



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

### **Guardianship orders for Aboriginal children and young people**



## Summary

Recent reforms within the NSW child protection legislative framework have introduced new legal orders as well as establishing a hierarchy of placement options for all children and young people in out-of-home care (OOHC). This hierarchy, known as the Permanent Placement Principles, prioritises guardianship orders for those children who are unable to remain at home. Under guardianship orders, full parental responsibility for a child or young person for whom there is “no realistic possibility of restoration” will be placed with a “relative, kin or suitable other person” until 18 years of age. While guardians will currently continue to receive financial support in the form of carer payments, guardians will not receive ongoing practical or casework support from FACS or other accredited agencies, but will be expected to meet the child’s needs independently, drawing on community supports.

Given the over-representation of Aboriginal children and young people in OOHC, reforms to the OOHC system are of significant concern to Aboriginal families and communities. Guardianship, as it is conceptualised in NSW, raises a number of worries for Aboriginal families and communities.

First, there are significant concerns over legal permanent care orders administered by non-Aboriginal systems being imposed on Aboriginal children and families. In the context of ongoing challenges in the application of the Aboriginal Child and Young Person Placement Principles, including the participation and self-determination of Aboriginal people in decision making, challenges in the timely and accurate identification of Aboriginal children and families in the child protection system, and ongoing concerns in the development and implementation of rigorous cultural care and support plans to protect Aboriginal children’s cultural rights, AbSec remains opposed to permanent care orders such as guardianship and adoption for Aboriginal children.

Additionally, we feel that the design of guardianship orders place children and young people at risk through the absence of ongoing practical supports that are critical to supporting children and young people and those that care for them. Ongoing casework support is essential to meeting our obligation to ensure that children and young people removed from their families by the State are safe and free from abuse, neglect and exploitation in care, receive appropriate therapeutic care including supports for their carers and supports to effectively navigate the education and other systems, are supported to maintain and build their connections to family, community, culture and Country, and are supported to transition from statutory care. It is our belief that these elements are critical to realising the best interests of the child and for achieving positive outcomes for children and young people in OOHC.

In order to overcome the over-representation of Aboriginal children and young people in the OOHC system, it is critical that Aboriginal communities are empowered to design and implement systems and processes for the care and protection of Aboriginal children, and that those in care are adequately supported. As such, AbSec continues to oppose guardianship orders for Aboriginal children in the absence of adequate safeguards that ensure that Aboriginal families and communities make decisions about the wellbeing of their children and are able to monitor the wellbeing of Aboriginal children in OOHC and support their care and cultural rights. Aboriginal families and communities are strongest when they are empowered to exercise control over their own lives and to develop systems and services to support vulnerable families and strengthen communities, which will in turn ensure that Aboriginal children are safe, supported and strong in their culture, providing the opportunity to participate fully in their community and fulfil their potential.

## Introduction

The purpose of this paper is to outline recent permanency reforms in out-of-home care (OOHC), and to develop a position regarding these reforms and their potential impact on Aboriginal children, families and communities. In particular, this paper focuses on the recent introduction of guardianship orders as a form of permanent care order, and the potential risks and benefits such orders pose for Aboriginal children and young people in OOHC. In considering these risks and benefits, AbSec seeks to develop a formal position regarding appropriate orders for the care and protection of Aboriginal children, with the best interests of the child as our paramount consideration, ensuring meaningful connection to culture.

Aboriginal children and young people continue to be over-represented within the OOHC population, being in OOHC at 9.7 times the rate of their non-Indigenous peers in NSW; slightly higher than the national average (9.2). NSW has among the highest rates of children in OOHC (10.8 children per 1000 overall, compared to a national average of 8.1). In simple terms, this means that approximately 1 in 14 Aboriginal children in NSW are in OOHC, compared to approximately 1 in 136 for their non-Indigenous peers. Of particular concern, the rate of Indigenous children in OOHC has risen steadily, with the risk ratio (that is, the rate at which Aboriginal children are over-represented in the OOHC system) in NSW rising from 11.3 in 2010 to 11.8 in 2013<sup>1</sup>.

