Public Interest Advocacy Centre

Submission to Department of Communities and Justice Family is Culture Legislative Recommendations Consultation

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About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is a leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Our priorities include:

- Reducing homelessness, through the Homeless Persons' Legal Service.
- Access for people with disability to basic services like public transport, financial services, media and digital technologies.
- Justice for First Nations people.
- Access to sustainable and affordable energy and water (the Energy and Water Consumers' Advocacy Program).
- Fair use of police powers.
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project).
- Improving outcomes for people under the National Disability Insurance Scheme.
- Truth-telling and government accountability.
- Climate change and social justice.

Since 2017, we have been working in collaboration with First Nations organisations to achieve better outcomes for Aboriginal and Torres Strait Islander children, families and communities in the NSW child protection system.

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The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

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1. Introduction

PIAC welcomes the opportunity to contribute to the Department of Communities and Justice (**DCJ**) Family is Culture legislative recommendations consultation. We commend the NSW Government for its ongoing commitment to implementation of the Family is Culture (**FIC**) reforms and for committing to introduce legislation by the end of this year.

PIAC works with people and communities who are marginalised and facing disadvantage, and helps to change laws, policies and practices that cause injustice and inequality. Since 2017 we have been working in collaboration with First Nations organisations to achieve better outcomes for Aboriginal and Torres Strait Islander children, families and communities in the NSW child protection system.

This submission draws on our experience working with First Nations organisations on child protection reform as well as our broader experience working on systemic reform to laws and policies. We are not a First Nations organisation and do not attempt to speak to the concerns or priorities of Aboriginal and Torres Strait Islander people or communities. We strongly encourage DCJ to consider and defer to the views of Aboriginal and Torres Strait Islander stakeholders on these issues.[1] We limit our comments in this submission to views on how reforms may operate in practice and on the consistency of various approaches with the recommendations and themes of the Family is Culture (**FIC**) Review Report.

We have made general observations on legislative reform and the sequence for implementing the legislative reform recommendations as well as comment on the individual recommendations. We have organised this submission by reference to the three sections under which individual recommendations are grouped in the DCJ Family is Culture legislative recommendations discussion paper (**DCJ Discussion Paper**). We have attempted to answer the individual discussion questions posed in relation to each recommendation but note that we do not always agree with the framing of, or assumptions underlying, these questions. Where this is the case we have made that clear in our response.

2. General observations

The 2019 Family is Culture Independent Review of Aboriginal Children in Out-of-Home Care in NSW (**FIC Review**) was an independent, Aboriginal-led review into the experiences of Aboriginal children, young people, families and communities in the NSW child protection system. It was a monumental undertaking by Professor Megan Davis and her team, involving the review of the case files of all Aboriginal and Torres Strait Islander children and young people in out-of-home care (**OOHC**) between 1 July 2015 and 31 June 2016, relating to 1,144 children and young people. The FIC Review spent two years, from July 2017 to July 2019, holding consultations with a range of stakeholders including Aboriginal families and communities, government agencies, legal services, NGOs and caseworkers.

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[1] We particularly encourage the NSW Government to have regard to the joint publications by AbSec - NSW Child, Family and Community Peak Aboriginal Corporation (**AbSec**) and the Aboriginal Legal Service (NSW/ACT) Limited (**ALS**) *Honouring Family Is Culture: NSW Aboriginal community monitoring and reporting framework* (November 2019) and *Briefing Paper: Family is Culture Recommendations for Immediate Reform* (May 2022).

Out of this process, the FIC Review produced more than 3,000 recommendations relating to the individual case files, and a further 126 systemic recommendations[2] for reform of the NSW child protection system. Those 126 recommendations, 25 of which are being considered in this consultation, are the blueprint for a system that will better respect and serve Aboriginal children, families and communities and drive down the appalling rate of over-representation of Aboriginal children in OOHC in NSW.

The FIC Review intended its recommendations to be interdependent, overlapping, and necessarily implemented *together* to achieve meaningful change.[3] It was and is a holistic vision for reform. While we understand why the 25 legislative recommendations have been separately identified for consultation and implementation, we emphasise that implementation of the FIC Review recommendations cannot be piecemeal – *all* 126 recommendations must be fully implemented, in genuine partnership with Aboriginal communities and organisations such as AbSec and the ALS. PIAC supports the creation of an implementation plan for all 126 of the FIC Review recommendations, developed in partnership with Aboriginal communities and peak organisations. The voices and views of Aboriginal and Torres Strait Islander people must be centred and prioritised in the implementation of these reforms.

A vast amount of work went into the FIC Review's recommendations and all elements of the child protection system including policy, practice and legislation received consideration. We are concerned that some of the discussion questions posed in the DCJ discussion paper appear to undermine or re-litigate recommendations of the FIC Review, by asking if the recommendation should be implemented or if there are alternatives that could be considered. The FIC Review came to these recommendations after extensive and expert consideration and we urge that these recommendations are respected and implemented in the ways suggested.

Many of the legislative recommendations will require additional funding commitments to be effective. We strongly urge the NSW Government to commit to these resourcing requirements, and make the investment that is needed for transformational change to the child protection system. Effective investment in early intervention will mean far less money spent on removing children and less money spent on the OOHC system. Families being supported to remain together is the most affordable long term model for the child protection system.

We particularly urge the NSW Government to embrace additional resourcing for the funding and capacity building of Aboriginal controlled organisations and services. We know that Aboriginal children and families do better when they are supported by culturally safe and appropriate services, that understand them and their communities and the challenges they are facing. This was a consistent theme of the FIC Report and has been a theme of countless other calls for reform – services *for* Aboriginal people must be designed and delivered *by* Aboriginal people.

Similarly, we urge the NSW Government to embrace reforms that may require significant practice change for DCJ caseworkers and DCJ's funded service providers. Some of the recommendations may ask a lot more of these individuals and the structures in which they operate, but that is again

[2] There are two recommendations labelled 'Recommendation 93'. See Megan Davis, *Family is Culture Independent Review of Aboriginal Children in Out-of-Home Care* (Final Report, November 2019) (**FIC Report**), 299 and 303.
[3] This is one of the reasons we begin each of our discussions on the individual recommendations in this submission by attempting to place the recommendation in its broader context.

something that should be embraced. Change to large and complex systems has never been easy, but it is necessary, now more than ever. 25 years on from the Bringing them Home Report is far too long for Aboriginal families and communities to wait for change. All parts of the system must commit to doing better.

The NSW Government has committed to the National Agreement on Closing the Gap (**CTG**). The targets set by this agreement include CTG Target 12, committing the NSW Government to reduce the over-representation of Aboriginal and Torres Strait Islander children in OOHC by 45 per cent by 2031. Fully implementing the 126 systemic recommendations of the FIC Review, in genuine partnership with Aboriginal stakeholders and organisations would significantly improve the chances of meeting this target.

3. Sequence for implementing legislative recommendations

DCJ has organised the 25 legislative recommendations for consultation into three categories:

1. changes that can be made quickly subject to stakeholder feedback;
2. changes that may require further time and consideration; and
3. areas where existing settings may already be sufficient.

The peak Aboriginal and Torres Strait Islander organisations, AbSec and the ALS, disagree with DCJ about the categorisation of the 25 recommendations. The joint Briefing Paper on the FIC legislative reforms notes:

> As to the **first category**, all but one of the 11 recommendations proposed by DCJ for immediate implementation are aligned with our proposal. We disagree on recommendation 76, relating to (de)identification, as we believe this is a complex issue that requires deep engagement with Aboriginal communities and stakeholders through a longer consultation process and so should be in Stage 2.
>
> As to the **second category**, we disagree with DCJ about 4 of the 10 recommendations in this category. We say these 4 recommendations should be immediately implemented in Stage 1, rather than deferred to Stage 2. These are recommendations 25 (Requirement to Provide Early Intervention Support), 94 (Carer Authorisation), 117 (Period for Restoration) and 123 (Rules of Evidence). We agree with DCJ that the remaining recommendations in this category require more extensive consultation and are not appropriate for immediate implementation. **We are also concerned that DCJ have proposed recommendations in this category for future review at an unspecified time. The Stage 2 recommendations should be implemented by the end of 2023 at the latest.**
>
> As to the **third category,** we disagree with this category in its entirety. FIC examined existing policy and practice and found it to be inadequate to meet the needs of Aboriginal children and families. Recommendations 64 (Known Risks of Harm from Removal) and 121 (Adoption) should be considered for immediate, Stage 1 implementation and recommendations 11 (For-

Profit OOHC Providers) and 20 (Accrediting OOHC Agencies) considered for Stage 2 implementation.[4]

We respectfully agree with and adopt the views of our First Nations colleagues. We suggest DCJ re-think the categorisations in the DCJ Discussion Paper. We suggest that each of the AbSec and ALS 'Stage 1' recommendations be included in the Bill to be introduced this year, and that any remaining legislative recommendations, the AbSec and ALS 'Stage 2' recommendations, be included in a Bill by the end of next year at the latest.

4. Section 1 Recommendations

4.1 Recommendation 15: Public interest defence

Recommendation 15 was a recommendation made in the chapter of the FIC Report considering ways to increase accountability and oversight of the NSW child protection system.[5] Along with self-determination, increased public accountability and oversight was one of two areas of structural change that the FIC Review was of the view would go a significant way to addressing the entrenched problem of the over-representation of Aboriginal children in the statutory child protection system.[6]

FIC made Recommendation 15 out of a concern for the chilling effect that the current s 105(1AA) may have on otherwise important disclosures regarding poor casework practice or the welfare of children in OOHC. Section 105(1AA) criminalises publication of certain information about a child in OOHC. FIC examined the existing exceptions to criminal liability under s105(1AA) and found them 'insufficiently broad to cover a number of situations where it may legitimately be in the public interest to publish the fact that a child or young person is or has been under the parental responsibility of the Minister or in OOHC'[7] and that there was a 'great breadth of information that may be suppressed [that is] clearly undesirable and unwarranted'.[8]

Like DCJ and FIC,[9] we acknowledge and support the general position that children can suffer stigma and stress when it becomes known that they are in OOHC and so are entitled to keep this information private. It is important however, to ensure that provisions protecting this privacy do not prevent parents, other relatives or local organisations from bringing attention to or exposing poor casework practice. Stronger public scrutiny can be an important means for ensuring better casework practice.

We are of the view that a public interest defence to s 105(1AA) should be legislated, as recommended by the FIC review. We support the FIC recommendation that this be done by way of amendment to the current s 105(1AA). We are of the view that a narrowly tailored, good faith, exception would balance a child's entitlement to privacy against the chilling effect the provision

[4] AbSec & the Aboriginal Legal Service (NSW/ACT), *Briefing Paper: Family is Culture Recommendations for Immediate Reform* (May 2022), 6.
[5] FIC Report, Ch 8 (Public accountability and oversight).
[6] Ibid, xxxii.
[7] Ibid, 134.
[8] Ibid, 135.
[9] Ibid, 134 citing a DCJ publication: Department of Family and Community Services (NSW), *Shaping a Better Child Protection System* (Discussion Paper, 2017) 37.

may have on public scrutiny of DCJ. We suggest adding an additional subsection to s 105 to create the defence:

> (5A) Despite subsection (5), it is a defence to prosecution for an offence under subsection (2) that the person who published or broadcast the name of a child or young person acted in good faith:
>
> (a) to promote the safety, welfare or well-being of the child or young person; or
>
> (b) in the public interest.

We have suggested the inclusion of subsection (a) to cover situations where there may be doubt about whether what is in a particular child's best interests is the same as what is in the 'public interest'.

We note that an alternative to creating a defence to the criminal charge would be to create a 'pre-clearance' procedure, by which an individual such as a family member or a media organisation could apply to the NSW Children's Court for a declaration that they may publish certain information, on the basis that it would promote the safety, welfare or well-being of the child or young person or is in the public interest. This may address any concerns that a person or media organisation may publish or broadcast and raise a defence, but the harm to the child has already been done. We suggest that this alternative could also be achieved by adding an additional subsection to s 105:

> (5A) A person concerned that publication or broadcast of certain information may contravene subsection (2), may:
>
> (a) apply to the NSW Children's Court for a declaration that publication or broadcast of that information in good faith would:
>
> (i) promote the safety, welfare or well-being of a particular child or young person; or
>
> (ii) be in the public interest; and
>
> (b) if the Court makes such a declaration, that declaration is a defence to a prosecution for an offence under subsection (2).

This inclusion could be supported by an amendment providing for a regulation or rule making power for the conduct of an application for a declaration. We would support a pre-clearance approach rather than a defence, provided two conditions are met:

1. The Children's Court is sufficiently resourced to hear and determine applications in a timely manner. As with freedom of information requests, delays in granting permission to release or publish information can defeat the purpose of the exercise.
2. The application procedure not involve such cost as may deter potential applicants. We suggest that there be a nominal application fee for organisational applicants and no fee for individual applicants.

