Shaping a Better Child Protection System – AbSec Submission

November 2017

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

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, about proposed legislative amendments to the *Children and Young Persons (Care and Protection) Act 1998* (the 'Care Act') and the *Adoption Act 2000* (the 'Adoption Act'). 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.

Aboriginal children and families continue to be over-represented within the child protection system in NSW, and indeed nationally. The report of the National Inquiry into the Separation of Aboriginal Children from their Families, *Bringing Them Home,* carefully outlined the history of forced removals, driven by a colonial interpretation of what governments felt was in the 'best interests' of Aboriginal children and families. Aboriginal families and communities still bear the scars of the government's paternalism. Importantly, *Bringing Them Home* linked these colonial practices with the ongoing over-representation of Aboriginal children and families within contemporary statutory child protection systems, and made a number of recommendations focused on addressing the impact of these past practices and urging reform to statutory systems to safeguard the rights of Aboriginal children and young people. These recommendations regarding contemporary statutory systems focused on the principle of self-determination and the implementation of the Aboriginal and Torres Strait Islander Child Placement Principles (ATSICPP).

This year, marking 20 years since the release of *Bringing Them Home,* Aboriginal communities continue to advocate for the right to self-determination in the care and protection of our children. However, despite numerous inquiries, reviews and reports, and a long-standing legislative obligation for Aboriginal people to "participate in the care and protection of their children and young persons with as much self-determination as is possible"[1], genuine self-determination remains aspirational rather than reality. Similarly, safeguards aligned with the ATSICPP, including elements of prevention, partnership, placement, participation and connection, are not adequately implemented[2].

Both issues were recently identified in the *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia* earlier this year. The Special Rapporteur described the failure of governments in Australia to respect the right of

[1] Section 11 *Children and Young Persons (Care and Protection) Act 1998*

[2] Arney, F., Iannos, M., Chong, A., McDougall, S., & Parkinson, S. (2015). *Enhancing the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Policy and practice considerations* (CFCA Paper No. 34). Melbourne: Child Family Community Australia information exchange, available at: https://aifs.gov.au/cfca/publications/enhancing-implementation-aboriginal-and-torres-strait-islander-child

Aboriginal peoples to self-determination and the right to full and effective participation as "alarming", noting that this failure contributed to the escalating crisis of child welfare[3]. Similarly, the failure to fully implement the Aboriginal and Torres Strait Islander Child Placement Principles was also noted, with the Special Rapporteur calling for greater engagement with Aboriginal families and communities in child welfare decision making, greater investment in community-led early intervention, and the establishment of dedicated Aboriginal oversight bodies to address this national crisis.

Legislative reform presents an opportunity to strengthen safeguards for Aboriginal children and young people, their families and communities. While existing legislation includes broad principles for self-determination and participation, these provisions have failed to empower Aboriginal communities in any meaningful way to address the over-representation of Aboriginal children and families through Aboriginal-led systems and supports. Rather, the contemporary child protection system still reflects protection and assimilation-era practices in many critical ways. Fundamentally, decisions about the safety, welfare and wellbeing of Aboriginal children continue to be made by the NSW Government rather than Aboriginal communities themselves, without adequate Aboriginal community oversight of decision making processes or practice.

Without significant structural change consistent with the principles of self-determination and the ATSICPP, the number of Aboriginal children in out-of-home care is anticipated to triple by 2036[4].

AbSec's submission is focused on the interests of Aboriginal peoples within the contemporary child protection system, starting from a foundation of the state's commitments under existing human rights instruments including the United Nations Declaration of the Rights of Indigenous Peoples and the Convention on the Rights of the Child. It is worth noting that the Declaration of the Rights of Indigenous Peoples is itself now 10 years old, with international focus on its adoption by member states. AbSec urges the NSW Government to show significant leadership in this regard.

Outline of this response

This submission will provide a broad overview of key issues arising in the legislative reforms proposed by the NSW Government in the *Shaping a Better Child*

[3] Tauli-Corpuz, V. (2017) *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, available at: http://unsr.vtaulicorpuz.org/site/images/docs/country/2017-australia-hrc-36-46-add-2-en.pdf

[4] SNAICC (2017) *Family Matters Report 2017: Measuring trends to turn the tide on the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care in Australia,* available at: http://www.familymatters.org.au/wp-content/uploads/2017/11/Family-Matters-Report-2017.pdf

Protection System discussion paper and the broader consultation process from AbSec's perspective. Following this overview, AbSec will provide responses to the specific questions raised in the discussion paper, before finally providing additional further reforms that would substantially strengthen the legislative framework regarding the rights and best interests of Aboriginal children and young people.

Overview of proposed reforms

The NSW Government launched a discussion paper on 20 October, 2017, outlining proposed amendments to the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (the Care Act) and the *Adoption Act 2000* (NSW) (the Adoption Act). The proposed amendments intend to streamline proceedings within the Children's Court with respect to the adoption of children from care. The Minister hoped that the discussion paper would "generate thoughtful discussion about reform that is so critically important".

The proposed reforms span earlier family preservation and restoration, assessment and response times, service provision, actions taken before court, changes to mandatory reporter guidelines, changes to court processes including changes to section 90 processes, the use of short-term court orders, and changes to contact orders, as well as streamlining adoption and other changes to out-of-home care. Key points include:

- Redefining restoration to include broader family structures, although it is unclear how doing so would meaningfully alter practice for families, given the existing Aboriginal Placement Principles (section 13) and the Permanent Placement Principles (section 10A) which both prioritise broader family and kin structures where children cannot return to their parents.
- Introducing mandated timeframes to respond to risk of significant harm reports, although such action is entirely possible under the current Care Act and is only limited by a lack of resource investment, which could be argued to reflect a lack of political will to address this issue.
- Strengthening the requirement for Family and Community Services (FACS) to "consider" the use of alternate dispute resolution processes, including Family Group Conferencing
- Broadening the scope of "best endeavours" provisions
- Changes to mandatory reporting including definitions of "children's services" and proposed exceptions for practitioners working intensively with families
- Enabling guardianship orders by consent through the Care Act
- Short-term court orders
- Amending the test of 'realistic possibility of restoration'
- Clarifying the role of the Children's Court where it is not satisfied that proper arrangements have been made for care and protection of children
- Changes to contact orders to further promote guardianship
- Limiting the opportunity of families to make a section 90 order

- Removing the responsibility of FACS to oversee and consent to guardianship orders for children and young people currently in the care of the Minister
- Conferring jurisdiction for adoption orders from the statutory system to the Children's Court
- Expanding powers to dispense with parental consent beyond the already considerable powers invested in the Children's Court and limiting the parent's right to be advised of the prospective adoption of the child, reducing the responsibility on FACS to engage with and foster strong enduring relationships with parents and families when they remove a child from their family
- Similarly, clearly defining the grounds on which parents may rely upon when contesting the adoption of their child, by doing so limiting the scope and opportunity of families to participate fully in these processes by restricting what the court can consider
- Broadening time frames allowing FACS to restore a child prior to the expiry of a Court order that found a child to be unsafe and allocating parental responsibility to the Minister without the oversight of the Children's Court
- Abolishing supported care arrangements where there is no court order in place, although what that would mean for children currently in such arrangements is not explored
- Amending the Care Act to explicitly prohibit publication of information identifying a child as being under the parental responsibility of the Minister, in response to a recent decision by the NSW Court of Appeal. It is concerning that such an amendment might significantly constrain reasonable scrutiny of Family and Community Services
- Clarifying processes regarding the parental responsibility of children on the death of a guardian

Streamlining Permanent Care Orders

It is the stated objective of the current reforms to streamline the making of permanent care orders (guardianship and adoption). While some proposed reforms refer to the early intervention segment of the Care Act, many of these seem to reflect policy-level changes with very little need for legislative reform (with the notable exception of efforts prior to court action, which AbSec feels can be substantially strengthened in line with the obligations to provide meaningful supports to vulnerable families and communities to meet their parenting responsibilities[5]). Rather, the more substantive changes proposed relate to court processes and permanency decisions, including strengthening opportunities to make permanent care orders (guardianship and adoption) and significantly limiting the opportunity for parents and families to engage with and participate in critical

[5] Articles 18 and 19, UN Convention on the Rights of the Child.

court processes (such as limitations on section 90 orders, removing key responsibilities held by FACS regarding guardianship and adoption orders and limiting grounds for contesting adoptions).

Critically, no evidence is presented to justify the proposed changes or demonstrate how the proposed legislative changes will achieve better outcomes for children and their families, including Aboriginal children. In AbSec's view, streamlining permanent care orders and drastically limiting the rights of children and families to participate in decisions should be clearly evidenced. Extraordinary powers require extraordinary evidence. In the absence of such evidence or the underlying rationale (see discussion regarding transparency below), there is a concern that the proposed changes reflect an ideologically driven agenda that seeks to minimise the responsibility of the NSW Government and FACS to vulnerable children and families. This presents a risk of establishing a pipeline from notification through removal to permanent alternate care. While this approach would reduce the number of children and young people considered to be in statutory care, it seems unlikely to reduce the number of children experiencing harm or being at risk of harm, the number of children and families exposed to statutory intervention, or to meaningfully improve the circumstances of those children affected by the statutory system.

AbSec and Aboriginal communities share the NSW Government's concerns about the number of Aboriginal children removed from their families, but have a fundamentally different view of the problem. The goal of Aboriginal communities is to support Aboriginal children and young people in the context of their families and communities, reducing the incidence of harm and addressing those factors that place Aboriginal children and their families at risk. Aboriginal young people told us that enduring relationships with family, community and peers were central to their experience of safety and wellbeing[6]. This is consistent with international child wellbeing evidence[7], and seeks to prevent the need for statutory intervention, while meeting our responsibilities to children deprived of their homes and families. To achieve these goals, AbSec remains committed to a system that is open and transparent about the number of children and young people experiencing a statutory intervention.

Further, AbSec believes that children removed from their family by the statutory system fundamentally remain the responsibility of the state (and their community with respect to Aboriginal children), with clear obligations to safeguard their safety,

[6] AbSec (2016) *Youth Report: AbSec Youth Ambassador Program.* Available https://www.absec.org.au/images/downloads/AbSec-YouthReport-2016-web.pdf

[7] Center on the Developing Child at Harvard University (2017). Three Principles to Improve Outcomes for Children and Families. http://www.developingchild.harvard.edu

welfare and well-being until such time that they are able to safely return home. This approach is consistent with our obligations to children and young people, and reflects lessons learned from the *Royal Commission into Institutional Responses to Child Sexual Abuse* regarding the heightened vulnerability of children and young people recovering from abuse and neglect and early trauma. In NSW, the *NSW Child Safe Standards for Permanent Care* seek to provide critical safeguards for children and young people who have been removed from their family, providing ongoing monitoring, review and oversight of their placement and treatment to guard against this future risk of abuse and exploitation. However, these critical safeguards are not extended to, and in fact are explicitly removed from a subset of children and young people based solely on the nature of orders promoted by Family and Community Services, presumably in an attempt to reduce the longer term costs associated with a growing out-of-home care sector. To the extent that such safeguards are considered integral to our efforts to keep this vulnerable cohort of children safe from further harm, the explicit removal of these safeguards for a political imperative is unconscionable.

AbSec appreciates the developmental importance of safety and stability for children and young people, with enduring positive relationships critical to lifelong wellbeing and support. However, AbSec believes this is best achieved by providing effective supports and addressing the underlying issues of poverty and inequality, marginalisation, and mental health. For those children that cannot be safely returned to their home, it is critical that responsibility for them remains a public matter, given that their removal is authorised by the public through our democratic processes. Public oversight and accountability regarding the treatment of our state's most vulnerable children must not be diminished. AbSec acknowledges the Community Services Ministers' Meeting Communique that acknowledged the need to enshrine the five domains of the ATSICPP, for Aboriginal children to be raised in culture and connected to their family and community, and the role of Aboriginal community controlled organisations across the continuum of support[8]. Further, the Ministers made a shared commitment to improving investment in early intervention for children and families, particularly Aboriginal and Torres Strait Islander children and families. AbSec welcomes this commitment, and encourages the NSW Government to enshrine the full ATSICPP into legislation and ensure critical safeguards for Aboriginal children and young people deprived of their family environment for any period of time. We look forward to working with the NSW Government on these initiatives.

