peak Aboriginal child and family organisation in NSW, and has a mandate to advocate for the rights of Aboriginal children, families and communities. AbSec would like to take this opportunity to acknowledge the many Aboriginal community voices across NSW, who have continued to call for greater accountability and oversight of the statutory child protection system and its disproportionate impact on Aboriginal children, their families and communities. It is our sincere hope that this review will articulate a clear way forward for structural and systemic change in NSW, achieving a child and family system that is focused on the needs of Aboriginal children and families, and accountable to Aboriginal communities for the outcomes it achieves for our most vulnerable families. Without such structural change, any practice improvements are likely to remain superficial in impact, and the number and rate of Aboriginal children being removed from their families through the statutory system will continue to rise.

NSW can do better for our vulnerable children and families. We must do better.

In this submission, AbSec will briefly outline some of the key challenges within the current statutory system that have a disproportionate and adverse impact on Aboriginal children and young people. We will then respond to the three issues of focus identified by the independent review:

1. The reasons for the high and increasing rates of Aboriginal and Torres Strait Islander children and young people in OOHC in NSW;
2. The application of the Aboriginal and Torres Strait Islander Child Placement Principles in NSW; and
3. Strategies to reduce the number of Aboriginal and Torres Strait Islander children and young people currently in OOHC and entering care in NSW, including improving pathways to family reunification

We have attached to this paper other recent submissions and papers on related issues that provide more in-depth discussions of some key areas of interest.

Background

Aboriginal and Torres Strait Islander children and young people continue to be over-represented in the Australian out-of-home care system. Aboriginal children and young people in NSW were 7 times more likely to be receiving a child protection service relative to their non-Aboriginal peers, 7.8 times more likely to be subject of a substantiation of abuse or neglect, 9.9 times more likely to be the subject of care and protection orders, and 10.4 times more likely to be in out-of-home care¹. Put simply, not only are Aboriginal children over-represented across the statutory child protection system, but their over-representation

¹ Australian Institute of Health and Welfare (2017) Child Protection Australia Report 2015/16, available: <https://www.aihw.gov.au/reports/child-protection/child-protection-australia-2015-16>

grows as we look to more intensive and intrusive interventions. This may suggest that current efforts of the system to intervene early and prevent escalation of risk are less effective for Aboriginal children and young people and their families than they are for their non-Aboriginal peers.

Furthermore, data shows Aboriginal children who were the subject of a substantiation tended to come from those areas of the lowest socioeconomic status (49%), compared with 33% for their non-Aboriginal peers, suggesting that vulnerability for Aboriginal children is closely related to the socioeconomic marginalisation of Aboriginal families and communities. Aboriginal people, collectively, are more likely to have poorer outcomes across the domains of health, housing, education, socio-economic, wellbeing) and are over-represented across a number of service systems (including justice, health, disability and child protection), arising from the legacy of past forced separations.

Of significant concern, the over-representation of Aboriginal children and young people deprived of their family through the statutory system continues to rise. At the time of *Bringing Them Home*, a watershed report in the Aboriginal child and family welfare field, there were 829 Aboriginal children and young people in OOHc in NSW at a rate of 26 per 1000 Aboriginal children². Twenty years after the publication of *Bringing Them Home*, there are now more than 6600 Aboriginal children in care, at a rate of 71 per 1000.

It would seem that not only are current systems disproportionately ineffective, but are fundamentally failing to address the underlying issues contributing to the over-representation of Aboriginal children and families within the statutory system.

Significant systemic change is needed to align the system to the needs of Aboriginal children and young people, their families and communities. Such changes must create a system that is locally responsive and culturally embedded, tailored to the specific and dynamic needs of discrete communities. From a systems level, our responsibility is to support the establishment of robust local mechanisms, to provide needs-based investment at the local level, and to monitor outcomes and share evidence across communities, informing their ongoing efforts to improve outcomes and opportunities for Aboriginal children and young people to thrive.

In line with *Bringing Them Home*, the fundamental failure of the NSW Government in this respect over the last twenty years has been the failure to enshrine genuine Aboriginal self-determination into the child and family system. Self-determination is distinct from both consultation and participation, reflecting the collective right of Aboriginal communities to make decisions, through their own processes, and carry them through to implementation³. Despite a legislative mandate to empower Aboriginal communities to participate “with as much self-determination as possible”⁴, genuine Aboriginal decision making carried through

² Note – while published in 1997, *Bringing Them Home* refers to data from 1993.

³ *Bringing Them Home*

⁴ Section 11, *Children and Young Persons (Care and Protection) Act 1998*

to implementation is not currently a feature of the NSW child and family system, and is not meaningfully supported by NSW Government.

To be clear, the reluctance to empower Aboriginal voices, established through our own collective community processes, on matters that affect our children, families and communities, is not unique to the NSW statutory child protection system. Governments at both the state and federal level remain reluctant to support Aboriginal community proposals for systemic change to empower our collective voices. Further, the NSW Government has made some efforts, through the OCHRE strategy, to support Local Decision Making, however these are not currently a feature within the statutory child protection system. Rather, paternalistic approaches endure, and continue to achieve the same lacklustre and indeed damaging results as those administered through the *Aborigines Protection Act* a century ago.

It is long past time to genuinely empower Aboriginal communities to determine the services needed in their communities to support children and their families to thrive.