It is critical that the Aboriginal sector defines a clear and reasoned position on guardianship orders and other permanent orders for Aboriginal children and young people, including a vision for the way forward with respect to meeting the developmental needs of Aboriginal children and young people in OOHC. This position will provide unambiguous advice to government regarding the expectations of the sector when making decisions about the lives of Aboriginal children and families that reflects both our right as Aboriginal people to self-determination as well as our obligations to care for our communities, particularly our young people.

While this paper focuses on guardianship orders within the OOHC sector, AbSec reaffirms our broader perspective regarding the importance of effective community-controlled universal child and family supports as well as targeted family preservation services to promote child-centred communities and reduce the need for children to enter OOHC. We continue to assert that adoption is not an appropriate placement option for Aboriginal children and young people in OOHC, given the devastating lasting impacts on the child losing their identity and belonging.

## Background

### Permanent Placement Principles

The Permanent Placement Principles, included as s.10a of the *Children and Young Person (Care and Protection) Act 1998 (NSW)* (the Care Act), establish the preferred order of placement for children and young people entering care with *no realistic possibility of restoration*. For Aboriginal children, this preferred order of placement is shown in Table 1.

The Permanent Placement Principles operate within the context of the Care Act, including principles of safety, wellbeing, cultural considerations and the Aboriginal Child and Young Person

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<sup>1</sup> Rates taken from the Child Protection Australia annual reports published by AIHW. It should be noted that figures from 2014 outlined in the most recent report note a risk ratio in NSW of 9.7, however this figure cannot be compared with previous figures due to changes in the underlying population assumptions, which were updated in the most recent report based on census data.

Placement Principles (ACYPPP). These reforms also establish clear timeframes, based on the age of the child, for the Children’s Court to determine whether restoration is a realistic possibility in order to promote timely decision making about the long term needs of children and young people.

The Permanent Placement Principles then refers to the party or parties in whom full legal responsibility for children and young people may be placed (preferring in general to invest legal responsibility in individuals rather than the State/Minister - see Table 1), raising the significant concern of the impact this might have on Aboriginal children, families and communities (stability, wellbeing, connection to family and community, identity formation and cultural dispossession).

Table 1: Permanent Placement Principles and Parental Responsibility for Aboriginal children and young people

Preference	Court Order	Long term Parental Responsibility
1	Family Preservation/Restoration	Retained by parent(s)
2	Guardianship	Relative, kin or other suitable person
3	Foster Care	Minister/FACS
4	Adoption	Adoptive parent

AbSec remains committed to promoting effective universal and targeted family support services to support Aboriginal children and young people to remain safe at home. Aboriginal children and families remain at significantly higher risk as a result of the intergenerational impacts of trauma, dispossession and marginalisation associated with colonisation, past government policies and ongoing social disadvantage. It is critical that Aboriginal communities are empowered to develop and deliver holistic Aboriginal child and family services that are able to effectively intervene in the harmful cycles that place children at risk, with international evidence suggesting that indigenous communities that are empowered to control their own lives are best able to promote the safety, welfare and wellbeing of their children<sup>2</sup>. AbSec and our member agencies are focused on building the capacity of Aboriginal community-controlled organisations that are able to meet the needs of local communities, including universal and bespoke child and family services, in order to reduce the risks present for vulnerable Aboriginal children and give them the opportunity to grow up safe with their families, as is the experience of the vast majority of Aboriginal children. It should go without saying that this focus on reducing the need for OOHC services is not about keeping Aboriginal children in unsafe family environments, but rather seeks to support families and communities to keep their children safe from harm.

*Aboriginal communities that are empowered to control their own lives are best able to promote the safety, welfare and wellbeing of their children.*

**Guardianship Orders**

Guardianship orders made under the Care Act place all aspects of parental responsibility (including responsibility for the child’s cultural and religious upbringing) for a child with a “relative, kin or other suitable person” who is then responsible for the ongoing care and wellbeing of the child until they reach the age of 18. It should be noted that “suitable person” is not defined by the legislation, but does not have to be a member of the child’s family or kinship group. Current

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<sup>2</sup> Chandler, M. (2015) ‘Cultural wounds require cultural medicine’. Presentation at Secretariat of National Aboriginal and Islander Child Care Conference, 15 September 2015, Perth WA.

figures<sup>3</sup> suggest that 2430 children in NSW are on guardianship orders, however AbSec is unaware of how many of these children are Aboriginal.