Is a public interest defence a sufficient deterrent to prevent publication of the names or identifying information of children and young people who are or have been in care?

We are concerned that this question misunderstands the nature of the recommendation. THE FIC Report suggested:

> A public interest defence would provide an adequate deterrent to sensationalist or unnecessary violations of a child's privacy, *whilst maintaining a channel for transparency and accountability in relation to matters of legitimate public concern* [emphasis added][10]

The FIC Review was concerned to balance the privacy of a child against disclosure of matters in which there may be a genuine public interest. The general rule in s 105(1AA) is the deterrent mechanism that protects privacy and the proposed defence narrowly allows for public interest disclosures.

What other mechanisms could be used to achieve the intent of the recommendation and protect the privacy of children and young people?

We are concerned that this discussion question either misunderstands, or seeks to re-litigate, the findings and recommendations of the FIC Review. The FIC Review identified the mechanism that it considered would best balance the privacy of children and young with the facilitation of genuine public interest disclosures, which is the legislative amendment recommended by Recommendation 15. This is the mechanism that should be implemented.

We note that the age of consent to publication could be lowered from 16 as an alternative to addressing the balancing the FIC Review sought to achieve. We are of the view however that the provision needs to be able to operate in regards to all children, as poor casework practice can be present whether a child is 12 or a newborn. As The FIC Review noted, having the power to consent for those children not able to consent vested in the Secretary is undesirable as the Secretary 'may consciously or unconsciously desire to minimise the political consequences of any perceived failure by DCJ'.[11] We support this in addition, but not as an alternative, to the public interest defence or pre-clearance procedure.

4.2 Recommendation 17: NSW Ombudsman's jurisdiction

As with Recommendation 15, Recommendation 17 is directed to strengthening public accountability and oversight of the NSW child protection system.[12] Recommendation 17 was designed to strengthen the role of the NSW Ombudsman as an accountability institution, as an interim measure while the Independent Child Protection Commission recommended by Recommendation 9 is being established.[13]

In relying on the Ombudsman to play an interim accountability role, the FIC Review was concerned that the Ombudsman could not investigate complaints more than 12 months old or issues that have or could be considered by a court.[14] The latter of these limitations is particularly significant in the context of child protection, given that most if not all child protection matters involving significant casework decisions are likely to be the subject of a proceeding in the Children's Court. Recommendation 17 was directed to removing this limitation.

[10] Ibid, 135.
[11] Ibid.
[12] Ibid, Ch 8 (Public accountability and oversight).
[13] Ibid, 139.
[14] Ibid.

Since the FIC Report was published, the NSW Ombudsman has issued a Special Report to Parliament concerning its jurisdiction.[15] In that report, the Ombudsman discusses and suggests that its position, based on legal advice, is that it does have the power to investigate under the *Ombudsman Act 1974* (NSW), regardless of whether there are related court proceedings underway.[16] The Ombudsman noted that this was a common misunderstanding of its jurisdiction and had been the basis of a DCJ objection to jurisdiction in a recent child protection investigation.[17] The NSW Ombudsman concluded that while not legally necessary, there may be benefit in putting its jurisdiction beyond any possible doubt.[18] The Ombudsman was therefore supportive of an amendment as recommended by the FIC Review and provided a suggestion as to how that amendment should be drafted.[19]

We are of the view that a clarification of the Ombudsman's jurisdiction to investigate notwithstanding related court proceedings should be legislated, as recommended by the FIC Review. We suggest that this be done by amending the *Ombudsman Act 1974* (NSW) in the manner proposed in the Ombudsman's Special Report.[20] The drafting in the Ombudsman's report uses slightly different language ('unlikely to adversely affect those proceedings') to the FIC Report ('not interfere with the administration of justice') but we do not consider anything significant turns on that distinction.

If so, what safeguards can be put in place to ensure that court or tribunal proceedings are not prejudiced?

We consider that the Ombudsman's discretion should be sufficient safeguard against prejudice. The Ombudsman is an experienced oversight institution, familiar with considering the terms of its jurisdiction and balancing the competing interests that may be involved in an investigation. If the concern regarding prejudice is significant, the NSW Government could legislate a power in the NSW Children's Court to order that the Ombudsman cease an investigation, either by application of a party or of its own motion, if the Children's Court is of the view the investigation is likely to adversely affect the proceeding before it.

4.3 Recommendation 19: Parliamentary Committee oversight

Recommendation 19 is a further recommendation directed to strengthening public accountability and oversight of the NSW child protection system. The FIC Report noted a number of concerns about the lack of transparency surrounding the activities of the Office of the Children's Guardian (**OCG**) and about the effectiveness and vigour of its regulatory approach to the OOHC sector.[21] FIC noted that unlike many other independent statutory bodies, the OCG in its OOHC role is not subject to parliamentary oversight, an important avenue of accountability (ultimately to the citizens of NSW).[22]

[15] NSW Ombudsman, *The Ombudsman's jurisdiction to investigate when there are related court proceedings* (Special Report to Parliament, 5 May 2022).
[16] Ibid, 1.
[17] Ibid, 4.
[18] Ibid, 2-3.
[19] Ibid.
[20] Ibid, 4.
[21] FIC Report, 140.
[22] Ibid, 140-141.

We are of the view that oversight of the OCG's OOHC functions by a NSW Parliamentary Committee should be legislated, as recommended by the FIC Review. We consider that this appropriately brings the OCG in line with many other independent statutory bodies. We agree with FIC that the most appropriate committee to hold the oversight function would be the NSW Parliament statutory Committee on Children and Young Persons, established under s 36 of the *Advocate for Children and Young People Act 2014* (NSW).

We note that under s 37 of that Act, the Committee already oversees certain functions of the OCG. We suggest that the preferable way to legislate oversight would be to amend s 37 as follows:

> **37 Functions of Committee**
> (1) The Parliamentary Joint Committee has the following functions under this Act—
> (a) to monitor and review the exercise by the Advocate of the Advocate's functions,
> (b) to monitor and review the exercise by the Children's Guardian of functions under—
> (i) the *Child Protection (Working with Children) Act 2012*, ~~or~~
> (ii) the *Children's Guardian Act 2019* in relation to the reportable conduct scheme and working with relevant entities to prevent, identify and respond to reportable conduct and promote compliance with the scheme, or
> (iii) Part 5 of the *Children's Guardian Act 2019*,
> (c) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter relating to the Advocate or connected with the exercise of the Advocate's functions, or on any matter relating to the exercise of the Children's Guardian's functions specified in paragraph (b), to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,
> (d) to examine each annual or other report of the Advocate and the Children's Guardian and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report,
> (e) to examine trends and changes in services and issues affecting children and young people, and report to both Houses of Parliament any changes that the Joint Committee thinks desirable to the functions and procedures of the Advocate or the Children's Guardian,
> (f) to inquire into any question in connection with the Advocate's functions or the Children's Guardian's functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

We consider that this would have the benefit of aligning the oversight powers and functions of the Committee with respect to the OCG and the Advocate for Children and Young People.

Alternatively, a new section could be added to Part 5 of the *Children's Guardian Act 2019* (NSW), in similar terms to s 8AC of that Act which gives the Committee oversight of the OCG's functions in relation to the Child Safe Scheme or in similar terms to s 37 of the *Advocate for Children and Young People Act 2014* (NSW).

Are there any concerns with the Parliamentary Committee overseeing the OCG's accreditation functions?

We do not hold any concerns regarding the Committee on Children and Young Persons overseeing the OCG's functions under Part 5 of the *Children's Guardian Act 2019*. This is provided that the oversight powers given to the Committee are sufficiently broad to ensure proper accountability and oversight of the OCG's functions. As suggested above, we consider that a provision in similarly broad terms to s 37 of the *Advocate for Children and Young People Act 2014* (NSW) would be appropriate, and would create consistency with the oversight functions that the Committee currently exercises in respect of the Advocate for Children and Young People.

4.4 Recommendation 26: Active efforts

Recommendation 26 is a recommendation made in the chapter of the FIC Report considering how to better achieve early intervention support for families[23] in the part of the Report concerning how to reduce entries into care[24]

It has been a longstanding criticism of the NSW child protection system that much more time and many more resources are directed to the removal of children and placement in OOHC than is directed to supporting families to stay together. In Supplementary Budget Estimates hearings in March 2022, DCJ advised that the NSW Government spends $1.4bn a year on OOHC, but less than $200m on support for keeping families together.[25] Many of the FIC Review's recommendations were directed to a fundamental re-orientation of the system towards early support for families.

The recommendation regarding active efforts is a central recommendation in the attempt to re-orient the NSW child protection system towards early support for families. The FIC Review suggested that an 'active efforts' provision, modelled on the Indian Child Welfare Act (**ICWA**), would be a clear direction to the State that it bears the onus to prevent the removal of the child, and that this is where the responsibility lies to ensure efforts are made prior to removing Aboriginal children from their families.[26] The FIC Review was concerned to see a change to casework practice within DCJ and was of the view that a legislative requirement would assist in driving that change.

As with several other recommendations being considered in the consultation, this is a recommendation that will inevitably require an additional allocation of resources. Additional resources will be required to enable caseworkers to engage in more intensive casework support and may also be required for capacity building of services, particularly culturally safe or appropriate services, with which families can engage with the support of DCJ. We encourage DCJ make these additional resourcing commitments, and see the implementation of the FIC Review recommendations as an opportunity for transformational investment in the NSW child protection system.

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[23] Ibid, Chapter 9 (Getting early intervention right).
[24] Ibid, Part D (Reducing entries into care), comprising Chapters 9 (Getting early intervention right), 10 (Prenatal reporting and newborn removals), 11 (Considering alternatives to removal), 12 (Improving entry into care practice), 13 (Poor removal practices), 14 (Recognising the harm of removal) and 15 (Care criminalisation).
[25] NSW Parliament, *Transcript: Examination of proposed expenditure for the portfolio area Families and Communities and Disability Services* (2 March 2022), 29.
[26] FIC Report, 160-161.

We are of the view that a requirement that DCJ take active efforts to prevent Aboriginal children from entering OOHC should be legislated, as recommended by the FIC review. We suggest that this recommendation be legislated together with the legislative response to Recommendations 25 and 54,[27] creating a tripartite legislative obligation to provide early intervention support for families, take active efforts to prevent Aboriginal children from entering OOHC and to consider specific alternatives prior to removal.

We suggest that there are three ways these obligations could be legislated, in decreasing order of the severity of consequence for non-compliance:

1. As a legislative pre-condition to the Secretary commencing an application for a care order;
2. As a discretionary consideration allowing the NSW Children's Court to dismiss an application for a care order if the legislative obligations have not been complied with; and
3. As a matter about which the NSW Children's Court can make a declaratory order, that the Secretary has not complied with one or more of the legislative obligations.

A legislative pre-condition to commencing an application for an order under the Care Act would be the strongest guarantee of the requirement to take active efforts. This is how ICWA operates, requiring that the State demonstrate to the court that active efforts have been provided but were unsuccessful prior to seeking an order for removal of the child.[28] The Secretary could similarly be required to show that they have provided early intervention support for families, have taken active efforts to prevent Aboriginal children from entering OOHC and have considered specific alternatives to removal, before they can proceed with an application under the Care Act. We support this as the preferred option, being the most likely to result in significant change to casework practice.

A slightly less strong guarantee would be empowering the Children's Court with a discretionary power to dismiss an application for an order under the Care Act, where the Secretary has failed to demonstrate that they have provided early intervention support for families, have taken active efforts to prevent Aboriginal children from entering OOHC and have considered specific alternatives to removal. This option has the benefit of allowing the Children's Court to balance all considerations in the case, against requiring the Secretary to comply with its legislative duties. The risk that a case may be dismissed for non-compliance with the statutory duties will likely result in a change to casework practice.

The weakest guarantee would be to empower the Children's Court to make declaratory orders, that the Secretary has not complied with one or more of its legislative obligations to provide early intervention support for families, take active efforts to prevent Aboriginal children from entering OOHC or considered specific alternatives to removal. If this option is being considered we suggest that the declaration should be able to be made of the Court's own motion or by application of a family member or relative of the child the subject of the care application. If there are concerns about delays to finality, any provision could provide that an application for a declaration must be made by a certain point in a proceeding, and empower the Court to make the declaration along with final orders, rather than as a separate interlocutory order (we consider the

[27] Recommendations 25 and 54 are discussed in more detail later in this submission.
[28] As discussed in the FIC Report, 159-161.