As the Aboriginal child and family peak body in NSW, AbSec has in recent years endeavoured to articulate a holistic Aboriginal child and family service system, including local community governance structures and a state-wide safety-net of Aboriginal service providers, ensuring access to effective and culturally embedded services for all Aboriginal children and their families. We continue to advocate for such a system to be realised in NSW, through the establishment of an Aboriginal commissioning and oversight body, and adequate investment in Aboriginal community capacity building and service delivery.

The reason for the high and increasing rates of Aboriginal and Torres Strait Islander Children and Young People in OOHC in NSW

Various factors contributing to the high and increasing rates of Aboriginal and Torres Strait Islander children and young people in out-of-home care in NSW have been identified. For example, the recent Australian Institute of Health and Welfare *Child Protection Australia Report 2015/16* notes:

The reasons for the over-representation of Indigenous children in child protection substantiations are complex. The legacy of past policies of forced removal, intergenerational effects of previous separations from family and culture, a higher likelihood of living in the lowest socioeconomic areas, and perceptions arising from cultural differences in child-rearing practices are all underlying causes for their over-representation in child protection services (HREOC 1997). Drug and alcohol abuse and family violence may also be contributing factors (Scott & Nair 2013). Aboriginal children are also over-represented in other areas related to child safety, including hospital admissions for injuries and assault; experiences of homelessness; and involvement in the youth justice system (AIHW 2014b).⁵

⁵ Australian Institute of Health and Welfare (2017) *Child Protection Australia Report 2015/16*

Similarly, the recent Parliamentary Inquiry into Child Protection explored factors including entrenched systemic cultural bias, lack of access to prevention and early intervention services and mistrust of the statutory system, inadequate implementation of the Aboriginal and Torres Strait Islander Child Placement Principles (discussed in the subsequent section), and a lack of culturally appropriate tools and resources across the sector. In our view, each of these factors contribute to the high and increasing rates of Aboriginal children and young people in OOHC, and the poorer outcomes achieved for Aboriginal children and young people deprived of their family environment.

To address these shortfalls, a fundamentally different approach to Aboriginal child and family welfare is needed. A public health approach to child protection.

“one of the things they teach you in public health school, is that if you’re a doctor, and you see 100 kids that all drink from the same well, and 98 of them get diarrhoea, you can go ahead and write that prescription for dose after dose after dose of antibiotics, or you can walk over and say “what the hell is in this well?””⁶,

This public health approach has significant implications for the statutory child protection system, particularly given the established link between chronic childhood trauma and poorer health and wellbeing outcomes⁷, and must be front and centre of our system design in order to achieve better outcomes for children and young people. The NSW Government continues to prescribe out-of-home care in ever increasing numbers, without significant focus on the factors contributing to the incidence of risk of harm in the first instance – growing inequality and marginalisation, the impacts of poverty, and a failure to invest in supports and healing initiatives for individuals, parents and communities. For example, less than 20% of the child protection budget is dedicated to family support and intensive family support service⁸. While AbSec acknowledges recent investment of \$90million over 4 years in intensive family support models, this investment reflects approximately 1% of all annual child protection expenditure. Further, despite Aboriginal children representing between 21% and 38% of the statutory system (depending on the which segment of the continuum is the focus), less than 10% of all investment is directed toward the needs of Aboriginal children and young people and their families through community controlled processes.

Given that holistic Aboriginal child and family services tailored to the specific needs of their communities are chronically underfunded, and the absence of robust Aboriginal oversight and accountability mechanisms, it is of little wonder that the current system continues to achieve such poor outcomes for Aboriginal children and their families. Further, eligibility for preventative and early intervention approaches have been expanded to include preservation for those on guardianship orders, emphasising that the supports withdrawn as part of the

⁶ Dr Nadine Burke Harris (2014) *How childhood trauma affects health across a lifetime*, presentation at TEDMED 2014, available:

https://www.ted.com/talks/nadine_burke_harris_how_childhood_trauma_affects_health_across_a_lifetime/transcript#t-226368

⁷ See for example the Adverse Childhood Experiences study, available at:
<https://www.cdc.gov/violenceprevention/acestudy/index.html>

⁸ Australian Government Productivity Commission (2017) *Report on Government Services 2017*

existing permanent care model is presenting additional challenges for children and young people. The importance of relationship stability for the immediate and long term wellbeing of children and young people is well established, and AbSec and accredited Aboriginal agencies continue to work hard to strengthen relationship stability for children in care. However, it is clear that withdrawing out-of-home care supports through the use of permanent legal care orders such as guardianship orders places additional strain on an already under-resourced prevention and early intervention service system, reducing the capacity of critical family preservation and restoration services.

Even more concerning, proposed legislative changes have focused on further reducing the safeguards that do exist by accelerating the use of permanent legal care orders which represent significant risks to Aboriginal children, and are contrary to the Aboriginal and Torres Strait Islander Placement Principles. The focus continues to be on applying band-aid approaches to deeply entrenched, structural issues. In a recent submission to that process, AbSec argued to strengthen safeguards for Aboriginal children, families and communities, ensuring Aboriginal family participation and Aboriginal community oversight of decision making processes across the continuum of support to ensure that the rights of Aboriginal children were upheld. In doing so, AbSec is seeking to shift the current approach from one that is focused only on “dose after dose after dose” of statutory intervention, to one that addresses the fundamental issue of the well of poverty, disadvantage and intergenerational trauma that disproportionately impacts on the safety, welfare and wellbeing of Aboriginal children and young people, their families and communities.

