Family is Culture legislative recommendations

Discussion paper

April 2022

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Minister's foreword

The Hon. Natasha Maclaren-Jones MLC

I invite you to have your say on legislative responses that will support the NSW Government's commitment to improving the lives of Aboriginal children and their families. I look forward to reviewing your feedback on the legislative recommendations from the *Family is Culture* review.

As the recently appointed Minister for Families and Communities and Minister for Disabilities, I have listened closely to many stories about the trauma experienced by Aboriginal families who have come into contact with the child protection system.

At the same time, I have been touched by the knowledge and wisdom of these communities who are working to make positive change.

I know that if we can improve outcomes for Aboriginal children in contact with the child protection system, we can improve them for all children who need our support.

Progressing with consultation on the Family is Culture legislative recommendations

The *Family is Culture* review, released in 2019, is an independent review looking into the experience of Aboriginal children in out-of-home care in NSW. You can find the Government's response and progress on implementing the 125 systemic recommendations from *Family is Culture* at familyisculture.nsw.gov.au

The review included 25 recommendations about changes to laws and court processes. I am pleased to introduce this discussion paper that outlines the 25 legislative recommendations in detail.

While robust Aboriginal community consultation was undertaken in the development of *Family is Culture*, this round of consultation will look more closely at how the specific proposals to change child protection laws could work in practice. It is important to ensure that any potential legislative changes do not have unintended negative impacts on Aboriginal children and their families. This is an opportunity for all Aboriginal and legal stakeholders to shape the implementation of these proposals.

There are 11 recommendations in this discussion paper that have been noted as having potential to be implemented or resolved in the short-term, subject to important stakeholder feedback.

While we are consulting on all 25 recommendations, we are seeking to identify which recommendations could be implemented in the near-term and which may need more time for further consultation.

The complexities of some recommendations may require more time to implement due to competing stakeholder views or major structural reform.

The Government is committed to ongoing consideration and consultation on any recommendations that cannot be legislated in the short-term.

Addressing Aboriginal over-representation is a priority

NSW continues to lead Australia in child protection, and is the highest performing jurisdiction on key measures.

The out-of-home care population in NSW is at its lowest in a decade and NSW has consistently had the lowest rate of entries into out-of-home care across all jurisdictions since 2017-18.

We continue to strengthen permanency outcomes, with more than twice as many Aboriginal children exiting to guardianship in NSW in 2020-21 compared to 2017-18.

There has been a 22 per cent reduction in Aboriginal children entering out-of-home care in the five years to 2020-21. However, Aboriginal children are still more likely to be in care than non-Aboriginal children in NSW.

That's why the NSW Government is taking action. We have already implemented a number of significant reforms to help address over-representation. Nearly all of the over 3,000 recommendations from the *Family is Culture* review that related to individual case files has been completed.

The NSW Government has established an Aboriginal Knowledge Circle and an Aboriginal Outcomes Taskforce, and appointed the Deputy Children's Guardian for Aboriginal Children and Young People and a Deputy Secretary for Aboriginal Outcomes.

The release of this discussion paper is another step to move towards further addressing Aboriginal over-representation in child protection and out-of-home care.

It is the remarkable caseworkers, families and community that will need to work together to bring legislative change and implement the *Family is Culture* recommendations.

I thank you for your time in reviewing this discussion paper and welcome all interested stakeholders to participate in this important consultation process to make a real difference for Aboriginal children and their families.

Regards,

The Hon. Natasha Maclaren-Jones MLC

MINISTER FOR FAMILIES AND COMMUNITIES
MINISTER FOR DISABILITY SERVICES

April 2022

Introduction

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 New South Wales (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 (hereafter referred to as '*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 Principles (ACPP). The Review involved analysis of policies and practices relating to Aboriginal children in OOHC, community consultations and 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 recommendations were made about the way the NSW Government delivers services.

The NSW Government considered the recommendations made and released its response on 8 July 2020.

97 per cent of the 3,026 case file recommendations made in the *FIC* Review have now 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 on the *Family is Culture* website.

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

Family is Culture review made 25 recommendations about changes to laws and court processes

FIC made 25 recommendations that involve changes to laws, court processes and how the system operates.

These recommendations suggest changes to laws including:

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

This is the first opportunity since *FIC* was released to provide input into any issues that have emerged over the past three years since it was released, particularly around the impact of recent government permanency reforms. Implementing these proposals without this consultation may unintentionally have unintended consequences for Aboriginal families.

The NSW Government is considering which recommendations can be acted on quickly and which recommendations need a longer period of consultation to get right.

Some of the recommendations are complex and there are different views about how best to implement them. Others involve changes to the way the system works, including changes to courts.

The NSW Government wants to ensure that any changes to the system are effective and reduce the number of Aboriginal children and young people in the statutory child protection system.