Similarly, in AbSec's view the decision to exclude some children who have been removed from their family and placed under the Care Act from the "out-of-home

[8] Community Services Ministers' Meeting Communique, 25 August 2017

care" population with respect to official statistics seeks to obfuscate the current state of the child and family support infrastructure in NSW. Fundamentally, there must remain clarity and transparency in the public reporting of the number and treatment of all children and young people deprived of their family environment through the statutory child protection system. Rather than improving services, supports and practice with families, permanent care orders seek to absolve the NSW Government of their responsibilities on behalf of the public to our state's most vulnerable children and to engage meaningfully with families and communities, and actively minimise the magnitude of this challenge. These reforms represent an extension of this approach, further absolving FACS of their responsibility to engage and foster strong relationships with children and families and reflecting a fundamentally exclusionary approach to families and communities as opposed to an inclusive, participatory approach that is considered best practice.

Arguably, the approach reflected in these proposals is targeted more at the political goal of reducing the number of children considered to be in out of home care by shifting definitions and streamlining permanent orders, rather than by actually improving the lives of children and young people through systems and practices focused on upholding their rights and interests. Fundamentally this agenda is about deferring, rather than upholding, the NSW Government's responsibilities to vulnerable children and young people in behalf of the people of NSW[9]. This is particularly puzzling given it appears to be in direct conflict with the practice direction promoted within FACS by the Office of the Senior Practitioner and articulated within the Practice Framework, and the proposed shift towards Family Finding. The FACS Practice Framework emphasises "Justice Doing. Dignity Giving. Family Seeing." while these reforms further marginalise vulnerable children and families, limit their access to courts and other processes and basic procedural fairness, and further exclude families. It is family replacing rather than family seeing.

AbSec wholeheartedly rejects such an agenda. We remain committed to safeguarding the rights of Aboriginal children through honest and transparent processes that keep those responsible for the care of children, including the statutory system, Aboriginal organisations and other NGOs, fully accountable to Aboriginal children and young people, families and communities. We outline possible legislative safeguards to achieve greater self-determination for Aboriginal peoples in child welfare, and to promote genuine accountability of the statutory system to Aboriginal children and young people, their families and communities, later in this submission. This includes the establishment of a distinct Aboriginal

[9] Libesman, T (forthcoming 2018) 'Indigenous child welfare : self-determination vs privatisation, in Howard-Wagner (ed) *Indigenous Justice Issues*, CAEPR Research Monograph, ANU E Press, Canberra.

system with responsibility for the wellbeing of Aboriginal children and young people, through Aboriginal community controlled mechanisms.

Permanent Care Orders (Guardianship and Adoption) and Aboriginal Children

AbSec wishes to take this opportunity to reiterate the broad opposition of Aboriginal communities to the permanent removal of Aboriginal children and young people from their families through guardianship and adoption orders[10]. Such orders significantly intervene in the lives of Aboriginal children, families and communities, through processes that are fundamentally imposed on, and are not meaningfully accountable to, Aboriginal people. To many, this reflects the ongoing forced transfer of Aboriginal children from their families and communities with the significant effect of undermining the culture and identity of Aboriginal children. As such, they represent a breach of the rights of Indigenous peoples across NSW, who should be protected from the forced removal of their children to another group[11], with states required to provide "effective mechanisms for prevention of, and redress for" any actions that have the "aim or effect" of depriving our integrity as distinct peoples, forced assimilation or population transfer that undermines any of our rights[12]. The NSW Government must put measures in place to uphold the rights of Aboriginal children and young people, preventing their forced removal through permanent legal care orders that undermine their enduring rights to family, community and culture. Such processes must be determined by Aboriginal communities themselves through our own processes, with appropriate Aboriginal oversight mechanisms to ensure that Aboriginal communities determine as far as possible the circumstances that impact on the lives of their children.

Further, in AbSec's view the current guardianship and adoption orders represent a failure of the NSW Government to meet their obligations under the Convention on the Rights of the Child to the periodic review of their treatment and all circumstances relevant to their placement[13]. The *Implementation Handbook for the Convention on the Rights of the Child* emphasises the critical importance of this article.

> *"In its quiet way article 25 is a very important right under the Convention on the Rights of the Child because it provides safeguards against one of the most serious forms of child abuse – abuse by the State. Children in all parts of the world suffer neglect and mistreatment in a wide variety of*

[10] 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

[11] Article 7(2) United Nations Declaration on the Rights of Indigenous Peoples

[12] Article 8, United Nations Declaration on the Rights of Indigenous Peoples.

[13] United Nations Convention on the Rights of the Child, Article 25.

> *residential placements, having been put there by the state* ***in the sincere belief that this is in their best interests****."*[14] (emphasis added)

Aboriginal children and young people, our families and communities have a long experience of neglect and mistreatment at the hands of the State, even when those actions might have been sincerely argued by the NSW Government to be in the best interests of Aboriginal children. AbSec continues to be concerned about the overall tone of these reforms, which seem to be intended to streamline processes of forced adoption and guardianship of Aboriginal children and young people, without any meaningful safeguards to empower Aboriginal communities to determine the systems and supports for Aboriginal children and to oversee the safety, welfare and wellbeing of Aboriginal children and young people. In order to avoid repeating the mistakes of the past, decision making about Aboriginal children and families must be made through Aboriginal community controlled mechanisms as the only way to validly determine the best interests of Aboriginal children and young people.

However there is a clear and ingrained reluctance to divest decision making about Aboriginal children and families to Aboriginal communities themselves. This is in stark comparison to other jurisdictions, including those in the United States that serve as the inspiration for many of the reforms raised by Family and Community Services within this Discussion Paper (notably New York and Illinois). Child welfare systems in both jurisdictions must comply with the federal *Indian Child Welfare Act* (ICWA) which provides explicit safeguards to Indigenous communities, including mandating active efforts for preserving families and empowering communities to make decisions about their children through their own self-determined processes. The decisions of Indigenous communities are respected by statutory authorities, recognising the fundamental sovereignty of communities to make decisions about their children, and in doing so, about their community's future.

The right of Aboriginal people to determine our future, particularly with respect to decisions affecting our future generations, has long been denied.

There remains significant concern within Aboriginal communities that the proposed reforms represent further attempts to continue the destruction of Aboriginal families, communities and culture through the forced removal of Aboriginal children through permanent care orders such as guardianship and adoption, imposed on Aboriginal families by non-Aboriginal processes. Twenty years after *Bringing Them Home,* and almost ten years after the Federal Government's apology to the Stolen

[14] Hodgkin, R. and Newell, P. (2007) Implementation Handbook for the Convention on the Rights of the Child, Fully Revised Third Edition, UNICEF, pp. 379,

Generations, Aboriginal communities remain justifiably concerned that little has changed.

Similarly, in our engagement with carers and others, it appears that many carers (particularly those still case managed by FACS) find themselves ultimately balancing considerations of guardianship between two competing issues; the desire for ongoing support in meeting the changing needs of children and young people recovering from early trauma, weighed against the impact of intrusive "casework support" by FACS. Worryingly, we have heard from some carers that FACS promote being free from the "support" of FACS as an apparent benefit of permanent care orders. That is, the removal of child focused safeguards and caregiver supports is framed as a benefit to carers, in a clear acknowledgement of the unsupportive nature of these systems. In AbSec's view, poor practice from FACS with respect to providing supports to carers is a reason to strengthen oversight and accountability mechanisms, rather than withdrawing supports entirely from children and those that care for them. AbSec continues to advocate for improved supports tailored to the needs of children and young people, their families and carers. Our responsibility to children and young people and those that care for them following statutory intervention cannot and should not be deferred. In particular, current poor practice supporting carers should not be used as justification to abrogate those responsibilities through permanent care orders.

Aboriginal children, families and communities in the current reforms

Although Aboriginal children and families are significantly over-represented across the statutory child protection system and a pressing need to dramatically rethink the legislative framework affecting Aboriginal children and families, the Discussion Paper is oddly silent on the NSW Government's proposed solutions to this challenge. In fact, across the 38 pages of the Discussion Paper, the word "Aboriginal" can be found only 8 times in the body of the text; relating to the importance of early intervention and family supports, restoration, and family group conferencing. Few of these directly relate to substantive legislative change intended to strengthen safeguards and improve outcomes for Aboriginal children, their families and communities, reflecting the principles of self-determination. In general, these brief mentions are superficial at best, and reinforce the experience of the Aboriginal community that Family and Community Services are incapable of safeguarding the rights and interests of Aboriginal children and families.

In contrast, many jurisdictions internationally are seeking to strengthen their engagement with and statutory safeguards for Indigenous children, families and communities. Queensland have recently strengthened safeguards for Aboriginal children and families, including a principle for self-determination enacted through empowering Aboriginal and Torres Strait Islander entities with delegated

authorities, as well as enshrining the elements of the ATSICPP (prevention, partnership, placement, participation and connection) and improving advocacy and family decision making provisions. Last month, the state of Alaska entered into formal compacts with Indigenous peoples to strengthen Indigenous-led approaches to child welfare services[15] [16]. Victoria are likewise pursuing approaches that empower Aboriginal communities in decisions about their welfare of Aboriginal children and families as part of a $168 million Roadmap for Reform of the child protection system[17]. Similarly, Manitoba, Canada announced broad ranging reforms to strengthen their systems[18], building on previous reforms including the establishment of First Nations authorities to oversee child welfare for their children dating back more than a decade[19]. On a related note, the Canadian Government recently reached a settlement valued at around $800m for the forced removal of First Nations children from their families during the period known as the "Sixties Scoop"[20]. Put simply, the trend internationally is to overturn colonial child protection approaches and strengthen Indigenous responses to child and family welfare.

AbSec strongly urges the NSW Government to engage with Aboriginal communities on these important matters. AbSec has proposed a range of frameworks and approaches for achieving critical structural changes to best meet the needs of Aboriginal children and young people, their families and communities. Within this submission, AbSec further proposes a range of legislative safeguards that would strengthen systems and processes with respect to Aboriginal children and families, elevating the existing principles regarding self-determination and family participation from aspirational principles with extremely limited (and considerably constrained) application in practice to foundational principles that are structurally embedded, including important Aboriginal oversight and accountability mechanisms.

Timeline of Review

In AbSec's view, the proposed reforms require in depth consideration and community consultation. Given the over-representation of Aboriginal children and families across the continuum of support, specific focus on the impacts of these reforms on Aboriginal children and families, as well as a comprehensive community

[15] See Alaska Tribal Child Welfare Compact between certain Alaska Native Tribes and Tribal Organisations and the State of Alaska (2017), available at: http://dhss.alaska.gov/ocs/Documents/Publications/pdf/TribalCompact.pdf;

[16] https://gov.alaska.gov/newsroom/2017/10/governor-walker-signs-historic-tribal-compact-to-improve-child-welfare-system/

[17] https://www.premier.vic.gov.au/empowering-aboriginal-communities-to-help-their-children-receive-the-care-they-need/, accessed 30 November 2017

[18] http://news.gov.mb.ca/news/index.html?item=42322&posted=2017-10-12

[19] http://news.gov.mb.ca/news/?item=26778&posted=2003-11-24

[20] http://www.cbc.ca/news/politics/ottawa-settle-60s-scoop-survivors-1.4342462

consultation approach is warranted to support Aboriginal communities to participate in this "critically important" process.

The consultation period was open for just 6 weeks, closing on 30 November 2017. An Aboriginal specific consultation was only organised following the advocacy of AbSec, for the 29th November, providing extremely limited opportunity for Aboriginal communities to reflect on the consultations and provide a response within the allocated timeframe. AbSec is disappointed at the lack of meaningful consultation and engagement about these important reforms, particularly with respect to Aboriginal children, families and communities, who are more likely to be affected by these changes than their peers.

By comparison, recent reforms completed in Queensland included a multi-stage public process spanning from September 2015 with a reform bill being passed more than two years later on 26 October 2017. This process recognised the important public interest and complexity relating to child and family reforms.

Issues relating to our most vulnerable children and families are deserving of our utmost consideration. Further, the principles of participatory democracy emphasise the importance of community consultation, offering an opportunity for citizens to engage with the political process and have their voices heard[21]. This is particularly critical to Aboriginal communities on the issue of child protection, given the history of forced separations and the ongoing over-representation of Aboriginal children and young people within the contemporary child protection system.