AbSec has called for a public health approach to child and family welfare, with significantly greater investment in universal and targeted services designed and delivered by Aboriginal communities⁹. Based on the evidence-based principles of child development, self-determination and the protective value of culture, AbSec continues to develop this model. At its heart, it seeks to empower local Aboriginal communities to design and deliver the services they need, aligned to agreed high level outcomes, and to measure their impact. In building this local evidence-base, Aboriginal communities will be able to share outcomes, working collaboratively across the state to continually improve local approaches, and thereby improve outcomes state-wide. This model includes an Aboriginal commissioning for outcomes approach, and the establishment of an oversight and accountability framework to ensure effective service delivery and improve performance, elements that have been sorely missing from the current system.

At the practice level, this will include the development and validation of culturally appropriate tools, to ensure that decision making is driven by valid assessment of the issues at hand. Oversight mechanisms will provide clear line of sight to ensure that the rights of Aboriginal children are upheld and that statutory obligations with respect to participation in decision making¹⁰ are met.

⁹ AbSec (2016) *Achieving a holistic Aboriginal child and family system for NSW*.

¹⁰ Section 12, *Children and Young Persons (Care and Protection) Act 1998*

The application of the Aboriginal and Torres Strait Islander Child Placement Principles in NSW

In AbSec's view, and from our engagements with Aboriginal people and their organisations, the failure to fully comply with the Aboriginal and Torres Strait Islander Child Placement Principles remains a significant concern. In particular, there appears a significant misunderstanding about the fundamental nature of the Aboriginal and Torres Strait Islander Child Placement Principle, which is often reduced to a simple placement hierarchy, rather than understanding its role in safeguarding Aboriginal children and recognising that Aboriginal people themselves are best placed to make decisions about the safety, welfare and wellbeing of Aboriginal children¹¹.

Even in the context of this significantly reduced understanding and responsibility, compliance is unacceptably low, with worrying trends towards that place Aboriginal children at risk of disconnection from their family, community and culture, and undermine the full enjoyment of their rights.

The Aboriginal and Torres Strait Islander Child Placement Principle is intended to preserve Aboriginal children's connection to their family, community and culture, in line with their rights, and in response to the devastating impacts of forced removals as part of government policy. The Principle is understood as referring to five elements: prevention, partnership, placement, participation, connection. These principles are interrelated and interdependent. As such, there is no "partial compliance" – all elements must be present. For example, placement decisions cannot be meaningfully made by engaging with and supporting the full participation of families, and should be supported through processes established by Aboriginal communities through partnership with Family and Community Services. By upholding each of these elements in practice, better decisions will be made about the immediate and long-term safety, welfare and wellbeing of Aboriginal children and young people.

The relevance and importance of the Principle is recognised in many inquiries and/or reviews into the child protection and justice systems. While elements of the Principle is reflected in legislation and policy in NSW (for example s.11-13, and provisions for cultural planning), Aboriginal people and organisations have significant concerns about its implementation practice. While no comprehensive data exists in NSW, research in other jurisdictions demonstrate that few cases comply with this full conceptualisation¹².

Prevention

While there has been a recent shift broadly through *Their Futures Matter* to strengthen investment in prevention, this has been largely directed to two international models with no evidence of their effectiveness or even suitability for Aboriginal families and communities.

¹¹ Tilbury, C., Burton, J., Sydenham, E., Boss, R., and Louw, T. (2013) *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and core elements*. Melbourne, Secretariat of National Aboriginal and Islander Child Care (SNAICC).

¹² Commission for Children and Young People and Child Guardian (2013) *Indigenous Child Placement Principle: Audit Report 2012/13*, The State of Queensland

Rather than engaging with Aboriginal communities to identify potential approaches, FACS have chosen to impose these models, in a top-down, one-size-fits-all approach, placing Aboriginal communities desperate for investment in family supports to address the over-representation to participate in the implementation of these models, or to have them implemented without their participation at all. Rather than empowering communities to engage with the evidence, and their own knowledge and expertise of their families and communities, to implement those solutions that are most likely to meet their needs, approaches continue to be externally imposed. The approach continues to try to fit communities to models, rather than build models for, and indeed from, communities. In this way, the approach reflects the lower bar of “participation” rather than self-determination for Aboriginal communities.

Further, as noted above, the scale of this investment is small relative to total expenditure, and is at risk of being placed under additional strain of supporting children on permanent care orders such as guardianship, following the removal of critical ongoing supports and safeguards that characterise these orders. AbSec calls for an injection of significantly greater investment in Aboriginal communities to design, deliver and monitor the effectiveness of community-led, evidence-informed approaches, building a local evidence base that is tailored to the needs of our communities. As these approaches demonstrate their effectiveness, a reinvestment strategy could be used to further invest in prevention and early intervention, accelerating their impact. It is acknowledged that some work has been completed in partnership between AbSec, Bamba Baa Aboriginal Children’s Service and FACS to establish an expanded Aboriginal intensive family support service, drawing on the expertise of Aboriginal intensive family based services and Protecting Aboriginal Children Together practitioners. If supported, this model represents a significant opportunity to reshape the Aboriginal child and family service system in Moree and surrounding areas. Further, AbSec calls for additional safeguards and specialised supports to be provided to Aboriginal children placed through the statutory system, regardless of the type of order, fulfilling our ongoing obligations to children removed from their families, and reducing the burden on an already under-resourced early intervention and prevention service system.

Partnership:

Partnership refers to the need for Aboriginal community representatives, external to the statutory authority, to participate in all decisions that impact on children and young people. In AbSec’s view, this includes the right to self-determination, as well as providing input and oversight of the implementation of these systems.

