Communities and Justice

NSW GOVERNMENT

Family is Culture legislative recommendations

Consultation findings report

September 2022


THE
BEATLES

Contents

Contents (continued)

Acknowledgement of Country

The Department of Communities and Justice NSW acknowledge the Traditional Custodians of the lands where we work and live. We celebrate the diversity of Aboriginal peoples and their ongoing cultures and connections to the lands and waters of NSW.

We pay our respects to Elders past, present and future. We extend this acknowledgement to the Aboriginal and Torres Strait Islander people that contributed to the development of this report.

We advise this report may contain images of deceased persons in photographs.

Executive summary

This report summarises the key themes that emerged from the consultation process conducted by the NSW Government from 7 April 2022 to 27 May 2022 on a range of recommendations made by the Final Report of the Family is Culture: Independent Review into Out-of-Home Care in New South Wales (hereafter referred to as 'FIC'). The report also outlines how the Government proposes to progress each recommendation.

NSW Government is working hard towards reducing the number of Aboriginal children in the child protection system by implementing the FIC recommendations, increasing the supports provided to Aboriginal families, and strengthening accountability to our practice with Aboriginal families. The proposed legislative amendments will also contribute to our commitments to improve outcomes for Aboriginal families under the under the National Agreement on Closing the Gap and Safe and Supported: the National Framework for Protecting Australia's Children 2021-2031. Under these national agreements, the NSW Government is committed to progressing systems transformation that has Aboriginal and Torres Strait Islander self-determination at its centre.

Aim of consultation

The purpose of this consultation process was to inform how and when to give effect to recommendations made by FIC to existing legislation and court processes.

The consultation was guided by the Family is Culture Legislative Recommendations Discussion Paper April 2022 which was released on 14 April 2022.

The discussion paper identified priority recommendations that can implemented quickly and other changes that may require further consideration.

The Department of Communities and Justice (DCJ) consulted with a wide range of Aboriginal community organisations and individuals, legal and court stakeholders across NSW.

The proposed changes to the Children and Young Persons (Care and Protection) Act 1998, the Ombudsman Act 1974, the Advocate for Children and Young People Act 2014, and the Children (Protection and Parental Responsibility) Act 1997 detailed in this report are directly informed by the rich feedback generated in response to the discussion paper.

Channels for consultation included:

- face-to-face forums
- online sessions
- written submissions.

Who we heard from

The Department of Communities and Justice (DCJ) consulted with a wide range of Aboriginal community organisations and individuals, legal and court stakeholders across NSW. We acknowledge the efforts of the many Aboriginal community representatives, organisations and individuals across metropolitan and regional NSW who took the time to share their views on how we can change our systems to better meet the needs of Aboriginal children and their families. We have also considered the perspectives of the Children's Court, the Aboriginal Legal Service (NSW/ACT), Legal Aid NSW and other legal representatives.

DCJ consulted with more than 130 representatives. DCJ received 31 written submissions.

Stakeholders were advised that their feedback would be kept confidential.

A full list of participating organisations is at Appendix A.

Executive summary (continued)

The consultation was led by Aboriginal staff in DCJ and included:

- seven in-person consultation sessions with Aboriginal people and service providers in Coffs Harbour, Dubbo, Lake Macquarie, Little Bay, Penrith, Redfern, Wollongong
- one online-only session
- one in-person consultation session in Parramatta for legal and court stakeholders and agencies
- one in-person and online session with Aboriginal DCJ caseworkers

Details of these sessions are at Appendix B.

How to read this report

This report is structured into three sections:

- Section 1: changes that can be made quickly
- Section 2: changes that require further time and consideration
- Section 3: areas where existing policy settings are considered to be sufficient at this time

In section 1, after consulting with stakeholders the number of FIC recommendations to be expedited expanded from 11 recommendations to 15. Some FIC recommendations originally listed in sections 1 and 3 have now moved to section 2.

Section 2 of this report outlines seven FIC recommendations that cannot be progressed at this time as they require further consultation so that they are designed in conjunction with Aboriginal community members. The Government will consider how to implement these recommendations in the coming months, with further targeted consultation planned to conclude in 2023. This will include further community consultation, including with family and community members.

Section 3 outlines three FIC recommendations where the NSW Government does not propose any legislative change at this time, and existing policy settings will remain in place.

In the context of this report, references to “Aboriginal people” represent both Aboriginal and Torres Strait Islander people.

Executive summary (continued)

Changes to be made immediately

After considering the feedback received, the NSW Government will progress the following changes in the coming months:

1. incorporating the Secretariat of National Aboriginal and Islander Child Care (SNAICC) Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) to be applied in decision-making under the Children and Young Persons (Care and Protection) Act 1998 (Care Act) involving Aboriginal and Torres Strait Islander children, including involving Aboriginal community members and organisations
2. undertaking consultation and co-design with Aboriginal people to determine how to strengthen the provisions of the Care Act so that they are consistent with the right to self-determination
3. clarifying that the NSW Ombudsman may undertake investigations despite there being any anticipated or related court proceedings, provided the investigation will not adversely affect those proceedings
4. granting the Parliamentary Joint Committee on Children and Young People oversight of the out-of-home care (OOHC) accreditation functions of the Office of the Children's Guardian (OCG)
5. mandating that the Secretary of DCJ take 'active efforts' to reduce entry of children into OOHC and to restore children to family
6. removing the presumption in the Care Act that the child subject to proceedings is in need of care and protection if there has been prior removal of a child from the parent. Such evidence will remain admissible in the proceedings but will not give rise to a rebuttable presumption that the current child is in need of care and protection
7. mandating consideration of specific alternatives to be offered to families prior to the removal of a child into OOHC
8. allowing a court to require the attendance of a delegate of the Minister in a criminal court proceeding involving a young person in the parental responsibility of the Minister
9. inserting a power in the Care Act to make regulations about processes to be used when identifying children and young people in the child protection system as Aboriginal
10. providing a right of independent review of a decision to not authorise a person as a carer under the Care Act by the NSW Civil and Administrative Tribunal
11. allowing the Children's Court to take a more active role in ensuring restoration is the preferred placement by enquiring more directly about the 'active efforts' taken by DCJ to support restoration
12. requiring the Secretary, where there is no realistic possibility of restoration, to submit a permanency plan to the Children's Court recommending placement with a relative, kin or community member, or other suitable person, or to indicate there is no suitable person
13. expanding the permanent placement principles to include parental responsibility to a relative or suitable person order (PRR) where it is supported by DCJ, to be considered if guardianship is not practicable or in the best interests of the child
14. providing a non-exhaustive list of circumstances to be considered by the Children's Court when determining whether 'special circumstances' exist that warrant an allocation of parental responsibility to the Minister for longer than 24 months
15. providing guidance in the Care Act about when formal rules of evidence may apply in care and protection proceedings
16. implementing policy change to publicly report on Family Group Conferencing

About this report

Family is Culture independent review

The NSW Government commissioned Professor Megan Davis to chair an independent review of the Aboriginal and Torres Strait Islander children and young people who entered out-of-home care (OOHC) in NSW between mid-2015 and mid-2016. Her report, the Final Report of the Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out of-Home Care in New South Wales (FIC), was released publicly on 7 November 2019.

