



Mr Michael Coutts-Trotter
Secretary
Department of Family and Community Services
Email: Adoption.RegReview@facs.nsw.gov.au

Re: Adoption Regulation 2015 – Regulatory Impact Statement

Dear Mr Coutts-Trotter

I refer to the above and thank you for the opportunity for the Aboriginal Child, Family and Community Care State Secretariat (NSW) (AbSec) to provide input into the matter.

At the outset, we state our opposition to the adoption of Aboriginal children through processes designed and administered by non-Indigenous people, and assert our right to develop and maintain systems for the care of our children.

We acknowledge in the Regulatory Impact Statement that the central purpose of such Regulations are to support the objectives of the *Adoption Act 2000* (the Act), including that “NSW adoption law and practice should comply with Australia’s obligations under treaties and other international agreements”, which includes the UN Declaration on the Rights of Indigenous Peoples (the Declaration).

We outline some broad principles with respect to the operation of the Act with respect to Aboriginal children, and seek to comment in a general way as to the impact that the proposed regulatory provisions might have on Aboriginal children, families and communities. We also make a clear recommendation regarding the inclusion of an additional criterion to Clause 86 of the *Draft Adoption Regulations*.

Guiding Principles

AbSec has significant concerns regarding processes such as adoption administered by non-Indigenous people for the long term care of Aboriginal children. Such processes undermine the rights of Aboriginal people to self-determination and to culture. Similar practices enacted in the past under contemporaneous understandings of the child’s best interests continue to have a devastating effect on our communities, contributing to poor outcomes including over-representation in child protection and justice populations, poor health outcomes and other issues that limit the ability of many Aboriginal people to participate fully in our community. As such it is critical that decision making about the long term care of Aboriginal children is determined by Aboriginal families and communities, including Aboriginal community organisations, as deemed appropriate by each community.

In doing so, we assert the rights of Aboriginal people and communities, as outlined in the Declaration, including the right to self-determination, to participate in decision-making and to protect, preserve and revitalise our distinct cultural identities and pass them on to our children. We acknowledge that these issues are in many ways reflected in s. 33-36 of the Act (and to s.39 with respect to Torres Strait Islander children), which require the Director-General or appropriate officer to ensure that Aboriginal people, including relevant community-based organisations, are consulted with respect to the placement of an Aboriginal child, require that the Aboriginal Child Placement Principles (s.35) are followed, and that adoption is only considered if clearly preferable in the best interests of the child to any other legal alternative (s. 36). In light of past practices, we assert that the best interests of the child can only validly be defined by Aboriginal families and communities themselves, in line with our rights as Indigenous people.

In addition to these provisions, we argue that there is a role for an independent Aboriginal officer or organisation, such as AbSec, to support Aboriginal families and communities to participate effectively in decision making about their children and to provide ongoing monitoring and support cultural participation in any instances where alternate care is required for Aboriginal children.

Further, we feel that “consultation” sets an inadequate condition that is inconsistent with the rights of Aboriginal peoples, as there is no obligation placed on the Director-General or other officers to listen to the wishes of Aboriginal people in forming their decision. We feel that adoptions for Aboriginal children would only ever be appropriate where that decision is made freely by Aboriginal people according to accepted processes designed by Aboriginal people and communities, consistent with our rights.

Dual accreditation and assessment: The streamlining of the accreditation of OOHC and Adoption services and the assessment of carers as both authorised carers and prospective adoptive parents

In our response to the proposed 2014 legislative amendments to the *Children and Young Persons (Care and Protection) Act 1998*, our organisation made the submission that no processes should be ‘fast-tracked’ or streamlined for OOHC adoptions of Aboriginal and Torres Strait Islander children. In particular, our comments related to the dual assessment of authorised carers and prospective adoptive parents. We were opposed to the streamlining of assessments on the basis that the processes for assessment and approval of prospective out-of-home carers and adoptive parents have separate and distinct considerations.