The experience of children and young people in foster care in NSW is too often characterised by instability and placement changes, which make it difficult for already vulnerable children and young people to develop the strong, supportive relationships that promote resilience. There is considerable evidence that placement changes represent a risk to the long-term wellbeing of children and young people in OOHC<sup>4</sup>. In this sense, guardianship orders are intended to provide permanence and stability for children and young people in OOHC care through making legal “permanent care orders” that place full parental responsibility for children and young people with those that provide their day-to-day care. That is, guardianship orders seek to promote stability through creating a formal legal relationship between the child and their caregiver in the hope that investing parental responsibility in the guardian and removing FACS involvement will result in a more stable “normal family” arrangement for the child and their family.

While financial support is currently provided to guardians, it is noted that the Director General “may” continue to provide financial support to guardians<sup>5</sup>, suggesting that this support is open to the discretion of the Director General. Ongoing casework support is not provided, with guardians expected to access local services in the community. The assessment process for guardianship orders is understood to include the prospective guardian demonstrating their ability to meet the child’s needs, including accessing any local services that may be required, supporting family contact and maintaining connections to community and culture. In granting a guardianship order for an Aboriginal child, the Court must be satisfied that:

- There is no realistic possibility of restoration
- That the prospective guardian is able to provide a safe, nurturing, stable and secure environment, and will continue to do so,
- That the placement is in accordance with the placement hierarchy outlined in s.13 of the Care Act
- That the child has consented (if the child is over 12 years of age and is capable of giving consent)<sup>6</sup>

Guardianship orders are also required to comply with the Aboriginal Child and Young Person Placement Principles (ACYPPP), which seeks to empower Aboriginal communities to make decisions about the care and protection of their children and outlines a placement hierarchy to keep Aboriginal children connected to their family, community, culture and Country. Care plans are also required as part of the application for guardianship orders, outlining at a minimum the residence of the child, any arrangements for contact, education and training, religious upbringing, health care, and the views of the child or young person themselves, including “issues of social, cultural, educational or economic significance in relation to the child or young person or his or her family”<sup>7</sup>.

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<sup>3</sup> NSW Family and Community Services, NSW OOHC Aboriginal Transition Dashboard June 2015

<sup>4</sup> Pecora P, Kessler R, Williams J, et al. Improving family foster care: findings from the Northwest Foster Care Alumni Study. Seattle, WA: 2005. Casey Family Programs, available at <http://www.casey.org>.

<sup>5</sup> s.79(c) *Children and Young Persons (Care and Protection) Act 1998 (NSW)*

<sup>6</sup> s.79(a) *Children and Young Persons (Care and Protection) Act 1998 (NSW)*

<sup>7</sup> s.22(2)(g) *Children and Young Persons (Care and Protection) Regulation 2012*

## Implications of guardianship orders for Aboriginal children and young people

AbSec and its members acknowledge the importance of promoting stable care for children and young people for whom restoration is not a realistic possibility, and the benefits conferred by stable, supportive relationships with caring adults in their community.

However, AbSec remains concerned about plans to legislate stability for children and young people in OOHC care, and sees permanent care orders such as guardianship and adoption, administered “on” Aboriginal communities (rather than by communities through their own robust governance structures) as a return to past practices broadly referred to as the Stolen Generations. That is, it represents the ongoing permanent removal of Aboriginal children from their families, communities, culture and Country by non-Aboriginal systems in the name of providing better outcomes for our children. As with the Stolen Generations, there is no evidence that outcomes for Aboriginal children are promoted through these approaches.

Rather, AbSec agrees with evidence provided to the Senate Inquiry into OOHC care noting that stability should not be conflated with legal permanence, and can be achieved through other types of orders<sup>8</sup>. AbSec believes that the current instability experienced by many children and young people in OOHC care is not due to a lack of legal permanence or a lack of commitment from foster or kinship carers in the absence of a legal order, but rather a failure of the child protection system to provide the necessary supports that empower families and communities to meet the changing needs of children and young people in OOHC care over the course of their development. This includes monitoring that the rights of children are protected and realised in their alternate care, including their right to safety, culture, care and dignity. This is further informed by the voices of children and young people in OOHC care who have consistently emphasised the importance of consistent positive relationships, particularly the role of caseworkers in providing support and advocacy for children and young people and those that care for them<sup>9</sup>.