A national policy agenda to reduce Aboriginal over-representation in the statutory child protection system

The NSW Government is guided by the National Agreement on Closing the Gap ('Closing the Gap') and Safe and Supported: The National Framework for Protecting Australia's Children (2021-2031) ('the National Framework').

Closing the Gap commits NSW to improving the child protection and OOHC systems and family support services. This includes a 10-year target to reduce the over-representation of Aboriginal and Torres Strait Islander children in OOHC by 45 per cent by 2031.

The National Framework commits NSW to reforming relevant legislation and policy, with a view to fully embedding the Aboriginal and Torres Strait Islander Child Placement Principle, supporting delegation of authority in child protection to families, communities and Aboriginal and Torres Strait Islander community-controlled organisations, and embedding self-determination and participation.

This *FIC* consultation will provide much needed stakeholder input, not only to progress *FIC*, but to enable the Government to implement these recent commitments under Closing the Gap and the National Framework.

Invitation to comment: Have your say

This discussion paper lists the recommendations in *FIC* that involve changes to laws or court practices. It summarises the reasons behind each recommendation and asks questions to guide feedback.

The discussion paper is divided in three sections:

Section 1: Changes that can be made quickly, subject to stakeholder feedback

Section 2: Changes that require further time and consideration

Section 3: Areas where existing policy settings may already be sufficient

You can provide feedback via email or video submission to: familyisculture@facs.nsw.gov.au (Subject: '*FIC* legislative review submission')

The Department of Communities and Justice (DCJ) is holding consultations with key stakeholders. This consultation has been designed by and is led by Aboriginal staff.

FIC involved extensive consultations with Aboriginal organisations and stakeholders. This consultation does not intend to replicate that process. Targeted feedback is now being sought from the legal sector, non-government stakeholders, and Aboriginal community leaders.

Feedback is being sought on all of the *FIC* legislative recommendations.

Guidance to stakeholders is that the initial consultations will have a strong focus on the 11 recommendations that, pending feedback from key stakeholders, have the potential to be implemented or resolved in the short-term. We want you to look at the recommendations in Section 1 and consider:

Are they the right ones?

What do we need to consider to effectively implement them?

Are there any other recommendations that could be actioned in the short-term (pending appropriate stakeholder consultation)?

Have your say by 5pm on Thursday 26 May 2022.

Importantly, DCJ is commencing consultations on all *FIC* legislative recommendations, and will continue the detailed consultations beyond May 2022 in relation to those recommendations that may be complex to implement or may have strong competing stakeholder views.

Important note: Your feedback will not be published.

List of abbreviations

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 Principles
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
OOHC	Out-of-home care
ROSH	Risk of significant harm
SNAICC	Secretariat of National Aboriginal and Islander Child Care

Section one: **Changes that can be made quickly subject to stakeholder feedback**

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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].

Summary of FIC proposal

The Care Act makes it an offence to publish information that reveals a child's care status until the young person is 25 years old, or dies, due to perceptions of stigma and stress associated with disclosure of this information. While *FIC* agrees that such information should remain private to protect those children and deter intrusive or sensationalist media reporting, it argues that a competing public interest exists in ensuring accountability and scrutiny of the child protection system.

It recommends that a 'public interest' defence be available to a person who is prosecuted for an offence under s 105(1AA).

If implemented, a court would determine whether it was in the public interest to publish or broadcast the name or identifying information of a child or young person in care in the circumstances before it, noting that this judgement would occur after the information has been published or broadcast.

More at page 134 - 135 of FIC Review Report

Discussion

Young people aged over 16 years of age who are in OOHC can consent to the publication of their identity. The Children's Court can consent to the publication of the names of children under 16 years of age under section 105 of the Care Act. However, this recommendation provides a pathway for the publication of children's names without Children's Court oversight and in the absence of a young person's consent, risking harm.

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?

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

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.

Summary of FIC proposal

FIC is concerned that jurisdictional limitations mean that the Ombudsman does not investigate complaints more than 12 months old or complaints involving issues that could be considered by a court. These issues hamper the Ombudsman's ability to oversee the child protection sector, particularly complaints about casework. *FIC* is of the view that there are many cases where the Ombudsman could investigate complaints about casework in parallel to court processes without interfering with the administration of justice.

More at page 139 of FIC Review Report

Discussion

There is uncertainty over whether the NSW Ombudsman can investigate the conduct of the Department relating to child protection matters if the matter is, or was, or may become the subject of Children's Court proceedings. It is important that any investigations of complaint about casework do not impinge on the administration of any parallel judicial proceedings that are on foot.

Further clarification is needed about the scope of the Ombudsman's powers and how the Ombudsman exercises its discretion to commence investigations.

Should the Ombudsman have the power to investigate a matter that may become the subject to proceedings in a court or tribunal?

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

Recommendation 19:
Parliamentary Committee oversight

The NSW Government should amend the Advocate for Children and Young People Act 2014 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.