We repeat below our submissions about these proposals, as the Regulatory Impact Statement accompanying the *Draft Adoption Regulations* states that the Office of Children's Guardian (OCG) and Family and Community Services (FaCS) would consider any comments about the changes to the Act in this regard.

The alignment of the two accreditation processes (for OOHC and Adoption services) that has now been incorporated into the recently amended Part 2 of the *Adoption Regulation 2003* was and remains similarly opposed by AbSec. It is concerning that these amendments have effect while there has not yet been a merging of the NSW Standards for Statutory OOHC and the NSW Adoption Standards.

Further, we assert that it is not proper to characterise the fact that there are separate processes for authorisation of authorised carers from adoptive parents as something requiring the reduction of 'unnecessary red tape'. AbSec sought, and continues to seek, the legislative recognition of the additional needs of children in OOHC who are prospective adoptive children, with particular attention paid to the specific rights of Aboriginal and Torres Strait Islander children as they relate to their cultural identity and connection to Community. This distinction is clearly revealed in the Aboriginal Child Placement Principles as outlined in s. 35 of the Act, compared with those found in s. 13 of the *Children and Young Persons (Care and Protection) Act 1998*. In particular, s. 13(6)(a) of the *Children and Young Persons (Care and Protection) Act 1998* states:

"13(6)(a) Subject to the best interests of the child or young person, a fundamental objective is to be the reunion of the child or young person with his or her family or Torres Strait Islander community."

We are concerned that combined assessment processes may lead to significant difficulties for Aboriginal children. In particular, the placement (even if initially intended to be short-term) of Aboriginal children with non-Indigenous dually-authorised carers who intend to adopt may contribute to the long-term cultural dispossession of children, with determination made that adoption in this apparently stable placement is in their best interest. AbSec and our members have long challenged conceptualisations of "best interests" that argue that children's attachment relationships "trump" considerations of culture, in effect operating to deny Aboriginal children their right to community and culture and, in our opinion, contrary to the Aboriginal Child Placement Principles and the rights of the child. AbSec asserts that a child's rights to safety and development are indivisible from their rights to community and culture. AbSec is concerned that the dual

authorisation of those that care for Aboriginal children (particularly non-Indigenous carers) may similarly contribute to the long term cultural dispossession of Aboriginal children.

As stated above, AbSec asserts that the adoption of Aboriginal children is only appropriate where that decision is freely made by Aboriginal people according to our own processes. As such, and consistent with s.33-39 of the Act, only Aboriginal adoption services would be appropriate to support adoption processes for Aboriginal people. At present, there are no Aboriginal community-controlled services that are accredited to provide adoption services for Aboriginal or Torres Strait Islander children. Further, for Aboriginal children in OOHC, adoption is the last option with respect to the permanent placement principles (s.10A of the Children and Young Persons (Care and Protection) Act 1998). With this in mind, AbSec looks forward to continuing to work with FACS to improve the long-term outcomes (as defined by their Aboriginal community) of Aboriginal children and young people in OOHC.

Additional clauses requested as they relate to prospective adoption of Aboriginal children

AbSec agrees with imposing a positive obligation that a prospective adoptive parent must notify the relevant decision-maker of any significant change in circumstances that might affect their approval as soon as practicable after the change occurs (Clause 48(2) and 62(2) of the *Draft Adoption Regulations 2015*).

In light of the above, it is our view that a positive obligation should also be imposed on a dually-accredited OOHC/Adoption service to advise of the identification of any person seeking to be assessed as a carer for Aboriginal and Torres Strait Islander children and young persons who are in long term statutory OOHC with non-Aboriginal or authorised carers who had no prior existing relationship with the child before they entered statutory out of home care. Such a regulatory provision would be consistent with the Aboriginal Child Placement Principles and the permanent placement principles of the *Children and Young Persons (Care and Protection) Act 1998*.