In particular, the voices of those most affected by the statutory child protection system children and young people and their families, must be actively engaged to have their voices heard on this important issue. AbSec notes that the views of Aboriginal young people regarding their experience of safety and views on providing greater supports to families and communities are outlined in the *Youth Report* as part of the AbSec Youth Ambassador program, noting the importance of enduring relationships to family and community, the need for greater community control and participation and the importance of culture[22].

AbSec has endeavoured to engage with members and communities within the limited timeframes, hosting a session on the reforms and AbSec's response at the AbSec Conference on 24 November 2017, leading discussions with the NSW Family Matters Collective, and participating in a conversation about the reforms with Grandmothers Against Removals representatives at the Guiding Principles

[21] Libesman, T forthcoming 2018) 'Indigenous child welfare : self-determination vs privatisation, in Howard-Wagner (ed) *Indigenous Justice Issues*, CAEPR Research Monograph, ANU E Press, Canberra.

[22] AbSec (2016) *Youth Report: AbSec Youth Ambassador Program.* Available https://www.absec.org.au/images/downloads/AbSec-YouthReport-2016-web.pdf

Yarning Circle meeting on 8 November 2017. The views shared within these consultations have been integrated into this submission.

Despite these efforts, AbSec calls for greater engagement and consultation with Aboriginal children and young people, families, carers, communities and their organisations about these significant reforms. These dialogues are essential to empowering Aboriginal communities to engage with legislative reforms "with as much self-determination as possible", in line with the principles of the current Care Act. These conversations should be led by AbSec, in partnership with the Aboriginal Legal Service (NSW/ACT), as the relevant Aboriginal child and family and legal peak bodies respectively.

Further, AbSec notes the ongoing Independent review of Aboriginal Children in out-of-home care, Family Is Culture, chaired by Prof Megan Davis and due to report in 2018. This review represents a significant opportunity to understand existing structural, systemic and practice issues that contribute to the over-representation of Aboriginal children and young people within the statutory system, and may recommend legislative reforms to better safeguard the rights of Aboriginal children and young people within the statutory system. However, these recommendations are unlikely to fit within the timeframes planned by FACS, further representing the marginalisation of Aboriginal people and processes in determining the systems and frameworks that impact on Aboriginal children and families. AbSec calls on the NSW Government to make a strong commitment to implement the recommendations arising from this independent review in full.

Transparency of Consultation

These proposed reforms occur in the context of broader reviews and inquiries, including two completed in the recent past; the Parliamentary Inquiry conducted by General Standing Committee No.2, and the independent review of out-of-home care led by Mr David Tune AO PSM ('the Tune Review').

The Parliamentary Inquiry represented a comprehensive, participatory process including numerous submissions and in-person evidence from young people, families, practitioners and communities, including the participation of Aboriginal people and organisations. This evidence was presented in the Report of the committee, available in full, including a range of recommendations across the continuum of support, representing a transparent process of community engagement. AbSec notes that many of the recommendations made by the Committee were dismissed or otherwise deflected by the NSW Government, and are not significantly represented in the proposed legislative reforms.

In contrast, the Discussion Paper notes that the current legislative reform agenda is driven substantially by the recommendations of the Tune Review. However, this

report has not been made publicly available, with Minister Goward noting through Budget Estimates processes earlier this year that it was cabinet in confidence. Rather, citizens, sector stakeholders and Aboriginal communities must rely on the NSW Government's response to the Tune Review, 'Their Futures Matter'. These decisions significantly undermine the capacity of Aboriginal communities and their organisations to engage fully with the current legislative reform discussion, and the ability of the public more broadly to engage in "thoughtful discussion about reform that is so critically important".

These actions are not consistent with the fundamental principles of participatory democracy, or the NSW Government's obligations under the UN Declaration on the Rights of Indigenous Peoples and the Care Act to promote the self-determination of Aboriginal communities, which requires governments to engage with Aboriginal communities openly and in good faith. That the underlying rationale for the proposed reforms remains secret through the actions of the current government reveals a fundamental lack of transparency that belies the NSW Government's rhetoric with respect to these reforms. It denies Aboriginal communities and the NSW public more broadly the opportunity to independently engage with the underlying evidence and assumptions driving the current reform agenda. Mistrust of government with respect to the care and protection of Aboriginal children remains a significant issue, and is only exacerbated by such actions.

Although the timeframes imposed by the NSW Government have limited the scope for direct community engagement, AbSec has nevertheless endeavoured to present both a considered response and further recommendations to strengthen the legislative safeguards for Aboriginal children and families consistent with the expectations of Aboriginal communities. However, this process would have been substantially strengthened by including an adequate period for community consultation and engagement. Further, a distinct conversation with Aboriginal communities about the legislative framework needed to best serve Aboriginal children and young people, their families and communities was also warranted given the over-representation of Aboriginal communities, however only secured following advocacy from AbSec. Given these broad issues, AbSec holds serious concerns about the overall direction of the proposed reforms as they relate to Aboriginal children and young people. AbSec reiterates our call for a differentiated Aboriginal child and family welfare system that empowers Aboriginal communities to respond to identified needs and to shape systems at the local and state level to best meet the needs of Aboriginal children and young people, their families and communities.

Specific feedback to Discussion Paper

In the following section AbSec provides a view on the various proposals put forward by the NSW Government in the Discussion Paper. However, it must be noted that the context for these responses reflects the current context of the statutory system as one where the views and voices of Aboriginal people are seldom included in favour of the continued paternalism of government. As such, our responses are provided in the context of ongoing decision making by systems and processes that are not determined by or accountable to Aboriginal people in any meaningful way. However, AbSec further outline additional safeguards that would enhance the self-determination of Aboriginal communities and the participation of Aboriginal children, families and communities. Implementation of these provisions might alter the position of Aboriginal communities

Early Intervention and Restoration

The concept of restoration

1. What does the concept of restoration mean?

2. How could the Care Act be amended to better reflect the breadth of family systems and structures within our community?

3. If the Care Act was amended to better reflect the breadth of family systems and structures within our community what additional safeguards should be required to ensure children and young people are protected?

The NSW Government proposes to broaden the definition of restoration within the Care Act to include family members beyond a child biological parents. The Discussion Paper argues that this broader view aims to reflect broader cultural conceptualisation of family, including Aboriginal families, which often include a range of family members sharing care giving responsibilities.

AbSec notes that the placement element of the ATSICPP establishes a clear placement hierarchy for Aboriginal children and young people, prioritising family preservation before considering placement with extended family or other members of the child's Aboriginal community. While this longstanding placement hierarchy is legislated for Aboriginal children and young people, reflecting the history of forced and systemic racism that disconnected Aboriginal children from their families, communities and culture, the principle of seeking placements within the child's family, extended family or community networks if they are unable to remain safely at home is now generally accepted as best practice for all children. This is reflected

within the Permanency Placement Principles, which prioritise preservation with parents, then placement with family and kin[23].

In AbSec's view, this principle must be retained. That is, there must remain a clear preference, and obligation on the statutory authority, to provide support to parents (or whomever holds parental responsibility prior to statutory intervention) to address risk of harm concerns and preserve the family wherever possible.

Further, broadening this definition would raise additional questions, such as identifying who would be empowered to make a determination about who should be considered as a child's family in any specific case. Rather, AbSec would be concerned that such a broadening would further empower the statutory system to further obfuscate removal and placement decision making by blurring a currently clear distinction between restoring children (and parental responsibility) to those from whom they were removed through statutory intervention, and placements with extended family.

The current legislation and policy emphasise that where children cannot be safely restored, the next priority is to place them within their family. As such, it is unclear what benefit the proposed changes represent for children and young people, however it would appear reduce the responsibility of the statutory system to work with a child's parents to address risk of harm concerns. AbSec invites the NSW Government with evidence outlining how such a change might benefit children and young people over and above the current legislative framework.

While AbSec does not see a valid argument for expanding the current definition given the existing legislative framework, AbSec further recommends legislative changes to achieve full implementation of all elements of the Aboriginal Child Placement Principle. AbSec urges consideration of strengthening the Aboriginal and Torres Strait Islander Principles within the Act (sections 11-14) to reflect all elements, including prevention, partnership (self-determination), placement, participation and connection, with Aboriginal oversight and compliance frameworks built in. This will provide further safeguards for Aboriginal families and communities to be involved in decision making across the continuum of support, including proactive efforts to support preservation and restoration, as well as empowering Aboriginal families to drive decision making, including with respect to family identification and placements (among other things).

Response Timeframes

4. Should there be mandated timeframes for responses to ROSH reports by FACS or other agencies? If so, why? If not, why not?

[23] Section 10A *Children and Young Persons (Care and Protection) Act 1998*

5. What would you consider to be an appropriate timeframe for assessments to be conducted, a case plan to be developed and appropriate support services to be put in place to keep the family together?

6. What benefits and risks for families may arise from mandating response timeframes?

The NSW Government has proposed establishing mandatory timeframes for responding to ROSH reports within the Care Act. Currently less than a third of all risk of significant harm reports receive a face-to-face assessment[24]. The Discussion Paper argues that mandated response timeframes will ensure that children and young people at risk of significant harm receive an assessment. The NSW Government notes that responding to all risk of significant harm reports would require significantly greater resources.

AbSec notes that nothing in the current Care Act prohibits the Government from increasing caseworker numbers and other resources required to respond to all risk of significant harm reports. As such, legislative change is not required where there is the political will to invest the resources required to increase the current response rate. The most recent Caseworker Dashboard illustrates an incremental increase in the response rate in the context of steady casework numbers[25]. These improvements reflect a commitment to increasing the response rate, driven by regular public reporting and accountability. Further gains could likewise be achieved, with or without legislative mandate, through appropriate investment and ongoing transparent reporting. However, as with many measures in this space, care must be taken to avoid perverse outcomes associated with the particular indicators we choose. For example, AbSec would be wary of mandates regarding response timeframes contributing to tokenistic assessment practices where systemic compliance is valued over quality practice with families. Our response to families must be driven by a desire to provide support and achieve genuine change for children and their families. A response that merely reports on the risks facing children and their families but is unable to help further marginalises this vulnerable population and undermines hope for change.

AbSec is encouraged by the apparent willingness of the NSW Government to increase investment in responding to risk of significant harm reports. However, such an action may not achieve improved outcomes for children and young people unless it is further accompanied by significantly increased investment in early intervention and family preservation. In AbSec's view, a significant structural issue

[24] FACS Caseworker Dashboard – June 2017 Quarter, see http://www.community.nsw.gov.au/__data/assets/file/0006/425625/Caseworker-Dashboard-June-2017-quarter-V3.pdf
[25] Ibid.

with the current statutory system is its construction as a forensically-focused system, responding to incidence of harm and intervening in families. Rather, AbSec's *Achieving a holistic Aboriginal child and family service system* framework conceptualises a child and family system oriented towards supporting families and preventing harm in the first instance. Without additional investment in early intervention and family preservation, an increased focus on investigation is likely to exacerbate issues and the marginalisation of vulnerable families rather than mitigating harm.

In short, AbSec appreciates the intent reflected in mandated response timeframes, however notes that mandated timeframes are not necessary to achieve this intent – just the political will to commit to such a target and ongoing transparency in reporting. However care must be taken to ensure that this resource investment is directed towards providing meaningful proactive supports to families to reduce the incidence of harm and keep children safe at home, rather than only increasing the stress experienced by families and thereby the likelihood of subsequent harm and entry into care.

Actions taken before court proceedings

7. What are your views about strengthening the obligation for FACS to always consider the use of ADR where there are child protection concerns?

8. Does the Care Act provide enough clarity in relation to the use of ADR at various stages of the child protection process? If not, how could it be improved?

9. What measures could be implemented to improve support for participants in the FGC process?

10. In what circumstances do you consider the use of ADR is appropriate or inappropriate?

The Care Act currently requires the Secretary to consider the appropriateness of alternative dispute resolution processes in responding to a report[26]. These processes are intended to:

- Ensure intervention so as to resolve problems at an early age, and
- Reduce the likelihood that a care application will need to be made under Chapter 5, and
- Reduce the incidence of breakdown in adolescent-parent relationships, and

[26] Section 37 *Children and Young Persons (Care and Protection) Act 1998*

- Work towards the making of consent orders that are in the best interests of children and young people, where an application for a care order is made under Chapter 5.

The Care Act further notes that such participation is voluntary, and is agnostic with respect to specific models of alternative dispute resolution allowing flexibility that can be tailored to the specific needs of families, including cultural needs.