Summary of FIC proposal

FIC has concerns about the transparency and effectiveness of the OCG's regulatory activities related to the OOHC sector. It recommends that the OCG's OOHC activities be overseen by the Joint Parliamentary Committee on Children and Young People.

The aim of this additional oversight is linked to *FIC's* Recommendation 20 that objects to the OCG accrediting providers that substantially, but not yet wholly, satisfy the accreditation criteria.

More at page 140 - 141 of FIC Review Report

Discussion

The Parliamentary Committee on Children and Young People currently oversees the OCG's Working with Children Check function, its reportable conduct function and has recently, also taken on oversight of its Child Safe Standards function. The *FIC* recommendation would broaden the Parliamentary Committee's oversight to include the OCG's accreditation of OOHC agencies.

Are there any concerns with the Parliamentary Committee overseeing the OCG's 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.

Summary of FIC proposal

FIC recommends that child protection agencies be mandated to take 'active efforts' to support a child before removing that child into care. Active efforts suggest more than mere referral to services. This recommendation would place the onus onto DCJ to prevent the removal of a child.

More at page 159 - 161 of FIC Review Report

Discussion

There are a range of current legal requirements to prevent children entering OOHC. DCJ must:

- abide by permanent placement principles with restoration to family being the first preference
- offer ADR first
- implement the principle of the 'least intrusive intervention' in the life of the child and family to protect a child from harm and promote their development.

How would this provision interact with existing provisions?

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

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

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

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

Recommendation 48:
Evidence of prior removals

The NSW Government should repeal s 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

Summary of FIC proposal

FIC recommends that DCJ assesses the situation of individual children at the point in time of their birth.

FIC found evidence that caseworkers previously used the birth mother's post-natal stay as an opportunity to investigate the newborn baby's safety and wellbeing. Following the introduction of s 106A, babies were increasingly brought into OOHC immediately after birth, as 'the need for ongoing assessment and evidence-building was no longer pressed as an issue' due to the operation of 106A (2). This sub-section means that evidence of removals of siblings admitted under section 106A becomes prima facie evidence that the child in the current proceedings is in need of care and protection.

More at page 201 - 203 of FIC Review Report

Discussion

Section 106A was originally introduced in response to community concerns that where siblings had previously been removed by DCJ, subsequent children were not being adequately protected. Section 106A therefore required the court to admit evidence about the prior removal of siblings who have not been restored and this could be used as evidence to presume that the current child was at risk.

Removing section 106A does not prevent the Court from hearing evidence about the prior removal of siblings that have not been restored to their parents or carers in child protection proceedings. The current provision means the evidence about the removal of earlier children must be admitted in the current proceedings about a subsequent child, and avoids technical legal arguments about the admissibility of such evidence.

Recommendation 48 continued

Although a prior removal of a child from a parent or carer and their non-restoration may be a potential risk factor, DCJ is nevertheless required to make an assessment and provide evidence to the Court of the current risks to the child who is the subject of the care proceedings.

Families in vulnerable circumstances may avoid prenatal care and other support services due to the fear of having children removed at birth if there have been previous removals of their children – an unintended consequence of this provision.

Should the current provision be amended?

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

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

Recommendation 54:
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.

Summary of FIC proposal

FIC argues that alternatives to removal are underutilised when working with Aboriginal families. These alternatives, such as parental responsibility contracts, parent capacity orders, family group conferences and temporary care arrangements are designed to be used prior to a child being removed.

FIC recommends legislative change to mandate the consideration of specific alternatives prior to removal, as well as judicial guidance to Children's Court magistrates to ensure that the Court plays a more active role in scrutinising the pre-entry into care casework.

More at pages 204 - 211 of FIC Review Report

Discussion

When keeping a child safe, the law requires that the course to be followed is the 'least intrusive intervention' and that removing any child from their family must be the very last resort to guarantee the safety of that child.

Every care application to the Children's Court must be supported by a report setting out why DCJ has removed the child and the prior alternative action DCJ took to avoid removal. DCJ tenders evidence as part of the care application, which is served on all parties.

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

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?

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

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.

Summary of FIC proposal

FIC argues that it is unacceptable for Aboriginal children to be required to navigate the criminal court system without the assistance of an adult who has parental responsibility for the child. Currently, the Children's Court may require one or more parents to attend criminal proceedings relating to their child.

FIC recommends that a representative of DCJ or a non-government OOHC agency always attend court with a child in OOHC as a support person.

More at page 238 - 240 of FIC Review Report

Discussion

Current practice guidelines state that casework support is to be provided to a young person in OOHC appearing before a court in a criminal matter, which may include attendance by a support person at the criminal court proceeding. This is not currently not mandated in legislation.

Should this be mandated in legislation?

If yes, should this mandate include NGO caseworkers?