While self-determination is enshrined in legislation, it continues to be largely absent from the system, and indeed it seems that FACS do not have a clear understanding of self-determination. Rather, FACS conflate participation of families, within highly constrained parameters imposed by FACS, with Aboriginal self-determination, which refers to the collective right of Aboriginal communities to make decisions and carry them through into implementation.

There is limited genuine effort to empower Aboriginal people at the collective community level to design, deliver and oversee the systems and processes that impact on their children

and families. Even efforts to strengthen this voice, such as the Guiding Principles, have been unnecessarily constrained by imposed parameters of what is, and what is not, in scope. AbSec reiterates the message of *Bringing Them Home*: “to respect the right of self-determination, governments should confine their roles largely to providing financial and other resource support for the implementation of Indigenous programs and policies.” To this end, AbSec has proposed the establishment of a suitably resourced Aboriginal commissioning body, to empower local communities to invest in services and supports aligned to agreed high level outcomes.

It is worth noting that partnership is displayed in some areas, and these opportunities should be expanded upon. For example, FACS have recently engaged AbSec to develop a distinct Aboriginal Case Management Policy and Guidelines, which is nearing completion. This Policy will include local Aboriginal community controlled mechanisms for oversight and community participation in decision making, and strengthened use of Aboriginal family-led decision making models, supported by community controlled processes and facilitators. If implemented well, and properly resourced, this policy seeks to integrate many of the Aboriginal and Torres Strait Islander Placement Principles into practice across the service system. However, it is noted that policy change is insufficient, and broader systemic change is needed in order to establish an effective Aboriginal child and family system.

Placement:

Placement decisions of Aboriginal children must be driven by their families, through community-led processes and valid assessments, and oriented towards preventing family breakdown so that children remain connected to, and embedded within, their family, community and culture, for their lifelong wellbeing. There are no adequate systems to support this practice. In particular, it is concerning that over the last decade, the proportion of Aboriginal children placed with relatives has dropped more than 11%, from 68.7% to a deeply concerning 57.6%. The proportion of Aboriginal children placed with Aboriginal carers (including non-relative foster carers) is similarly in freefall, from 78% in 2006/07 to 65.4% in 2015/16 (AIHW). This is particularly concerning given the coordinated push from the NSW Government to increasingly make legal permanent care orders for children and young people in care. These statistics demonstrate that Aboriginal children remain at risk of disconnection from their family, community and culture, through inadequate application of the child placement principle and the imposition of legal permanent care orders despite the widespread opposition of Aboriginal communities. Further safeguards are needed to ensure that placement decisions, and indeed all decisions, are made through appropriate processes established by Aboriginal communities themselves, with Aboriginal families supported to participate. As noted above, this demonstrates the interdependent nature of these principles.

Participation:

As noted above, there are no consistent mechanisms to drive accountability with respect to the participation of Aboriginal families (including importantly young people themselves) in decisions about the safety, welfare and wellbeing of Aboriginal children and young people.

Despite a clear legislative obligation¹³, implementation of this principle remains a significant concern. While there have been efforts to move to more participatory practice approaches, including Family Finding and the use of Family Group Conferencing, such practice changes must be supported by structural changes that improve access to Aboriginal community controlled approaches. It is notable, for example, that despite a commitment to expanding access to Family Group Conferencing, FACS have nevertheless undermined an Aboriginal community controlled approach in favour of FACS administered approaches. Independent facilitation of Aboriginal family-led decision making processes is a key feature to empowering the voices of Aboriginal families and ensuring their voices are not co-opted or marginalised by the more powerful statutory system. By delivering family group conferencing through a FACS-administered process, these adverse outcomes become more likely. In AbSec's view, facilitation of Aboriginal family-led decision making processes, regardless of the model, must rest with Aboriginal community controlled organisations, ensuring direct accountability for the outcomes achieved. In doing so, structures will support the voices of Aboriginal children and families being at the heart of case planning and decision making.

This is a feature of the Aboriginal Case Management Policy that is currently in the final stages of development, and it is our hope that this new approach is fully implemented and properly resourced to drive genuine change for Aboriginal children and families.

Connection:

AbSec is concerned about the decline in the proportion of Aboriginal children being placed with Aboriginal households, and the ever-present risks of loss of Aboriginal children's connection to their family, community and culture. As noted above, the shift towards legal permanent orders and the absence of meaningful safeguards to ensure that Aboriginal families and communities participate in decisions, and that the rights of Aboriginal children to ongoing connection with their family, community and culture are upheld, or at odds with the Aboriginal and Torres Strait Islander Placement Principles. The fundamental rights of Aboriginal children to their family, community and culture must not be 'traded' for legal permanency as a solution to reduce the OOHc population. Rather, accountability across the system for upholding the inalienable rights of children and operating in their best interests is essential to a rights-based child protection system.

AbSec is pleased to note recent work being undertaken to improve cultural planning through Children's Court processes. While it is perhaps too early to measure impact, there is an emphasis on the need for oversight and quality assurance mechanisms placed within community. There is a need to improve systems to ensure Aboriginal children and their carers are provided with the supports they need to exercise full enjoyment of the rights of Aboriginal children in OOHc. There is also an imperative to improve practice so that children are able to remain safely within their family and community in the first instance, and if removed, are able to return safely as soon as possible. This is how AbSec considers stability

¹³ Section 12, *Children and Young Persons (Care and Protection) Act 1998*

for Aboriginal children, specifically continuity of family relationships and culture, is best achieved for Aboriginal children.