FIC examined the high rates of Aboriginal children and young people in OOHC in NSW and the implementation of the Aboriginal Child Placement Principle (ACPP). The Review involved analysis of policies and practices relating to Aboriginal children in OOHC, extensive community consultation, consideration of public submissions, and case file audits of the 1,144 Aboriginal children who entered OOHC in NSW between 1 July 2015 and 30 June 2016.

FIC made over 3,026 recommendations about the specific circumstances of the Aboriginal children and young people who entered care in 2015-16. A further 125 systemic recommendations were made about the way the NSW Government delivers child protection and OOHC services.

The NSW Government considered the recommendations made and released its response on 8 July 2020. Since then, 97 per cent of the 3,026 case file recommendations made in the FIC Review have been implemented. Implementation of the FIC systemic recommendations is also underway, guided by a partnership approach with Aboriginal stakeholders and communities. Updates on progress are published online.

The FIC Review Report and the NSW Government's response can be found at www.familyisculture.nsw.gov.au.

FIC made 25 recommendations to change to laws and court processes to improve how the system operates, including changes to:

- The Children and Young Persons (Care and Protection) Act 1998 (NSW) ('the Care Act')
- Adoption Act 2000 (NSW)
- Ombudsman Act 1974 (NSW)
- Children's Guardian Act 2019 (NSW)
- Advocate for Children and Young People Act 2014 (NSW)
  Children (Protection and Parental Responsibility) Act 1997 (NSW)

Summary of consultation findings

This report summarises the key themes and findings from the consultation process conducted by DCJ from 14 April 2022 to 27 May 2022 on implementation of the 25 legislative recommendations. Details of the consultation sessions are at Appendix B.

It was important to ensure that any potential legislative changes do not have unintended negative impacts on Aboriginal children and their families.

Consultation also gave communities the opportunity to comment on issues that have emerged since Family is Culture was released.

DCJ will continue to engage with Aboriginal and legal stakeholders to progress those recommendations that are more complex and require more detailed consultation to shape how changes to the law would work in practice.

Section one: **Proposals to be implemented in 2022**

1

Recommendation 8:
Self-determination

The NSW Government, in partnership with Aboriginal stakeholders and communities, review the Aboriginal and Torres Strait Islander principles of the Children and Young Persons (Care and Protection) Act 1998, sections 11-14, with the view to strengthening the provisions consistent with the right to self-determination.

More at page 78 – 92 of FIC Review Report

How Government will progress this recommendation

The NSW Government will insert the five elements of the SNAICC Aboriginal Torres Strait Islander Placement Principle (ATSICPP) into the principles of the Care Act and any necessary consequential amendments to give effect to those principles, including involving Aboriginal community members and organisations in decision-making.

Further consultation and co-design will occur in 2022-2023 to determine how to implement other aspects of this recommendation.

Empowering Aboriginal communities to have a meaningful role in decision making is a vital part of strengthening Aboriginal peoples' right to self-determination.

The NSW Government has provided $8.7 million in the 2022-23 budget to fund a four-year project, Strong Families, Our Way initiative to strengthen sustainable, community-led structures of self-determination in the Aboriginal child and family system. This project will support the NSW Government to implement other aspects of this recommendation.

The Government has also allocated $3.9 million over four years to bolster Aboriginal communities' decision-making power over the design, delivery and evaluation of child and family programs and services through the development and piloting of an Aboriginal-commissioning model.

These initiatives form part of the Government's commitments to strengthen decision making under the National Agreement on Closing the Gap.

What we heard

Consultation supported the need for self-determination to be enshrined in legislation, policy, and casework practice. Aboriginal people, communities, families and organisations must have authority to define these provisions and how they apply in decisions impacting on children and young people, families, communities and the wider service system. Stakeholders recognised the complexities in defining and implementing self-determination, however, it was clear that Aboriginal people want to co-design this work and want opportunities to be heard in community level consultation to drive improvements.

• Delegating statutory authority to Aboriginal communities

Many participants raised concerns that a lack of self-determination and decision-making power disadvantages Aboriginal children and their families in the child protection system. True self-determination would need to see government relinquishing statutory power and delegate authority to ACCOs to fully manage the child protection needs of Aboriginal children. In tandem, all Aboriginal children in OOHC should be transferred to Aboriginal providers as a matter of priority.

Recommendation 8 (continued): **Self-determination**

Feedback also highlighted the need for government to recognise the validity of existing practices of self-determination that already occur at a community level. Most participants wanted to adapt Aboriginal-led decision-making models, like Circle Sentencing and the Youth Koori Court, into the child protection system. It was also suggested that the Government consider Aboriginal-led child protection models in Victoria and Canada as alternatives.

• Better funding for Aboriginal-led approaches

Consultation underlined the urgent need for ACCOs to receive adequate funding and resourcing to run sustainably. Concerns were raised that funding is distributed to mostly non-Aboriginal organisations, and that funding decisions lack transparency.

Feedback was given that current government procurement policies do not enable equitable competition from ACCOs and in some cases rewards poor performance from contracted service providers in terms of early intervention outcomes.

Participants proposed that procurement through select and direct tenders should not be the only way DCJ meets its targets for Aboriginal participation in the service sector and different approaches to Aboriginal commissioning needs to be supported by legislation.

• More Aboriginal child protection staff

Consultation showed a need to recruit a larger Aboriginal child protection workforce, including leadership positions to match rates of Aboriginal children in OOHC and it was stressed that being Aboriginal should be considered a core qualification for DCJ casework roles.

• Accountability

There were strong opinions around the need for better accountability for DCJ staff who do not conduct appropriate cultural case-planning and the view that Aboriginal people should oversee all casework practice and decision-making that concerns Aboriginal children and young people. Participants raised the need for consistent and ongoing cultural training and mentoring of caseworkers and managers to ensure best practice, with Aboriginal people signing off on a caseworker's cultural capabilities. Caseworkers who demonstrate exceptional cultural capability should champion this work.

• Aboriginal voices

There was a clear call for Aboriginal people and communities to have a voice at all stages of casework and court proceedings to effectively implement this recommendation. Participants broadly noted that where Aboriginal community groups are invited to take part in consultation, advice-giving, or other activities to support continuous improvement of DCJ's services, there should be appropriate remuneration and recognition of their involvement.

Recommendation 17:
NSW Ombudsman's jurisdiction

The NSW Government should amend the Ombudsman Act 1974 (NSW) to enable the NSW Ombudsman to handle complaints in matters that are (or could be) before a court, in circumstances where doing so would not interfere with the administration of justice.

More at page 139 of FIC Review Report

How Government will progress this recommendation

An amendment will be made to the Ombudsman Act 1974 to clarify that the NSW Ombudsman may undertake investigations despite there being related court or other proceedings if the investigation is unlikely to adversely affect those proceedings.

While no amendment is strictly necessary, it will be helpful to clarify this in law.

There is no need for an amendment extending the time period for making a complaint as there is no statutory time limit on the Ombudsman's jurisdiction.

What we heard

Clarification of the NSW Ombudsman's jurisdiction and ability to investigate was welcomed by stakeholders. The NSW Ombudsman clarified that there are no legislative time limits on its jurisdiction to receive and investigate complaints.