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

Recommendation 71:
Aboriginal Child Placement Principles

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 Principles (ACPP), namely: prevention, partnership, participation, placement, and connection.

Summary of FIC proposal

The Aboriginal Child Placement Principles (ACPP) is intended to guide child protection services to strengthen Aboriginal children's connections with their family, community and cultural identity and recognise their right to their own heritage, customs, community, and institutions. The ACPP outlines a preference that, if Aboriginal children are to be placed outside their immediate families, they should stay within their extended kinship or community or be placed with other Aboriginal people.

FIC is concerned that the child placement principle in the Care Act is used as a hierarchy of placement options for the physical placement of Aboriginal children in OOHC. This does not reflect the breadth of the ACCPs, which is one principle made up of five interrelated elements aimed at enhancing and preserving Aboriginal children's sense of identity, and connection to culture, heritage, family, and community.

FIC recommends that the Care Act be amended to explicitly incorporate the five elements of the SNAICC Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP). Those elements are:

PREVENTION: Protecting children's rights to grow up in family, community and culture by redressing the causes of child protection intervention

PARTNERSHIP: Ensuring the participation of community representatives in service design, delivery and individual case decisions

CONNECTION: Maintaining and supporting connections to family, community, culture and country for children in out-of-home care

PARTICIPATION: Ensuring the participation of children, parents, and family members in decisions regarding the care and protection of their children

PLACEMENT: Placing children in out-of-home care in accordance with the established placement hierarchy

These elements capture the original intent and purpose of the ACPP, which is to guide decision-makers to make culturally safe decisions about children's care and protection.

Refer to page 248 – 251 of FIC Review Report

Recommendation 71 continued

Discussion

The five elements of the SNAICC ATSICPP appear in current policy and legislation, but not in a way that reflects the breadth of the ACCPs, which is one principle made up of five interrelated elements.

FIC contends that the piecemeal approach to the ACPP in current legislation contributes to misunderstanding of the scope of the ACPP and non-compliance by caseworkers.

There are opportunities to amend the Care Act to explicitly reflect all five elements of the SNAICC ATSICPP, to support compliance with the ACCPs, and increase meaningful involvement of Aboriginal people into child protection processes.

NSW has made a commitment to embed these principles into legislation under the National Framework.

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

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

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?

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.

Supporting recommendation

Recommendation 77: Identifying Aboriginality policy

The Department of Communities and Justice should develop a policy to assist in the implementation of the new regulation about the identification and 'de-identification' of children in contact with the child protection as Aboriginal.

Summary of FIC proposal

FIC argues it is essential that Aboriginal children's cultural background is identified promptly and accurately. Research has demonstrated that issues relating to Aboriginal identification are complex and *FIC* found there is little guidance available about best practice approaches to investigating the issue of Aboriginality. For instance, there is no guidance about the recommended approach if:

- the caseworker has difficulty obtaining information about a child's Aboriginality
- there are doubts about a child's Aboriginality
- a child's parents do not wish to be identified as Aboriginal
- a child's parents or a child are disengaged from their culture
- there is a suggestion that a child should be 'de-identified' as Aboriginal.

FIC thus recommends that the NSW Government improve the process and policy guidance for the identification of Aboriginality in respect to children in OOHC. This includes the circumstances in which it is possible and appropriate to 'de-identify' a child as Aboriginal, and the procedure to be followed when doing so.

More at page 258 - 263 of FIC Review Report

Discussion

DCJ is in the process of developing a policy to guide caseworkers in determining whether a child is Aboriginal and consultation is underway. This process will guide the response to this recommendation.

Without correct and early cultural identification, Aboriginal children may not receive culturally safe support, case planning and OOHC placements.

Recommendation 76 continued

In DCJ's current casework practice, a child's Aboriginality is based on their family identifying as Aboriginal. DCJ (or an NGO) does not generally need to confirm Aboriginality in any additional or formal way.

Circumstances arise where there is uncertainty or a disagreement as to whether a child is Aboriginal. In these cases, formal confirmation is needed. There may also be times where a family or a child chooses not to identify as Aboriginal, and that observing their wishes upholds the principle of self-determination.

DCJ makes reasonable inquiries regarding a child's Aboriginality as soon as possible. This enables decisions to be made in a timely manner while taking a child's Aboriginality into account.

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

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

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

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

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].

Summary of FIC proposal

FIC is of the view that restoration goals and casework need to be improved to effectively support parents and families to address issues that affect their ability to safely parent their children.

FIC questions whether section 83 of the Care Act adequately promotes restoration, ahead of a permanent placement elsewhere.

FIC recommends that the Children's Court follows the ACPP and more actively encourages restoration rates. If restoration is not recommended, *FIC* proposes that the Children's Court be empowered to query why the preferred placement is not recommended and enquire about the specific actions DCJ could take to support restoration becoming a realistic possibility.