Court should have a discretion as to when the declaration is made, so that it can do what is most appropriate in the particular circumstances of each case).

While not having the direct consequences of the other two options, we consider that a declaratory option has merit as it:

- may provide a child or individual family member with some feeling of vindication that failures in their case have been heard and recognised by the Court;
- creates a dialogue between the Children's Court and DCJ regarding best practice around fulfilment of the legislative obligations; and
- could form the basis of a reporting mechanism to the new Independent Child Protection Commission or to Parliament, the Ombudsman or the OCG in the interim, by which any declarations are to be provided to one of those oversight bodies, and the Secretary is required to provide the oversight body with an explanation for why the obligations were not complied with, within a certain period of time – this would enable the oversight body to report on, and make recommendations about, the Secretary's compliance with their legislative obligations.

We consider that these merits commend a declaratory mechanism as a way to improve casework practice. A declaratory mechanism could be an alternative, or in addition to, the legislative pre-condition and discretionary dismissal options.

If these obligations are being legislated as recommended by the FIC Review, they should be accompanied by a requirement that when filing a care application, the Secretary must provide the Children's Court with details of:

1. what early intervention support has been provided for the family of the child, including the ways in which culturally safe and appropriate early intervention support was provided for the family of an Aboriginal child or Torres Strait Islander child;
2. what active efforts have been taken to prevent the child being taken into care, including what culturally safe and appropriate active efforts were provided to prevent the entry into care of an Aboriginal child or Torres Strait Islander child;
3. what specific alternatives to removal were considered and offered to the family; and
4. why the early intervention support, active efforts and specific alternatives were unsuccessful.

This will allow the Children's Court to assess compliance with the legislative obligations.

How would this provision interact with existing provisions?

We suggest that the legislative obligations be legislated as a new provision, with a separate enforcement mechanism that stands apart from existing provisions of the Care Act.

What kind of activity would constitute 'active efforts' for the purposes of the proposed provision?

We suggest that active efforts should cover similar activities to those under ICWA. The ICWA Regulations define active efforts as:

> …affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe.[29]

The ICWA Regulations also provide 11 examples of what active efforts may include:

> (1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
> (2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
> (3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;
> (4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;
> (5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;
> (6) Taking steps to keep siblings together whenever possible;
> (7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
> (8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;
> (9) Monitoring progress and participation in services;
> (10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available; and
> (11) Providing post-reunification services and monitoring.[30]

We suggest active efforts in the NSW child protection system should cover similar activities, appropriately adapted for Aboriginal children, families and communities.

[29] 25 CFR § 23.2.
[30] Ibid.

Should any provision include a list of types of 'active efforts'?

We do not think it is desirable to limit the activities that may constitute active efforts by legislating an exhaustive list. We suggest that the most desirable approach is to legislate a similarly broad definition to ICWA Regulation 23.2, including a similar inclusive list of activities that may constitute active efforts, appropriately adapted for Aboriginal children, families and communities.

Who should determine what 'active efforts' should be taken?

We refer to the discussion above regarding options for enforcing the legislative requirement to take active efforts. In these suggestions the Children's Court is the ultimate arbiter of whether the active efforts that have been taken are sufficient. An oversight body such as the new Independent Child Protection Commission may also play a role in considering the sufficiency of active efforts, as part of reporting on the Secretary's compliance with the obligations.

As with the ICWA definition, we consider that in determining the active efforts to be taken, these should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the child's community and should be conducted in partnership with the child and the child's parents, extended family members, traditional custodians, and other community members.

How exactly the ICWA definition should be adapted to Aboriginal children, families and communities should be determined in specific consultation with Aboriginal stakeholders and organisations, such as AbSec and the ALS.

What would be the consequence if active steps are not properly taken?

We refer to the discussion above regarding options for enforcing the legislative requirement to take active efforts.

4.5 Recommendation 48: Evidence of prior removals

Recommendation 48 was a recommendation made in the chapter of the FIC Report considering the particularly concerning issue of prenatal reporting and newborn removals,[31] within the part of the Report examining ways to reduce entries into care.[32]

Recommendation 48 concerns s106A(1)(a) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (**the Care Act**). That provision requires the admission in a care proceeding of any evidence that a parent has previously had a child removed from their care. In addition, together with 106A(2), s106A(1)(a) creates a legislative presumption that evidence that a parent has had a child previously removed from their care is evidence that the child the subject of the current proceeding is in need of care and protection.

The FIC Review was concerned by reports that s 106A(1)(a) had changed the practice surrounding newborn removals in NSW. The FIC Review heard reports that babies were

[31] FIC Report, Chapter 10 (Prenatal reporting and newborn removals)
[32] Ibid, Part D (Reducing entries into care), comprising Chapters 9 (Getting early intervention right), 10 (Prenatal reporting and newborn removals), 11 (Considering alternatives to removal), 12 (Improving entry into care practice), 13 (Poor removal practises), 14 (Recognising the harm of removal) and 15 (Care criminalisation).

increasingly assumed into care immediately after birth, as the need for ongoing assessment and evidence building was no longer pressed as an issue, something that the FIC Review saw evidence of in its case file review.[33] Having examined s106A(1)(a) and the evidence surrounding casework practice, the FIC Review considered that s106A(1)(a) was not necessary to ensure the safety and wellbeing of children and may unduly encourage poor casework practice in respect of newborns.[34]

There are two aspects to s106A(1)(a) that should not be conflated in consideration of the repeal of the provision. The first is the question of the admissibility of evidence of prior removals, and the second is the presumption of a need for care and protection created by s 106A(2). As to the first aspect, repeal will have no effect in many cases. The general position in proceedings under the Care Act is that the rules of evidence do not apply.[35] A rule that evidence of prior removals must be admitted has no effect in these cases, as there is nothing preventing that information being placed before the Court. In the few cases where the Children's Court determines that the rules of evidence should apply, evidence of prior removals is likely to be admitted if relevant to protection concerns that continue to exist and provided that it is not material such as hearsay or opinion evidence that is inherently less reliable and probative. If irrelevant to whether the parent can care for the child at that time, the material is not probative and should not properly be admitted in any event.

As to the second aspect of s 106A(1)(a), the presumption created in conjunction with 106A(2) is an effective reversal of the burden of proof, making the difficult task of prosecuting a parent's court case even more difficult. Many parents in care proceedings struggle to access timely legal and advice and representation, placing them at an even greater disadvantage in the face of a reversed evidentiary burden. As FIC noted in a separate chapter, the presumption can trap some women in a perpetual cycle of successive newborn removals.[36] We consider that this provision creates an oppressive procedural burden that does little to safeguard the wellbeing of children.

We are of the view that s 106A(1)(a) of the Care Act should be repealed, as recommended by the FIC Review. We suggest the subparagraph be repealed in its entirety. We consider that this would be straightforward, as the subparagraph could be repealed without disturbing other provisions.

Should the current provision be amended?

We support the FIC recommendation that s 106A(1)(a) be repealed in its entirety.

Are there alternative options to mitigate the concerns around admitting evidence of prior removals of siblings?

We are concerned that this discussion question either misunderstands, or seeks to re-litigate, the findings and recommendations of the FIC Review. The FIC Review was concerned by the influence that s 106A(1)(a) was having on casework practice regarding newborn removals and saw no alternative options to recommending that it be repealed in its entirety.

[33] Ibid, 203.
[34] Ibid.
[35] Care Act, s 93(3).
[36] FIC Report, 192.

As discussed above, in most cases evidence of prior removals of siblings will not be prevented from being put before the Court.

How can the court properly consider risk to children without discriminating against Aboriginal families?

We do not understand this question. The Children's Court has many tools at its disposal to consider the risk that a child or young person may be at, that are not discriminatory to Aboriginal families. As the FIC Review concluded, s 106A(1)(a) was not a tool required by the Court to keep children safe.[37]

4.6 Recommendation 54: Alternatives to removal

Recommendation 54 was recommended by the FIC Report in the chapter considering alternatives to removal, also within the part of the Report addressed to reducing entries into care.[38]

In its case file review, the FIC Review found that DCJ was quick to remove Aboriginal children without considering less intrusive options, despite this being a legislative requirement under s 9(2)(c) of the Care Act.[39] The FIC Review also heard from stakeholders that DCJ was not using Parental Responsibility Contracts, Parent Capacity Orders, Temporary Care Arrangements and Family Group Conferences, despite these being alternatives to the most invasive response, the removal of a child.[40] The FIC Review recommended an increase in the use of these alternatives by DCJ, to reduce the rate of removals, and on this basis made Recommendation 54, suggesting a legislative requirement to consider specific alternatives such as these prior to removal.

We support the introduction of a legislative obligation that DCJ be required to consider specific alternatives prior to removal, as recommended by the FIC Review. We are of the view that this recommendation will more readily drive practice change if it is implemented in one of the ways discussed above in relation to Recommendation 26. There is an existing requirement in the Care Act ('least intrusive intervention') and the power to order these alternatives but they are not being utilised. Something more is required so that DCJ considers and utilises these alternatives. Consequences for non-compliance are likely to drive practice change in a way that has not occurred under the existing legislative provisions.

As with some of the other legislative recommendations considered in this consultation, implementation of this recommendation may need to be accompanied by an additional commitment of resources, to ensure specific alternatives are available and can be delivered in a manner that is culturally safe (such as by having an Aboriginal or Torres Strait Islander person facilitate FGCs).

[37] Ibid, 203.
[38] Ibid, Part D (Reducing entries into care), comprising Chapters 9 (Getting early intervention right), 10 (Prenatal reporting and newborn removals), 11 (Considering alternatives to removal), 12 (Improving entry into care practice), 13 (Poor removal practises), 14 (Recognising the harm of removal) and 15 (Care criminalisation).
[39] Ibid, 204.
[40] Ibid, 206.

What specific alternatives could be considered prior to removal that will enable families to be more effectively supported?

The FIC Review canvassed the specific alternatives to removal it had in mind with this recommendation, namely Parental Responsibility Contracts, Parent Capacity Orders, Temporary Care Arrangements and Family Group Conferences. These are the specific alternatives that should be considered.

Should any legislative provision list the steps required, i.e. objective evidence that each of these alternatives has been tried and failed before the Court can make a removal decision?

This is similar to our suggestion regarding a legislative pre-condition, as discussed in relation to Recommendation 26 above. We consider that this is an option for enforcement of the legislative obligation.

Should it create gates that a matter must pass through to ensure these alternatives are properly offered?

The creation of gates may be more structure than is required to ensure compliance with the legislative obligation but could certainly be a way of ensuring that DCJ turns its mind to each of the available alternatives before proceeding to remove a child. We consider that this is an option for enforcement of the legislative obligation but only if it could be guaranteed that the alternatives are being considered in a meaningful way, that is culturally safe for Aboriginal families, so that it does not become a 'tick-box' exercise.

4.7 Recommendation 65: Children at criminal proceedings

Recommendation 65 was recommended in the chapter of the FIC Report considering the link between OOHC involvement and the criminal justice system, the final chapter in the part of the Report considering ways to reduce entries into care.[41] The FIC Report noted the extensive evidence that children in OOHC were far more likely to be in contact with the criminal justice system, an overlap that has been shown to continue into early adulthood, and described the numerous reasons why that was the case, including 'care criminalisation'.[42]

The FIC Review was concerned that the difficulties faced by children in OOHC in the criminal justice system were compounded by the fact that they do not receive support from DCJ during police investigations and court cases, despite DCJ being the child's 'parent'.[43] The FIC Report noted the negative consequences of this, namely that the Court misses out on complete information about the young person's circumstances and the young person misses out on the guidance and assistance of a support person.[44] There is currently no obligation on a representative of DCJ or a non-government OOHC agency to attend court as a support person.

[41] Ibid, Part D (Reducing entries into care), comprising Chapters 9 (Getting early intervention right), 10 (Prenatal reporting and newborn removals), 11 (Considering alternatives to removal), 12 (Improving entry into care practice), 13 (Poor removal practises), 14 (Recognising the harm of removal) and 15 (Care criminalisation).
[42] Ibid, 235-238.
[43] Ibid, 238.
[44] Ibid, 239.

The FIC Review saw no reason that DCJ should not have a legal obligation corresponding to that placed on parents to attend a criminal hearing if requested by a court.

We support the introduction of a legislative amendment to empower a court exercising criminal jurisdiction to require the attendance of a delegate of the Secretary in circumstances where the Secretary has parental responsibility of the child, as recommended by the FIC Report. The FIC Report suggested that this be achieved by amending s 7 of the *Children (Protection and Parental Responsibility) Act 1997*. We agree, and consider the section could be amended as follows:

> **7 Attendance of parents at proceedings**
>
> (a) A court exercising criminal jurisdiction with respect to a child may require the attendance, at the place where the proceedings are being or are to be conducted, of one or more parents of the child. The court may specify which parents are to attend.
> (b) Where a child is subject to an order under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) allocating parental responsibility of the child to the Minister either solely or jointly with another person or persons, ***parent*** in subsection (a) includes a delegate of the Minister.