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

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<sup>8</sup> Australian Senate Community Affairs References Committee (2015) Out of home care, available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/out\\_of\\_home\\_care/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/out_of_home_care/Report)

<sup>9</sup> CREATE Foundation ‘Hear our Voice’ forum, Sydney NSW; Ministerial Out-of-home care forum, 19 October 2015, Australian Technology Park, Redfern NSW

models of guardianship and adoption place children in OOHC at unacceptable risk of possible future harm, and fail in the State's responsibility to ensure the safety, welfare and wellbeing of children and young people taken from their families by the State for the duration of their time in statutory OOHC.

In addition to safety concerns, the current model of guardianship arguably is not well suited to meeting the developmental needs of children and young people in care. While guardianship orders currently offer carers ongoing financial support, recent inquiries have emphasised the importance of providing ongoing practical supports to children and young people in OOHC and those that care for them<sup>10</sup>. This is in recognition of the specialised therapeutic care required to support children and young people to recover from their early traumatic experiences and develop resilience. In particular, caseworkers provide a critical layer of support for both children and young people and their carers to proactively manage the changing therapeutic and developmental needs of children and young people in OOHC, providing trauma-informed therapeutic supports as well as supporting young people and their carers to navigate the often fragmented systems that young people in OOHC may interact with (such as the education, health and justice systems) to achieve positive outcomes for those in OOHC.

As noted above, guardianship orders must comply with the ACYPPP and include a care plan that outlines how a child's important connections with family, community and culture will be retained and promoted. NSW reports one of the highest rates of compliance with the ACYPPP in Australia<sup>11</sup>, however it should be noted that focusing on these figures oversimplifies the intent of the ACYPPP to a simple placement hierarchy, and does not examine whether an appropriate process is followed to identify Aboriginal children and engage relevant family and community members in decision-making about the placement of Aboriginal children and their ongoing connection to family, community and culture. Existing research in other jurisdictions demonstrates that few cases comply with this broader conceptualisation of the ACYPPP<sup>12</sup>, and while equivalent data does not currently exist in NSW, it is likely that similar issues persist here too, as evidenced by community responses to placement decision making such as the Grandmothers Against Removals (GMAR) and the experiences of Aboriginal community-controlled organisations working within their communities.

Similarly, there remain significant concerns about the quality and implementation of cultural care and support plans for Aboriginal children in OOHC, including the extent to which they retain and build on the child's connection to family, community and culture. Again, existing evidence suggests that the implementation of cultural support plans can be as low as 10%<sup>13</sup>, or, where they are present, be of poor quality that does not provide a meaningful cultural connection for Aboriginal children<sup>14</sup>. Similarly, while care plans include a commitment to maintaining a child's connection to their family, community and culture through cultural care and support plans, there is no clear

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<sup>10</sup> Australian Senate Community Affairs References Committee (2015) Out of home care, available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/out\\_of\\_home\\_care/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/out_of_home_care/Report)

<sup>11</sup> AIHW (2015) Child Protection Australia 2013-14

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

<sup>13</sup> Jackomos, A. (2014) *International Human Rights Day Oration: Linking our past with our future: How cultural rights can help shape identity and build resilience in Koori kids*. 4 December 2014

<sup>14</sup> Commission for Children and Young People and Child Guardian (2013) *Indigenous Child Placement Principle: Audit Report 2012/13*, The State of Queensland

mechanism to monitor or ensure compliance once a guardianship order is finalised, leaving Aboriginal children vulnerable to cultural dispossession<sup>15</sup>.

While the ACYPPP and care plans, including maintaining the child's connection to their family, community, culture and Country, are a prerequisite for guardianship orders, existing evidence raises many significant concerns about their implementation in practice and the ongoing monitoring and support role once legal permanence is established. As noted above, a feature of permanent care orders such as guardianship orders is that there is no legal mechanism to ensure compliance or to address practice issues regarding the ACYPPP or cultural care and support plans. Together, this emphasises the significant risks these orders present for Aboriginal children, families and communities, including the very real risk of disconnection and cultural dispossession. Further, the absence of transparent data regarding the number of Aboriginal children currently on guardianship orders undermines the ability of AbSec to advocate for the needs of Aboriginal children and families, and to support the Aboriginal sector to build capacity and deliver services targeted at meeting the needs of Aboriginal children in OOHC and their families.