Recommendation 19:
Parliamentary Committee oversight

The NSW Government should amend the Advocate for Children and Young People Act 2014 (NSW) or otherwise legislate to ensure that a parliamentary committee monitors and oversees the out-of-home care functions of the Office of the Children's Guardian.

More at page 140 – 141 of FIC Review Report

How Government will progress this recommendation

An amendment will be made to the Advocate for Children and Young People Act 2014 (NSW) to give oversight of the OCG's OOHC accreditation functions to the Parliamentary Joint Committee for Children and Young People.

What we heard

Community members supported this recommendation. Feedback highlighted the need for greater accountability in the system via parliamentary oversight of OOHC accreditation functions.

Recommendation 26:
Active efforts

The NSW Government should amend the Children and Young Persons (Care and Protection) Act 1998 (NSW) to require the Department of Communities and Justice to take active efforts to prevent Aboriginal children from entering into out-of-home care.

More at page 159 – 161 of FIC Review Report

How Government will progress this recommendation

An amendment will be made to the Care Act to place a positive obligation on DCJ to take active efforts linked to the reasons for removal to prevent children from entering OOHC. 'Active efforts' should include timely, practical and responsive supports that are culturally appropriate, aimed at keeping families together, and mitigate the specific risks faced by the child or young person.

DCJ consulted with the U.S. National Indian Child Welfare Association about the implementation of the Indian Child Welfare Act and found that different requirements for American Indian and Alaskan Native children versus other children has been problematic. It was recommended that NSW adopt a consistent approach, and that the requirement to undertake active efforts be applied to all children in the statutory child protection system.

The law will require DCJ to provide information to the Children's Court when making a care application (except an application for an emergency care and protection order) that sets out the particulars of the active efforts taken and/or reasons why they have not been taken.

What we heard

There was overwhelming support for the inclusion of 'active efforts' in legislation, however, it was agreed that 'active efforts' should be clearly defined to ensure understanding of what is required, accountability, and consequences. Legal stakeholders recognised the potential for overlap between section 63 (which requires the DCJ Secretary to provide evidence of prior alternative action taken before making a care application, and the support and assistance it has provided) and how any requirement to take active efforts' will interact with other legislative provisions.

Participants expressed their concerns that while parents and families are held to account when they fail to engage with DCJ services and supports, there is a lack of reciprocal accountability for DCJ staff when active efforts have not been adequately taken to prevent children from entering OOHC.

• Frontloading the system

Participants noted that this proposal must be 'frontloaded' which would involve more active management of listed child protection matters by the court at earlier stages and ideally, before removal has occurred to ensure that removal is the last resort.

• Early intervention

Feedback was given that for an active efforts provision to have an impact, there must be adequate funding and resourcing for services to engage with Aboriginal families early and for those services to be provided by ACCOs.

Recommendation 26 (continued): **Active efforts**

• ACCOs

Participants voiced that ACCOs should solely or primarily have the responsibility of providing supports to Aboriginal families. Some local services may not be DCJ funded or a contracted service provider but are able to offer quality support to meet needs (such as counselling support provided by an Aboriginal Medical Service rather than NSW Health).

• Finding extended family

Participants noted that mapping kinship structures could constitute an 'active effort' that can prevent removal from family and country. Participants felt that there are inconsistent DCJ practices around finding family or kin as alternative carers and family finding efforts should be improved through further resourcing and education, and co-ordination of information held by government.

Recommendation 48:
Evidence of prior removals

The NSW Government should repeal section 106A(1)(a)* of the Children and Young Persons (Care and Protection) Act 1998.

Section 106A states:

(1) The Children's Court must admit in proceedings before it any evidence adduced that a parent or primary care-giver of a child or young person the subject of a care application--

(a) is a person--

(i) from whose care and protection a child or young person was previously removed by a court under this Act or the Children (Care and Protection) Act 1987, or by a court of another jurisdiction under an Act of that jurisdiction

(ii) to whose care and protection the child or young person has not been restored

More at page 201 – 203 of FIC Review Report

How Government will progress this recommendation

An amendment will be made to section 106A of the Care Act to remove the presumption that the child subject to proceedings is in need of care and protection where evidence has been admitted of a prior removal of a child from the parent. Such evidence will still be admissible in the proceedings but will not give rise to a rebuttable presumption that the current child is in need of care and protection.

While not a repeal of the whole section, the amendment proposed would implement the FIC recommendation in part as:

- it would still allow evidence about the removal of other siblings to be admitted in the proceedings to ensure that this information is before the Children's Court
- but remove the presumption that the current child is in need of care and protection, and therefore places the onus on the DCJ Secretary to prove that the child is in need of care and protection.

Evidence of the removal of prior siblings is often considered by the Court as relevant to a risk assessment in respect of whether a child is in need of care and protection.

What we heard

There was broad community support for this provision to be repealed as recommended due to reports of the detrimental impact this provision has had on families who have had babies removed at birth. Some stakeholders raised concerns about the impact the provision has had on pre-natal casework practices, including the use of high-risk birth alerts, including deterring women from seeking early intervention support. Some community stakeholders raised concerns that expectant mothers who have had previous contact with the child protection system are not accessing pre-natal support due to fear that their baby will be removed by DCJ, regardless of their current circumstances, risk assessment and best efforts.

Recommendation 48 (continued): **Evidence of prior removals**

An alternative view was to remove the presumption but retain the requirement for evidence of prior removals to be admitted as evidence, to ensure that the Court has all relevant information before it in the proceedings. It would then be a matter for the Court to decide what weight should be placed on that evidence.

Recommendation 54:
Mandating alternatives to removal

The NSW Government should amend the Children and Young Persons (Care and Protection) Act 1998 to mandate the consideration by the Department of Communities and Justice of specific alternatives prior to removal. Such specific alternatives could include Parent Responsibility Contracts, Parent Capacity Orders, and Temporary Care Arrangements.

More at pages 204 – 211 of FIC Review Report

How Government will progress this recommendation

An amendment will be made to the Care Act that when a care application is brought to the Children's Court, DCJ must outline and provide supporting evidence of how it has made active efforts to ensure other less intrusive options have been considered, from a non-exhaustive and non-hierarchical list of alternatives to removal, which includes:

- providing support services
- Parent Responsibility Contracts
- Temporary Care Arrangements
- Parent Capacity Orders
- Alternative dispute resolution
- other alternatives which may be prescribed by regulation.

This amendment would apply to both Aboriginal and non-Aboriginal children and includes a mechanism for the court to defer a decision about the care application until it was satisfied that DCJ had made active efforts.

What we heard

Consultation confirmed that alternatives to removals are underutilised and that alternatives should be mandated prior to removal being considered. Some participants were of the view that any legislative amendment must clearly define what 'properly offered' means in legislation so as to ensure that there is not a tick a box response by caseworkers. Some noted that legislation surrounding this recommendation already exists. Instead of amending the Act, there was a view that improving casework practice should be the primary focus and a number of stakeholders highlighted the need for service capacity to be considered to achieve the intent of this recommendation. The inclusion of a hierarchy of alternative methods in the Care Act was suggested.