More at page 360 - 362 of FIC Review Report

Discussion

The Children's Court is currently required to:

- approve a permanency plan for a child
- accept or reject DCJ's assessment of whether there is a realistic possibility of restoration.

DCJ is currently required to:

- take the "least intrusive action" to guarantee the safety of a child or young person
- comply with the permanent placement principles – family preservation is the first step, but once a child is removed, the next placement preference must always be to seek restoration.
- offer ADR to the family of a child or young person before seeking care orders from the Children's Court
- provide evidence of what prior alternative action the Department has taken before filing the application for care orders.

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

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

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?

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?

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.

Summary of FIC proposal

FIC recommends that the Children's Court expressly consider placing an Aboriginal child with family and kin if the Court determines there is no realistic possibility of restoration to parents. This would enshrine the ACPP by requiring the Court to actively consider extended family, kin or other suitable persons if restoration to parents is not a realistic possibility within a reasonable period.

More at page 360 - 362 of FIC Review Report

Discussion

The Children's Court is already required, when making decisions under the Care Act, to have regard to the section 10A permanent placement principles. Restoration to the family is always the first placement preference after a child has been removed.

NSW has made a commitment to embed these principles into legislation under the National Framework (as per *FIC* recommendation 71).

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

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

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

Section two: **Changes that may require further time and consideration**

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.

Supporting recommendations

Recommendation 6: Agreed understanding of self-determination

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: Systemic review of policies that refer to self-determination

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.

Summary of FIC proposal

For a child protection system to be effective, many Aboriginal people have argued that it must be founded on Aboriginal peoples' right to self-determination and be consistent with Australia's human rights obligations.

FIC notes that there are differences of views about self-determination. Inconsistent uses of 'self-determination' in law and policy create competing expectations about the way it is implemented in practice. Therefore, it is important for law and policy makers to be specific about what self-determination involves in the context of the child protection system.

FIC recommends that the Department of Communities and Justice, Aboriginal stakeholders in the child protection sector and communities develop an agreed understanding of the right to self-determination, and reflect this in law and policy.

Refer to page 78 – 92 of FIC Review Report

Discussion

The Care Act refers to self-determination in section 11, stating:

> (1) It is a principle to be applied in the administration of this Act that Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young persons with as much self-determination as is possible.
>
> (2) To assist in the implementation of the principle in sub section (1), the Minister may negotiate and agree with Aboriginal and Torres Strait Islander people to the implementation of programs and strategies that promote self-determination.

Recommendation 8 continued

The *FIC* review identified that the current child protection framework uses the language of self-determination, the term is not defined. Current provisions of the Care Act that limit self-determination to participation of Aboriginal and Torres Strait Islander people do not reflect the full concept of self-determination.

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

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

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

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.

Summary of FIC proposal

FIC argues that the current oversight mechanisms are fragmented and complex with the Ombudsman, OCG and DCJ all responsible for various elements of complaints and monitoring across the child protection system. Currently, the Ombudsman accepts complaints about the actions of those involved in the child protection system, prepares reports about the OOHC system for parliament, coordinates the 'reportable conduct' scheme and coordinates the Official Community Visitors Scheme. The Office of the Children's Guardian is responsible for accrediting and monitoring OOHC agencies and maintaining the Carers Register. DCJ accepts and handles complaints about its own caseworkers and oversees services provided by non-government agencies. *FIC* recommends that the child protection system be governed by a single independent specialist body to monitor, oversee and enhance public confidence in the system through greater transparency, accessibility, and maintain a singular focus.

Recommendation 9 continued

A new, independent Child Protection Commission would undertake the oversight and regulatory activities currently performed by the Ombudsman, OCG and DCJ. It would also oversee additional functions, including reviewing the circumstances of individual children in OOHC, conducting regular, random case file reviews, and monitoring the implementation of the Aboriginal Case Management Policy.

More at page 127 of FIC Review Report

Discussion

This proposal requires the creation of a new specialist government agency for oversight and monitoring of the whole child protection system, with a range of functions, requiring legislative and administrative changes and additional expenditure.

This Commission would provide oversight for the whole the child protection system, not only for Aboriginal children and families.

It would likely replace the existing child protection functions of the OCG and the Ombudsman. *FIC* argues that additional costs could be outweighed if sustained oversight led to practice improvements resulting in reductions of the number of children in OOHC.

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

Would an additional oversight mechanism add complexity to the system?

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

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.

Summary of FIC proposal

Currently, the Children's Court publishes a small number of its decisions each year. *FIC* recommends that the Children's Court publish all of its final judgments online (without identifying people's names) as a matter of standard practice to ensure the ability to access information about the way in which proceedings are conducted and determined in the Children's Court, promoting access to justice for unrepresented litigants.