Section 38 of the Care Act outlines that care plans established through alternate dispute resolution are to be registered with the Children's Court. Further, the Children's Court can make an order by consent to transfer parental responsibility, so long as the order does not contravene the principles of the Act, the parties understand the orders, and has received independent advice about the orders. This would include that the views of children are taken into account and the child is actively supported to retain their right to identity, family, community culture. Where such orders are made by consent, the Children's Court does not need to be satisfied of the existence of any grounds for the care orders as would otherwise be required under section 71.

The Discussion Paper presents no current evidence about the use of alternative dispute resolution within the current system. It is therefore unclear how these provisions are currently used, and how they might be altered to best achieve their intent. The lack of transparency, oversight and accountability with respect to these provisions and others, including the Aboriginal and Torres Strait Islander Principles (section 11-14), remains a significant outstanding issue. In response to this issue with respect to Aboriginal children and young people, AbSec later proposes the establishment of an appropriately empowered Aboriginal body to (among other things) oversee such processes and ensure transparency and accountability of the statutory system in all interactions with Aboriginal families and communities.

In AbSec's view, there are a couple of key elements within these provisions, focused towards different goals across the continuum of care. Family group conferencing and other similar approaches occurring early in the continuum of support reflect the key principle of participation, and seek to empower families and their wider networks to access the services and supports they need to resolve problems at an early stage, reduce the likelihood of a care application being made and reducing the incidence of breakdown in adolescent-parent relationships. That is, these approaches are oriented away from the Children's Court and care application processes. In comparison, Dispute Resolution Conferences and mediation are deliberately positioned within the Children's Court process, and are oriented towards making of consent orders through the Children's Court. By blurring these distinctions, the current legislation presents potential risks for Aboriginal children and families seeking assistance from FACS through

participatory approaches. Distinct provisions, aligned to the specific goals at that point of the continuum and ensuring appropriate safeguards where the transfer of parental responsibility is considered (including legal representation and independent, transparent facilitation or referral to appropriate judicial processes), are required.

In AbSec's view, it is critical that a clear distinction between these intents is present within the Care Act. Family group conferencing, done well, remains a powerful tool for achieving real and sustainable change, engaging families and their broader networks in solutions to keep children safe within their family. However, research has demonstrated that where tensions between participatory practice and legalistic child welfare practice discourses emerge, children and families are adversely affected[27]. In particular, the voices of families are subjugated by the more powerful statutory child protection system, undermining the social justice intent of participatory approaches. In order to guard against this abuse of power and genuinely empower families, such approaches must be distinct from processes seeking the transfer of parental responsibility, allowing families a safe space to discuss issues and work collaboratively towards family-led solutions.

AbSec is of the view that flexible approaches aimed at empowering Aboriginal families to participate in decision about their children is essential to best practice prior to statutory action. These approaches must be focused on strengthening families and keeping children safe and at home through family engagement and coordination of formal and informal supports, particularly at times of crisis or difficulty. Appropriate Aboriginal family-led decision making processes must be established and enacted in all cases as part of proactive efforts for family preservation, administered through Aboriginal community controlled organisation to ensure direct community accountability.

Further, AbSec proposes requiring the Secretary to demonstrate what steps have been taken to empower families to participate in decision making prior to court proceedings, ensuring that particular approaches are both culturally embedded and tailored to the particular circumstances of each family (for example, a mediation process is unlikely to be appropriate in cases of domestic violence where parties are expected to engage with their abuser). This might require significant innovation and creativity on behalf of practitioners and commissioning entities, however in AbSec's view providing permission and appropriate support to practitioners that values their experience and expertise (including the expertise of Aboriginal people and their organisations) is essential to achieving the best outcomes for children and families. From a systems perspective, it is our job to support and empower

[27] Ney, T., Stoltz, J., and Maloney, M. (2013) Voice, power and discourse: Experiences of participants in family group conferences in the context of child protection, *Journal of Social Work,* Vol 13(2), pp. 184-202

practitioners to do the same for vulnerable families. Additionally, Aboriginal families can be supported through Aboriginal family-decision making processes through independent facilitators and community advocates, who are able to support families throughout the process and are directly accountable to the Aboriginal community. Such requirement would further strengthen confidence in these processes for Aboriginal families and communities.

This could be addressed by a general provision similar to section 37(1)(a-c) placed within a broader "proactive efforts" provision (discussed later), outlining actions to be undertaken by the statutory system to engage with and support families prior action in the Children's Court. Similar to current provisions, this could be a broad provision that is agnostic with respect to particular models, permitting families, communities and providers to establish innovative approaches tailored to the needs of children and families. This is particularly important to Aboriginal communities, who must be supported to design and deliver their own community-led, culturally embedded approaches. Parent responsibility contracts may be included under such processes, noting that such contracts cannot involve changes in parental responsibility or a child's entry into out-of-home care[28].

Alternative dispute resolution processes directed towards the making of orders made under Chapter 5, including orders that transfer parental responsibility, should be made through the Dispute Resolution Conferences outlined in section 65 of the Care Act. This framework should only be enacted when the risk of harm issues warrant an application to the Children's Court, and seek to engage families in the making of those orders. The nature of this framework requires independent mediation by the Children's Registrar, and includes provisions for parties to be independently represented through the process, thereby providing safeguards for families that seek to limit as much as possible the impact of power imbalances between parties. However, AbSec is of the view that some flexibility in the design and implementation of approaches which reflect these fundamental principles provides an opportunity for the emergence of Aboriginal community systems and processes, with the potential of working towards genuine Aboriginal community decision making bodies, similar to Tribal Courts that exist in other jurisdictions. However, it is essential that processes with powers to intervene in families in this way have these minimum safeguards for procedural fairness as a fundamental element of a fair and just system.

It is further noted in the Discussion Paper that Family Group Conferencing provides a mechanism for the self-determination of Aboriginal communities. This is fundamentally false, and demonstrates a basic misunderstanding of the concept of

[28] Section 38A(6) *Children and Young Persons (Care and Protection) Act* (NSW)

self-determination as distinct from concepts of participation. Self-determination is a collective right of peoples to establish the systems, processes and frameworks within which individual families are empowered to make decisions. It is about Aboriginal "decision-making carried through to implementation"[29]. Given this lack of understanding regarding self-determination, it is of little wonder that despite repeated recommendations across numerous reports, the NSW Government is no closer to implementing this principle into practice. Rather, a paternalistic, Government-administered process persists across the continuum of support. As a clear example, AbSec notes that the current approach to family group conferencing for Aboriginal people is contrary to the principles of the Care Act, specifically section 11. This is demonstrated by the fact that AbSec, as the Aboriginal child and family peak body, had developed an Aboriginal community controlled Family Group Conferencing model in NSW (Connecting Voices), which was subsequently replaced by a FACS administered model. This raises significant concerns, consistent with the research noted above, that current FGC processes that are FACS-administered and enabled to include the transfer of parental responsibility may act in a coercive fashion, undermining the social justice and participatory intent of such approaches. It is critical that such approaches are delivered by and for Aboriginal people, through our own processes and organisations, ensuring transparency and accountability for the outcomes they achieve promoting the strengthening of Aboriginal families so our children can thrive. This goal would be supported by the establishment of an Aboriginal commissioning body.

Achieving self-determination must be placed in Aboriginal hands, through the establishment of an appropriately empowered Aboriginal body. AbSec outlines how this might be achieved later in this submission.

That said, the principle of self-determination must also apply to alternative dispute resolution processes. That is, Aboriginal communities must be adequately empowered and resourced to design and deliver Aboriginal alternative dispute resolution processes that are appropriate for our communities. This is not currently the case, although it does seem consistent with the intent of the current Care Act, particularly those provisions regarding Aboriginal self-determination. The Act must be broadly permissive of Aboriginal-led approaches, including Aboriginal decision making through our own established processes. Given that these processes may include the transfer of parental responsibility, principles of procedural fairness and independent representation must also apply, ensuring that the impact of power imbalances can be minimised.

[29] 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,* available at: https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf, pp. 276

With these provisions in mind, and noting AbSec's recommendation regarding placing provisions similar to those in section 37(1)(a-c) into a distinct, prevention focused 'proactive efforts' standard and the opportunity for Aboriginal community participation and process to be established alongside those provisions, there does not appear to be a compelling reason to keep section 38 in its current form.

11. What is considered to be sufficient prior alternative action before taking action to remove a child from their family?

AbSec believes that proactive efforts to support Aboriginal families to address those issues that are placing Aboriginal children at risk must be meaningfully delivered prior to action to remove a child from their family. This is essential to building the ATSICPP element of prevention into the statutory system in NSW. An example of strengthened guidelines in this regard is provided in the *Indian Child Welfare Act* and accompanying guidelines, which require *active efforts* to support families. For example, these provisions identify that providing referrals to families is not an adequate response, but the statutory system must meaningfully engage with and support families to access those supports and benefit from them. Such provisions ensure that responsibility for the appropriateness of services rests with those that determine service provision, rather than placing this responsibility on families who have no power to change the services available.

AbSec also notes that evidence provided to the recent parliamentary inquiry into child protection in NSW emphasised concerns about the standards of evidence required for removal, particularly given the frequency with which 'neglect' is cited as the reason for removal. Current provisions outlining the grounds for removal are broad in scope, requiring only that the Children's Court be satisfied that the child is in need of care and protection, and providing broad grounds which might be considered in making such a determination (without limitation). While a provision exists in an attempt to guide consideration of the impact of poverty on families, this might be considered to be somewhat narrowly defined. It is important that standards of evidence consider not only the known developmental literature, but also appropriately allocate responsibility, and don't seek to hold parents responsible for social and economic disadvantage and poverty, but rather seek to support families to emerge from poverty intact. Clearer standards of evidence for removals, in addition to legislated proactive efforts, will help shift the system in this direction.

Again, the *Indian Child Welfare Act* provides an illustrative example, with standard of evidence provisions that require statutory authorities to demonstrate a causal link between the environmental conditions and the harm faced by the child. Further, relevant experts with an understanding of Aboriginal families and communities are also required in order to validate the assessment determinations of the statutory

system, in response to long-standing concerns about cultural biases within the system. Similar concerns have been raised in NSW[30]. The Queensland system likewise includes Aboriginal processes in assessment and decision making. AbSec has proposed the establishment of Aboriginal community controlled mechanisms at the local level to oversee and participate in such assessment, endorsing determinations or requiring additional evidence. Whatever process is established must be developed in partnership with Aboriginal communities.

Decisions to remove Aboriginal children from their families must be determined with the inclusion of Aboriginal community controlled mechanisms. For example, this might require oversight and endorsement by Aboriginal community controlled mechanisms prior to court orders being made, perhaps through requiring that Aboriginal community controlled mechanisms are informed matters involving Aboriginal children and families and empowered to appear as *amicus curae* in all such cases. Ideally, the involvement of such bodies in these matters should commence prior to court decision making, playing a role in ensuring Aboriginal families are empowered to participate fully in Aboriginal family led decision making and other case planning decisions as well as the provision of proactive efforts targeted towards family preservation. AbSec outlines a possible framework for such mechanisms later in this paper (see *Legislative Safeguards for Aboriginal children and young people – Self-determination*).

As noted in the Discussion Paper, clearly where immediate action is required to ensure the safety of Aboriginal children and young people it must be taken. However, such actions must include Aboriginal oversight, engaging with Aboriginal community controlled mechanisms prior to such action (where possible), or as soon as practicable thereafter, outlining the reasons for such actions, ensuring an appropriate placement with family/community, and developing an action plan to strengthen families and achieve timely restoration.

Service Provision

12. How can FACS more effectively access the capabilities of other government agencies and funded NGOs to provide services to vulnerable children and families?

13. Are the current 'best endeavours' provisions adequate to ensure timely service provision for vulnerable children and families?

14. What changes could be made to the 'best endeavours' provisions to align with a whole of government approach to service delivery to vulnerable children and families?

[30] Child Protection Inquiry

The Care Act empowers the Secretary to request other government departments or non-government organisations receiving public funds to provide a service to children and their families to promote and safeguard the safety, welfare and wellbeing of children and young people[31]. Section 18 outlines the obligations on agencies or organisations of which such a request is made, requiring them to use their "best endeavours" to comply if it is consistent with its own functions and does not unduly prejudice the discharge of its functions.