• Better education around alternatives to removal

Most participants expressed concern over the lack of education and understanding of alternatives to removal by DCJ caseworkers. The need for further training for caseworkers on how and when they should be offered was noted, including that the alternatives are not a 'one size fits all'. It was suggested that DCJ caseworkers need more guidance on strengths-based, culturally safe ways of working with Aboriginal families, and avoiding the use of jargon in their communications.

Recommendation 54 (continued): **Mandating alternatives to removal**

• Use of Temporary Care Arrangements (TCAs)

Stakeholders had mixed views on the usefulness of TCAs. While some identified these arrangements as helpful in providing parents with time to address identified issues, others reported they are consistently used incorrectly and that families must be provided with legal advice about the implications of these arrangements. Participants raised the uneven power relationship with DCJ and that families often feel coerced into entering TCAs. To remedy this, TCAs should be linked to accessible information and resources, prompt legal advice, and services that provide restoration support to assist the return of children to families.

• Use of Parent Capacity Orders (PCOs)

Stakeholders reported that PCOs are underutilised. Feedback was given that these orders are often made under coercion and can place excessive blame and responsibility on parents. It was reported that some areas regularly use PCOs and, if used well, can support families to keep children safely at home.

• Access to Family Group Conferencing (FGC)

Participants felt that FGCs should be held earlier in the process, rather than after a child is removed and in the OOHC system. FGCs were seen as a true "early intervention" option, which should be held as soon as significant concerns for a child are being assessed by DCJ. While there was support for greater use of FGCs, many argued the current model used in NSW is not culturally appropriate. Participants advocated for the development of a culturally safe model, noting this was recommended by FIC.

• Legal drafting concerns

Legal stakeholders raised concern as to how the provision would interact with other provisions in the Care Act, and that consideration be given to how this recommendation intersects with recommendation 26 ("active efforts").

Recommendation 65:
Children at criminal proceedings

The NSW Government should amend section 7 of the Children (Protection and Parental Responsibility) Act 1997 to enable a court exercising criminal jurisdiction, with respect to a child, to require the attendance of a delegate of the Secretary of the Department of Communities and Justice in circumstances where the Secretary has parental responsibility of the child.

More at page 238 – 240 of FIC Review Report

How Government will progress this recommendation

An amendment will be made to the Children (Protection and Parental Responsibility) Act 1997 that allows the court to require the Minister's delegate to attend criminal court proceedings involving a child or young person in OOHC, specifically a person with case management responsibility.

What we heard

There was broad support for implementing this recommendation, and where possible, that the support person have an existing relationship with the child and their family to be available to provide the court with relevant information as to their circumstances and needs. In many cases, the delegate will be a caseworker from a non-government organisation that has been working with the child or young person.

Recommendation 71:
Aboriginal Child Placement Principle

The New South Wales Government should amend the Children and Young Persons (Care and Protection) Act 1998 to ensure that its provisions adequately reflect the five different elements of the Aboriginal Child Placement Principle (ACPP), namely: prevention, partnership, participation, placement, and connection.

More at page 248 – 251 of FIC Review Report

How Government will progress this recommendation

An amendment will be made that inserts the five elements of the SNAICC Aboriginal and Torres Strait Islander Placement Principle (ATSICPP) into the Care Act and consequential amendments to give effect to the principle, including involving Aboriginal community members and organisations in decision-making.

Consequential amendments include:

- how the five elements of the ATSICPP must be applied in care applications and casework under the Act, including cultural planning, permanency planning and placement decisions
- how Aboriginal and Torres Strait Islander family members, kinship groups, representative organisations, relevant ACCOs and communities participate in decision-making under the Care Act.

What we heard

There was widespread support for embedding the SNAICC Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) to implement all of the five elements, beyond just how placement decisions are made. Feedback also underlined the need for practice change to align with legislation.

Consultation highlighted a strong need to embed the principle in legislation, practice manuals and creating resources to improve understanding, accountability and culturally appropriate practice. It was argued that legislating this principle would help to ensure that each element of the principle is routinely applied, rather than operate as an optional guideline. It was suggested that a legal test be incorporated into the legislation attached to each element of the principle to increase accountability in decision making.

• Practice concerns

While there was strong support to implement this recommendation, participants noted that legislation alone would not address casework practice issues. Participants submitted that there need to be practice improvements and greater accountability of DCJ caseworkers and staff. There was concern voiced over a lack of cultural care plans, appropriate family finding and culturally unsafe casework practices. Stakeholders saw the need for greater oversight by Aboriginal people of whether the SNAICC principle is being adhered to in practice.

• Risks of this recommendation

Whilst most participants supported this recommendation, some identified risks in embedding the SNAICC principle into legislation. Specifically, that the principle should not become a script for caseworkers, but a mechanism to support self-determination and family-led decision-making.

Recommendation 76:
Identifying Aboriginality

The New South Wales Government should, in partnership with relevant Aboriginal community groups and members, develop regulations about identifying and 'de-identifying' children in contact with the child protection system as Aboriginal for inclusion in the Children and Young Persons (Care and Protection) Regulation 2012.

More at page 258 – 263 of FIC Review Report

How Government will progress this recommendation

The Government recognises the complexity of this issue and supports the advice from stakeholders that further consultation with the Aboriginal community is required before the policy can be finalised and a regulation is made. To enable this recommendation to be implemented after that consultation process is completed, an amendment to the Care Act is required to give the Minister the necessary power to make the regulation. The amendment will provide an express power to make regulations about identifying and de-identifying Aboriginal children who come into contact with the child protection system. This response will allow time for further consultation and co-design with Aboriginal individuals, communities and organisations on the content of the proposed policy and regulations, but also shows the Government's commitment to progress this recommendation.

What we heard

There were diverging views on this recommendation and consultation highlighted the complexity of the issue. Participants spoke about the trauma associated with proving Aboriginality particularly for families impacted by the Stolen Generations and other discriminatory government practices.

Participants reported a lack of consistency and timeliness about the identification of Aboriginal children and 'de-identification' of children during casework. Concerns were raised that children were not identified as Aboriginal early enough in casework and legal proceedings. Concerns were also expressed regarding non-Aboriginal families intentionally identifying as Aboriginal believing they would receive enhanced supports.

Participants strongly expressed the need for Aboriginal community involvement in identification and de-identification policy design and decision-making. Feedback indicated that decision-making authority over identification and de-identification should be held by elders, community, and family members. It was also suggested that the views of the child or young person should be taken into account and that older children, either a direct sibling or within the broader kinship family unit, should also have a say in identification processes.

Recommendation 94:
Reviewing carer authorisation decisions

The NSW Government should ensure that the NSW Civil and Administrative Tribunal (NCAT) has jurisdiction to review a decision not to authorise a carer.

More at page 303 – 304 of FIC Review Report

How Government will progress this recommendation

The Care Act will be amended to provide that a decision to not authorise a carer under the Care Act is reviewable by NCAT. Most carer authorisation decisions are made by designated OOHC providers or ACCOs.

DCJ will also explore additional practice changes to address systemic bias in carer selection and any blockages in the carer authorisation process that prevent Aboriginal families from becoming authorised carers.

What we heard

There was broad support for this recommendation as many stakeholders agreed that current carer authorisation processes disadvantage Aboriginal people and prevent Aboriginal family members from becoming authorised carers, impacting on cultural rights. Currently, authorisation practices do not examine the reasons an individual does not pass a screening check.