We note that s 79 of the Care Act refers to the Minister rather than the Secretary and we have used that language in the suggested drafting.

Should this be mandated in legislation?

We are concerned that this discussion question either misunderstands, or seeks to re-litigate, the findings and recommendations of the FIC Review. The FIC Review recommended that the requirement be mandated in legislation, to ensure that the power of a court to order the attendance of a delegate was beyond doubt.

If yes, should this mandate include NGO caseworkers?

We are of the view that where a child or young person's case management involves a funded service provider such as a NGO, it would be consistent with Recommendation 65 for the Court to also be empowered to order the attendance of a representative from the NGO. This should be in addition to the power to order DCJ attendance as DCJ retains ultimate responsibility for the child or young person's wellbeing. The amendment to s 7 of the *Children (Protection and Parental Responsibility) Act 1997* suggested above could be modified as follows:

> **7 Attendance of parents at proceedings**
>
> (a) A court exercising criminal jurisdiction with respect to a child may require the attendance, at the place where the proceedings are being or are to be conducted, of one or more parents of the child. The court may specify which parents are to attend.
> (b) Where a child is subject to an order under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) allocating parental responsibility of the child to the Minister either solely or jointly with another person or persons, ***parent*** in subsection (a) *includes:*
>
> *(i) a delegate of the Minister; and*

(ii) a representative of an organisation contracted to provide services on behalf of the Minister to the child.

What other factors need to be considered when implementing this change?

We consider that the most important additional consideration is how DCJ can best support a child or young person when a delegate is required to attend at criminal proceedings. The FIC Review was alive to this concern, noting that the presence of a caseworker from DCJ or a non-government OOHC provider does not necessarily indicate that appropriate support will be given to the child in question.[45] As a matter of priority, DCJ should seek to develop a policy regarding best practice support for children and young people in criminal proceedings, particularly Aboriginal and Torres Strait Islander children and young people, in consultation with non-government organisations including ACWA, AbSec and the ALS.

4.8 Recommendation 71: Aboriginal Child Placement Principles

We do not consider that this is a recommendation appropriate for general consultation. While not a recommendation that is explicitly expressed as requiring consultation with Aboriginal communities and organisations,[46] we consider that the adequacy of the reflection of the five elements of the Aboriginal Child Protection Principle (ACPP) in the Care Act is a matter best determined separately between DCJ and Aboriginal communities and organisations such as AbSec and the ALS.

Does the existing ACPP placement hierarchy need to be aligned with the SNAICC ATSICPP?

DCJ should consult separately and specifically with Aboriginal communities and organisations such as AbSec and the ALS regarding how current provisions should be aligned to give expression to the ACPP.

Should the Children's Court processes be amended to improve application of the SNAICC ATSICPP?

If the legislation requires better alignment with the ACPP principles, it is likely that the Children's Court processes do as well. DCJ should consult separately and specifically with Aboriginal communities and organisations such as AbSec and the ALS regarding how Children's Court processes should be amended.

What role can Aboriginal people and communities play in determining whether the SNAICC ATSICPP have been applied in practice, including in the Children's Court?

Aboriginal people and communities should have a much larger role in all aspects of child protection casework and proceedings. DCJ should consult separately and specifically with Aboriginal communities and organisations such as AbSec and the ALS regarding the role Aboriginal people and communities can play in determining whether the ACPP principles have been applied in practice.

[45] Ibid, 239.
[46] Contrast Recommendations 6, 7 and 8 below.

4.9 Recommendation 76: Identifying Aboriginality

We do not consider that this is a recommendation appropriate for general consultation. Recommendation 76 refers specifically to the NSW Government developing regulations about identifying and 'de-identifying' children as Aboriginal, *in partnership with relevant Aboriginal community groups and members*. DCJ should consult separately and specifically with Aboriginal communities and organisations such as AbSec and the ALS regarding the development of regulations further to Recommendation 76.

What should be the main elements of the cultural identification policy?

We are concerned that this discussion question either misunderstands, or seeks to re-litigate, the findings and recommendations of the FIC Review. A separate recommendation, Recommendation 77, was directed to the development of a policy on identification and 'de-identification'. This was expressed by the FIC Report as something to be developed *after* the creation of regulations in accordance with Recommendation 76, to assist with their implementation. DCJ should consult separately and specifically with Aboriginal communities and organisations such as AbSec and the ALS about any policy to follow implementation of regulations on identification and 'de-identification'.

What should be the main elements for a process for de-identifying Aboriginal children and who should make those decisions?

FIC was deeply concerned by the active 'de-identification' of Aboriginal children in the review cohort.[47] It was also a matter of grave concern to the ALS and PIAC, when our organisations identified that DCJ had no existing policy guiding identification and 'de-identification' decisions. We wrote to the Minister about this issue in 2020 and called upon DCJ to suspend any decisions to 'de-identify' Aboriginal children until the relevant FIC recommendations had been implemented. It is a very serious matter and we re-iterate our concern that 'de-identification' decisions should be ceased until appropriate regulations and policy are in place to guide decision making about these matters. DCJ should consult separately and specifically with Aboriginal communities and organisations such as AbSec and the ALS regarding development of the regulations and policy, including who should be making identification and 'de-identification' decisions.

What should caseworkers consider when determining whether a child is Aboriginal?

DCJ should consult separately and specifically with Aboriginal communities and organisations such as AbSec and the ALS regarding development of the regulations and policy.

What are the best ways DCJ can make 'reasonable inquiries' about a child's identity?

DCJ should consult separately and specifically with Aboriginal communities and organisations such as AbSec and the ALS regarding development of the regulations and policy.

[47] FIC Report, 260.

4.10 Recommendation 112: Supporting restoration

Recommendation 112 was recommended in the chapter of the FIC Report on restoration, in the part of the Report concerned with increasing exits from care.[48]

The FIC Review examined s 83 of the Care Act and the way that provision has been interpreted.[49] Section 83 requires that when applying for removal, the Secretary must assess whether there is a realistic possibility of restoration, within a reasonable period. While restoration is the preferred option in the placement hierarchy in s 10A, the FIC Review was concerned that the ways 83 is currently drafted does not allow the Children's Court to adequately promote the preferred position of restoration as opposed to approving permanent placement elsewhere.[50] In order to increase the number of cases in which restoration occurs, FIC made Recommendation 112 – that s 83 be revised in order to enable the Children's Court to promote restoration so that it is an outcome in more cases. This recommendation does not attempt to replace or usurp s 10A, but rather strengthen the way it is given effect.

We support the amendment of s 83 to more strongly promote restoration as the preferred placement option, as recommended by the FIC Review. The FIC Review suggested two examples for how s 83 might be revised to better promote restoration:[51]

1. The Children's Court could be empowered to query why restoration is not recommended by the Secretary.
2. The Children's Court could be empowered to enquire more directly about the specific actions DCJ has taken, or could take, to support restoration becoming a realistic possibility.

We support the revision of s 83 in these ways. We suggest that these revisions could be incorporated by amending s 83 as follows:

> **83 Preparation of permanency plan**
>
> (1) If the Secretary applies to the Children's Court for a care order (not being an emergency care and protection order) for the removal of a child or young person, the Secretary must assess whether there is a realistic possibility of the child or young person being restored to his or her parents within a reasonable period, 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.
>
> (2) If the Secretary assesses that there is a realistic possibility of restoration within a reasonable period, the Secretary is to prepare a permanency plan involving restoration and submit it to the Children's Court for its consideration.
>
> (3) If the Secretary assesses that there is not a realistic possibility of restoration within a reasonable period, the Secretary is to:
>
> (a) prepare and submit to the Children's Court for its consideration a report stating:

[48] FIC Report, Part F (Increasing exits from care), comprising Chapters 21 (Restoration), 22 (Adoption of Aboriginal children in OOHC) and 23 (Reforming the Children's Court).
[49] Ibid, 360-361.
[50] Ibid, 361.
[51] Ibid.

(i) why the Secretary is of the view that there is not a realistic possibility of restoration within a reasonable period;

(ii) what actions the Secretary has taken to try and support restoration becoming a realistic possibility; and

(iii) what actions in the future may support restoration becoming a realistic possibility; and

(b) prepare a permanency plan for another suitable long-term placement for the child or young person and submit it to the Children's Court for its consideration.

(4) In preparing a plan under subsection (3), the Secretary must consider whether adoption is the preferred option for the child or young person.

Note—

See section 10A(3)(e) in relation to adoption of Aboriginal and Torres Strait Islander children and young persons.

(5) The Children's Court is to decide whether to accept the Secretary's assessment of whether or not there is a realistic possibility of restoration within a reasonable period—

(a) in the case of a child who is less than 2 years of age on the date the Children's Court makes an interim order allocating parental responsibility for the child to a person other than a parent—within 6 months after the Children's Court makes the interim order, and

(b) in the case of a child or young person who is 2 or more years of age on the date the Children's Court makes an interim order allocating parental responsibility for the child or young person to a person other than a parent—within 12 months after the Children's Court makes the interim order.

(5A) However, the Children's Court may, having regard to the circumstances of the case and if it considers it appropriate and in the best interests of the child or young person, decide, after the end of the applicable period referred to in subsection (5), whether to accept the Secretary's assessment of whether or not there is a realistic possibility of restoration within a reasonable period.

(6) If the Children's Court does not accept the Secretary's assessment, it may direct the Secretary to prepare a different permanency plan.

(6A) If the Children's Court is of the view that it requires further information beyond the information in the report or permanency plan submitted to it under subsection (3), it may order the provision of any further information from the Secretary that it deems appropriate, in order to determine whether to accept the Secretary's assessment.

(7) The Children's Court must not make a final care order unless it expressly finds—

(a) that permanency planning for the child or young person has been appropriately and adequately addressed, and

(b) that prior to approving a permanency plan involving restoration there is a realistic possibility of restoration within a reasonable period, having regard to—

(i) the circumstances of the child or young person, and

(ii) 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.

(7A) For the purposes of subsection (7)(a), the permanency plan need not provide details as to the exact placement in the long term of the child or young person to whom the plan relates but must provide the further and better particulars which are sufficiently identified and addressed so the Court, prior to final orders being made, can have a reasonably clear plan as to the child's or young person's needs and how those needs are going to be met.

(8) A permanency plan is only enforceable to the extent to which its provisions are embodied in, or approved by, an order or orders of the Children's Court.
(8A) A ***reasonable period*** for the purposes of this section must not exceed 24 months.
(9) In this section, ***parent***, in relation to the child or young person concerned, means—
(a) the child's or young person's birth parent, or
(b) if the child or young person has been adopted—the child's or young person's adoptive parent.

What provisions of the Care Act should be amended to provide stronger emphasis on restoration?

As described above, s 83 is the principal provision to be amended further to Recommendation 112. We suggest that a stronger emphasis on restoration is best achieved by fully implementing the other recommendations in Chapter 21 (Restoration) of the FIC Report (Recommendations 106 to 120), in genuine partnership with Aboriginal communities and organisations such as AbSec and the ALS.

What role can the legislation play in ensuring effective efforts are placed into restoration early in the child's contact with the child protection system?

We consider that legislating early intervention, active efforts and specific alternatives duties, as recommended by Recommendations 25, 26 and 54, will ensure the taking of steps and making of efforts to support a family to stay together, effectively promoting restoration from the earliest stage of proceedings.

What role could Aboriginal families and communities play in both Court and casework decision making to determine whether effective efforts have been made to restore children?

Aboriginal families and communities should have a much larger role in all aspects of child protection casework and proceedings. DCJ should consult separately and specifically with Aboriginal communities and organisations such as AbSec and the ALS regarding the role Aboriginal families and communities can play in determining whether effective efforts have been made to restore children.

How should this recommendation be linked to recommendation 71: Aboriginal Child Placement Principles and what greater role could there be for Aboriginal people and communities in these decisions?

We suggest that DCJ consult separately and specifically with Aboriginal communities and organisations such as AbSec and the ALS regarding the link to the ACPP and the role Aboriginal families and communities can play in these decisions.