The Discussion Paper proposes strengthening this obligation, however it is not clear how this provision is intended to be strengthened. The current language appears to balance the need to respond to such requests in a timely fashion with the need to ensure that such requests are reasonable; that is, that the organisation has the expertise and capabilities to provide a relevant service to families and communities. No evidence is presented about the current timeliness of responses by government agencies or non-government organisations, or cases where the current system failed in a way that could be addressed by strengthening this provision.

In AbSec's experience with non-government organisations, best endeavours are undertaken to provide a service to families. Aboriginal community controlled organisations often go above and beyond their funded responsibilities to provide services to their families and communities. Rather, the limiting factor reflects an under-resourcing of critical services by government relative to the needs of vulnerable families. Significantly greater investment in the provision of critical services and supports for children and families is needed. AbSec has argued for a legislative mandate for proactive efforts in the provision of services to children and their families, and for significantly increased investment in universal and targeted supports delivered through Aboriginal community controlled organisations as part of a holistic Aboriginal child and family system. This investment must be aligned to the identified need of Aboriginal families. That is, the proportion of overall investment in service delivery directed to Aboriginal children and families through community controlled processes should be aligned with the proportion of Aboriginal families at that point of the system. To achieve this, AbSec has argued for the establishment of an Aboriginal commissioning body.

With respect to government, greater coordination and collaboration in meeting the best needs of children and young people affected by the statutory system is needed. However, it is unclear how strengthening the 'best endeavours' provision might achieve genuine change. Rather, broader structural changes are needed in service provision and commissioning to achieve a more integrated and accountable

[31] Section 17 *Children and Young Persons (Care and Protection) Act 1998*

service system. Legislating genuine commissioning for outcomes approaches through an Aboriginal statutory body may contribute towards achieving the objective of better coordination and integration for families, providing greater accountability for investment across government agencies (in particular health, education and justice) aligned to outcomes for Aboriginal children and young people, their families and communities.

Definition of children's service

15. Should 'children's services' be limited to education and care services for the purpose of mandatory reporting, or should the term have broader application? Is so, why? If not, why not?

16. What additional 'children services' should be captured for the purposes of mandatory reporting?

The Care Act includes mandatory reporter provisions that requires those who work within health care, welfare, education, children's services, residential services or law enforcement fields involving children and who come to suspect a child may be at risk of significant harm arising from their work is to report that child and the grounds to the Secretary as soon as possible[32]. However, there is some uncertainty as to what constitutes "children services", and whether greater clarity can be achieved.

In AbSec's view, the safety, welfare and wellbeing of children and young people is a key community responsibility. It requires all members of the community to take responsibility upon themselves to appropriately report circumstances where they believe a child may be at risk of significant harm. That said, we don't feel a blanket "mandatory reporter" on all members of the community would be in any way tenable. However, by clearly defining those professions that have a clear responsibility to report such instances to the Secretary would strengthen mandatory reporter provisions by ensuring that all those to whom those provisions apply are aware of their obligations. AbSec believes that such provisions could include those that provide coaching/tuition or religious services to children and young people, following information through the recent Royal Commission into Institutional Responses to Child Sexual Abuse noting the prevalence of child sexual abuse in religious organisations, sports coaching and many other contexts.

[32] Section 27 *Children and Young Persons (Care and Protection) Act 1998*

Alternative pathway for mandatory reporters to make reports to FACS

17. Should mandatory reporters be exempted from making a traditional report to the Child Protection Helpline where supports are in place to mitigate child protection risks? If so, what additional safeguards should be in place?

As noted above, the success of any mandatory reporter regime is dependent on those individuals to whom such provisions apply being aware of their obligations so they can fulfil them. Introducing exemptions can also introduce confusion and uncertainty about the types of information that must be reported and in what circumstances.

As such, AbSec does not agree with the creation of an exemption.

It appears that the relevant provisions within the Care Act (sections 27 and 27A) require only that mandatory reports provide a report to the Secretary. It does not stipulate the form that such a report must take. As such, the proposal to facilitate reports through other channels, including a streamlined electronic system, appears to be consistent with the current Care Act, and does not require legislative change to implement. This can be achieved now. AbSec appreciates the potential benefits to streamlining these processes, but encourages caution in establishing exemptions that may introduce uncertainty, when an enduring obligation make such issues clear, with practitioners able to determine the appropriate manner by which to make such a report, based on the particulars of each case. Streamlining reporting through an online portal where children are already receiving a service, aligned to the identified case plan needs, would benefit the system by reducing the load experienced by the Helpline while still delivering a service.

Streamlining court processes

Registered care plans and guardianship orders

18. Should the Care Act contain specific provisions enabling the Children's court to make guardianship orders by consent? If not, why not? If so, what safeguards should be put in place?

AbSec is of the view that guardianship orders as currently defined lack key safeguards and oversight that are essential to the safety, welfare and wellbeing of Aboriginal children following the statutory intervention in their family. Further, such orders are currently made without any meaningful Aboriginal community controlled decision making processes to determine the appropriate orders for Aboriginal children, consistent with our right to self-determination and the rights of Aboriginal children to their culture and identity. As such, guardianship and other permanent care orders are not supported by AbSec (see *Permanent Care Orders (Guardianship and Adoption) and Aboriginal Children* section above, as well as

AbSec's position paper *Guardianship orders for Aboriginal children and young people)*.

The Discussion Paper proposes clarifying section 38 of the Care Act to specifically enable the Children's Court to make guardianship orders by consent. This section refers to those orders made through alternate dispute resolution processes. It should be noted that the intent of alternate dispute resolution processes are to:

- To ensure intervention so as to resolve the problems at an early stage, and
- To reduce the likelihood that a care application will need to be made under Chapter 5, and
- To reduce the incidence of breakdown in adolescent-parent relationships, and
- If an application for a care order under Chapter 5 is made, to work towards the making of consent orders that are in the best interests of the child or young person concerned.

It is AbSec's understanding that while section 38 permits orders under Chapter 5 (the Chapter that includes guardianship orders), other provisions specifically related to guardianship orders introduce uncertainty as to whether such orders can be made in this way. That is, while section 38 enables orders to be made by consent without the Children's Court being satisfied that there are any genuine grounds for the statutory child protection system to intervene in a family, section 79A requires the Children's Court to be satisfied that there is no realistic possibility of restoration to a child's parents. In AbSec's view, the provisions in section 79A reflect a critical safeguard for children and families, providing judicial oversight of statutory interventions that permanently deprive a child from their family environment. These safeguards must remain.

The principle of judicial review of the separation of children from their families reflects the obligations of the NSW Government under the UN Convention on the Rights of the Child. In particular, Article 9 states:

> *States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.*

As such, AbSec is concerned about the transfer of parental responsibility through the statutory child protection system without the assurance of judicial review of the grounds leading to the involvement of the statutory system. Other avenues, such

as Family Law, are present should families wish to pursue such orders of their own volition. It is critical that access to legal advocacy and process is strengthened for Aboriginal families, in particular through significantly greater investment in Aboriginal Legal Services.

As noted above regarding actions to be taken prior to court proceedings, AbSec identifies a key distinction in alternative dispute resolution processes depending on the current position of the family and the intent of the decision making process. In particular, AbSec argues that where the nature of the discussion initiated by the Secretary may include the transfer of parental responsibility, specific safeguards are required to ensure procedural fairness and minimise the impact of coercive applications of these processes, as identified by existing evidence[33]. In this respect, AbSec made a number of recommendations to update the provisions within section 38 to clearly distinguish between participatory practice aimed at family preservation, and alternative dispute resolution processes with respect to the making of orders including parental responsibility orders.

AbSec is concerned that the desire to include specific provisions is intended to promote the use of guardianship orders through alternative dispute resolution processes, removing critical judicial oversight with respect to permanent care orders. Given the significant power imbalance between families and the statutory authority, removing key safeguards to allow permanent care orders in this way opens the possibility that such orders could be made even when no such grounds for statutory intervention exist, as judicial oversight of these grounds is not required by section 38.

AbSec is further concerned that explicitly promoting guardianship orders within this section could have the effect (whether intended or not) of increasing the use of permanent care orders where desired by FACS as opposed to engaging with families and undertaking active efforts to preserve and restore families. AbSec is mindful of the significant power imbalance between the statutory systems and Aboriginal children, their families and communities, including how this power imbalance can manifest itself within alternate dispute resolution processes including but not limited to Family Group Conferencing. It is for this reason that AbSec advocates for independent Aboriginal facilitation of Aboriginal family led decision making processes (as distinct from the current FACS-administered model).

In AbSec's view, a statutory child protection system committed to "Justice Doing. Dignity Giving. Family Seeing" should emphasise family preservation and

[33] Ney, T., Stoltz, J., and Maloney, M. (2013) Voice, power and discourse: Experiences of participants in family group conferences in the context of child protection, *Journal of Social Work,* Vol 13(2), pp. 184-202

restoration rather than permanent care orders such as guardianship and adoption, as currently proposed by FACS. A proactive effort standard is required to ensure that family preservation and strengthening is considered and actively pursued, detailing the actions undertaken by the statutory system prior to the engagement of court processes through any process, including by consent. This will ensure that the orientation of the statutory system first and foremost is towards preserving the parent-child relationship and providing the supports and services families need to care for their children, consistent with the Convention on the Rights of the Child (Articles 18 and 19). Where processes are aimed at family preservation and strengthening, more permissive and informal approaches are applicable, providing families and communities with a safe space to develop their own solutions. However, once statutory intervention or other safety concerns become the driving factor and the transfer of parental responsibility is considered, specific safeguards are required to guard against the coercive intervention of the state over the free, prior and informed decision making of Aboriginal families and communities. Such safeguards include an appropriate independent mediator and facilitator (such as the process outlined in section 65), independent legal representation for parties and the inclusion of Aboriginal community controlled mechanisms in decision making are all essential to ensure that decisions are made in the best interests of Aboriginal children and young people. The possibility for judicial review, including of the grounds for intervention and the possibility of restoration remain critical within a statutory system, consistent with the Convention on the Rights of the Child.

Court's ability to vary interim orders

19. Should all parties to care proceedings be able to apply for interim orders to be varied without making an application under section 90 of the Care Act? If so, Why?

In general, interim orders can be varied at any point through a section 90 application, which can be brought by any party or person with sufficient interest in the welfare of a child and where relevant grounds exist. In practice, interim orders are often made allocating parental responsibility to the Minister, with those orders persisting until final orders. It is noted that evidence provided by Judge Peter Johnstone, President of the Children's Court of NSW, to the parliamentary inquiry stated that parental responsibility was allocated to the Minister in about 99% of cases in the initial stages.

In the interest of reorienting the child protection system to one focused on justice, dignity and family, AbSec suggests updating provisions relating to interim orders. In particular, the Secretary should be required to justify to the Court at each instance the ongoing need for interim orders, where those orders result in a child being removed from their parents (or other party with legal parental responsibility for the child). This subtle transfer in the burden of proof will ensure that the Secretary

remains accountability with respect to the ongoing decision to deprive a child of their family environment, without establishing a substantial onerous bar that may have the result of placing the child at risk. This might include providing evidence that circumstances haven't changed sufficiently to allow the child to return home safely, but should include strengths-based information noting the achievements of families with respect to the case plan and proactive effort provisions. In particular, AbSec notes Judge Johnson's statement to the parliamentary inquiry that the threshold for interim orders is a "very low threshold".

This would also reflect the lived experiences and relative power of different parties. Often, families have limited scope and opportunity to bring section 90 orders before the court. This is exacerbated by the ongoing under-resourcing of legal advocacy services, including the Aboriginal Legal Service, relative to need.

Shorter term court orders

20. In what ways should STCOs better support realisation or permanency outcomes for children and young people? If not, why not?

21. Will permanency outcomes be improved through greater use of STCOs? If not, why not?

22. Should the Care Act contain an explicit provision enabling the Children's Court to make STCOs as a final order i.e. orders allocating parental responsibility to the minister for FACS for shorter periods?

23. If yes, should they be defined differently based on permanency case plan goal (restoration, guardianship and open adoption)?

24. What might be an appropriate upper time limit for a STCO?

25. What would be appropriate matters for the children's Court to take into account when making a STCO on the basis that there is a future possibly of restoration e.g. parents demonstrate commitment to undergo counselling/therapy to address concerns that led to removal of their children?