There were mixed views on whether NCAT should have the authority to review decisions, or whether this is a role that should be taken on by community which would have greater insight into an individual's abilities and capacity. There was feedback that families should have a greater say in authorisation/de-authorisation processes and that additional weight should be given to the wishes of Aboriginal families when deciding on a carer. Feedback also highlighted the need for training for NCAT staff on the child protection system and cultural capability.

Recommendation 102:
Public reporting on Family Group Conferencing

The new recommended NSW Child Protection Commission should oversee, monitor and report on the operation of the new mandatory Alternative Dispute Resolution (ADR) system introduced by the Children and Young Persons (Care and Protection) Amendment Act 2018 (NSW).

More at page 316 – 317 of FIC Review Report

How Government will progress this recommendation

This will be implemented via policy change rather than legislative amendment to enable DCJ to publicly report on Family Group Conferencing (FGC).

Work is currently underway to finalise data collection to report on FGC. Data on other forms of ADR, such as perinatal family conferencing, require further development to enable accurate reporting. All publicly reported data will need to be at a high level and protect privacy of individuals.

What we heard

There was support for enhanced reporting on FCG, due to the lack of publicly available information about their use and their effectiveness. Participants also expressed that families should be able to choose the type of ADR, be able to obtain legal advice and representation, and for culturally-safe methods to be adopted including new Aboriginal specific models of FGC.

Recommendation 112:
Supporting restoration

The NSW Government should amend section 83* of the Children and Young Persons (Care and Protection) Act 1998 to allow the Children's Court of NSW a more active role in ensuring restoration is a preferred placement.

****Section 83 requires DCJ to assess whether there is a realistic possibility of a child or young person who has been removed into care being restored to their parents within a reasonable period***

More at page 360 – 362 of FIC Review Report

How Government will progress this recommendation

An amendment will be made to the Care Act to give the Children's Court a greater role in ensuring restoration is the preferred placement by enquiring more directly about the 'active efforts' DCJ has taken to support restoration.

What we heard

Consultation supported this recommendation and that the emphasis should shift to place greater scrutiny onto DCJ efforts to support restoration. This could mean that the court could closely monitor the steps which are being taken to ensure that genuine consideration is being given to the possibility of restoration above all other placement options

Consultation indicated that more can be done by DCJ, service providers and courts to support restoration. There were calls for DCJ to consider how it addresses historic mistrust that often prevents Aboriginal families from access support and to develop better information-sharing with other key services. Feedback emphasised that restoration should always be the primary goal, regardless of the time that has passed, and embedding restoration as the preferred method of placement in legislation is needed to help ensure this.

• Time limits for restoration

Concerns were raised about timeframes placed on restoration by the court, and there were calls for legislation to recognise that restoration takes time. Participants voiced concerns that existing timeframes place unfair limitations on families to make meaningful changes and that services should not be delivered against a timeframe.

• Restoration to wider family

There were community concerns that restoration is considered too narrowly to mean restoration to a child's parents. Community stakeholders viewed restoration in broader terms to include restoration to extended family/kin. There was a desire for this to be reflected in the Care Act, and for DCJ to embed a greater emphasis in finding and identifying extended family as restoration alternatives.

• Aboriginal voices

Feedback underlined the need for Aboriginal voices (from Aboriginal families and ACCOs) to be centred during restoration case-planning and at court hearings. One agency proposed the introduction of an Aboriginal Child Advocacy Officer at each CSC to advocate during casework decision-making.

Recommendation 113:
Placement with kin or community

The NSW Government should amend s 83 of the Children and Young Persons (Care and Protection) Act 1998 to expressly require the Children's Court of NSW 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.

More at page 360 – 362 of FIC Review Report

How Government will progress this recommendation

An amendment will be made to the Care Act to require that, where there is no realistic possibility of restoration, the DCJ Secretary is to prepare and submit a permanency plan either:

- recommending placement with a relative, member of kin or community or other suitable person(s), or
- indicating there is no suitable person (following family finding efforts undertaken in consultation with relevant Aboriginal community members).

This process is to be undertaken in line with the permanent placement principles (section 10(A)), Aboriginal child placement principles (section 13) and the SNAICC ATSICPP (as per recommendation 71).

The Care Act will also be amended to include parental responsibility to a relative or suitable person order (PRR) as another permanency option where it is supported by DCJ in the permanent placement principles in section 10A(3). This permanency option should be considered next if guardianship is not practicable or in the best interests of the child. It is the preferred placement option before parental responsibility to the Minister or adoption. Whilst this was not a specific recommendation of FIC, it does respond to feedback for more flexibility and additional options to support children to be placed with kin or community members.

What we heard

There was strong support for this recommendation. Consultation indicated that there is a lack of awareness of the definition of kinship in the Care Act. There is a need for cultural education on kinship structures within DCJ and for non-Aboriginal service providers, including increased understanding that kinship extends past the immediate family. There is a need for the extended kinship family unit to be involved in decision-making.

Participants highlighted that DCJ's family finding practices should be exhaustive and carefully recorded by DCJ to be admitted as evidence at court, and DCJ should partner with community to ensure family finding practices are accurate, effective and culturally-informed.

Feedback highlighted the demands on kinship carers, particularly that family members who volunteer to be kinship carers are often already stretched with family responsibilities. It was suggested that kin carers should receive the same financial (and other) supports as foster carers.

Participants said that there was a need for more flexibility and additional options to enable Aboriginal children and young people to be placed with kin or community members, including greater consideration being given to support families to obtain family law orders in the Family Court system, where there is a dedicated list and modified case management processes to accommodate Aboriginal litigants.

Recommendation 117:
Restoration to be linked to service provision

The NSW Government should amend section 79(10) of the Children and Young Persons (Care and Protection) Act 1998 to ensure that it is linked to service provision that would support Aboriginal parents to have their children restored to their care.

More at page 364 – 365 of FIC Review Report

How Government will progress this recommendation

An amendment will be made to the Care Act that:

- provides a non-exhaustive list of circumstances to be considered by the Court when determining whether 'special circumstances' exist that warrant an allocation of parental responsibility to the Minister for longer than 24 months, including the availability of services and whether 'active efforts' have been taken to support restoration
- applies to both Aboriginal and non-Aboriginal children.

This amendment will provide greater guidance about when special circumstances would apply to allow an extension of the 24-month period for the Court to order restoration.

What we heard

There was broad support for this recommendation.

• Lack of relevant services to support restoration

Feedback indicated that it can be challenging for many Aboriginal parents to access support, due to limited or no services in several areas, long waiting times and a lack of culturally-safe services. Many supports to assist restoration are often held during normal work hours which often prevents parents attending. One option raised would be to identify times where families experience prolonged waiting periods and allow the court to excuse non-attendance due to unavoidable circumstances.

There was discussion of the widespread lack of restoration services, reportedly due to rigid funding frameworks which result in ACCOs and community-based organisations not receiving sufficient funding to meet demand.

It was highlighted that Aboriginal families must know their rights and understand the process thoroughly before they agree to a restoration plan. It was suggested that specialised restoration staff could assist, along with independent legal advice, to ensure that restoration plans are reasonable and linked to child protection concerns.