4.11 Recommendation 113: Placement with kin or community

Recommendation 113 is closely related to Recommendation 112, being similarly directed to amendment of s 83 of the Care Act. Where Recommendation 112 is concerned to promote restoration, Recommendation 113 is concerned to promote placement with family or kin, if there is no realistic possibility of restoration within a reasonable period. This was adapted from the submission made by NSW Legal Aid to the FIC Review, noting that this would enshrine the s 10A

principles by requiring the Children's Court to actively consider extended family, kin or other suitable persons as the next option.[52]

We support amending s 83 to expressly require the Children's Court to consider the placement of an Aboriginal child with a relative, member of kin or community or other suitable person, if it determines that there is no realistic possibility of restoration within a reasonable period, as recommended by the FIC Review. We suggest that this could be done by inserting a new subsection (3A) into s 83, utilising the language suggested by NSW Legal Aid in its submission and a new section (6AA), empowering the Children's Court to direct the Secretary to make further inquiries regarding placement with a relative, member of kin or community if required.

We make some suggestions for amendment of s 83 as follows, in addition to the amendments suggested in response to Recommendation 112:

> **83 Preparation of permanency plan**
> (1) If the Secretary applies to the Children's Court for a care order (not being an emergency care and protection order) for the removal of a child or young person, the Secretary must assess whether there is a realistic possibility of the child or young person being restored to his or her parents within a reasonable period, 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.
> (2) If the Secretary assesses that there is a realistic possibility of restoration within a reasonable period, the Secretary is to prepare a permanency plan involving restoration and submit it to the Children's Court for its consideration.
> (3) If the Secretary assesses that there is not a realistic possibility of restoration within a reasonable period, the Secretary is to:
> (a) prepare and submit to the Children's Court for its consideration a report stating:
> (i) why the Secretary is of the view that there is not a realistic possibility of restoration within a reasonable period;
> (ii) what actions the Secretary has taken to try and support restoration becoming a realistic possibility; and
> (iii) what actions in the future may support restoration becoming a realistic possibility; and
> (b) prepare a permanency plan for another suitable long-term placement for the child or young person and submit it to the Children's Court for its consideration.
> *(3A) Where a child or young person is an Aboriginal or Torres Strait Islander child or young person, in preparing the permanency plan in subsection (3)(b), the Secretary must prepare a permanency plan either recommending placement with a relative, member of kin or community or other suitable person(s), or indicating that there is no suitable person, and submit that plan to the Children's Court for consideration.*
> (4) In preparing a plan under subsection (3), the Secretary must consider whether adoption is the preferred option for the child or young person.
> **Note**—

[52] Ibid, 361-362.

See section 10A(3)(e) in relation to adoption of Aboriginal and Torres Strait Islander children and young persons.

(5) The Children's Court is to decide whether to accept the Secretary's assessment of whether or not there is a realistic possibility of restoration within a reasonable period—

(a) in the case of a child who is less than 2 years of age on the date the Children's Court makes an interim order allocating parental responsibility for the child to a person other than a parent—within 6 months after the Children's Court makes the interim order, and

(b) in the case of a child or young person who is 2 or more years of age on the date the Children's Court makes an interim order allocating parental responsibility for the child or young person to a person other than a parent—within 12 months after the Children's Court makes the interim order.

(5A) However, the Children's Court may, having regard to the circumstances of the case and if it considers it appropriate and in the best interests of the child or young person, decide, after the end of the applicable period referred to in subsection (5), whether to accept the Secretary's assessment of whether or not there is a realistic possibility of restoration within a reasonable period.

(6) If the Children's Court does not accept the Secretary's assessment, it may direct the Secretary to prepare a different permanency plan.

(6A) If the Children's Court is of the view it requires further information beyond the information in the report or permanency plan submitted to it under subsection (3), it may order the provision of any further information from the Secretary that it considers appropriate, in order to determine whether to accept the Secretary's assessment.

(6AA) Where a child or young person is an Aboriginal or Torres Strait Islander child or young person, and the Children's Court is of the view that the Secretary has not made adequate efforts to identify a placement with a relative, member of kin or community or other suitable person(s), it may order the Secretary make additional efforts to identify a suitable placement, including any particular efforts that it considers appropriate.

(7) The Children's Court must not make a final care order unless it expressly finds—

(a) that permanency planning for the child or young person has been appropriately and adequately addressed, and

(b) that prior to approving a permanency plan involving restoration there is a realistic possibility of restoration within a reasonable period, having regard to—

(i) the circumstances of the child or young person, and

(ii) 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.

(7A) For the purposes of subsection (7)(a), the permanency plan need not provide details as to the exact placement in the long term of the child or young person to whom the plan relates but must provide the further and better particulars which are sufficiently identified and addressed so the Court, prior to final orders being made, can have a reasonably clear plan as to the child's or young person's needs and how those needs are going to be met.

(8) A permanency plan is only enforceable to the extent to which its provisions are embodied in, or approved by, an order or orders of the Children's Court.

(8A) A ***reasonable period*** for the purposes of this section must not exceed 24 months.

(9) In this section, ***parent***, in relation to the child or young person concerned, means—

(a) the child's or young person's birth parent, or

(b) if the child or young person has been adopted—the child's or young person's adoptive parent.

How can the Children's Court determine if appropriate effort in finding and connecting with family has occurred?

This is a matter best left to the experience of individual specialist magistrates. It could however appropriately be the subject of additional judicial training, that would benefit from being developed in partnership with the Aboriginal peak organisations AbSec and the ALS.

What role might there be for Aboriginal people at Court to determine if appropriate efforts have been made to restore children to their families?

Aboriginal families and communities should have a much larger role in all aspects of child protection casework and proceedings. DCJ should consult separately and specifically with Aboriginal communities and organisations such as AbSec and the ALS regarding the role Aboriginal families and communities can play in determining whether effective efforts have been made to restore children.

What else is needed to implement the intent of this proposal?

DCJ should consider how it can modify practice and procedure to better identify appropriate placements with a relative, member of kin or community or other suitable person(s) at the earliest possible time. We direct DCJ to the discussion and recommendations in Chapter 18 (Placement) of the FIC Report, particularly at 283-286 (Finding appropriate carers).

5. Section 2 Recommendations

5.1 Recommendation 8: Self-determination

We do not consider that this is a recommendation appropriate for general consultation. As the DCJ Discussion Paper notes, Recommendation 8 is closely related to Recommendations 6 and 7. These three recommendations sit within the chapter on self-determination, the first of the two areas the FIC Review identified as requiring significant structural change.[53] All three recommendations are expressed as *processes*, to be undertaken with Aboriginal stakeholders and communities including representative peak bodies:

> **Recommendation 6**: The Department of Communities and Justice should *engage Aboriginal stakeholders in the child protection sector, including AbSec and other relevant peak bodies*, to develop an agreed understanding on the right to 'self-determination' for Aboriginal peoples in the NSW statutory child protection system, including any legislative and policy change.
>
> **Recommendation 7**: The Department of Communities and Justice should*, in partnership with Aboriginal stakeholders and communities*, undertake a systemic review of all policies that refer to self-determination, to consider how they might be revised to be consistent with the right to self-determination.

[53] FIC Report, Chapters 7 (Self-determination) and 8 (Public accountability and oversight).

> **Recommendation 8**: The NSW Government should, *in partnership with Aboriginal stakeholders and communities*, review the Aboriginal and Torres Strait Islander Principles of the Children and Young Person (Care and Protection) Act 1998 (currently sections 11–14), with the view to strengthening the provisions consistent with the right to self-determination.
>
> [emphasis added]

As these recommendations envisage processes, to be undertaken by DCJ in partnership with Aboriginal stakeholders and communities, including representative peak bodies such as AbSec and the ALS, we do not think they should be open to general consultation. DCJ should separately engage in those processes to develop a plan for how to implement these recommendations by the end of 2023.

Is there a need for a consistent definition of self-determination in child protection law and policy?

We are concerned that this discussion question either misunderstands, or seeks to re-litigate, the findings and recommendations of the FIC Review. The FIC Review found that the language of self-determination was often used inaccurately in the child protection system and was not well understood.[54] To counter this, the FIC Review made Recommendations 6, 7 and 8, to ensure that there was a better and more consistent understanding of self-determination.

We otherwise suggest that DCJ engage in the processes described above with Aboriginal communities and organisations such as AbSec and the ALS.

What does self-determination mean in the child protection context?

We note the comprehensive discussion in FIC regarding the meaning of self-determination in the child protection context.[55] We otherwise suggest that DCJ engage in the processes described above with Aboriginal communities and organisations such as AbSec and the ALS.

How can self-determination of Aboriginal people in the child protection system be given full effect?

We suggest that DCJ engage in the processes described above with Aboriginal communities and organisations such as AbSec and the ALS, to determine how self-determination of Aboriginal people in the child protection system can be given full effect.

5.2 Recommendation 9: A new Child Protection Commission

As noted in our General Comments above, it is important that all 126 systemic recommendations made by the FIC Review are implemented to deliver on the holistic blueprint for system reform. With that said however, it is difficult to overstate the individual importance of Recommendation 9, recommending the creation of a new, Independent Child Protection Commission.

As has been noted earlier in this submission, FIC described self-determination and public accountability and oversight as the two areas of structural change that would go a significant way

[54] Ibid, 85-87.
[55] Ibid, 80-90.

to addressing the entrenched problem of the over-representation of Aboriginal children in the statutory child protection system.[56] Of the second of these, Recommendation 9 was described by the FIC Report as the 'cornerstone or key recommendation' with all other recommendations in that section only interim recommendations to remedy deficiencies that would no longer exist if Recommendation 9 were properly implemented.[57]

We are of the view that legislating to create a new, Independent Child Protection Commission, as recommended by the FIC Report, should be made a priority and should be included at the very latest in a second bill by the end of 2023, in line with other legislative recommendations that may not be able to be immediately implemented. The FIC Report provided a list of the functions with which the Commission should be empowered[58] and we support legislating to create a new body with these functions.

We recognise the complexity involved in creating a new statutory body with significant powers and functions, and the resource implications involved. This was also recognised by the FIC Review but we agree with its conclusion that the potential benefits far outweigh the initial resourcing commitment:

> The consolidation of oversight and monitoring functions into one body will require additional expenditure. However, the advantages to be gained from effective oversight and monitoring of the entire child protection system leading to improvements in the way in which the system operates and a reduction of the number of children in care are likely to outweigh these costs. In addition, the creation of an independent and transparent statutory body will enhance public confidence in the system, particularly among Aboriginal communities. It will also serve as symbolic recognition of the importance of the current child protection crisis, and a convenient and easily accessible point of contact for children and young people in the OOHC system to raise concerns and seek assistance.[59]

We would be pleased to be involved in any further discussions regarding a new statutory body, including detailed conversations regarding exact functions, powers and membership. We suggest at the very minimum that those discussions should include the Aboriginal peak bodies, AbSec and the ALS.[60]

What benefits would a new specialist government agency in the child protection system bring?

We are concerned that this discussion question either misunderstands, or seeks to re-litigate, the findings and recommendations of the FIC Review. The FIC Review described in detail the benefits a new statutory body would bring to the child protection system. Among these were that:

- a new statutory body would consolidate the current 'fragmented and complex' oversight mechanisms that exist within the NSW child protection system;[61]

[56] Ibid, xxxii.
[57] Ibid, 125.
[58] Ibid, 127.
[59] Ibid, 126.
[60] Noting particularly FIC's recommendation that the new statutory body have at least one Aboriginal Commissioner and an Aboriginal Advisory Body appointed in consultation with the Aboriginal community (FIC Report, 127).
[61] FIC Report, 125.

- a specialised body would be better equipped to meet the increasing need generated by a growing OOHC population and an increasingly complex system;[62]
- existing oversight mechanisms have a number of functions in addition to child protection functions, which may have contributed to a reduction in the volume and scope of work conducted by these bodies in relation to the child protection system and a lack of sustained focus on the operation of the system, both of which are matters a specialised body could address;[63]
- a specialised body would serve as a symbolic recognition of the importance of the current child protection crisis;[64] and
- a specialised body would be a convenient and easily accessible point of contact for children and young people in the OOHC system to raise concerns and seek assistance.[65]

Would an additional oversight mechanism add complexity to the system?

We are concerned that this discussion question either misunderstands, or seeks to re-litigate, the findings and recommendations of the FIC Review. One of the principal reasons this recommendation was made was to reduce the complexity of the system, by creating a 'one-stop shop' for the oversight and monitoring of the child protection system in NSW.[66] We do not see how the consolidation of various functions and powers in a single specialised body would increase rather than reduce the complexity of oversight mechanisms.

Are there other options to achieve the intent of this recommendation?

No, we do not consider that there are alternative ways to achieve the intent of this recommendation. FIC identified the need for a fragmented and complex system of oversight mechanisms to be brought together in a single specialised independent statutory body. We do not see how this might be done, other than committing to bringing into existence this body as recommended by the FIC Review.

5.3 Recommendation 12: Publishing final judgments

Recommendation 12 is another recommendation directed to improving public accountability and oversight of the NSW child protection system.