26. Does the test of 'realistic possibility of restoration' need to be amended? If so, how? If not, why not?

Short term court orders are proposed to support permanency outcomes for the NSW Government. On the face of it, AbSec appreciates the use of short-term orders that require the statutory system to actively pursue the restoration of children and young people experiencing crisis, providing immediate safety while intensive services and supports are delivered. In line with this requirement, AbSec has proposed placing a burden on the statutory authority to demonstrate the ongoing need for interim orders that deprive children of their family environment,

noting the low threshold currently required. Such provisions might further require the statutory system to demonstrate the services and supports being provided to work towards restoration, providing a genuine basis to assess the realistic possibility of restoration. Only after the possibility of restoration has been actively tested and found to be not realistic should orders transferring parental responsibility to the Minister until the age of 18 be considered. Such orders must include key safeguards, in line with the obligations under the Convention on the Rights of the Child, including ongoing periodic review of a child's placement and treatment and the active provision of services and supports to meet their developmental needs, foster resilience and promote identity and connection.

It is unclear from the Discussion Paper how such orders would be functionally different from existing interim orders, however the subsequent questions in this section raise concerns that the intent or effect of such orders might be to place significantly greater limitations on families with respect to the restoration of their child while simultaneously expediting guardianship and adoption orders. That is, AbSec is concerned that the conceptualisation of STCOs raised in the Discussion Paper represent a legislative tool to place arbitrary time limits on restoration work. AbSec is concerned that this could also be used to push families toward permanent care orders such as guardianship and adoption where restoration might be possible. Given that the majority of existing services are not Aboriginal community controlled, and appear to be less effective for Aboriginal families than other families (as shown in the increasing over-representation of Aboriginal children and families across the continuum), the imposition of arbitrary timeframes through Short Term Care Orders could have disastrous consequences for Aboriginal children and families. AbSec supports approaches that seek to ensure active preservation and restoration efforts as an essential first option, however there is insufficient detail of these proposals to endorse this approach given the potential risks that such orders might pose to Aboriginal families.

In practice, orders pursued by the statutory authority have almost routinely included parental responsibility to the Minister until the age of 18, with practice regarding restoration then pursued (in those relatively rare cases that it has been actively pursued) through later section 90 orders. This contributes to Aboriginal children entering care, and remaining in care. There is a clear need to shift this practice towards one that actively works towards restoration first and foremost, and with considerable urgency. AbSec has proposed shifting the burden of proof with respect to interim orders, alongside proactive efforts provisions, to reorient the statutory system towards actively supporting children and their families to address issues that contribute to the risk of significant harm faced by children.

Consistent with the above, AbSec does not support the use of STCOs as final orders, particularly where the permanency goal would result in a transfer of parental responsibility.

As noted above, AbSec does not necessarily support the implementation of STCOs, but rather suggests a shift in the burden of proof within interim orders in order to promote more active engagement with families to address risk of harm issues to preserve families. Further, AbSec is concerned about the imposition of arbitrary timeframes that reduce flexibility from the system to consider the circumstances of individual children and their families, their experience of the statutory system, and respond according to their specific needs. Such constraints limit the opportunity to work effectively with families.

With respect to the future possibility of restoration, the Discussion Paper seeks to include specific items for the Court to take into account. Currently, section 83 requires the Secretary to assess whether there is a realistic possibility of the child being restored, having regard to

a. The circumstances of the child or young person, and
b. The evidence, if any, that the child or young person's parents are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care

It is further noted that case law has established that this is assessed not as a mere hope of change, but is evidenced at the time of the hearing through actions already undertaken demonstrating positive change. Further, this determination must be undertaken through a full consideration of the Care Act, including the objects and principles. As such, the Children's Court currently considers this possibility of restoration through a comprehensive and practically-minded assessment of the circumstances before the Court.

In AbSec's view, this would not be strengthened by stipulating the grounds that can (and potentially, the grounds that cannot) be taken into consideration. However, AbSec believes that these provisions should consider this decision alongside proactive efforts and the obligation on the statutory authority to provide appropriate and timely supports. That is, a full consideration that requires "runs on the board" must also consider issues of access to the necessary supports and services. A parent cannot be expected to demonstrate significant change with respect to addiction where no treatment supports are currently available. This recognises that both parents and the statutory authority have responsibilities to uphold with respect to upholding the rights of children and young people, including their right to their family environment and the need for genuine efforts to support parents to care for children and young people. A provision that notes that the consideration of section 83(1)(b) should include the evidence that parents are likely to be able to

satisfactorily address the issues in the context of the provision of relevant and effective services and supports might achieve this goal. For Aboriginal families, this relevant and effective services and supports include those that are culturally embedded. Such guidelines are further outlined with respect to the provision of "proactive efforts".

Report on suitability of care arrangements

27. What should the role of the children's court be if it is not satisfied those proper arrangements have been made for the care and protection of a child or young person?

28. Should the children's court be given the ability to relist matters following receipt of a section 82 report where it forms the view that proper arrangements have not been made for the care and protection of the child or young person? In what circumstances should the children's court be given this power? If not, why not?

29. If a matter has been relisted by the court, what subsequent powers should the court be given?

30. Should the court be able to request further evidence from a party about its efforts to implement the care plan and its progress towards achieving a permanent placement, including reasons for delay in achieving these goals?

The Children's Court has an important role overseeing arrangements made for the care and protection of children and young people, and raising issues where it feels that current arrangements are not satisfactory. However, the Discussion Paper seeks to clarify exactly what role the court should take in such matters, specifically if the Court can relist the matter itself, or if it may only invite other parties to seek to vary the orders. In general, it appears that while the Court can raise concerns, varying the orders requires a party to make a section 90 application; an arrangement that appears reasonable. This raises the considerable concern that the court may feel that current arrangements are not adequate, but that no action is taken to rectify the issue. It is unclear how this could arise given the responsibility of FACS to operate as a model litigant, which presumably would require them respond to concerns raised by the court in this context. However, AbSec has proposed additional changes that might further support Aboriginal children and young people in this context, including requiring the Secretary justify the continuation of current orders, and enabling Aboriginal community controlled mechanisms to appear *amicus curae,* empowering the Aboriginal community to make a section 90 application to vary orders in this situation (and others).

Further, AbSec is of the view that the Court can request additional information from a party about its efforts to implement the care plan, including the proactive steps

taken on behalf of the statutory authority to provide relevant and effective supports to families. However, in doing so greater supports would need to be provided to families to engage with those processes and advocate effectively on their own behalf. AbSec has argued for the inclusion of Aboriginal community controlled mechanisms to support appropriate processes in cases involving Aboriginal families.

Contact orders and guardianship

31. What alternatives are available to overcome issues of contact supervision where an allocation of parental responsibility by guardianship order is being sought?

32. How could the current contact order provisions be enhanced to better support guardianship?

33. Should the Children's Court be empowered to make contact orders for the life of a guardianship order?

At the outset, AbSec notes our ongoing concerns regarding guardianship orders for Aboriginal children and young people. The inability to guarantee a child's ongoing connection to their family, community and culture is just one of the concerns noted by AbSec regarding the inadequate safeguards for Aboriginal children and young people present within permanent care orders. Rather, it appears to represent an opportunity for the child protection authority to abrogate their responsibility to children and young people following intrusive statutory intervention in their life. Similarly, the desire to explore alternatives or otherwise "enhance" contact provisions in care orders in order to make guardianship orders more attractive to carers further worryingly may represent a willingness to negotiate on the full enjoyment of the rights of children and young people in order to achieve political and ideological goals.

In addition to noting our opposition to guardianship orders, AbSec would further note that challenges regarding contact supervision should rather render guardianship and adoption as not the most appropriate placement type for that child.

Similarly, the question should not be how to make guardianship more attractive, which the statutory authority is arguably pursuing through failed attempts at quality casework support and reducing responsibilities to uphold the rights of children, but rather whether in the context of a specific case if guardianship orders are the most appropriate order possible. That is, the type of order achieved is not a goal with respect to the safety, welfare and wellbeing of children and young people, but rather a potential tool to maximise the safety, welfare and wellbeing of children.

While AbSec appreciates that empowering the courts ability to make contact orders for the life of a guardianship order may look good in theory, it remains our view that there is no meaningful mechanism to ensure such orders will be upheld in the vast majority of cases. Should a guardian conclude that it is no longer in the child's best interest to facilitate contact, there are little realistic avenues for parents to appeal, who often are already marginalised and disempowered within the statutory system. In that sense, such orders represent a false reassurance to parents to make guardianship orders appear more attractive. Similarly, such orders are unlikely to "mature" alongside children. That is, the persistent issues regarding contact with respect to guardianship orders arise from the very design of the orders themselves, demonstrating the concerns raised by AbSec with respect to the nature of such orders which are more aligned to the needs of the statutory system than the needs of children and young people. This is further demonstrated by the removal of critical safeguards with respect to ongoing periodic review of their treatment in care, despite the lessons of the *Royal Commission into Institutional Responses to Child Sexual Abuse* regarding the increased vulnerability of children exposed to early maltreatment and removed from their family to subsequent abuse, neglect and sexual exploitation.

These proposals represent a further removal of key safeguards to minimise rather than meet the state's obligations to children and young people.

Application to vary or rescind care orders

34. In what circumstances do you think that section 90 applications should be limited?

35. Are there any circumstances where an exception might need to apply?

Consistent with the theme already identified, the intent of this provision is to further marginalise families and limit their ability to engage in court processes to preserve their family, despite the already considerable powers invested in the Secretary and the Children's Court. Again, no evidence is presented that suggests claims that current provisions lack merit or are vexatious and are currently a significant problem. Given that such provisions would extraordinarily constrain the ability of families to participate in such processes, AbSec feels that extraordinary evidence is required to even consider such limitations.

Rather, as AbSec has argued previously, the burden of proof regarding interim orders must be changed such that the Secretary must demonstrate that they continue to be needed, ensuring that orders continue to operate in the best interests of children and young people.

As acknowledged in the paper, section 90 applications exist so as to ensure that care orders continue to operate in the best interests of children and young people.

Even if this may present a temporary barrier to achieving permanency (noting that no such evidence is presented), where such permanency orders are not in the best interests of children it is important that they are able to be challenged, with decisions being made by the Children's Court, including Aboriginal community controlled mechanisms with respect to Aboriginal children and young people.

Finally, AbSec has previously noted the challenges facing Aboriginal families in making section 90 applications. Rather than limiting such provisions, access to actively participate in these important judicial processes should be further strengthened, by making section 90 applications easier and improving resourcing of legal supports, including Aboriginal Legal Services.

Who can make applications to the Children's Court

36. Should NGOs be able to bring an application for a guardianship order without the written consent of FACS? If not, why not? What other risks might arise from this change?

It is proposed that NGOs be delegated casework management responsibilities and full decision-making for children and young people in the care of the Minister, which might result in more guardianship orders being filed. However, a number of potential risks are noted, including potential conflict of interest between FACS and designated agencies in court, as well as the simple fact that this is a basic responsibility of the Secretary given that the child is under the parental responsibility of the Minister.

In short, AbSec is strongly opposed to the responsibility of the Secretary being further mitigated through this or any other proposal. Put simply, when the state determines to intervene in the family environment of a child for their own safety, welfare and wellbeing, it does so on behalf of the broader community, reflecting our collective communal responsibility to children and young people. This responsibility cannot be abrogated. This represents an abuse perpetrated by the state against the most vulnerable members of our community.

Streamlining adoption orders

37. Should the Children's Court be conferred jurisdiction to make adoption orders where there are child protection concerns? If so, why? If not, why not?

AbSec continues to oppose the broad application of adoption orders for Aboriginal children and young people through the statutory child protection system, which should be enshrined within legislation as the basis for the NSW Government not repeating past practices. More specifically, given the requirement to ensure that adoption orders are clearly preferable to any other order that can be made, AbSec

is at a loss to explain how such orders are ever successfully justified, given the considerable additional supports available in statutory out-of-home care, unless it is determined that allocation of parental responsibility to the Minister is harmful in and of itself. In such a case, surely it is more beholden on government to improve the care conditions for children in statutory care.

With respect to the appropriate court, AbSec feels that given the significant scope and lifelong consequences of adoption orders, they must remain within the superior court, being the Supreme Court. While placing it in the Children's Court may streamline adoption applications, it is also a fact of social work that professionals are slow to revise their own judgements even in the context of mounting contrary evidence[34]. As such, transfer to a second court provides a critical opportunity for a fresh consideration of the circumstances of the child, critically important to upholding the rights of the child given the lifelong consequences of this decision.