• Short-term care orders

There was some feedback that short-term care orders should be used more widely by DCJ to encourage restoration, but that the court avoids making short-term orders fearing they do not provide enough certainty for children. Participants objected to this position and stressed that the court should recognise restoration as an ongoing goal and process. This means that supports should be provided to families following proceedings, despite court outcomes.

Recommendation 117 (continued): **Restoration to be linked to service provision**

• Guardianship orders

Some saw guardianship orders as a form of "back door adoption", warning that people who seek to adopt can foster babies and infants, bond with the child during the first two-year period, and have a final adoption order granted once the period for restoration has expired. Others noted that "guardianship" is not a culturally appropriate term.

• Timeframes for restoration orders

There was much community and stakeholder concern that the permanency timeframes in the Care Act pose an obstacle to restoration.

Legal stakeholders cautioned that extending the timeframe for making a restoration order would create too long a timeframe to predict whether restoration is likely to be achievable and to plan towards it. It was suggested instead that DCJ be encouraged to bring more early court applications to provide Aboriginal families the opportunity to address any parenting concerns before a child is removed. It was also noted that legislation already provides flexibility for the court to allow a longer period for restoration in appropriate cases.

Recommendation 123:
Rules of evidence

The NSW Government should amend the Children and Young Persons (Care and Protection) Act 1998 so that, as in section 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.

More at page 387 – 388 of FIC Review Report

How Government will progress this recommendation

An amendment will be made to the Care Act to provide further guidance as to the circumstances that might give rise to an application for the rules of evidence to be applied, including whether the evidence goes to a proof of a fact that will be significant to the determination of the proceedings. This amendment will provide further guidance to the Children's Court about applying the rules of evidence in care proceedings under section 93(3), while protecting the general informal nature of court proceedings.

What we heard

Consultation participants supported this recommendation but there were mixed views about how it could be implemented. Concerns were raised that evidence presented by DCJ was often unchallenged.

Some participants noted that allowing formal rules of evidence could disadvantage families and parents as it would change the informality of proceedings and potentially increase the adversarial nature of the court. Other participants disagreed, and expressed a view that the Children's Court is already an adversarial and frightening place for families.

Legal stakeholders warned that general application of the formal rules of evidence to proceedings would create lengthier proceedings and likely court delays. They suggested that further guidance could be given in the Care Act as to specific circumstances where the rules of evidence could be applied.

Section two: **Where further consultation is needed**

2

Recommendation 9:
A new Child Protection Commission

The NSW Government should establish a new, independent Child Protection Commission. The Commission, which should be required by legislation to operate openly and transparently, should have the following functions:

a) The handling of complaints about those involved in the operation of the child protection system (including complaints about matters that are before the Children's Court of NSW where the hearing of the complaint will not interfere with the administration of justice);

(b) The oversight and coordination of the Official Community Visitors Scheme;

(c) The management of the 'reviewable deaths' scheme where the death is: a child in OOHC, or a child whose death is or may be due to abuse or neglect;

(d) The accreditation and monitoring of OOHC providers;

(e) The reviewing of the circumstances of an individual child or group of children in OOHC (including the power to apply to the Children's Court of NSW for the rescission or variation of any order made under the Children and Young Persons (Care and Protection) Act 1998 (NSW));

(f) The monitoring of the implementation of the Aboriginal Case Management Policy and the Aboriginal Case Management Rules and Practice Guidance;

(g) The conducting of inquiries into systemic issues in the child protection system, either on its own motion or at the request of the NSW Government;

(h) The conducting of the new qualitative case file review program;

(i) The monitoring of the implementation of the Joint Protocol to reduce the contact of young people in residential out-of-home care with the criminal justice system;

(j) The oversight and monitoring of, and reporting about, the operation of the new mandatory Alternative Dispute Resolution system introduced by the Children and Young Persons (Care and Protection) Amendment Act 2018 (NSW); and

(k) The provision of information, education and training to stakeholders and the community about the operation of the child protection system.

More at page 127 of FIC Review Report

How Government will progress this recommendation

The Government will consult further on this recommendation.

What we heard

There was some support for a new Child Protection Commission.

Concerns were raised over the possible fragmentation and complexity a new Commission could add to the system, which is already inaccessible and bewildering for families. There were also concerns that creating yet another government agency may conflict with efforts to move towards self-determination and an Aboriginal-led child protection system.

Recommendation 12:
Publishing final judgments

The Children's Court of NSW should be appropriately resourced to enable it to publish all of its final judgments online in a de-identified and searchable form.

More at page 131 – 133 of FIC Review Report

How Government will progress this recommendation

No change is proposed at this time, however the Government will consult further on this recommendation.

What we heard

Consultations highlighted the complexities of implementing this recommendation. While there was general support for increasing the accountability and transparency of the child protection system, including court proceedings, there was some concern that publication of judgments, though anonymised to protect the identity of the parties, would nevertheless create the risk of the family being identifiable from the case facts, particularly in smaller communities.

It was noted that significant resources would be required in order to enable the Court to publish all final judgments, and would likely impact Court timeframes for finalising cases. Issues of data sovereignty were also raised.

Recommendation 15:
Public interest defence

The NSW Government should amend section 105 of the Children and Young Persons (Care and Protection) Act 1998 to include a public interest defence to an offence under section 105(1AA)*

Section 105(1AA) prohibits the publication of names and identifying information concerning a child's care status

More at page 134 – 135 of FIC Review Report

How Government will progress this recommendation

No change is proposed at this time, pending consideration by Government of the recommendations of the NSW Law Reform Commission's Report 149 – Open Justice: Court and tribunal information: access, disclosure and publication, which was tabled in Parliament on 12 July 2022. The report canvasses proposed amendments to the Care Act relating to consent to publication of identity for children and young people in care and justice systems.

What we heard

Stakeholders were divided on this recommendation. Some participants supported this recommendation, recognising the potential it had to empower children and families to share their personal experiences within the child protection system should they wish to do so. Some suggested lowering the age at which a child could consent to the publication of their identity to 14 years.

Others noted the risks associated with the recommendation, particularly the impact of publishing sensitive materials that disclose children and young people's identities in smaller communities and on younger siblings.

Legal stakeholders raised the issue that a public interest defence may not be effective as a safeguard as it cannot prevent information about the child or young person being disclosed (and any resulting harm to the child) since prosecution only occurs after the disclosure. There was also concern that the introduction of a public interest defence may promote breaches of section 105 rather deter it.

An option raised during consultations would be to provide for applications to be made to the Children's Court to approve the publication or broadcast of identifying details of child or young person in OOHC, taking into account the best interests of the child, the public interest, and the views of the child. There was feedback that there is not a clear process to follow to obtain permission from the court to publish the identity of a child or young person who is or has been under the parental responsibility of the Minister or in OOHC, and a lack of guidance to support judicial officers to assess an application. Some suggested that a simplified application process be introduced to balance transparency and the interests of the child or young person.

Recommendation 25:
Early intervention support services

The NSW Government should amend the Children and Young Persons (Care and Protection) Act 1998 (NSW) to mandate the provision of support services to Aboriginal families to prevent the entry of Aboriginal children into out-of-home care.