More at page 131 - 133 of FIC Review Report

Discussion

The Children's Court currently publishes some de-identified court decisions through the Children's Law News bulletin, which can be accessed by the public. The bulletin covers cases of particular interest but does not publish all decisions.

It is possible that publishing all final judgments for all Children's Court matters would require the Court to provide written transcripts of final decisions. This could create delays in the finalisation of matters. Preparing written judgments for Children's Court matters may significantly delay the finalisation of cases, which may not be in the interests of the child. Judgements would need to be transcribed by Magistrates and as such significant additional funding and resources would also be required to implement this.

Should the Court publish all final judgments?

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

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

Recommendation 25:
Early intervention 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.

Summary of FIC proposal

FIC notes that the need to provide early intervention support appears in relevant law and policy, but that there remains a significant gap between policy and practice. *FIC* recommends the law should mandate the provision of services to Aboriginal families at an earlier stage.

More at page 157 - 159 of FIC Review Report

Discussion

The Care Act contains provisions that require DCJ to take 'prior alternative action', for example, that ADR such as Family Group Conferencing (FGC) must be offered to families before DCJ makes a care application to the Children's Court. Participation in FGC is voluntary; parents/carers must give their consent before undertaking FGC.

Many support services are provided by NSW Health and may not be covered by this legislative change.

Should a requirement to provide services be legislated?

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

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

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

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.

Summary of FIC proposal

FIC notes that families are acutely aware of the power imbalance in their relationship with DCJ, due to significant socioeconomic and health disadvantage, intergenerational trauma, the complexity of the child protection system, and cultural difference. *FIC* is concerned that families are hesitant about how to respond to DCJ decisions about child placements, or otherwise advocate for themselves for fear being viewed negatively and losing their children.

To address the power imbalance, *FIC* recommends the establishment of a notification and advocacy service that is informed early of a family's involvement in the child protection service. It would assist families to navigate the child protection system through all stages of the process, including negotiating with DCJ and helping parents access relevant services.

FIC refers to the Aboriginal Tenants Advice and Advocacy Services funded by the Department of Fair Trading as similar models.

More at page 163 - 166 of FIC Review Report

Discussion

In the NSW, police are legally required to notify the Custody Notification Service, operated by the Aboriginal Legal Service (NSW/ACT) of the arrest of an Aboriginal person. This facilitates Aboriginal people in custody to access legal advice and respond to any concerns about treatment in custody. With consent, the Custody Notification Service can provide information to family about the person's whereabouts.

The *FIC* recommendation could function in a similar way. Informed consent would need to be given by families that come into contact with the child protection system for any notification to be made to an advocacy service. Once consent is given and the service notified, those families would be offered culturally safe advice and referral support. This process would need to ensure that the notification service provider does not disclose sensitive information such as the reasons for the removal of a child.

Is there a need for a notification and advocacy service?

Who should be notified if an Aboriginal child is removed?

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?

Recommendation 94:
Reviewing carer authorisation decisions

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

Summary of FIC proposal

Currently, a decision to decline to authorise an applicant as a carer cannot be reviewed by the NSW Civil and Administrative Tribunal (NCAT).

FIC recommends there be recourse to appeal a decision to decline to authorise an Aboriginal person as a carer for a child that is less costly and formal. It notes the decision whether or not to authorise a carer may be based on a subjective consideration of matters such as the applicant's health, or the suitability of the applicant's home.

FIC's proposal would affect the review process for both Aboriginal and non-Aboriginal carers.

More at page 303 - 304 of FIC Review Report

Discussion

In 2015, legislative changes came into effect removing NCAT review rights in respect of designated agency decisions to authorise or not authorise a person as an authorised carer, except on the grounds of workplace discrimination.

DCJ has since amended the carer authorisation mandate that guides caseworker practice which provides relative/kin care applicant with the ability to seek an internal review of a decision to not authorise them as a carer.

Currently, a person that is unsatisfied with the outcome of an internal review of a decision relating to authorised carers would need to apply to the Supreme Court of NSW for review of the administrative decision or complain to the NSW Ombudsman.

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

What other options could be considered?

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

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 system introduced by the Children and Young Persons (Care and Protection) Amendment Act 2018 (NSW).

Summary of FIC proposal

In 2018, the NSW Government amended the Care Act to increase the use of alternative dispute resolution (ADR) in the child protection system. Under the Act, the Secretary must now consider using ADR processes when responding to every report and must offer the family of a child who is at risk of significant harm an ADR process before seeking court orders in relation to the child.

FIC recommends there be a comprehensive, publicly available framework that outlines how family group conferencing system operates and how its effectiveness will be monitored and assessed over time.

More at page 316 - 317 of FIC Review Report

Discussion

This *FIC* recommendation is linked to recommendation 9, that the Government establish a new Child Protection Commission and that the Commission should oversee the mandatory ADR system. It may be that this proposal for public monitoring of FGC can be implemented separately from the proposal for a new Child Protection Commission.