It is disappointing that, despite legislative mandate for many of these elements, it is not applied consistently, undermining the unquestionable rights and lifelong wellbeing of Aboriginal children and young people. In AbSec's view, there is a pressing need to further strengthen legislative safeguards for Aboriginal children and families, through the establishment of an Aboriginal body to provide practice guidance and oversee efforts to implement a full understanding of the ATSICPP into practice.

Strategies to reduce the number of Aboriginal and Torres Strait Islander Children and Young People currently in OOHIC and entering care in NSW, including improving pathways to family reunification

The challenges facing this sector have been known for some time. Twenty years ago, the *Bringing Them Home* report made 54 recommendations to address the enduring impacts of forced removals. Many of these key recommendations, including the importance of Aboriginal self-determination, have been reiterated by subsequent reviews. However, these recommendations have largely not been implemented.

As noted above, AbSec has put forward a number of proposals for system and practice reform to reduce the number of Aboriginal children entering care in NSW, and to better support pathways for family reunification. Unfortunately, we have received limited support for these initiatives from the NSW Government. It appears that community-led approaches to strengthen families and work towards family reunification are at odds with a broader agenda to reduce the number of children in OOHIC largely through exits to guardianship and adoption. AbSec remains opposed to legal permanent care orders as they currently stand given the lack of meaningful safeguards for Aboriginal children and young people¹⁴.

As noted a number of times in this paper, AbSec has previously articulated a holistic Aboriginal child and family service system for NSW. This paper will be attached to this submission for information. Briefly, however, this model is informed by three foundational principles:

- Investment in the early environment and relationships of children and young people, particularly their families and communities, create an environment in which children can thrive
- Aboriginal families and communities are best placed to develop and deliver the services and support that Aboriginal children and families need, with approaches that empower communities and reflect our right to self-determination likely to be most effective at creating genuine and lasting change

¹⁴ AbSec (2015) *Guardianship Orders for Aboriginal children and young people*, available at: <https://www.absec.org.au/images/downloads/Guardianship-Orders-Position-Paper-November-2015.pdf>

- Culture represents a significant positive factor for Aboriginal children, families and communities, providing a strong foundation for the development of community and targeted family solutions to support vulnerable Aboriginal children and families.

This model further articulates the relationships between Aboriginal communities and other government stakeholders and regulatory bodies, aligned to high level goals, while remaining agnostic to the programs and approaches to achieve these outcomes. Rather, communities themselves will be equipped with the tools and resources, including local data, that they need to drive continuous improvement of the local service system. This model includes the development of Aboriginal community governance bodies at the local level as well as a state body to provide centralised support, guidance, advocacy and oversight, improving the capacity and capabilities of communities to be as effective as possible in service of their communities. A state-wide safety net of services will deliver a public health approach to child and family welfare, providing integrated services at the community, family and individual levels, to address issues early and prevent harm to children. The integrated response will ensure that service intensity is responsive to the changing needs of families, including responding to crises and setbacks.

Further work articulating the Aboriginal Community Response (universal) and Aboriginal Family Strengthening (secondary) service levels have also been attached to this submission. These papers provide a framework for services across these two important segments of the continuum of support. While the specific approaches may vary in form or implementation from community to community, these papers outline key principles and features to ensure that local approaches are appropriately targeted, integrated and accountable to communities.

Building on this work, AbSec have recently recommended a state-wide commitment to the *First 1000 Days Australia* model as a key universal support to give Aboriginal children the best possible start to life, supported by their family and community. This is particularly important given reduced access to maternal health, particularly in regional and remote areas of NSW.

In particular, the Aboriginal Family Strengthening service levels includes a focus on family preservation and restoration, working intensively with families to meet the needs of their children. AbSec recognises that Aboriginal children are less likely to return to their families, and that effective restoration work requires complex and coordinated work across a range of factors¹⁵. AbSec's approach reflects a system focused on strengthening Aboriginal families, keeping Aboriginal children safe at home and preventing the need for entering the out-of-home care system. Further, a transformed child protection system focused on reducing the overrepresentation of Aboriginal children and young people in the out-of-home care system would also seek to successfully reunify or restore Aboriginal children and young people to their families where it is safe to do so. Such a system would therefore characterise out-of-home care as an identified opportunity for intensive family work, addressing persistent

¹⁵ Prasad, N. and Connelly, M. (2013) Factors that affect the restoration of children and young people to their birth families, Transition Program Office, NSW Family and Community Services

risks while ensuring the immediate safety of children and young people, preferably through the involvement of extended family networks and existing relationships.

This model seeks to empower Aboriginal communities to play a far greater role in the provision of restoration supports, allowing Aboriginal children to return home safely as soon as possible. Models such as the Aboriginal Intensive Family Based Services Plus approach being developed for implementation in partnership with Bamba Baa Aboriginal Children's Services in Moree represent the types of models that may better orient the system towards such outcomes.

In order to achieve this vision, AbSec has recently recommended the establishment of an Aboriginal commissioning and oversight body, with localised panels to drive decision making at the community level supported by a state-wide body. While the model for such an approach must be established through comprehensive community consultation, it is worth noting that similar approaches to Aboriginal decision making have been proposed by the NSW Government in the area of culture and heritage. AbSec suggests that this rationale be extended to the child and family system.

This element was proposed in AbSec's submission to the proposed legislative reforms, *Shaping a Better Child Protection System*. That submission has been attached in full, however the proposals for strengthened safeguards outlined in the final section have been reproduced below – Legislative safeguards for Aboriginal children and young people.

Further, AbSec is currently developing an Aboriginal commissioning for outcomes paper to support the implementation of this model. This paper is expected to be ready for circulation within Aboriginal communities from early 2018.