Another significant concern for Aboriginal people is the timely and accurate identification of Aboriginal children. Ongoing challenges in the timely and accurate identification of Aboriginal children open the possibility that Aboriginal children may unknowingly be placed for adoption or guardianship prior to being identified as Aboriginal, again contributing to the cultural dispossession of Aboriginal people. For example, it has been reported that "in the majority of NSW cases where Aboriginal children in OOHC care have been adopted since 2011, their Aboriginal heritage became known after placement and during the adoption process and/or the children were of an age to give consent to their own adoption"<sup>16</sup>, identifying two significant issues. First, given the absence of a reliable process to accurately identify Aboriginal children at entry to the child protection system, permanent placement decisions may be made without due diligence and proper consideration of the child's cultural needs.

Second, but related to this, the issue of consent may be compromised with respect to children asked about guardianship and adoption where they have not been placed in accordance with the ACYPPP, and whose cultural rights and needs have been neglected throughout their time in OOHC. While AbSec respects the rights of young people to make decisions about their own lives, AbSec is concerned about the context in which such decisions are made in the absence of a meaningful cultural connection in the lived experience of Aboriginal children and young people in OOHC care, reflecting the ongoing failure of the child protection system to protect the cultural rights of Aboriginal children in its care. Aboriginal children and young people who have been denied their cultural rights are not in a position to make an informed decision regarding a permanent legal order that may deny them important cultural connections and safeguards where these cultural rights have already been systematically denied to them. In this context, guardianship orders can be viewed as introducing an inappropriate forced choice between a child's individual rights to belonging and connection to those providing their daily care, and their cultural rights and identity.

Evidence suggests that cultural connection is essential for identity formation and promotes resilience for children and young people exposed to adversity. However, permanent care orders such as guardianship provide no functioning mechanism to ensure that Aboriginal children and

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<sup>15</sup> Cripps, K. and Laurens, J. (2015) 'Protecting Indigenous children's familial and cultural connections: reflections on recent amendments to the Care and Protection Act 2007 (NT)', *Indigenous Law Bulletin* Vol. 8(17)

<sup>16</sup> Family and Community Services (2015) Issues Paper – Establishing an Institute of Open Adoption

young people have their cultural rights respected and grow up with meaningful connections to their family, community and culture. The absence of appropriate oversight mechanisms to protect the cultural rights of Aboriginal children, and ongoing challenges in the implementation of those parts of the Care Act that emphasise the participation and self-determination of Aboriginal communities in making decisions about the safety, welfare and wellbeing of Aboriginal children, raise significant concerns for the dispossession and disconnection of Aboriginal children from their family, community and culture. As such, permanent care orders such as guardianship and adoption, administered by non-Aboriginal systems and imposed on Aboriginal children, families and communities, represent a contemporary analogue of the policies of forced removal associated with the Stolen Generations, and may be contrary to the child's best interests.

*[1]Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. [2]States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; ... (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights.*

*Article 8, UN Declaration on the Rights of Indigenous Peoples*

#### AbSec's position regarding guardianship orders

A human rights framework provides an important foundation for an OOHC system operating as part of a broader child protection system aimed at realising the rights of children as outlined in the Convention on the Rights of the Child (the Convention). The Convention outlines the rights of all children, including the right to safety, family, community, identity and culture. Central to the Convention is the principle of "best interests of the child". This principle requires a systematic consideration of how children's rights and interests may be affected by decisions or actions taken by others, and affirms rather than overrides all other rights guaranteed by the Convention<sup>17</sup>, including the right of Aboriginal children to their community and culture<sup>18</sup>. Culture is considered to be of critical importance to the resilience of children and young people faced with adversity<sup>19</sup>, with cultural rights considered to underlie the meaningful enjoyment of all other rights and freedoms for Aboriginal children<sup>20</sup>. As such, any consideration of the best interests of Aboriginal children must include consideration of how their cultural rights will be realised, in partnership with the child's family and community.