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

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

Recommendation 117:
Period for restoration

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.

Summary of FIC proposal

FIC recommends that Aboriginal parents be better supported when their children are removed through the provision of clear, realistic, and mutually established restoration goals, along with appropriate, targeted and strengths-based casework that promotes restoration, and access to Aboriginal-designed support services.

FIC is of the view that Aboriginal parents can need longer periods of time to address issues that affect their ability to safely parent than are currently provided for in the Care Act, due to complex systemic issues experienced by Aboriginal families associated with the impacts of colonialism, including domestic violence, intergenerational trauma, poverty, and substance use.

This recommendation is linked to recommendation 112, which recommends that the Children's Court have a more active role in ensuring restoration is a preferred placement.

FIC recommends that section 79(10) be amended so that there is requirement to provide Aboriginal parents with relevant support services that facilitate restoration for the duration of the order.

More at page 364 - 365 of FIC Review Report

Discussion

The maximum period for the Court to approve a permanency plan involving restoration, guardianship or adoption is 24 months, but the Court has the discretion under section 79(10) to extend this timeframe if it is satisfied that there are special circumstances that warrants a longer period for restoration. However, the Care Act does not specify what those special circumstances are.

There are concerns that Aboriginal parents are not given sufficient opportunity and support to make necessary changes to enable restoration.

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

What barriers to restoration exist in legislation and policy?

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

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

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.

Summary of FIC proposal

FIC is concerned about the nature and quality of the evidence that DCJ provides to the Children's Court and suggests a professional separation between the decision to apply for a child protection order and the related frontline child safety casework to solve this problem. *FIC* recommends that an independent statutory body conduct care and protection litigation in NSW.

More at page 386 - 387 of FIC Review Report

Discussion

This proposal is modelled from a new body being trialled on a small scale in Queensland to establish an independent statutory agency that sits within the justice portfolio. The body makes decisions about matters which will be the subject of a child protection order application and what type of orders will be sought. This model (different to *FIC*'s proposed Child Protection Commission) is in its infancy and has not been evaluated.

The DCJ legal officers who conduct child protection proceedings are functionally separate from the DCJ caseworkers who work directly with families involved in the statutory child protection system and have different reporting lines. DCJ legal officers report, via the General Counsel, to the Deputy Secretary, Law Reform and Legal Services, who ultimately reports to the Attorney General. DCJ caseworkers report via their reporting lines to a different Deputy Secretary, Child Protection and Permanency, District and Youth Justice Services, who ultimately reports to the Minister for Families, Communities and Disability Services.

Legal officers take instructions from the relevant District office delegates. Their role is to provide independent expert legal advice based on the law and current DCJ policies and procedures. Like all lawyers, DCJ legal officers have a duty to their client, as officers of the Court, with their primary duty to the Court. They also ensure that DCJ complies with its obligations under the Model Litigant Policy.

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

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.

Summary of FIC proposal

The Children's Court is an informal jurisdiction and the rules of evidence do not generally apply. The Court can access to all information that may be useful to the determination of the proceedings It means the Court needs to carefully scrutinise the quality of the evidence to make sure it is sufficiently reliable to base its factual findings on.

FIC is of the view that there may be times when the rules of evidence should apply to care and protection proceedings to ensure that the evidence presented by DCJ is properly tested to ensure its accuracy and reliability.

More at page 387 - 388 of FIC Review Report

Discussion

It is important for the Children's Court to have all relevant information to make a fully informed decision in the best interests of the child who is the subject of the proceedings. Currently the Court has the discretion to place appropriate weight on types of evidence and apply the formal rules of evidence to all or part of proceedings.

What are the risks and benefits of implementing this recommendation?

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

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

Section three:
Areas where existing policy settings may already be sufficient

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.

Summary of FIC proposal

In NSW, providers of adoption services are required to be not-profit. This prohibition does not extend to OOHC providers.

FIC considers that this principle should be consistent across both service streams and recommends that for-profit organisations should not be allowed to be accredited as OOHC providers in recognition of the tension between financial imperatives and providing high-quality services to children and young people in vulnerable circumstances, particularly those in residential care.

FIC's concern is that privately-owned, profit-oriented companies have an explicit financial interest in maintaining and expanding their OOHC services. It identifies that risks of unethical practices and cost saving, detrimentally impacting on the standard of care provided, and on the support to exit the statutory OOHC system.

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

Discussion

There are very few for-profit organisations currently providing OOHC but where they do exist it is because they may be the only ones able to deliver services where there are not enough non-profit providers.

The consequences of banning all for-profit providers may mean there is no OOHC offered in some regional areas, placing children in these areas at significant risk.