In AbSec's view, the period for finalising adoption should be considered as a feature of the system, strengthening confidence in the ability of prospective adoptive parents to meet the needs of children and young people, noting that the needs of children exposed to early adverse experiences can be difficult to predict and can change drastically over time. It allows reality testing of the placement and the provision of supports. Streamlining this process is unlikely to be of benefit to children and young people, who should remain at the centre of system design and decision making.

Dispensing with a parent's consent for adoption of a child

38. Should the Adoption Act be amended to provide additional grounds for dispensing with parental consent? If so, what are the grounds upon which dispensing with a parent's consent could be considered? If not, why not?

The Discussion Paper proposes additional grounds for dispensing with the consent of parents in adoption matters. The Discussion Paper notes that it can be difficult to gain this consent due to difficulties engaging birth parents. As such, the NSW Government wishes to gain additional powers to dispense with the need to gain the consent of parents, relieving them of the responsibility to engage with parents.

Put simply, following poor practice on behalf of the statutory authority to engage and empower families throughout their work with families, FACS further seek to absolve themselves of responsibility to rectify this, rather dispensing with that responsibility altogether. AbSec is particularly concerned that this power will be utilised most with respect to children currently in care, who did not have the benefit

[34] Munro, E. (1999) Common errors of reasoning in child protection decision making, *Child Abuse and Neglect,* Vol.23(8), pp. 745-58.

of participatory practices such as Family Finding and Family Group Conferencing to engage families and support family preservation, and who have not been adequately supported by FACS to retain contact with their family, with these changes used to finalise their permanent disconnection from their family.

AbSec feels that provisions for dispensing with consent are already substantial, and to further extend them would reflect a commitment to exclusionary rather than open adoption practice. Our frameworks must protect families from the power and abuse of the state, upholding justice, dignity and family, rather than removing key responsibilities placed on governments as safeguards for children and their families.

Limiting a parent's right to be advised of an adoption

39. Should a parent's right to be advised of an adoption be limited? If so, how? If not, why not?

40. What is an appropriate period of time to wait for a parent to be located?

In the Discussion Paper, the NSW Government asserts that a balance must be achieved between the rights of parents to be heard and the interests of a child not being "unduly destabilised or undermined by unmeritorious applications contesting the decision". As such, the NSW Government seeks to limit the right of parents to be advised of an adoption.

In AbSec's view, this reasoning presents a view that a parent's opposition to the forced adoption of their child, thereby permanently severing their child's relationship with their family, is always vexatious. Further, these and other proposals undermine the commitment to openness in adoption. Rather, it seeks to excuse the historic poor practice of statutory authorities to engage with families and support ongoing contact with their children by using this failure as subsequent grounds to further marginalise vulnerable families. It is noted that while other jurisdictions promoting adoption in care invest in supports for birth parents to maintain contact with their children, thereby promoting openness and upholding each child's right to their family, the proposal takes an opposing view, using the failure to provide these critical supports as justification to exclude parents and families completely. The child's right to their family is not noted in the Discussion Paper as a relevant issue, and does not appear to be a consideration in proposing these limitations.

The Convention on the Rights of the Child notes that all parties must have an opportunity to participate in such decisions[35].

Finally, no significant evidence for the need for this limitation is presented. Actions that extraordinarily limit the rights of individuals and the responsibilities of the NSW Government must be justified by extraordinary evidence.

Providing clear grounds for birth parents to rely upon when contesting an adoption

41. Should the Adoption Act specify the grounds birth parents can rely on when contesting the adoption of a child under the parental responsibility of the Minister or a guardianship order? If yes, what should these grounds be? If not, why not?

The NSW Government notes that the Adoption Act doesn't currently stipulate the grounds on which parents can contest an adoption application before the Supreme Court. Again, this action seeks to substantially limit the ability of already vulnerable families to engage in such processes, and increases the power of the state to remove their children, and forcibly sever those ties, permanently. It is acknowledged that this action would be contrary to the principles of procedural fairness. In contrast, no meaningful justification or evidence as to why such limitations are required is presented. Rather, it appears to suggest that the NSW Government believes that vulnerable parents should be further marginalised and excluded. It represents the paternalism that contributed to past practices of forced adoptions, rather than a commitment to openness in adoption.

AbSec on behalf of our stakeholders and communities remain opposed to the broad application of adoption in regards to Aboriginal children and young people, which should be enshrined within legislation in NSW in order to prevent occurrence of past practices.

Facilitating restoration

42. Should the six month time limit in section 136(3) be changed to 12 months? If so, why? If not, why not?

43. What potential risks to the safety of children and young people are associated with this proposal?

44. What would parents have to demonstrate to FACS before having their child/ren restored to them prior to the expiration of an order allocating parental responsibility to the Minister?

[35] Article 9(2) UN Convention on the Rights of the Child

The Discussion Paper invites comment on whether a child placed in statutory out-of-home care by a Court with a case plan goal of restoration can be restored more than 6 months prior to the date of restoration in the care plan.

In AbSec's view, this provision and 6 month limit reflects the fact that the court has determined that, at the time of decision, the child is not safe at home, and identifies a timeframe in the case plan for when safety might be achieved. The timeframe acknowledges that it is difficult to accurately predict future circumstances, allowing considerable flexibility to practitioners in assessing the actual timing of restoration within particular timeframes.

AbSec is concerned that expanding this timeframe too broadly represents a potential risk to children, as well as possibly setting parents up to fail in the restoration of their children. It is unclear what benefits to children and young people could be gained through this change. However, in consideration of current foster care shortages, the benefits to FACS become clear. This is not a suitable reason to remove child-focused safeguards within the Care Act that are already substantially broad.

Fundamentally, the current provisions provide suitable flexibility for restoration practice in the context of cases where the Court has determined that the child is not currently safe at home, but restoration is possible. This determination rightly rests with the court, and broadening the timeframe would increase the scope for FACS to undermine a determination by the court. If the circumstances of families change substantial such that an earlier restoration is considered possible, there is no limitation on FACS from making a section 90 application, enabling the court to consider if the family circumstances have changed enough to allow the child to return home. Such variations are rightly determined by the court.

The Discussion paper further asks what parents would have to demonstrate to FACS before restoration prior to the expiration of an order allocating parental responsibility to the Minister, however the context of this question is not discussed. Without such context, it is difficult to respond to this question. However, it stands to reason that the identified risk of harm concerns should be addressed. As noted earlier, there is concern that the language of this question places responsibility for achieving restoration solely with parents, rather than acknowledging the shared responsibility of both parties, including the provision of necessary supports to achieve restoration. As such, AbSec has argued for proactive efforts provisions, as well as a shifting of the burden of proof to the Secretary. In this context, FACS would be required to demonstrate to the satisfaction of the Children's Court that the child would not be safe at home.

Supported OOHC

45. Should the Care Act be amended to remove supported care arrangement where there is no court order in place?

The Discussion Paper explores whether supported care arrangements where there is no court order in place should be removed from the Care Act. It is noted that due to policy changes, there is no new entry to such arrangements. The Discussion Paper offers no clarification of what would happen to families who entered such arrangements prior to 1 December 2016.

First, AbSec feels that the opportunity for supported care arrangements without court orders, administered effectively, provide an opportunity to support family preservation and restoration without Court orders. The intent of Chapter 8, Part 3 appears to be aligned to the voluntary arrangements, such as temporary care arrangements as part of a comprehensive care plan to address assessed safety and risk issues through the provision of formal and informal supports. Such flexibility provides a useful tool in fulfilling our shared obligations to support families in their parenting role, where effective casework practice is performed, with structured monitoring, review and oversight. In many cases, such arrangements would be time limited to achieve a timely restoration (for example, section 152 limits temporary care arrangements to not more than 6 months). However, there is some scope for judicial review or to provide avenues for such decisions to be reviewed on the request of any part. It is not currently clear how such reviews operate, for example should a designated agency assess that a child is unable to remain with their parent, which appears to allow that child to remain deprived of their family environment for up to two years without orders. The possibility broadly offered by these provisions, to provide some support to families to care for children within the broader family unit, administered effectively (with relevant safeguards) and oriented towards outcomes, could support flexible “reinvestment” approaches that empower families and achieve improved outcomes for children and young people where otherwise more expensive and intrusive permanent care orders might be required.

AbSec further notes that should such arrangements be removed, it is critically that pre-existing commitments made to families are upheld.

Better protection of children in OOHC

46. Should the Care Act be amended to explicitly prohibit the publication of information identifying a child or young person as being under the parental responsibility of the Minister or in OOHC? If so, why?

The Discussion Paper notes a recent decision allowing publication of information identifying that a child or young person was in foster care or under the parental

responsibility of the Minister. The NSW Government argues that this recent decision means that the status of most children in care is not protected, and can be published in the media. Noting stigma in the community about OOHC, the NSW Government argues that the explicit prohibition on publication of such information would ensure the privacy of children and young people in care.

AbSec is committed to upholding the privacy of children and young people in care. Further, it is important that such provisions are clear. AbSec is aware of occasions where the lack of clarity around this provision has had the unintended consequences of conferring stigma and identifying children in care as "different" within their social cohort (even if the reason was not clear). Clarity is therefore essential. However, another important consideration is the need to ensure appropriate scrutiny of FACS, which may be limited by an explicit prohibition. An appropriate balance must therefore be established, including a process for assessing when the publication of such information might be warranted, to be determined by an appropriate judicial officer.

AbSec further has a comment about the stigma conferred to children and young people in OOHC. This stigma is a result of community views, and not the views of children and young people themselves. Similarly, these provisions have the potential, although intended to protect their privacy, to nevertheless communicate to children that their status as being in OOHC is something to be embarrassed or ashamed of. It absolves us as the child's community to overcome our own biases and prejudices about children and young people in care, and places the responsibility on children and those who care for them to maintain their silence. AbSec looks forward to the day where we confront these views head on. This is one of the benefits arising from AbSec's youth ambassador project, as well as the advocacy of CREATE. There must be a concerted effort to address these damaging societal views, such as through the advocacy of these programs and organisations.

Care responsibility for children of guardians who have passed away

47. Should care responsibility for a child vest in the Secretary on the death of a guardian/s, or the death of a carer who has been allocated all aspects of parental responsibility? If not, what other legal arrangements might be in the best interests of a child whose guardian or carer has passed away?

48. If so, should there be a time limit placed on the Secretary to undertake those assessments?

AbSec appreciates the concerns raised in the Discussion Paper, which notes that parental responsibility in such cases will revert to the child's parents, which have previously been found to be unsafe by the Children's Court.

In such circumstances, it would seem reasonable for parental responsibility to be allocated temporarily to the Secretary.

However, this should be limited, and include a requirement to engage with the family and assess whether it is safe to do so. Consistent with arguments made above, the burden of proof should rest on the Secretary to demonstrate that the child would be unsafe if restored to the care of the parents, taking into account their current circumstances. Such assessment should be made in a timely fashion, so as to prevent their drift in care and provide stability.

Children on such orders and their families should be supported to retain their relationship while in care, meaning that being placed with their parents (if safe) should represent being placed with someone with whom the child has an existing relationship.

Legislative safeguards for Aboriginal children and young people

As noted above, despite the unacceptable over-representation of Aboriginal children and families across the continuum of support, and the pressing need to address structural challenges that continue to undermine outcomes for this population, there is little focus on addressing this issue presented in the Discussion Paper. Nevertheless, AbSec recognises the need to seize every opportunity to improve the systems, services and supports to achieve better outcomes for Aboriginal children, their families and communities. 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) governments, including segregation, protection, absorption and assimilation.

Self-Determination

Bringing Them Home clearly linked these past practices with the current national over-representation of Aboriginal children and young people within contemporary child protection systems. In particular, self-determination was identified as a necessary foundation in the operation of any child and family system for Aboriginal children, families and communities, and urged genuine efforts to implement self-

determination across the child protection system. Self-determination was defined as the "collective right of peoples to determine and control their own destiny"[36]. *Bringing Them Home* pointed out that this is more than simply consultation about what services might be delivered, or participation in the delivery of services, but rather includes the defining feature of "Indigenous *decision-making* carried through into implementation"[37].