Current trends in adoption as they relate to Aboriginal and Torres Strait Islander children (as outlined)

We note the statistics outlined in the Regulatory Impact Statement that state that seven Indigenous children were adopted nationally in 2013-2014, with “**all of these adoptions being known adoptions by persons that were either non-indigenous or whose indigenous status was unknown.**”¹

¹ Family and Community Services, Regulation 2015: Regulatory Impact Statement (2015) at page 8, quoting Australian Institute of Health and Welfare, *Adoptions Australia 2013-2014*, Child welfare series no. 60. Cat. No CWS 51, Canberra, 45. Emphasis added.

These cases may represent exactly the concerns that Aboriginal communities hold with respect to any proposed adoption of Aboriginal children in NSW – that Aboriginal children may be removed from their families, community and culture. This emphasises the importance of s. 33–39 in the current Act.

Further, s. 34(1) of the Act requires the Director-General or appropriate principal officer to make reasonable inquiries as to whether a child to be placed for adoption is an Aboriginal child. It is our position that these inquiries need to be extensive, well documented and involve the participation of relevant Aboriginal organisations, such as Family Link; an organisation able to make significant inquiries as to the Aboriginality of a child or young person. As the peak Aboriginal organisation for Aboriginal children and families in NSW, AbSec is well placed to support the Director-General in meeting their obligations under this part of the Act.

Our member agencies continue to be concerned about the adequacy of practices to identify Aboriginal children and young people (particularly within the child protection system). For example, we have recently been made aware of cases in which children previously identified as Aboriginal have been “de-identified” with inadequate consultation with Aboriginal agencies or community. These issues emphasise the importance of placing greater responsibility on officers to ascertain each child’s cultural background and ensure Aboriginal children are not denied their rights. It is essential that processes are established that are acceptable to the Aboriginal community and AbSec for the “de-identification” of Aboriginal children. At a minimum, a permanent note should remain on file for all children previously identified as Aboriginal and/or Torres Strait Islander in order flag this information for review should the child later be considered for adoption.

Provisions termed as ‘minor amendments’ to the draft regulations

We submit that the form of any written information given to a person on Aboriginal and Torres Strait Islander customs and culture (clause 86 of the *Draft Adoption Regulation*), should only be approved “*in consultation with an Aboriginal organisation approved by the Minister.*”

More specifically, we submit that for this information to be appropriate and significant, it needs to be provided by a member of the child or young person’s extended family or kinship group (where possible and appropriate), as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs.

We feel that it is important that Cultural Support Plans (as required under s. 46 (3) of the Act) are taken seriously in any situation in which an Aboriginal child is to be placed in long-term care with

carers of a different cultural group, including guardianship placements (us under the *Children and Young Persons (Care and Protection) Act 1998*). As is best practice in long-term OOHC, and consistent with the Aboriginal Child Placement Principles, this should include ongoing support and oversight by that child's community, through an appropriate local Aboriginal community organisation or AbSec (particularly where Aboriginal community-controlled OOHC agencies are not present). Such provisions are necessary to ensure that children and their carers are adequately supported, and that Aboriginal children placed outside of their cultural group retain access to culture consistent with the Act and the rights of the child. AbSec continues to have significant concerns about both the quality of Cultural Support Plans, and how rigorously they are applied and maintained for Aboriginal children and young people in OOHC. It is essential that Cultural Support Plans are monitored by an appropriate Aboriginal organisation, to support carers to meet their obligations and to ensure that Aboriginal children maintain their connection to family, community and culture. This would also enable AbSec as the peak body to further develop guidance for the broader system regarding best practice with respect to effective cultural support plans for Aboriginal children and young people.

With respect to cl. 82(3), we feel that changing "registered psychologist" to "counsellor" is contrary to the intent of the draft regulation, which extends protections for young parents consenting to adoptions (from those under 16 to those under 18). We feel that the previous regulations deliberately set this higher bar (referring to a registered psychologist rather than counsellor as proposed), and are concerned by the Regulatory Impact Statement suggesting that this is not reflected in current practice. Ensuring that young parents understand their rights and the effect of their consent is of critical importance, and we feel that this higher bar should not be removed in the name of expedience.

Regards



Tim Ireland

A/Chief Executive Officer

3 July 2015