Implementation of this recommendation may restrict the ability of Aboriginal for-profit OOHC providers to obtain accreditation. The Government is considering ways of scaling up the Aboriginal-controlled sector and does not want to limit the kinds of organisations that can enter the market at this stage. However, risks from for-profit service provision must be minimised.

The OCG commenced a review of its accreditation and monitoring functions in November 2021, and this issue was considered as part of its review. The OCG will release a range of legislative amendments and policy approaches to ensure that the regulatory scheme balances the need for a diverse range of OOHC providers (including for profit providers) with expertise to meet the complex needs of children and young people and the need to ensure that children and young people's safety, welfare and wellbeing is their paramount concern.

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

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.

Summary of FIC proposal

FIC recommends that only agencies that comply fully with the relevant legislation and standards should be permitted to provide OOHC services, and that accreditation not be permitted for agencies that 'substantially' but do not wholly satisfy the accreditation criteria.

More at page 141 of FIC Review Report

Discussion

The current OCG process allows for providers to be substantially accredited while establishing their ability to comply with legislative requirements and the NSW Child Safe Standards for Permanent Care (2015).

There is a concern that removing this power may reduce the number of OOHC providers in the sector, including substantially accredited Aboriginal-controlled OOHC providers and be a barrier to the growth of the Aboriginal-led sector.

The OCG is reviewing the way it accredits and monitors agencies that provide OOHC and adoption services as part of a broader review of the Children's Guardian Act and will release a range of legislative amendments and policy approaches following that review.

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

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.

Summary of FIC proposal

FIC recommends that adoption be removed as a legal option for all Aboriginal children in OOHC.

FIC notes the strong and long-held opposition of the Aboriginal community to the adoption of Aboriginal children due to ongoing trauma experienced by the Stolen Generations and the impact of child removals on Aboriginal communities, culture, and identity.

It refers to an acknowledgement by DCJ that 'adoption is not considered a culturally accepted practice for Aboriginal children' and that decisions about the placement of Aboriginal children in OOHC would continue to be made according to the child placement principles relating to Aboriginal children in the Care Act. It details concerns about the implications of NSW government reforms to permanency arrangements for Aboriginal children.

Refer to page 371 – 380 of FIC Review Report

Discussion

If implemented, the recommendation would prevent the adoption of Aboriginal children from care, including adoption by family members and Aboriginal foster carers. It is not clear whether *FIC* intended to extend this prohibition to an Aboriginal child or young person consenting to their own adoption.

The NSW Government's position is that there should not be a blanket prohibition of adoption of Aboriginal children. There are significant safeguards in the Care Act and the Adoption Act in the rare circumstances where there is an application for the adoption of an Aboriginal child. A blanket ban would prevent Aboriginal families from adopting Aboriginal children and older Aboriginal children from consenting to their own adoption.

Currently under the Care Act, adoption is the least preferred permanent placement option for Aboriginal children. The first preference is for an Aboriginal or Torres Strait Islander child or young person to be placed with their parents. The second preference is placement with a relative, kin or another suitable person, such an Aboriginal carer. The third preference is for an Aboriginal child to be placed under the parental responsibility of the Minister. The last preference is adoption and can only be ordered by the Court if it is in the best interests of the Aboriginal child or young person.

The Care Act and the Adoption Act contain safeguards prior to making an adoption plan that require:

- consideration of alternatives to adoption
- participation of and consultation with Aboriginal people
- that the child's culture be taken into account.

Recommendation 121 continued

Children over 12 who have been cared for the proposed adoptive parent for at least two years can consent to their own adoption if they are of sufficient maturity to understand the effect of giving consent. Children and others who consent to adoptions must be counselled on the legal and emotional effect of the adoption and alternatives to adoption. The Minister has oversight of adoptions of children under their parental responsibility.

Very few Aboriginal children are adopted in NSW. There have been 31 Aboriginal children adopted in NSW over the last decade, with one child being adopted in 2021.

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

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.

Summary of FIC proposal

FIC recommends that the Children's Court be required to take into account the harm of removal to Aboriginal children in care and protection proceedings. In particular, it considers the Court should be required to consider evidence about the intergenerational nature of child removals, or the effect of child removal on other wellbeing indicators, such as 'educational performance, substance abuse, work opportunities and life expectancy', and the damage done to an Aboriginal child's connection to culture.

More at page 233 - 234 of FIC Review Report

Discussion

The recommendation focuses on the role of judicial officers and factors they need to consider before determining if an Aboriginal child should enter OOHC. It would not apply to non-Aboriginal children.

There are existing principles contained in the legislation enable the Court to fully consider the consequences of removing a child into OOHC.

The Care Act requires DCJ to take the 'least intrusive intervention' to guarantee the safety of a child or young person and comply with the permanent placement principles – where the first placement preference must always be to seek restoration and consequently, family preservation.

Removing any child or young person from the child or young person's family should always the last resort irrespective of cultural background.

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

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NSW GOVERNMENT