This vision is further supported by initiatives to strengthen Aboriginal community capacity to deliver services and supports such as the Aboriginal Industry Development Strategy, and the development of Aboriginal-led policies, tools and resources to guide practice with Aboriginal children and families. Some examples have been noted within this paper, including the Aboriginal Case Management Policy, and recent work regarding cultural planning. However, a key note that AbSec heard clearly from stakeholders during consultations about the Aboriginal Case Management Policy, is that a policy is only as worthwhile as its implementation, and there is a distinct need for ongoing Aboriginal oversight to support full implementation. The Aboriginal and Torres Strait Islander Placement Principles provide a case in point – an important policy initiative that, decades later, still enjoys almost universal support from Aboriginal communities, but where implementation has significantly undermined outcomes for Aboriginal children and young people. AbSec feels it is critical that all such initiatives are overseen by a relevant Aboriginal body, including implementation of any recommendations arising from this review.

Legislative safeguards for Aboriginal children and young people

In this section, AbSec will propose a number of key safeguards that are essential to efforts aimed at achieving better outcomes for Aboriginal children, families and communities. These safeguards must be enshrined within legislation as a first step to addressing the current crisis

and not repeating the disastrous past practices that created the Stolen Generations, and ensuing intergenerational trauma within Aboriginal communities.

In addressing the unacceptable over-representation of Aboriginal children and young people and their families across the statutory child protection system, we must reflect on our past practices and learn from our history. Fundamentally, these past actions reflected paternalistic approaches to Aboriginal people by the New South Wales (and other States, Territories and Federal) government, including segregation, protection, absorption and assimilation.

Establishment of an Aboriginal Statutory Body

In order to deliver on the principle of Aboriginal self-determination, AbSec proposes the establishment of a statutory Aboriginal body within the child and family sector. This body would be empowered through legislation to undertake the following key roles within the child and family system, enshrining the principle Aboriginal self-determination into practice:

- Genuine commissioning for outcomes for Aboriginal child and family services through Aboriginal community controlled mechanisms across government departments for an integrated service response, as well as investing in areas of need to address child welfare, wellbeing and protection matters.
- Establish and apply Aboriginal-led standards for services delivered to Aboriginal children, families and communities
- Investing in and supporting local Aboriginal communities to design Aboriginal child and family services in partnership with Aboriginal community controlled organisations, aligned to those standards, and
- Overseeing the conduct of, and outcomes achieved by the service system for Aboriginal children, their families and communities, reporting these directly to Aboriginal communities – including the ongoing monitoring, systemic improvement and practice development of the NSW Government in delivering their child protection statutory functions

In commissioning Aboriginal child and family services, this statutory body will have the capabilities to support Aboriginal communities to engage with the international evidence as well as building a local evidence base to support Aboriginal communities to continually refine services and supports. Approaches proving effective elsewhere can be shared, allowing local communities to make informed and evidence-based decisions about the local service system and drive innovation and learning across the network of communities. Similarly, key learnings from systemic reviews will further support all parts of the system to best meet the needs of Aboriginal children and their families.

Key to this commissioning model is the equitable resourcing and investment of services and supports targeted to the needs of Aboriginal children and families. The recent AbSec State-wide Conference was told that, while Aboriginal children and families represent between about 20% and 40% of the statutory system (depending on which point of the continuum one refers to), less than 10% of investment is directed towards Aboriginal children and families through community-led approaches that are most likely to effectively support Aboriginal children and young people. This appears to be reflected in the recent statistics which show

a considerable reduction in the rate of children entering care (year on year) for non-Aboriginal children, but not Aboriginal children. Clearly, the existing service system is under-resourced and poorly targeted with respect to Aboriginal children and young people, their families and communities, and is failing this cohort as a result. This inequitable investment must be addressed, and can be addressed through an Aboriginal commissioning approach.

Aboriginal statutory bodies already exist within NSW, including the Aboriginal Housing Office and NSW Land Councils. AbSec would anticipate that a child and family Aboriginal statutory body would likewise have key elements of Aboriginal governance and accountability to community, promoting transparency and confidence in the statutory child protection system, as well as offering an avenue for advocacy and inquiry.

As one pertinent example, AbSec notes the model currently proposed by the NSW Government in ongoing consultations with respect to the legal frameworks to protect, manage and celebrate Aboriginal cultural heritage in NSW. According to *A proposed new legal framework: Aboriginal cultural heritage in New South Wales*, a statutory Aboriginal Cultural Heritage Authority would be established to make decisions, informed by local consultation panels. The role of the ACH Authority would be to:

- Administer the new legal framework
- Make key decisions, including the formation of local ACH consultation panels, and approving plans
- Providing advice on the operation of the new Act
- Developing and adopting operational policies, guidelines and codes of practice in fulfilling its requirements.

The ACH Authority would be made up of Aboriginal members appointed by the Minister, with expertise in relevant areas and relevant cultural authority.



Figure 3: Proposed new governance structure for Aboriginal cultural heritage.

The paper notes that the final form of the authority would be established in partnership with Aboriginal communities.

Similar principles could apply in the child and family system, with NSW showing genuine leadership nationally. A state-wide Aboriginal statutory body could be established, including commissioning responsibilities as well as establishing local Aboriginal community controlled mechanisms and providing advice and guidance with respect to relevant issues, including but not limited to guidelines for proactive efforts, involvement in decision making and distribution of evidence and best practice to inform local communities. This authority would be led by an appointed board of Aboriginal people through an appropriate process, ensuring relevant expertise, experience and authority for community confidence in the body. This body would also have review powers to ensure the best interests of Aboriginal children and young people are being upheld across the statutory system, from their cultural and social perspective.