The FIC Review considered that the NSW Children's Court publishing final decisions online in a de-identified and searchable form would be beneficial as it would:

- help ensure confidence in the independence and integrity of the Children's Court;
- provide members of the public, the media, scholars, policy makers and other interested stakeholders with the ability to access information about the way in which proceedings are conducted and determined in the Children's Court;
- promote access to justice by providing precedential information to parties and legal practitioners, a consideration particularly of assistance to unrepresented litigants; and

[62] Ibid, 126.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Ibid, 127.

- act as an important mechanism of accountability for DCJ.[67]

The FIC Review also considered that publishing final judgments would bring the NSW Children's Court in line with most other courts that deal with matters involving children.[68]

The FIC recommendation was not just that all final decisions be made publicly available, but that the NSW Children's Court *be appropriately resourced to do so*. There is no doubt that requiring final judgments to be published will place an increased burden on individual magistrates and on the administrators of the Children's Court. This is a recommendation that cannot be achieved without a commitment to increased resourcing and will likely need to be implemented in tandem with Recommendation 124, requiring the appointment of additional magistrates to the NSW Children's Court. We urge the NSW Government to make this additional funding commitment, to ensure the proper realisation of all the FIC Review recommendations.

We are of the view that the NSW Children's Court should be appropriately resourced to enable it to publish all its final judgments online in a de-identified and searchable form, as recommended by the FIC Review. We are of the view that this is a recommendation that cannot be achieved without a meaningful allocation of new resources to the NSW Children's Court, an allocation that should be made so that the accountability and transparency of the system can be improved, but not at the expense of additional delays in child protection proceedings.

Should the Court publish all final judgments?

We are concerned that this discussion question either misunderstands, or seeks to re-litigate, the findings and recommendations of the FIC Review. The FIC Review recommended that the NSW Children's Court should be appropriately resourced so that it could publish all final judgments online in a de-identified and searchable form, for the reasons described above. We support the recommendation and agree that the Children's Court should publish all final judgments online.

How do we increase access to information and minimise potential risks of delaying finalisation of matters?

As discussed above, there is no doubt that requiring the publication of all final judgments will create an increased burden on the NSW Children's Court and individual magistrates. While we encourage DCJ to consult with the NSW Children's Court about what exactly this might require, the likely answer is that it will not be able to be achieved without appointing new magistrates as recommended by Recommendation 124, and by dedicating additional resources to the functions of the NSW Children's Court.

Are there any alternatives we could consider to facilitate better Aboriginal community engagement in proceedings?

We do not consider that there are any alternatives to the issue the FIC Review was concerned to address with this recommendation. While publishing a subset of final judgments may be a less resource intensive alternative, we are concerned that this would raise issues regarding how those

[67] Ibid, 132.
[68] Ibid.

judgments are selected. This has the potential to undermine in part the intent of the recommendation, which was to increase confidence in the operations of the Children's Court.

We otherwise encourage DCJ to consult directly with Aboriginal communities and organisations such as AbSec and the ALS regarding additional ways better Aboriginal community engagement in proceedings might be achieved.

5.4 Recommendation 25: Early intervention services

Recommendation 25 was one of the recommendations made by the FIC Review as part of its consideration of how to reduce entries into care[69] and in particular its consideration of how to better achieve early intervention support for families.[70] As noted above in the discussion regarding Recommendation 26, the FIC Review was concerned to see a reorientation of the NSW child protection system away from removals of children and towards support for families to stay together. As the FIC Report emphasised, early provision of the right services to families can prevent entry into care.[71]

The FIC Report noted that while it is one of the objects of the Care Act to provide parents with appropriate assistance in the performance of their child-rearing responsibilities (s 8(c)), there is no legislative obligation to actually provide this support despite the fact that 'inquiry after inquiry' has recommended the provision of early support.[72] The FIC Review identified that a legislative requirement was a way in which law and policy could be translated into practical application and help ensure those services are provided to families where they are required.[73]

We are of the view that an obligation to provide support services to Aboriginal families to prevent entries into care should be legislated, as recommended by the FIC Review. As discussed above in relation to Recommendation 26, we are of the view that Recommendations 25, 26 and 54 should be legislated together, in a similar manner.

Should a requirement to provide services be legislated?

We are concerned that this discussion question either misunderstands, or seeks to re-litigate, the findings and recommendations of the FIC Review. The FIC Review recommended that a requirement to provide services be legislated, for the reasons described above. The right services can prevent entry into care and currently DCJ are not translating this into practice and providing those services. A legislative obligation is required to change casework practice.

How far would this requirement go, does it include health and education services (e.g. early maternal care services)?

We are of the view that the requirement should be interpreted broadly, but always with regard to what is needed by the individual family. If health and education services could be of assistance to a particular family staying together then they should be considered early intervention services

[69] FIC Report, Part D (Reducing entries into care), comprising Chapters 9 (Getting early intervention right), 10 (Prenatal reporting and newborn removals), 11 (Considering alternatives to removal), 12 (Improving entry into care practice), 13 (Poor removal practises), 14 (Recognising the harm of removal) and 15 (Care criminalisation).
[70] FIC Report, Chapter 9 (Getting early intervention right).
[71] Ibid, 159.
[72] Ibid.
[73] Ibid.

that DCJ are required to provide. If DCJ are considering legislating a definition of early intervention support, we suggest that it be broad, be linked to the needs of individual families, and provide that where the child or family are Aboriginal or Torres Strait Islander, the support must be culturally safe and appropriate.

How can support services be mandated prior to a ROSH report?

We acknowledge this is one of the issues with requiring DCJ to provide early support to families. The difficulties facing a family may not be known to DCJ until a ROSH report is made. We suggest one way that this could be addressed is to ensure that DCJ is adequately investing in the capacity of local Aboriginal organisations, so that families feel they have a safe place to speak about issues they may be experiencing, before things progress to the stage that a ROSH report is made. Local organisations may then voluntarily link the family in with DCJ, to facilitate access to appropriate additional services. When we are considering early intervention we should be considering, investing in and strengthening local, community controlled support mechanisms, as well as DCJ facilitated mechanisms.

What alternative non-legislative measures could be taken to improve the support given by DCJ and other agencies to families?

We are concerned that this discussion question either misunderstands, or seeks to re-litigate, the findings and recommendations of the FIC Review. The FIC Review was of the view that a legislative measure was required, for the reasons described above.

Otherwise, we suggest that the non-legislative measures that should be taken are those recommended in Chapter 9 (Getting early intervention right) of the FIC Report. We suggest that fully implementing these recommendations, in genuine partnership with Aboriginal communities and organisations such as AbSec and the ALS will significantly improve the support given to families.

5.5 Recommendation 28: Notification service

As with Recommendations 25 and 26, Recommendation 28 sits within the FIC Report's chapter on improving early intervention support for families, to reduce entries into care.

The FIC Review noted the power imbalance that exists between parents and DCJ and that a common suggestion to remedy this problem is the introduction of parental advocacy services.[74] Parental advocacy can help ensure that parents are not unduly pressured into consenting to care arrangements and can help parents to access relevant services to assist them to address issues that may affect the safety of their children.[75] On this basis the FIC Review recommended in Recommendation 27 that an Aboriginal Child Protection Advocacy Program be established in NSW, to enable 'advocates' to assist families at all stages of the process, at the notification and investigation stage, in court proceedings and in family group meetings.[76] Recommendation 28 was directed to enabling automatic notification to the Program (or a relevant Aboriginal community body) if an Aboriginal child or young person is removed from their family.

[74] Ibid, 163-164.
[75] Ibid, 165.
[76] Ibid.

We support the introduction of a notification service, as recommended by the FIC Review. As the Review noted, this notification service could be enacted in a similar manner to the Custody Notification Service (**CNS**), that provides for notification to the ALS if an Aboriginal or Torres Strait Islander person is detained in custody. We suggest that once the Aboriginal Child Protection Advocacy Program is established, the Care Act be amended to insert a new s 51A, modelled on the provision for the CNS:[77]

> **51A Legal and other assistance where child an Aboriginal child or Torres Strait Islander child**
>
> If a child removed from the care of a person is known or suspected to be an Aboriginal child or a Torres Strait Islander child, then, unless the Secretary is aware that the person has contacted the Aboriginal Child Protection Advocacy Program, the Secretary must:
>
> (a) immediately inform the person that a representative of the Aboriginal Child Protection Advocacy Program will be notified—
>
> (i) that the person has had an Aboriginal child or a Torres Strait Islander child removed from their care, and
>
> (ii) of a means to contact the person, and
>
> (b) notify such a representative accordingly.

Is there a need for a notification and advocacy service?

We are concerned that this discussion question either misunderstands, or seeks to re-litigate, the findings and recommendations of the FIC Review. The FIC Review considered that a notification and advocacy service was required for the reasons described above.

Who should be notified if an Aboriginal child is removed?

Recommendation 28 was designed to be implemented together with Recommendation 27, concerning the establishment of the new Aboriginal Child Protection Advocacy Program. The FIC Review envisaged that this body, or a relevant Aboriginal community body, should be notified if an Aboriginal child is removed.

Until that body is established, we suggest that (subject to its views and appropriate funding being provided) the ALS be notified if an Aboriginal child is removed. The ALS has expertise with the CNS, on which the recommendation is modelled. In addition or in the alternative, a local Aboriginal community body could be notified in areas where that is available, in order to provide culturally safe advice and assistance and a referral to culturally safe services as soon as possible.

What provisions need to be in place to protect the privacy of information provided through any notification service and ensure notifications are made with the consent of parents or carers?

The CNS operates by providing minimal information to the ALS, enough for the organisation to make initial contact with the detained person and speak with them directly about their situation. We suggest the child protection notification service be similar, providing only a name, the fact the

[77] *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW), cl 37.

person is the parent of, or carer for, an Aboriginal or Torres Strait Islander child or children, that they have had that child or children removed from their care and how the person can be contacted. The Aboriginal Child Protection Advocacy Program or the ALS as an interim measure could then directly contact the person and provide culturally safe advice and assistance.

We suggest DCJ engage directly with the ALS given its experience with the CNS for any further consultation questions regarding an effective notification service.

5.6 Recommendation 94: Reviewing carer authorisation decisions

Recommendation 94 was a recommendation of the FIC Report in the chapter considering placement of Aboriginal children, within the part of the Report considering the Aboriginal Child Placement Principle.[78]

The FIC Review was concerned that there were a number of barriers to the location and recruitment of appropriate Aboriginal carers for Aboriginal children in OOHC.[79] The FIC Review identified that a matter potentially contributing to this issue was that if an Aboriginal person was refused to be authorised as a carer by DCJ, that decision was not subject to enforceable independent review.[80] The FIC Review noted that this put NSW out of step with the majority of states and territories in Australia.[81] With Recommendation 94, the FIC Review recommended that the 2015 legislative amendments removing the jurisdiction of the NSW Civil and Administrative Tribunal (**NCAT**) to review a decision to refuse to authorise an applicant as a carer be reversed.

We support the legislation of a right to review a decision not to authorise a person as a carer at NCAT, as recommended by the FIC Review. We suggest this be done by reversing the relevant amendments made by the *Child Protection Legislation Amendment Act 2015* (NSW). NCAT is not a costs jurisdiction and is a more accessible forum than the NSW Supreme Court for potential Aboriginal carers aggrieved by decisions not to authorise them.

Should there be the right to appeal these decisions to NCAT?

We are concerned that this discussion question either misunderstands, or seeks to re-litigate, the findings and recommendations of the FIC Review. FIC recommended the right to appeal these decisions to NCAT should be reinstated, for the reasons described above.

What other options could be considered?

We do not see what other options might deliver on this recommendation. The recommendation is to reinstate a jurisdiction that NCAT previously held, for the reasons described above. NCAT is a no costs jurisdiction, designed to be efficient, accessible and affordable. We do not see that an appeal right to any other body would be as appropriate or effective.

[78] FIC Report, Part E (Aboriginal Child Placement Principle), comprising Chapters 16 (Introduction to the Aboriginal Child Placement Principle), 17 (Partnership), 18 (Placement), 19 (Participation) and 20 (Connection to family, community, culture and country).
[79] See generally the discussion at FIC Report, 283-307.
[80] FIC Report, 303-304.
[81] Ibid, 304.

What factors should be considered so that decisions about authorising carers are transparent and the rate of refusal is reduced?

We suggest DCJ consider publishing de-identified reasons for decisions to authorise or not authorise carers. This would be a way to improve transparency and allow prospective applicants to better understand decision making in this area. We also suggest that DCJ can make improvements in this area by prioritising Recommendation 93 of the FIC Review, partnering with Aboriginal community organisations and representatives to develop and implement a culturally appropriate carer assessment tool to be used in all carer assessments involving Aboriginal carers.