More at page 157 – 159 of FIC Review Report

How Government will progress this recommendation

No change to mandate the provision of support services is proposed at this time. However, DCJ will be required to provide evidence to the Children's Court about what 'active efforts' were taken to keep families together and mitigate the specific risks faced by the child or young person, including the provision of support services (as per Recommendation 26).

There will be further consideration of how the intent of this recommendation could be implemented to support all children. There is an existing mechanism in the Care Act that enables the Secretary of DCJ to request assistance from other agencies - the application of this mechanism and how to maximise its use will be explored.

What we heard

Consultation supported this recommendation, provided that services would be mandatory for government to provide, not mandatory for families to access. Some stakeholders raised questions as to how the Government could mandate early intervention services for people who are not yet in contact with the statutory child protection system, or where the services do not exist, are at capacity, or have long waiting lists. Some noted that mandating the provision of support services could bring families into the statutory system prematurely and lead to families being reluctant to engage with services. Stakeholders further questioned DCJ's understanding of and use of "early intervention" terminology as it relates to the care and protection of Aboriginal children and young people.

• A range of services are needed

A range of services were identified by participants as essential for families. Consultation underlined that Aboriginal people want choice over the services they access, with a much greater proportion of services being provided by ACCOs to ensure services are culturally safe and appropriate for Aboriginal families.

Feedback emphasised that early intervention support is vital and should be made available when a risk concern is raised, rather than after a crisis or at the point that removal is being considered. Participants also wanted more holistic services to support Aboriginal people across housing, health, mental health, and trauma, with services to be delivered on Country.

Recommendation 25 (continued): **Early intervention support services**

• Increasing funding to the Aboriginal community-controlled sector

Some objected to non-Aboriginal services being consistently given funding packages to service Aboriginal children rather than Aboriginal service providers. Consultation strongly affirmed the call to shift and increase resourcing to ACCOs.

• Other options

It was noted that bilateral agreements could be made between DCJ and other government agencies including NSW Health and the Department of Education to improve the availability of support services to Aboriginal families and children. There was also the suggestion of adapting the Safety Action Meeting model in domestic and family violence to the child protection context, and involving ACCOs and other relevant government agencies to provide holistic support for a family where there is a child protection risk.

Recommendation 28:
Notification service

The Department of Communities and Justice establish a notification service, similar to the NSW Custody Notification Service, to notify a relevant Aboriginal community body about the removal of an Aboriginal child or young person from their family, providing a timely opportunity for review, oversight and advocacy on behalf of Aboriginal families and communities in the best interests of Aboriginal children and young people.

More at page 163 – 166 of FIC Review Report

How Government will progress this recommendation

The Government will consult further on this recommendation.

The NSW Government has allocated $9.9 million over four years in the 2022-23 Budget for an Aboriginal Child and Family Advocacy Support pilot aimed at keeping Aboriginal families safely together and prevent removals and escalation of matters into the Children's Court through legal and non-legal advocacy. This initiative forms part of the Government's commitments under the National Agreement on Closing the Gap.

What we heard

There was some support for this recommendation as early access to legal advice and support can assist families to understand their rights and obligations and prevent the entry of Aboriginal children into out-of-care and respond to the reported lack of support and information from caseworkers for families through critical stages of the protection process. Stakeholders sought the establishment of an "advocacy service" rather than "notification service".

Recommendation 64:
Known risks of harm of removal

The NSW Government amend the Children and Young Persons (Care and Protection) Act 1998 to require judicial officers to consider the known risks of harm to an Aboriginal child of being removed from the child's parents or carer in child protection matters involving Aboriginal children.

More at page 233 – 234 of FIC Review Report

How Government will progress this recommendation

The Government has committed to further consultation on this recommendation.

What we heard

Feedback was in favour of the implementation of this recommendation. It was recognised that DCJ casework must also be improved alongside any changes to legislation. A range of practice concerns were raised and there was a consensus that improving cultural practice would help ensure caseworkers and judicial officers are properly equipped to identify all kinds of risks and harms to Aboriginal children, including the cultural harm of removal in all aspects and touch points with the child protection system.

Recommendation 122:
New agency to run litigation

The NSW Government should establish an independent statutory agency to make decisions about the commencement of child protection proceedings (including decisions about what orders are to be sought in the proceedings), and to conduct litigation on behalf of the Secretary of the Department of Communities and Justice in the Children's Court of NSW care and protection jurisdiction.

More at page 386 – 387 of FIC Review Report

How Government will progress this recommendation

The Government will consult further on this recommendation.

Organisational changes within NSW Government have resulted in increased separation of legal, child protection policy and child protection operations functions – with each function reporting to a different Deputy Secretary within DCJ. This has enabled legal and operational decisions to be made by different senior executives. Further consideration of additional structural change, and other initiatives to achieve the full intent of the recommendation will be undertaken.

What we heard

There was some support to establish an independent agency as some participants considered it would be better placed to make decisions relating to the conduct of care proceedings, consistent with the model litigant principles. Concerns were raised about caseworkers presenting false or misleading evidence to the court, and the need for greater scrutiny of this evidence. Some stakeholders considered an independent agency would increase the quality of evidence put before the Children's Court and increase accountability. Others considered that further consultation as required.

Section three: **Where current settings are considered sufficient at this time**

3

Recommendation 11:
For-profit OOHC providers

The NSW Government should amend clause 45 of the Children and Young Persons (Care and Protection) Regulation 2012 and all other related clauses to ensure that only a charitable or non-profit organisation may apply to the Office of the Children's Guardian for accreditation as a designated agency.

More at page 113, 130 – 131 of FIC Review Report

How Government will progress this recommendation

The Government is not proposing change at this time. The Government considers existing accreditation requirements, as well as regulatory mechanisms to respond to non-compliance, to be adequate.

For-profit providers comprise a very small part of the statutory OOHC system (there are currently three providers across NSW). All providers are held to the same standards.

What we heard

Opinions on this recommendation were mixed. While some supported the implementation of this recommendation, the danger of market failure and a lack of available services in some areas posed a major concern to other participants. Some participants saw that retaining accreditation of for-profit providers supports a stable service delivery sector as for-profit organisations can effectively fill gaps in the market where there are no providers in the local area.

Recommendation 20:
Accrediting OOHC agencies

The NSW Government should amend the Children and Young Persons (Care and Protection) Regulation 2012 to ensure that the Office of the Children's Guardian does not have the power to accredit agencies that have not demonstrated compliance with the accreditation criteria.

More at page 141 of FIC Review Report

How Government will progress this recommendation

The Government's view is that existing provisions are sufficient and there are robust processes in place for accrediting agencies that have demonstrated substantial compliance with accreditation criteria. Removal of the ability to grant accreditation on the basis of substantial compliance could be a barrier to the growth of the Aboriginal community-controlled sector, because of its small size.

Only a small number of agencies are accredited on the basis of substantial compliance, with the vast majority of agencies being accredited on the basis that they are wholly compliant with accreditation standards. Implementing the recommendation would reduce the number of existing OOHC providers in the sector, and this could disproportionately impact the Aboriginal OOHC sector, because of its small size.

The Government's view is that where an agency has demonstrated that it has capacity to improve practice and can become wholly compliant within a reasonable timeframe (i.e. 12 months), it is less disruptive to children and young people to allow the agency to continue to operate and provide continuity of care, than removing the agency from the OOHC service system.