Local Aboriginal community controlled mechanisms would be endorsed by this body, ensuring that such mechanisms were appropriately constituted. Endorsed local bodies would be empowered to appear *amicus curae* in local matters and oversee local systems, including endorsing plans established between Aboriginal families and FACS where appropriate, and ensuring Aboriginal family-led decision making processes have been followed, as well as design and delivery of local services across the continuum of support. Local coordination

and support would be provided through relevant Aboriginal community controlled organisations and overseen through the role of the statutory authority.

In AbSec's view, this approach represents a plausible starting point for broader community engagement towards establishing an appropriate Aboriginal statutory body and governance structure, including local Aboriginal community controlled mechanisms, to ensure Aboriginal self-determination where previously it has remained elusive to the continued detriment of Aboriginal children and young people, and families and communities.

Aboriginal decision making

In addition to establishing clear community controlled mechanisms for decision making about the design and delivery of services across the continuum of support, mechanisms to empower Aboriginal decision making with respect to Aboriginal children and families are essential. As noted above, safeguards contained within the *Indian Child Welfare Act* (US) play a critical role in the upholding the rights of Indigenous children and young people across the US, including New York and Illinois, and such safeguards are reasonable in the context of ongoing shifts to emulate their systems and practice in NSW. Similarly, it reflects domestic trends towards empowering Aboriginal decision making, including the use of recognised entities in Queensland and the delegation of authority in Victoria.

This should include clear legislative requirements on the statutory authority to engage with Aboriginal community controlled mechanisms in every matter that relates to a child believed to be of Aboriginal descent, enabling such mechanisms to oversee decisions regarding safety and wellbeing goals, placement decision making and proactive efforts, with their views and decisions respected. As noted above, these local bodies would oversee the participation of Aboriginal children and families in case planning processes, ensuring their rights are respected and upheld, and could represent the views of their communities through being empowered to appear *amicus curae* in Children's Court matters. Aspects of decision making that could be extended to such mechanisms include overview of the assessment of the possibility of restoration, endorsement of case planning and care planning to ensure they are consistent with Aboriginal community expectations, placement decision making, and oversight of proactive efforts with respect to family preservation and restoration efforts. By empowering Aboriginal people to make decisions about Aboriginal children through their own processes, genuine self-determination will become a key feature of the NSW statutory child protection system, rather than a promise that lives in a vacuum.

Proactive Efforts

Another key safeguard present with respect to Indigenous children and young people in Illinois and New York are the active efforts requirements contained within the *Indian Child Welfare Act* and guidelines. These provisions place a clear obligation on statutory authorities to actively support families to overcome the challenges that represent a risk of significant harm to their children, reflecting a system that is truly oriented towards family preservation and upholding the rights of children and young people to be raised safe with their family and community, strong in their identity and culture and supported to fulfil their potential. As noted above, AbSec believes that such provisions must be meaningfully implemented within NSW,

including legislative provision that require FACS to demonstrate the active steps they have taken to preserve families and prevent removals.

Similarly, legislative changes could strengthen and clarify the standard of evidence required by the Children’s Court in making any order that transfers parental responsibility. Again, the *Indian Child Welfare Act* provides a useful example, requiring clear and convincing evidence, including the use of qualified expert witnesses with knowledge of the prevailing social and cultural standards of the child’s community. In doing so, the US Congress sought to ensure that such decisions were not based on “a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family”¹⁶. The NSW system continues to face similar criticisms, with evidence presented to the General Purpose Standing Committee No.2 during their inquiry into child protection in NSW about the prevalence of “neglect” as the reason for the removal of Aboriginal children. However no legislative amendments to allay these fears have been proposed.

It should go without saying that Aboriginal communities do not accept that Aboriginal children should remain in circumstances where they are at risk of physical, sexual or emotional harm as a result of the conduct of their parents or other caregivers (by commission or omission). However this evidence demonstrates that often the determination of the statutory system are not sufficiently linked to evidence regarding the conditions experienced and their link to significant harm. The grounds for care orders are broadly outlined in section 71 of the Care Act, and could be clarified by requiring FACS to provide the Court with clear evidence demonstrating the causal link between the conditions in the home and the likelihood of harm to the child. Further, the involvement of community controlled mechanisms (which might include a community appointed practitioner or community-led case panel) to oversee and endorse these and other assessments, including case planning and goals, cultural planning and placement decision making must be included, instilling greater confidence of the community in Court processes that impact on the safety, welfare and wellbeing of Aboriginal children.

AbSec notes that the most recent *Report on Government Services* demonstrates that the NSW Government invests significantly more in child protection and out-of-home care services compared to family support services (see Table 1). Adequate investment in proactive efforts to support children and family to overcome the issues contributing to a risk of significant harm for children and young people can be promoted by government committing to investing at a least as much in early intervention, prevention, preservation and restoration services as in tertiary responses including child protection and out-of-home care (including guardianship and adoption).