5.7 Recommendation 102: Public reporting on Family Group Conferencing

Recommendation 102 was a recommendation of the FIC Report in the chapter on improving participation by parents, families and communities in child protection decision making, also within the part of the Report considering the Aboriginal Child Placement Principle.

The FIC Review found that data acquired during the Review supported the views of stakeholders that consultation with parents, kin, families and children is not always undertaken, or is undertaken in an inappropriate or ineffective manner.[82] The FIC Review was concerned by this, noting:

> When the state intervenes to remove an Aboriginal child from his or her place of belonging, it is engaging in a regulatory action, the magnitude of which is difficult to overstate. In light of this, when a child is to be removed from his or her family, it is vital that the child's family is afforded procedural justice—that family members are spoken to formally and respectfully, that their views are not only listened to, but heard, and that they have the opportunity to engage with the representatives of the state to craft a safe and secure life for their children.[83]

Family group conferences (FGCs) are one method of consultation with family utilised by DCJ. The FIC Review heard mixed accounts from stakeholders about FGCs, with many concerned the FGC process was tokenistic or too constrained by DCJ to be useful for families.[84] In order to strengthen the practice surrounding FGCs and their efficacy, the FIC Review made Recommendation 102, recommending that the new Independent Child Protection Commission oversee, monitor and report on the operation of alternative dispute resolution in care proceedings.

We support the legislation of oversight, monitoring and reporting functions on the operation of the mandatory alternative dispute resolution (**ADR**) system for the new Independent Child Protection Commission, as recommended by the FIC Review. An effective and culturally safe system of ADR would be a significant step in improving the involvement of families and communities in decision making about Aboriginal children, leading to better placement outcomes.

[82] Ibid, 314.
[83] Ibid, 308.
[84] Ibid, 312-313.

What information needs to be included in a comprehensive, publicly available framework to enable ADR to be monitored and assessed over time*?*

We recommend that a publicly available framework to monitor ADR would at a minimum set out best practice principles for effective ADR processes and in particular, best practice principles for culturally safe ADR processes including the use of Aboriginal and Torres Strait Islander convenors.[85]

We consider that any publicly available framework should also address data availability, and that release of statistics on the use of ADR in care proceedings will be an important accountability function. We suggest as a starting point that the following information could be publicly reported, on a quarterly basis (to align with other DCJ data reporting):

1. The number and proportion of cases in which ADR was offered.
2. The number and proportion of cases in which ADR was not offered because of the s37(1B) exception.
3. The number and proportion of cases in which ADR was not offered but no reason was provided for not offering ADR.
4. The number and proportion of cases in which ADR was offered but the matter still proceeded to court.
5. All four of the above metrics broken down by whether the child and/or family members were Aboriginal or Torres Strait Islander.
6. The number and proportion of cases in which ADR was offered to Aboriginal or Torres Strait Islander family members and was led by an Aboriginal or Torres Strait Islander convenor.

Suggestions 1-3 would monitor whether there are issues with DCJ offering ADR services in the first place, 4 would monitor the efficacy of the ADR services being offered and 5 would measure whether Aboriginal and Torres Strait Islander children and families are experiencing different outcomes with ADR as compared to non-Indigenous children and families. Suggestion 6 would measure how often DCJ is using Aboriginal and Torres Strait Islander convenors, as recommended by the SNAICC guidance on the implementation of the ACPP.[86]

If the Child Protection Commission does not proceed, should there be other oversight of ADR?

As noted in our discussion on Recommendation 9, the creation of a new Independent Child Protection Commission is one of the most critical recommendations of the FIC Review, and should not be discarded without exceptionally good reason. As an interim measure until the Independent Child Protection Commission is established, we suggest there should be oversight of ADR and this could be located with the NSW Ombudsman or OCG, consistent with other interim accountability recommendations while the new Commission is being established.

[85] As recommended by the SNAICC guidance on the implementation of the ACPP, cited in the FIC Report (FIC Report, 316).
[86] FIC Report, 316.

5.8 Recommendation 117: Period for restoration

Recommendation 117 is recommended in the chapter of the FIC Report on restoration,[87] located within the part of the report considering how to increase exits of Aboriginal children from OOHC.[88]

FIC examined the legislative timeframes added to the Care Act in 2018, within which restoration or an alternative permanency arrangement must occur. The FIC Review noted the views of many stakeholders regarding the difficulties for parents to make changes to address protection concerns within these timeframes.[89]

The FIC Review recognised that remaining indefinitely in care is not desirable for children, but it also recognised that rigid timeframes are problematic when there are lengthy waiting lists for the services that are generally linked to restoration goals.[90] The FIC Review was concerned to provide parents a longer period to address complex issues with the assistance of support services delivered by Aboriginal community organisations, as a way to increase the restoration rate for Aboriginal children.[91] Recommendation 117 arose from this concern, suggesting that a decision of the Children's Court to dispense with the permanency timeframes should be explicitly linked to considerations of service provision that would support Aboriginal parents.

We support a legislative amendment to directly tie s 79(10) of the Care Act to service provision, as recommended by the FIC Review. We agree that a decision to dispense with the permanency timeframes and adopt a different timeframe for an order should be tied to service provision, given the challenges we know parents face accessing appropriate support services. We suggest that this amendment could be made by inserting an additional subsection after subsection (10):

> (9) The maximum period for which an order under subsection (1)(b) may allocate all aspects of parental responsibility to the Minister following the Court's approval of a permanency plan involving restoration, guardianship or adoption, is 24 months.
> (10) Subsection (9) does not apply if the Children's Court is satisfied that there are special circumstances that warrant the allocation being for a longer period.
> (11) ***Special circumstances*** in subsection (10) include that there are services or programs that a parent could access or complete to address concerns that the child or young person is in need of care and protection, but the parent is unlikely to be able to access or complete those services or programs within 24 months.

The subsection could refer to s 17 of the Care Act by way of illustrative and non-exhaustive reference to the types of services or programs envisioned. This may have the additional benefit of encouraging the Secretary to more often make use of the power available under s 17.

How can restoration of Aboriginal children and families be better supported?

We suggest that fully implementing the recommendations of Chapter 21 (Restoration) of the FIC Report (Recommendations 106 to 120) in genuine partnership with Aboriginal stakeholders,

[87] FIC Report, Chapter 21 (Restoration)
[88] FIC Report, Part F (Increasing exits from care), comprising Chapters 21 (Restoration), 22 (Adoption of Aboriginal children in OOHC) and 23 (Reforming the Children's Court).
[89] FIC Report, 364.
[90] Ibid, 365.
[91] Ibid.

communities and representative bodies such as AbSec and the ALS would be the best way to begin better supporting restoration for Aboriginal children and families.

What barriers to restoration exist in legislation and policy?

We refer DCJ to the discussion in Chapter 21 (Restoration) of the FIC Report.

Should legislation incorporate principles to guide restoration decisions made by DCJ and the Court?

Section 79 could potentially provide greater guidance as to what should be considered 'special circumstances' for the purpose of s 79(10). Any additional guidance should be non-exhaustive to ensure the Court retains a broad discretion to dispense with the permanency timeframes as may be appropriate in an individual case.

Should the Department of Communities and Justice and other relevant agencies be required to take active efforts to promote restoration?

We would support a legislative requirement that DCJ and other relevant agencies take active efforts to promote restoration. As with other legislative obligations suggested by the FIC Review, this could be an effective means to drive casework practice improvements. We refer to the discussion in relation to Recommendation 26 above regarding how obligations such as this could be legislated.

5.9 Recommendation 122: New agency to run litigation

Recommendation 122 was recommended in the chapter of the FIC Report concerning reforms to the Children Court,[92] also within the part of the Report considering how to increase exits from care.[93]

The FIC Review was concerned by its finding that despite many policy documents, codes of conduct, legislative instruments and training materials, DCJ was still found to have 'provided the Children's Court with misleading or untrue evidence in a significant proportion of the case files that were reviewed'.[94] The FIC Review suggested that the preferable solution to this issue was to establish an independent body to conduct care and protection litigation. Recommendation 122 follows the Queensland model, creating a 'professional separation between the decision to apply for a child protection order and the related frontline safety casework'.[95] The FIC Review noted that after almost three years of operation, the Queensland model has 'proven to be workable and has been well-received by stakeholders'.[96]

We acknowledge the functional separation that currently exists between DCJ legal officers and DCJ caseworkers and the separate reporting lines described in the DCJ Discussion Paper. We note however that this is the same separation and reporting that existed at the time of the FIC

[92] FIC Report, Chapter 23 (Reforming the Children's Court).
[93] FIC Report, Part F (Increasing exits from care), comprising Chapters 21 (Restoration), 22 (Adoption of Aboriginal children in OOHC) and 23 (Reforming the Children's Court).
[94] FIC Report, 384.
[95] Ibid, 386.
[96] Ibid, 387.

Review. The FIC Review considered the model litigant policy,[97] the ethical obligations of lawyers acting for DCJ,[98] the Code of Conduct for Legal Representatives in Care and Protection Proceedings in the Children's Court of New South Wales[99] and the caseworker training on legal matters.[100] The FIC Review examined all of these and found they were still inadequate to ensure best practice in the conduct of child protection proceedings. Recommendation 122 was not made in ignorance of the matters raised in the DCJ Discussion Paper, but after full consideration of them.

We support the establishment of an independent statutory agency to make decisions about the commencement of child protection proceedings and to conduct litigation on behalf of DCJ, as recommended by the FIC Review. The FIC Review noted that in Queensland the new body was co-located with Crown Law to enable both to share support services, which has been effective and resulted in cost savings.[101] We agree with the FIC Review that the new statutory body could similarly be co-located with (but institutionally separate from) the Office of the Director of Public Prosecutions, the Crown Solicitor's Office or a specialist Children's Court.[102]

How can best practice, transparency and consistency in care and protection litigation be strengthened?

We suggest that fully implementing the recommendations of Chapter 23 (Reforming the Children's Court) of the FIC Report (Recommendations 122 to 125) in genuine partnership with Aboriginal stakeholders, communities and representative bodies such as AbSec and the ALS is the best way to begin strengthening best practice, transparency and consistency in care and protection litigation.

5.10 Recommendation 123: Rules of evidence

Recommendation 123 was also recommended in the chapter of the FIC Report concerning reforms to the Children's Court. It is similarly directed to addressing the issues that the FIC Review identified with the quality of evidence presented by DCJ to the Court. The FIC Review was conscious that in a jurisdiction in which the rules of evidence do not presumptively apply, 'the quality of the evidence presented to the Court needs to be carefully scrutinised to ensure that it is sufficiently reliable to form the basis of factual findings'.[103]

The FIC Review noted that the application of the rules of evidence would ensure that the evidence presented by DCJ was 'tested', in the sense that it was adequately screened for accuracy and truthfulness.[104] The FIC Review suggested that a provision similar to that used in sentencing proceedings could be used in care and protection proceedings, allowing parties to request that the rules of evidence apply to important facts or matters and allowing the Court to make an order if it is in the 'interests of justice' to do so.[105] This was the basis on which Recommendation 123 was made.

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[97] Ibid, 382.
[98] Ibid, 382-283.
[99] Ibid, 383.
[100] Ibid.
[101] Ibid, 387.
[102] Ibid.
[103] Ibid.
[104] Ibid, 388.
[105] Ibid.

We support the amendment of the Care Act so that, as in s 4(2) of the Uniform Evidence Acts, the rules of evidence do not apply unless: (i) a party to the proceeding requests that they apply in relation to the proof of a fact and the court is of the view that proof of that fact is or will be significant to the determination of the proceedings; or (ii) the court is of the view that it is in the interests of justice to direct that the laws of evidence apply to the proceedings, as recommended by the FIC Review. We suggest that this could be done by way of amendment to s 93(3) of the Care Act, as follows:

> (3) The Children's Court is not bound by the rules of evidence unless:~~,~~
> (a) a party to a proceeding requests that the rules of evidence apply in relation to proof of a fact and the Children's Court is of the view that proof of that fact is or will be significant to the determination of the proceedings; or
> (b) in relation to particular proceedings or particular parts of proceedings before it, the Children's Court determines that it would be in the interests of justice that the rules of evidence, or such of those rules as are specified by the Children's Court, are to apply to those proceedings or parts.

This drafting preserves the broad discretion of the Children's Court, while also providing for a party to make an application if there are certain matters to which it is important a more rigorous standard of scrutiny apply.

What are the risks and benefits of implementing this recommendation?

The benefits of this provision are those identified in the FIC Report, including that it is a provision that will ultimately result in better practice regarding the preparation and presentation of evidence to the Children's Court.