The NSW Government has strengthened requirements for all OOHC providers, including additional requirements where a decision on an agency's accreditation is deferred and a new provision to prohibit an agency that has had its accreditation cancelled from re-applying for accreditation for two years.

What we heard

Perspectives on this recommendation were mixed. Feedback recognised genuine barriers to accreditation for small or newly established organisations. Some suggested that additional oversight of the OCG's accreditation functions could have a specific focus on how the OCG provides provisional authorisation and what checks and balances are in place to ensure provisional accreditation does not mean children and young people under the supervision of a provisionally accredited organisation receive a lesser standard of care.

Recommendation 121: **Adoption**

The NSW Government should amend the Children and Young Persons (Care and Protection) Act 1998 and the Adoption Act 2000 to ensure that adoption is not an option for Aboriginal children in OOHC.

Refer to page 371 – 380 of FIC Review Report

How Government will progress this recommendation

The Government's view is that existing safeguards in the Care Act and Adoption Act are appropriately robust to ensure that Aboriginal children and young people remain with family, kinship groups or community wherever possible and adoption is only progressed in rare circumstances.

If implemented, this would prevent Aboriginal families from adopting Aboriginal children and older Aboriginal children from consenting to their own adoption. This may also contravene the Racial Discrimination Act 1975 (Cth).

What we heard

There were mixed views expressed by participants on this recommendation. While AbSec and ALS supported the prohibition of adoption for all Aboriginal children, some community members were concerned that taking away the power of Aboriginal children and families to participate in a decision around adoption impedes self-determination, and may disempower Aboriginal families and children.

Next steps

The NSW Government will progress the 15 recommendations by the end of 2022.

More detailed consultation with expert stakeholders and Aboriginal community on the remaining FIC recommendations that relate to changes to the law or court processes will be undertaken in 2023.

Appendix

Appendix A: List of participating organisations

1. Abcare - Coffs Harbour Aboriginal Family and Community Care Centre Inc.
2. Aboriginal Housing Office (NSW Government)
3. Aboriginal Legal Service (NSW/ACT)
4. AbSec NSW Child, Family and Community Peak Aboriginal Corporation
5. Advocate for Children and Young People (ACYP)
6. Allambi Care
7. Australian Aboriginal Child and Family Services (AACAFS)
8. Australian Childhood Foundation
9. Baabayn Aboriginal Corporation
10. Barang Regional Alliance
11. Barnardos Australia
12. Burran Dalai Aboriginal Corporation Inc.
13. Carrie's Place Inc.
14. Charlestown CSC - Hunter Central Coast District (DCJ)
15. Children in Care Collective (submitted by Life Without Barriers)
16. Children's Court of NSW
17. NSW Coalition of Aboriginal Regional Alliances (NCARA)
18. Community Legal Centres NSW (CLC NSW)
19. Core Community Services
20. Office of the Children's Guardian
21. Dubbo Regional Council
22. Family Inclusion Strategies in the Hunter Inc. (FISH)
23. Fams
24. Health Justice Australia
25. Hunter Volunteer Centre
26. Illawarra Wingecarribee Alliance Aboriginal Corporation
27. Impact Policy AU
28. Jannawi Family Centre
29. Jumbunna Institute for Indigenous Education and Research, UTS
30. Katungul Aboriginal Corporation Regional Health and Community Services
31. Key Assets Australia
32. Kinchela Boys Home Aboriginal Corporation
33. Law Society of NSW
34. Legal Aid NSW
35. Life Without Barriers (LWB)
36. Maari Ma Aboriginal Health Corporation
37. Mission Australia
38. Mudgin-Gal Women's Place Aboriginal Corporation
39. Muloobinba Aboriginal Corporation
40. Ngaramanala (DCJ Aboriginal Knowledge Program)
41. Ngunya Jarjum Aboriginal Corporation
42. NSW Aboriginal Land Council
43. NSW Bar Association
44. NSW Civil and Administrative Tribunal (NCAT)
45. NSW Coalition of Aboriginal Regional Alliances (NCARA)
46. NSW Ombudsman
47. Orange Aboriginal Medical Service
48. Public Interest Advocacy Centre (PIAC)
49. Regional Youth Support Services (RYSS)
50. Shoalcoast Community Legal Centre
51. Singleton Council - Youth and Community Development
52. SNAICC
53. Stolen Generations Council (NSW)
54. Sydney Children's Hospital Network
55. The Benevolent Society
56. The Law Society of NSW
57. Tribal Warrior
58. UnitingCare Australia
59. Upper Hunter Homelessness Support
60. Waminda South Coast Women's Health & Welfare Aboriginal Corporation
61. Weave Community Services
62. Western Women's Legal Support
63. Women's Legal Service NSW
64. Yerin - Eleanor Duncan Aboriginal Health Services
65. Youth Action

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Appendix B: List of consultation forums

1. Tuesday 26 April for legal and court stakeholders

2:00 – 5:00pm
DCJ Head Office, Parramatta, Sydney also online

2. Tuesday 10 May

9:30am – 12:30pm
Aboriginal Health and Medical Research Centre, Little Bay also online

3. Wednesday 11 May

10:00 – 1:00pm
Sydney Region Aboriginal Corporation, Penrith

4. Thursday 12 May

11:00am – 2:00pm
DCJ District office, Dubbo also online

5. Monday 16 May for DCJ Aboriginal casework staff

2:00pm – 4:00pm
DCJ Head Office Paramatta Square, Sydney also online

6. Tuesday 17 May

10:30am – 1:30pm
Illawarra Cultural Centre, Wollongong

7. Thursday 19 May

11:00 – 2:00pm
DCJ District office, Coffs Harbour

8. Friday 20 May

1:00pm – 4.00pm
National Centre of Indigenous Excellence, Redfern

9. Tuesday 24 May

2.00pm – 5.00pm
Rathmines Theatre, Lake Macquarie

10. Wednesday 25 May

2:00 – 5:00pm
ONLINE ONLY session

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Appendix C: List of acronyms

AbSec	NSW Child, Family and Community Peak Aboriginal Corporation
ACCM	Aboriginal Community Controlled Mechanism
ACCO	Aboriginal Community Controlled Organisation
ACMP	Aboriginal Case Management Policy
ACPP	Aboriginal Child Placement Principle
ALS	Aboriginal Legal Service (NSW/ACT)
AOD	Alcohol and other drugs
ATSICPP	Aboriginal and Torres Strait Islander Child Placement Principle
ADR	Alternative Dispute Resolution
DCJ	Department of Communities and Justice
DRC	Dispute Resolution Conference
FIC	Family is Culture Review
FGC	Family Group Conferencing
NCAT	NSW Civil and Administrative Tribunal
NGO	Non-Government Organisation
OCG	Office of the Children's Guardian
On Country	The term "Country" is often used by Aboriginal people to describe family origins and associations with particular parts of Australia
OOHC	Out-of-home care
PRR	Parental responsibility to a relative or suitable person order
ROSH	Risk of significant harm
SNAICC	Secretariat of National Aboriginal and Islander Child Care

Communities and Justice
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Family is Culture
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NSW GOVERNMENT