Table 1	Child Protection/OOHC \$,000 (%)	Family Support/IFSS \$,000 (%)	Total \$,000
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¹⁶ *Holyfield*, 490 US at 36 (citing H.R. Rep. No. 95-1386, at 24), cited in US Department of the Interior, Bureau of Indian Affairs (2016) Guidelines for Implementing the Indian Child Welfare Act, pp. 54

2011-12	1124144 (73.9%)	396081 (26.1%)	1520225
20015-16	1450091 (83.4%)	289099 (16.6%)	1739190
Note: 2011/12 selected as comparison as earliest reported period with figures indicated for both family support and intensive family support. Investment trends should be considered over a longer continuous timeframe, but are indicative of chronic under-resourcing of family supports			

AbSec understands that FACS have recently invested \$90m over four years to improve access to intensive family preservation services, but as shown in Table 1 this represents an increase of just over 1% of total expenditure. Significantly greater investment in universal and secondary prevention and early intervention is needed, particularly if mandated response times are introduced, in order to offer supports to children and families identified at risk. If not, the proposed suite of reforms represents a risk of creating a statutory system that is not focused on the values and the rights of children and the principles of justice, dignity and family, but rather the simplistic permanent transfer of children from marginalised to relatively more advantaged families, akin to practices of the Stolen Generation.

Similarly, such approaches must reflect the principle of self-determination, engaging with Aboriginal communities themselves to design and deliver the approaches needed, that are tailored to the needs of local children and families and culturally embedded. This was not reflected in this most recent investment, with international models selected by government and imposed on Aboriginal communities. While Aboriginal organisations were invited to participate in service delivery of these models, and many organisations accepted this invitation recognising it as the only opportunity to deliver much-needed family supports to their communities, *Bringing Them Home* clearly articulated that this approach is inadequate; it does not rise to the NSW Government's statutory obligation to Aboriginal self-determination. It is for this reason that AbSec has called for the establishment of an Aboriginal Commissioning approach that empowers communities to engage with the international evidence and integrate it with their own expertise and community knowledge to establish and continually refine Aboriginal community-controlled child and family supports.

This investment in Aboriginal prevention, family preservation and early intervention services must be aligned to need as reflected in the proportion of Aboriginal families within the service system, and delivered through Aboriginal community controlled mechanisms such as those described above. This will ensure that services delivered are locally tailored, culturally embedded and directly accountable to the communities they serve. AbSec praises the commitment of FACS to direct 30% of the Targeted Earlier Interventions investment to Aboriginal children and families through Aboriginal community controlled mechanisms; this approach should be extended across the continuum of support through an Aboriginal commissioning model.

Existing approaches whereby FACS select intervention programs and then invite Aboriginal organisations to participate in service delivery is not an appropriate strategy for the development of targeted services and does not reflect a genuine commissioning for outcomes model. This approach is consistent with previous practices of government and is

enshrined by standard procurement approaches that stymie innovation to deliver outcomes. Above, AbSec has outlined a possible structure to strengthen the self-determination of Aboriginal communities in the design and delivery of local services for Aboriginal children and families across the continuum of support.

Conclusion

The Independent Review of Aboriginal Children and Young People in OOHC represents a critical opportunity to learn from the current statutory system and implement reforms that will provide greater safeguards for Aboriginal children and young people. The current system is underperforming with respect to Aboriginal children and families, failing to intervene early and effectively to prevent entries to care, and to engage families and work towards the timely restoration of Aboriginal children.

Fundamentally, there is a need to shift the focus of the statutory system from the interventionist and assimilationist thinking that characterised past (and arguably contemporary) government policy, to a system founded on our inalienable human rights, particularly our right to raise and care for our children, and to design, administer and oversee systems for their care and protection. Failure to support this change and empower Aboriginal communities to exercise genuine self-determination across the continuum of support, would demonstrate that a failure to learn from our past and overcome the institutional racism of colonisation that should rightly be relegated to the past.

AbSec have outlined a number of important steps in achieving a more effective service system for Aboriginal children and young people, articulated in this paper and those attached. This includes:

1. Implementation of *Achieving a holistic Aboriginal child and family service system for NSW* and associated papers. This implementation includes a surge of investment in universal and secondary supports to address the underlying factors that contribute to risk, with reinvestment of downstream savings. This includes investment in First 1000 days Australia alongside Aboriginal communities, and other initiatives within the *Aboriginal Community Response* and *Aboriginal Family Strengthening* segments. These models include a key role for Aboriginal community governance bodies, providing oversight and ensuring services are accountable to Aboriginal communities
2. The provision of the funding required to establish an independent NSW Aboriginal Agency that would provide/oversee commissioning services, provide consistent practice guidance, oversight and development of an evidence base to drive systems accountability and continual service improvement. This agency would establish, and work with local community governance mechanisms to drive investment and accountability locally, ensuring services and supports that have been appropriately designed and delivered by Aboriginal people, with local community oversight. This is a natural extension of the Guiding Principles framework, strengthened through a clear legislative framework negotiated between communities and the NSW Government. By commissioning through an Aboriginal body, aligned to community-derived outcomes, Aboriginal communities will have greater flexibility to innovate, and will have a clear avenue to compare and contrast results across the state. This

body would also coordinate key oversight and advocacy roles, including reviewing and supporting full compliance with all five elements of the Aboriginal and Torres Strait Islander Child Placement Principles.

3. Strengthen the capacity and capabilities of Aboriginal communities and their organisations, particularly in regional and remote areas of the state, to ensure equitable access to critical services including maternal health and family support services. Work is already underway with the Aboriginal Industry Development Strategy, and it is important that this strategy is properly resourced and implemented.
4. Aboriginal-led policy and systems, aligned to a shared commitment to high level outcomes. The Aboriginal Case Management Policy is a key example, which builds in many of the elements of the Aboriginal and Torres Strait Islander Child Placement Principles into case management practice with Aboriginal families.