A human rights framework also emphasises the principles of participation and self-determination for Aboriginal families and communities in making decisions about the care and protection of Aboriginal children<sup>21</sup>. These principles are also reflected in the Care Act, which states that "Aboriginal and Torres Strait Islander people are to participate in the care and protection of their

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<sup>17</sup> Article 8, Convention on the Rights of the Child

<sup>18</sup> Article 30, Convention on the Rights of the Child

<sup>19</sup> National Scientific Council on the Developing Child (2015) *Supportive Relationships and Active Skill-Building Strengthen the Foundations of Resilience: Working Paper 13*. <http://www.developingchild.harvard.edu>

<sup>20</sup> Jackomos, A. (2014) International Human Rights Day Oration: Linking our past with our future: How cultural rights can help shape identity and build resilience in Koori kids. Delivered 4 December, 2014, Peninsula Community Theatre, Mornington. Published in *Indigenous Law Bulletin*, Vol 8(17).

<sup>21</sup> United Nations Declaration on the Rights of Indigenous Peoples

children and young persons with as much self-determination as possible”<sup>22</sup>. These principles emphasise the importance of Aboriginal families and communities making decisions about and developing appropriate systems for the ongoing care and protection of Aboriginal children.

Aboriginal communities remain distrustful of government in the child welfare space. Too often, and despite the legislative commitments to Aboriginal participation and self-determination, significant decisions with wide-reaching impacts on the lives of Aboriginal children, families and communities (including the identification of Aboriginal children and families, decisions about safety, welfare and wellbeing, and placement decisions) continue to be made for, rather than by, Aboriginal families and communities, despite recent efforts to promote ‘consultation’. As such, AbSec and our member agencies remain opposed to permanent care orders being made through non-Aboriginal controlled processes and imposed on Aboriginal families and communities, and see such processes as failing to provide Aboriginal people with the opportunity to act “with as much self-determination as is possible” in child welfare matters<sup>23</sup>. Rather, guardianship orders are viewed as a “quasi-adoption” order that may see Aboriginal children dispossessed of their connection to family, community and culture, with significant impacts on the child’s current and future wellbeing<sup>24</sup>.

These concerns are exacerbated by the ongoing concerns of the Aboriginal community regarding the ability of FACS to adequately implement the ACYPPP, to develop and implement quality cultural care and support plans that provide Aboriginal children and young people with a meaningful connection with their family, community and culture, or even to accurately identify the cultural background of children and families coming into contact with the child protection system or entering care in a timely fashion. This final point is particularly concerning, as Aboriginal children may be placed on permanent legal orders before they are identified as Aboriginal, potentially denying Aboriginal children their cultural rights and providing no avenue for the Aboriginal community to ensure these rights are recognised and respected.

*In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.*

*Article 30, UN Convention on the Rights of the Child*

Additionally, AbSec argues that such orders do not represent the best interests of Aboriginal children and young people in need of alternate care given the lack of ongoing practical support provided to children and young people themselves and those that care for them, the lack of monitoring for safety, and the absence of effective mechanisms to ensure their rights to family, community, culture and Country are respected. In these ways, permanent care orders such as guardianship orders represent the closest contemporary analogue of past policies associated with the Stolen Generations in their failure to ensure the safety and wellbeing of children in alternate care and their capacity to contribute to the disconnection of Aboriginal children from their family,

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<sup>22</sup> s.11(1) *Child and Young Persons (Care and Protection) Act 1998 (NSW)*

<sup>23</sup> S.11 *Children and Young Persons (Care and Protection) Act 1998 (NSW)*

<sup>24</sup> Cripps, K. and Laurens, J. (2015) ‘Protecting Indigenous children’s familial and cultural connections: reflections on recent amendments to the Care and Protection Act 2007 (NT)’, *Indigenous Law Bulletin* Vol. 8(17)

community, culture and Country. In particular AbSec is critical of the implication that, having determined that a child is in need of care and protection, guardianship orders represent FACS deferring their responsibility to ensure the best interests of the child<sup>25</sup>. As Aboriginal community-controlled organisations, AbSec and our members take our responsibility to our children and young people seriously, and oppose guardianship orders on the grounds that they deny Aboriginal communities any effective legal mechanism to ensure that our children are safe and strong in culture.