> "*Self-determination requires more than consultation because consultation alone does not confer any decision-making authority or control over outcomes. Self-determination also requires more than participation in service delivery because in a participation model the nature of the service and the ways in which the service is provided have not been determine be Indigenous peoples. Inherent in the right of self-determination is Indigenous decision-making carried through into implementation… 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"*[38]

However, the majority of the recommendations arising from *Bringing Them Home* have not been implemented[39], including efforts to genuinely empower Aboriginal communities to design, deliver and oversee systems intended to meet the needs of their children and families. While the *Children and Young Persons (Care and Protection) Act 1998* included a provision to promote "as much self-determination as possible" for Aboriginal communities, it is clear that this has not been implemented into practice in any significant way, with numerous subsequent reviews re-iterating the need to achieve greater self-determination for Aboriginal communities in child protection matters. In 2015, the Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda advocated that while self-determination was not a panacea, it provides a "necessary foundation to addressing the overrepresentation of our children in out-of-home care"[40]. Commissioner Gooda further emphasised the need for clear monitoring of progress

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[36] 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,* available at: https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf, pp. 276-277

[37] ibid

[38] 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,* available at: https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf, pp. 276

[39] Aboriginal and Torres Strait Islander Healing Foundation (2017) *Bringing Them Home 20 years on: an action plan for healing,* available at: http://healingfoundation.org.au//app/uploads/2017/05/Bringing-Them-Home-20-years-on-FINAL-SCREEN-1.pdf

[40] Gooda, M. (2015) *Social Justice and Native Title Report 2015,* Australian Human Rights Commission, Aboriginal and Torres Strait Islander Social Justice Commissioner, pp. 159

towards outcomes for Aboriginal children and young people, oversight mechanisms that are able to hold governments to account, and secure funding for Aboriginal community controlled organisations to deliver the services their communities need and achieve sustainable results. Aboriginal young people themselves noted the importance of Aboriginal community control and coordination of services at the local level in overcoming the challenges faced by their communities[41]. AbSec firmly supports the importance of these key elements in comprehensive reform to the child protection system in order to achieve better outcomes for Aboriginal children and young people.

Most recently, the Legislative Council General Purpose Standing Committee No.2 reported on an inquiry into child protection acknowledged the efforts of AbSec and others in advocating for practices which enhance self-determination. The Committee recommended that the NSW Government commit to working with Aboriginal communities and their organisations "to provide a far greater degree of *Aboriginal* self-determination in decisions on supporting families, child protection and child removals". [42] This recommendation was supported by the NSW Government[43]. Further, the Committee also noted the importance of more secure investment for service providers, and for greater investment in early intervention. Taken together, this view again emphasises the need for Aboriginal designed and delivered solutions to address the over-representation of Aboriginal children and young people within the statutory child protection system, with direct accountability to Aboriginal children, families and communities.

The ongoing and growing overrepresentation of Aboriginal children and young people, their families and communities across the statutory child protection system is a direct result of the failure of successive governments to learn the lessons of the past. By ignoring the recommendations of *Bringing Them Home* and subsequent reports to achieve genuine Aboriginal self-determination in child welfare, to invest in Aboriginal designed and delivered solutions to strengthen families and keep children safe at home, and establish accountability and community oversight mechanisms, the size and scale of Aboriginal over-representation has worsened. For example, *Bringing Them Home* noted that Aboriginal children were almost seven and a half times more likely to be in care than their non-Indigenous peers, however recent evidence from the Australian Institute of Health and Welfare places

[41] AbSec (2016) *Youth Report: AbSec Youth Ambassador Program.* Available https://www.absec.org.au/images/downloads/AbSec-YouthReport-2016-web.pdfA

[42] Legislative Council General Purpose Standing Committee No.2 (2017) *Child Protection*, pp. 140. available at: https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2396#tab-reports

[43] NSW Government (2017) NSW Government Response to Report 46 of the Legislative Council Portfolio Committee No. 2 – Health and Community Services – Child Protection, available at: https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/GovernmentResponse/6106/Government%27s%20Response%20-%20Child%20Protection.pdf

that figure at over 10[44]. *Bringing Them Home* reported that 829 Aboriginal children were in care in 1993, comprising 17.7% of the out-of-home care population of the state. At 30 June, 2016, there were 6652 Aboriginal children in out-of-home care in NSW, an increase of over 700%, compared to an increase of 188% for non-Aboriginal children and young people over the same period. The evidence clearly demonstrates that the status quo approach to Aboriginal child welfare, applying a "one-size-fits-all" model, is incapable of addressing the over-representation of Aboriginal children and young people in care. Further, Family and Community Services report that:

> *"Aboriginal children and young people account for 21.5% of all children and young people reported at risk of significant harm, and 37% of all children and young people in out-of-home care"*[45]

That is, the disproportionate presence of Aboriginal children increases across the continuum of support, suggesting that current approaches to actively support children and families, strengthening families and reducing the need for more intrusive and damaging interventions are particularly poorly aligned to the needs of Aboriginal children and families. The ongoing over-representation of Aboriginal children and young people within the statutory system has been described as "one of the most pressing human rights challenges facing Australia today"[46].

Despite this national crisis, the legislative reforms proposed by Family and Community Services are almost entirely silent with respect to addressing the over-representation of Aboriginal children affected by the statutory child protection system in NSW. This is hugely puzzling to Aboriginal communities and their community controlled organisations, who continue to advocate for a dedicated focus on the needs of Aboriginal children and young people, their families and communities, addressing the enduring intergenerational impacts of colonisation, marginalisation and forced separations through Aboriginal community controlled, culturally embedded and holistic healing-focused approaches.

Where the importance of Aboriginal self-determination is mentioned, it reflects a distinct lack of understanding of the principle of self-determination. The Discussion Paper argues that Aboriginal self-determination will be strengthened through Family Group Conferencing approaches that promote the participation of Aboriginal families in child protection decision making. However, family participation, while

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[44] Australian Institute of Health and Welfare (2017) *Child Protection Australia Report 2015-16.*

[45] NSW Family and Community Services (2017) Aboriginal Targeted Earlier Intervention Strategy 2017-2021, Draft for Consultation, pp.5 available at: https://www.facs.nsw.gov.au/__data/assets/pdf_file/0005/432869/Draft-for-Consultation-FACS-Aboriginal-Targeted-Earlier-Intervention-S....pdf

[46] Gooda, M. (2015) *Social Justice and Native Title Report 2015,* Australian Human Rights Commission, Aboriginal and Torres Strait Islander Social Justice Commissioner

essential, is distinct from the collective right of Aboriginal peoples to design, deliver and oversee the system in which individual families can participate in decision making about their lives, and the lives of their children. This is clearly demonstrated in the current Care Act, with both self-determination and participation emphasised within the Care Act[47].

Further, the current approach of Family and Community Services to Family Group Conferencing is inconsistent with the principle of self-determination, with Family and Community Services withdrawing support for a co-designed Aboriginal Family Group Conferencing approach delivered by AbSec in favour of a Family Group Conferencing model administered by Family and Community Services. That is, while Family and Community Services mistakenly argue that Family Group Conferencing will promote Aboriginal self-determination, showing a fundamental misunderstanding of the principle of self-determination, their recent history involving Family Group Conferencing shows a willingness to undermine genuine Aboriginal designed and delivered approaches in favour of a government imposed approach.

These factors demonstrate that provisions of the Care Act related to the self-determination of Aboriginal communities must be substantially strengthened if we are to see the structural changes necessary to address the over-representation of Aboriginal children and young people across the statutory child protection system, and improve the safety, welfare and wellbeing of all Aboriginal children. Further, and consistent with previous recommendations, these must be accompanied by significant changes to commissioning and investment, providing secure funding to Aboriginal communities to drive Aboriginal-led solutions, with oversight and accountability mechanisms to safeguard Aboriginal children and young people and their families. This is the focus of AbSec's recommendations on behalf of our members, stakeholders and communities in NSW.

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

[47] Section 11 relates to Aboriginal self-determination, section 12 relates to the participation of Aboriginal families in decision making

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.

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"[48]. 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

[48] *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

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
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 stymy 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 NSW Government has proposed a range of legislative reforms to the Care Act and the Adoption Act, with a clear intent to make permanent care orders easier to establish, significantly limit existing and appropriate responsibilities currently placed on the Minister and Secretary, and limit the rights and opportunities available to already vulnerable families to participate in such processes.

In AbSec's view, these reforms are not consistent with the stated commitment of FACS to justice, dignity and family as expressed through their practice framework. Rather, it represents a shift towards exclusionary and paternalistic practice.

AbSec has a wide range of concerns about the proposed reforms with respect to their potential impact on Aboriginal children and families, as well as the consultation process itself. AbSec remains opposed to permanent care orders as currently conceptualised, given the absence of critical safeguards for Aboriginal children, and therefore is concerned about the significant potential for the permanent disconnections of Aboriginal children and young people from their family, community and culture that such orders represent. Further, AbSec is

concerned by the lack of a clear and coherent strategy for overcoming the over-representation of Aboriginal children across the continuum of support, as demonstrated by the remarkable absence of consideration about the particular needs of Aboriginal children, families and communities within the Discussion Paper. In particular, AbSec is concerned that this might reflect either that the NSW Government has no such strategy, or feels that a "business as usual" approach to Aboriginal children and families will, for some reason, suddenly have drastically different results to those achieved over the long history of government paternalism with respect to Aboriginal children and families.

Further, AbSec is concerned about the lack of genuine community engagement and the unreasonable timeframes provided for community consultation, particularly given the importance of such issues. This is exacerbated by the fact that the driving rationale for the review, the Tune Review, remains cabinet in confidence, and that no clear evidence is presented for many of the proposals included in the Discussion Paper. AbSec feels that the lack of community engagement, and lack of transparency, reflects a worrying approach to an important public issue.

As well as responding to the key questions, AbSec further outlines additional safeguards and frameworks that would integrate self-determination and the ATSICPP (including prevention, partnership, placement, participation, and connection) into the very fabric of processes and practice in NSW. This includes the establishment of an Aboriginal statutory authority and relevant local Aboriginal community controlled mechanisms to play a far greater role in the design and delivery of services and supports as well as decision making regarding Aboriginal children and families. AbSec notes the commitment of Community Services Ministers to uphold the five domains of the ATSICPP, and encourages the NSW Government to engage with AbSec and Aboriginal communities to effectively enshrine these important principles into our legislative and practice frameworks.

Further, AbSec recommends proactive efforts be mandated within the Care Act to ensure that the statutory system actively supports families to address those issues contributing to risk of significant harm to their children. For Aboriginal children and families, such supports should be designed and delivered by Aboriginal communities themselves, ensuring they are culturally embedded and tailored to the needs of Aboriginal children and families. Many of these recommendations are consistent with the approaches undertaken in other jurisdictions (including the *Indian Child Welfare Act* in the US, as applies in Illinois and New York which were cited as models for other aspects within the Discussion Paper), and even within NSW with respect to other issues of key concern to Aboriginal communities. In AbSec's view, these elements must be implemented for the Care Act to represent internationally accepted best practice with respect to the care and protection of Indigenous children and young people.

AbSec recommends that the NSW Government significantly reconsider the direction of their current reform agenda as it relates to Aboriginal children, families and communities, and to undertake a more extensive and collaborative consultation process to facilitate greater engagement and participation in this important area of reform. In particular, AbSec calls on the NSW Government to commit to a dedicated Aboriginal engagement strategy, facilitated by AbSec in partnership with the Aboriginal Legal Service (NSW/ACT), with an appropriate timeframe for the participation of Aboriginal communities "with as much self-determination as possible". This process must include consideration of the findings and recommendations arising from the independent review of Aboriginal children and young people in out-of-home care, *Family Is Culture,* chaired by Prof. Megan Davis, as well as any other relevant recommendations including those from *Bringing Them Home.*

Aboriginal communities have been clear and consistent about the changes necessary to achieve a more effective child and family system for Aboriginal children and young people, their families and communities. Without the principle of self-determination and a full implementation of the ATSICPP, including prevention, partnership, placement, participation and connection, the over-representation of Aboriginal children and families across the continuum of support has continued to climb.

Positive change for Aboriginal children, families and communities, in line with the recommendations of *Bringing Them Home,* is long overdue.

We invite the NSW Government to join with Aboriginal communities to finally implement these principles into the very fabric of the statutory system for Aboriginal children and families.