We consider that this amendment will likely result in additional work for DCJ in the preparation of a matter for court. We do not consider this to be an adverse consequence however and in fact is at the heart of this recommendation. The FIC Review was concerned to place the onus on DCJ to ensure that the material before the Court is of the highest quality and does not misrepresent any aspects of a child or family's situation.

As discussed above, the second limb of the proposed amendment preserves a general discretion for the Children's Court to determine that the rules of evidence should apply. If there is a concern that the first limb of the amendment unduly constrains the discretion of the Court, it could potentially be modified as follows:

> (3) The Children's Court is not bound by the rules of evidence unless:~~,~~
> (a) a party to a proceeding requests that the rules of evidence apply in relation to proof of a fact and the Children's Court is of the view that proof of that fact is or will be significant to the determination of the proceedings *and that it would be in the interests of justice that the rules of evidence, or such of those rules as are specified by the Children's Court, are to apply to proof of that fact*; or
> (b) in relation to particular proceedings or particular parts of proceedings before it, the Children's Court determines that it would be in the interests of justice that the rules of

evidence, or such of those rules as are specified by the Children's Court, are to apply to those proceedings or parts.

This modification would preserve the discretion of the Children's Court to look at all considerations and determine if the rules of evidence should apply having regard to the interests of justice, for both limbs of the provision.

Will allowing people to request that the stricter rules of evidence apply create a more adversarial Children's Court?

We do not consider that this amendment will necessarily make care proceedings any more adversarial than they are currently. While we anticipate there will be applications that the rules of evidence apply under the first limb and that these may be opposed at a contested hearing, the remainder of proceedings should continue in similar fashion, with the exception that the parties are required to be mindful that the rules of evidence will apply to proof of a particular fact. Additional formality will only apply to proof of those particular facts that the Court has considered and determined it is in the interests of justice for the rules of evidence to apply.

We also do not anticipate that this amendment will lead to a significant rise in interlocutory applications. We note that the recommendation is that a party can only apply for the rules to apply to proof a particular fact, not to the proceeding as a whole, which remains at the discretion of the Children's Court on its own motion. We are of the view that parties will be required to think very carefully about which facts are so significant that they require an application to be made, and that this will necessarily limit the number of applications. It may be different if a party could apply in every case for an order that the rules of evidence apply wholesale and so are inclined to do so as the default position, but that is not what is recommended.

Are there alternatives that could achieve the intent of the recommendation?

We do not consider that there are alternatives that can achieve the intent of the recommendation. The FIC Review was concerned to align care proceedings with sentencing proceedings in providing for a limited ability to seek that the rules of evidence apply, balancing informality against the need for rigorous scrutiny of certain matters. The recommendation is designed to drive practice change in a way that other measures such as training and policies have proven incapable of doing.

6. Section 3 Recommendations

6.1 Recommendation 11: For-profit OOHC providers

Recommendation 11 was a recommendation made in the chapter of the FIC Report concerning increased public accountability and oversight of the NSW child protection system,[106] in the part of the Report concerning the key areas requiring significant structural change.[107]

[106] FIC Report, Chapter 8 (Public accountability and oversight).
[107] FIC Report, Part C (Key areas requiring significant structural change), comprising Chapters 7 (Self-determination) and 8 (Public accountability and oversight).

The recommendation is directed to the OCG's regulatory role in accrediting OOHC providers, discussed earlier at Recommendation 19. The FIC Report reviewed the role that for-profit OOHC providers play and questioned whether it was 'desirable or ethical' to permit those types of entities to operate in the child protection system, given the nature of the service being delivered and the service recipients as one of the most vulnerable groups in society.[108] The FIC Review noted its concern that these entities have an interest in maintaining and expanding OOHC services and reducing the costs associated with providing OOHC services which may not be what is best for the children in their care.[109]

The FIC Review identified that there was no reason in principle why the providers of *adoption* services in NSW are required to be non-profit organisations, while the providers of OOHC services are permitted to make a profit.[110] The FIC Review noted that the underlying rationale was the same, to ensure the highest quality services and that decisions are not tainted by profit-oriented motives.[111] It was on this basis that the FIC Review made Recommendation 11, suggesting that legislation be amended to ensure OOHC services can only be provided by charitable or non-profit organisations, effectively removing for-profit providers from the OOHC space. We note that while this was potentially to be considered by the OCG and reported on separately, its recent Special Report on Family is Culture did not consider this recommendation.[112]

We support a blanket legislative prohibition on for-profit OOHC providers, as recommended by the FIC Review. We agree that this is an area where the quality of service provision cannot be risked by the potential influence of for-profit motivations. We recognise that for-profit service providers currently play a role in providing OOHC services in areas where there may not be not-for-profit or charitable services available and hence this is not a recommendation that can be immediately implemented.

We suggest that DCJ work over the next 12 months to build the capacity of not-for-profit OOHC service providers to step in to cover potential service gaps in these areas, ensuring a transition to a full not-for-profit service model. If this were the case, the NSW Government could look to legislate in accordance with Recommendation 11 by the end of 2023, in line with other legislative recommendations that may not be able to be immediately implemented.

If you have not already provided feedback to the OCG, what are your views on how to minimise the risks of for-profit services?

We are of the view that, as with adoption service providers, a complete prohibition on for-profit service provision is the only way to mitigate the potential risks to quality of service.

6.2 Recommendation 20: Accrediting OOHC agencies

Recommendation 20 was the final recommendation of the FIC Report in the chapter on public accountability and transparency.

[108] FIC Report, 130.
[109] Ibid.
[110] Ibid, 131.
[111] Ibid, 131.
[112] Office of the Children's Guardian, *Special Report under section 139(2) of the* Children's Guardian Act 2019*: Family is Culture Review* (Final Report, March 2022).

As with Recommendations 11 and 19, Recommendation 20 is directed to the OCG's OOHC regulatory functions. The FIC Review was concerned that legislation currently allows organisations to provide OOHC services, even if they do not comply with the minimum requirements for accreditation – the standards put in place to ensure that a child is safe, supported and nurtured in the OOHC environment.[113] As with Recommendation 11, the concern is that this may create significant risks for a highly vulnerable community. We note that while the DCJ Discussion Paper suggests the OCG is considering solutions to this issue, this was not a matter addressed in the OCG's recent Special Report on Family is Culture.[114]

We support a blanket prohibition on OOHC service provision by partially accredited agencies, as recommended by the FIC Review. We agree that this is an area where the quality of service provision cannot be risked by allowing the participation of non-compliant organisations. As with Recommendation 11, we recognise that partially-accredited providers currently play a role in providing OOHC services in areas where there may not be fully-accredited providers.

As with our submission on Recommendation 11, we suggest that DCJ work over the next 12 months to either assist partially-compliant service providers to become fully compliant or build the capacity of fully-accredited OOHC service providers to cover potential service gaps in these areas, ensuring a transition to a fully accredited service model. If this were the case, the NSW Government could look to legislate in accordance with Recommendation 20 by the end of 2023, in line with other legislative recommendations that may not be able to be immediately implemented.

If you have not already provided feedback to the OCG, what are your views on this issue?

As with our submission on Recommendation 11, we are of the view that a complete prohibition on partially accredited OOHC service providers is required to mitigate the potential risks to quality of service.

6.3 Recommendation 121: Adoption

We stand with our First Nations colleagues and the FIC review in calling for a total ban on adoptions for First Nations children in OOHC. This is not a question of safeguards. The FIC Review has made clear, as have AbSec, the ALS and other First Nations advocates, that adoption is not a recognised practice in Aboriginal cultures and the prospect of Aboriginal children being adopted causes significant distress to Aboriginal family and community members. We direct DCJ to the conclusion of the FIC Review:

> In light of widespread opposition from the Aboriginal community to the practice of adoption for Aboriginal children; the fact that adoption is not a culturally accepted practice; the history of the forced removal of Aboriginal children; the damaging consequences of loss of connection to culture and sense of identity that may accompany adoption; the fact that 'permanency' should be perceived as more than legal permanency (and should incorporate cultural permanency); and the evidence uncovered in this Review that at least one OOHC provider is opposing

[113] FIC Report, 112.
[114] Office of the Children's Guardian, *Special Report under section 139(2) of the* Children's Guardian Act 2019*: Family is Culture Review* (Final Report, March 2022).

> restoration based on a view that the child would be better off being adopted by his foster carers, the Review has concluded that legislation should provide that adoption cannot not be pursued for Aboriginal children.[115]

We note that in 2020, PIAC and the ALS sought records from DCJ under the *Government Information and Public Access Act 2009* (NSW) regarding the number of children identified as Indigenous who had been adopted from OOHC since 2014-15. Both our organisations were extremely concerned to learn that of the 23 Aboriginal and Torres Strait Islander children who had been adopted from OOHC in the years 2014/15 to 2019/20, 20 of those children were adopted into non-Indigenous families. In these circumstances, it is no wonder that Aboriginal families and communities consider the stolen generations to be repeating.

We support an amendment to legislation to ensure that adoption is not an option for Aboriginal children in OOHC, as recommended by the FIC Review. We consider this could be legislated immediately. Unlike some other legislative recommendations, this is not an amendment that affects service provision or DCJ capacity. It is the simple creation of a legislative safeguard that would prevent a practice that Aboriginal families and communities have expressed they find deeply distressing and are concerned should immediately cease.

What additional safeguards are needed to ensure the adoption of Aboriginal children and young people remains the last preference, and cultural permanency is prioritised?

We are concerned that this discussion question either misunderstands, or seeks to re-litigate, the findings and recommendations of the FIC Review. As above, this recommendation is not a question of safeguards. It is a question of prohibiting a practice that is subject to widespread opposition and is causing significant distress to Aboriginal families and communities. We are of the view that nothing less than a complete prohibition will suffice.

6.4 Recommendation 64: Known risks of harm of removal

Recommendation 64 was recommended in the FIC Report chapter concerning the harm of removal,[116] in the part of the Report considering ways to reduce entries into care.[117]

The FIC Review was concerned that the harm of removal may not be adequately considered in care proceedings currently and that a legislative provision explicitly addressing this would unambiguously signal to all magistrates that removal is often a harmful practice that must be undertaken with due care.[118]

The FIC Review considered other provisions of the Care Act that seek to address the harms of removal, such as the requirement that the least intrusive intervention be taken in the life of the child (s 9(2)(c)). Of the least intrusive intervention principle, the FIC Review identified that in many cases no attempt was made to take the least intrusive option, with 72 of the 200 cases in the qualitative sample (36%) specifically involving DCJ not considering less intrusive actions for

[115] FIC Report, 380.
[116] FIC Report, Chapter 14 (Recognising the harm of removal).
[117] FIC Report, Part D (Reducing entries into care), comprising Chapters 9 (Getting early intervention right), 10 (Prenatal reporting and newborn removals), 11 (Considering alternatives to removal), 12 (Improving entry into care practice), 13 (Poor removal practises), 14 (Recognising the harm of removal) and 15 (Care criminalisation).
[118] FIC Report, 233.

children and instead moving to the most intrusive option, namely removal.[119] In only 14 cases (7%), did FIC find that DCJ considered and used less intrusive options to removal.[120]

Even if the view were to be taken that implementing Recommendation 64 was not necessary because of other provisions that exist, we are of the view that there would be no disadvantage to doing so and significant potential benefits. If the harm of removal was legislatively recognised, the best interests of the child (Care Act s 9(1)) would remain the paramount legislative consideration, and the definition of risk of significant harm (Care Act s 23) would be unaffected. We are of the view that a legislative presumption as recommended by Recommendation 64 would not lead to a different result in a proceeding where the Children's Court would otherwise be concerned about the level of risk facing a particular child.

We support an amendment to the Care Act to require judicial officers to consider the known risk of harm to an Aboriginal child of being removed from the child's parents or carers, as recommended by the FIC Review. We note that this provision could be legislated as a general provision, concerning the potential harm of removal for all children, not just Aboriginal or Torres Strait Islander children. The FIC Review however was concerned that the provision be specifically addressed to Aboriginal children, because of the specific element of cultural harm in matters involving Aboriginal children – that removal of an Aboriginal child may damage the child's connection to culture.[121] We would support a general provision being legislated, but only if it were also to specifically and additionally acknowledge the particular harms of removal for Aboriginal children.

Are the current provisions of the Care Act sufficient to consider the potential harmful effects of removal?

We are concerned that this discussion question either misunderstands, or seeks to re-litigate, the findings and recommendations of the FIC Review. The FIC Review considered the Care Act in its entirety and remained of the view that Recommendation 64 was required in order to adequately ensure the harm of removal was being considered by all magistrates in all cases. The current provisions were found to be insufficient.

[119] Ibid, 205.
[120] Ibid.
[121] Ibid, 234.