Finally, it is not AbSec's role to intervene in the decisions of families and communities regarding the care of their children. AbSec acknowledges a variety of approaches to child-rearing in our communities, including relying on family members. Rather, if direct members of the child's family wish to become the child's legal guardian, including through the Care Act or Family Court processes, AbSec views that as a family matter. In such cases, it is important that family members, particularly the child's parents, are able to participate in and agree to placement decisions, and that appropriate, Aboriginal designed and controlled, rigorous assessment of prospective family guardians is followed to promote child safety. Rather, AbSec's position is that additional safeguards should be included to ensure that Aboriginal families and communities are empowered to determine the appropriate placement types for their children and young people.

Further, AbSec acknowledges that kinship carers, and particularly Aboriginal kinship carers, may often require significant support, either at specific times or events or generally over the course of the child's life, to meet the specific care needs of the child or young person. As such, ongoing active monitoring and support of long-term placements by skilled and capable Aboriginal community controlled organisations, including cultural support, is considered essential to promoting positive outcomes for Aboriginal children in OOHC, regardless of their placement type. This is consistent with AbSec's commitment to supporting the development of a comprehensive safety net of Aboriginal community-controlled services providing culturally appropriate services to children and families in their communities.

## Conclusion

AbSec and our members are committed to providing the highest quality support to Aboriginal children and young people who are not able to remain safely at home, built on a human rights foundation that respects a child's need for stability, consistent care, positive relationships and their right to remain connected to their family, community and culture. Further, AbSec and our members assert the sovereignty of Aboriginal peoples in New South Wales, and the rights of Aboriginal people to make decisions regarding the care and protection of Aboriginal children and young people. We believe that where children are deemed unable to remain safely at home and require the intervention of the community and alternate care, the obligation to ensure their ongoing safety, welfare and wellbeing requires an active commitment to provide ongoing support within the new or extended environment. As such, we remain opposed to permanent care orders including guardianship for Aboriginal children as they currently exist, being administered by non-Aboriginal people without appropriate assurances of Aboriginal participation and self-determination, and in the absence of ongoing casework support for children and their families.

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<sup>25</sup> Cripps, K. and Laurens, J. (2015) 'Protecting Indigenous children's familial and cultural connections: reflections on recent amendments to the Care and Protection Act 2007 (NT)', *Indigenous Law Bulletin* Vol. 8(17)

AbSec asserts that legislative changes are required to protect Aboriginal children from being permanently disconnected from their Aboriginal family, community and culture through permanent care orders, including additional safeguards to ensure that Aboriginal families and communities participate in decision making regarding the placement of Aboriginal children in care (including the most appropriate legal orders), and that their decisions are respected.

Additionally, it is important for Aboriginal children and young people placed in statutory care to receive specialised therapeutic care and ongoing casework support delivered through accredited Aboriginal community-controlled organisations in order to promote positive outcomes for this vulnerable population. This specialised support is critical and should be provided regardless of the type of order as part of our obligation to Aboriginal children and young people.

Ongoing support should include:

- Financial support for carers while Aboriginal children are in care.
- Casework support related to the ongoing implementation of each child's care plan, including positive relationships with the children themselves and the carers to support the therapeutic care of children and young people in care.
- Support relating to the implementation of cultural care and support plans, including retaining a child's connection to family, community and culture.
- Support relating to the transition from statutory care, to prevent homelessness and other inappropriate outcomes for children and young people.

In submitting this position, AbSec considers a system that is designed by and driven by Aboriginal families and communities upholds the true sense of self-determination, and allows us to ensure the safety, wellbeing and outcomes for Aboriginal children and young people. It is through this that we maintain a holistic Aboriginal child and family service system can ensure better outcomes for Aboriginal children and young people, and ensure ongoing and necessary supports for vulnerable or 'at risk' Aboriginal children and young people regardless of their placement type. Decisions regarding child upbringing and developmental growth need to be informed by their cultural, community and family history to inform their lifelong identity and sense of belonging.