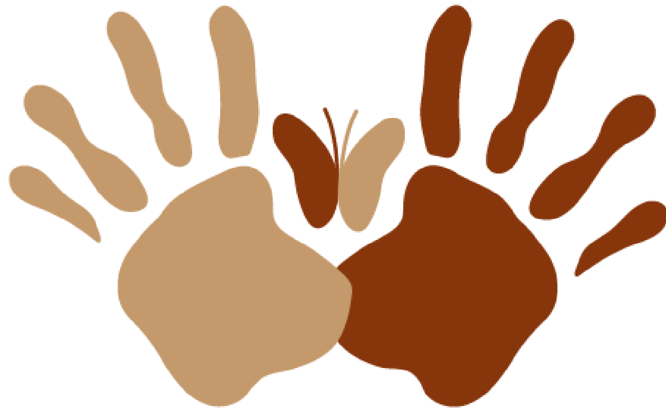

COMMISSIONER FOR
ABORIGINAL CHILDREN
& YOUNG PEOPLE

Submission to the Statutory Review of the Children and Young People (Safety) Act 2017

18th November 2022 with Revisions to 9 January 2023

Executive Summary

According to the Family Matters Report Card 2021 (Annexure AL1) South Australia has the second highest Aboriginal entry into Out of Home Care rate nationally and the highest number of long-term guardianship orders. It has the lowest rate of reunification (7%) and the second lowest proportion of expenditure on family support services (8.8%). It has the third lowest proportion of expenditure on ACCOs (3.4% of expenditure). The Report Card found that there is also a lack of a plan to address over-representation of Aboriginal children. Community voices identified continued government control over decisions for Aboriginal families.

As reported by the Department for Child Protection (DCP) Annual Report 2021-2022 (published DCP website) Aboriginal children comprise 37% (1756) of children admitted to an order compared to 36% (1675) in 2020-2021 and 33.5% (866) in 2019-20. The DCP Annual Report also states that Aboriginal children comprise 38.2% of children on an order to 18 years as of 30 June 2022 (1550), compared to 37.9% (1480) in 2021 and 36.1% (1,317) in 2020.

The most recent data shows that 54% of Aboriginal children were placed with kin. Significantly, of this 54.8%, SA placed 31.2% of Aboriginal children with Aboriginal relatives/kin in 2021, compared to 31.5% in 2020 (ROGS 16A.22). This means only 33 of the 84 additional family/kin placements in 2021 went to Aboriginal family and kin or 39.2%, just over a third. This shows a clear preferencing for non-Aboriginal kin, despite the ATSICPP.

The 2021 Family Matters Report Card 2021 notes that only 8.8% of the overall DCP budget expended on child protection in South Australia is directed at family support services and intensive family support services. This has reduced from 14.6%. South Australia has the lowest expenditure on family services nationally. By comparison the highest proportional expenditure is Victoria (25.3%) and the Northern Territory (23.7%).

Despite policy commitments to reduce the removal rates of Aboriginal children and increase expenditure on early intervention and kinship support, there remain significant deficits in the structure of the *Children and Young People (Safety) Act 2017* (the Act) that must be remedied to address the horrific over-representation of Aboriginal children in the child protection system, and the abject failure of the system to ensure ongoing connection with family, community and culture for children removed.

The current *Children and Young People (Safety) Act 2017* (the Act) provides but one purpose-built statutory mechanism that seeks to address these issues and that is the Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP), contained in section 12. Unfortunately, it only applies once an Aboriginal child is removed.

The ATSICPP was inserted into the *Children's Protection Act (1993)* and Regulations in 2009. This provision was largely replicated in the current Act but only applies to post guardianship order - placement decisions. It therefore has

had no impact on removals. Whilst DCP claim that it is applied in 64.5% of matters (DCP Annual Report 2021-2022) there is no disaggregated data, and the claim does not resonate in success, as only 31% of children are placed with Aboriginal families.

The reasons for the failure of application of the ATSICPP within the current scope of its limited statutory operation are manifold, but to a large degree it fails because it does not provide a strong statutory mechanism for achieving its section 12 (2) objects to keep children connected to their families and culture, to enable Aboriginal families to participate in the care and protection of their children and to make placement decisions in partnership with Aboriginal people, and their children and young people.

As a result, Aboriginal children, their families and communities remain marginalized from decision making. Most decisions are made without the inclusion of the broader network of family and community that have cultural and familial responsibilities for the child quite simply because there is no understanding of who they are or how to reach them.

The section 12 aims of partnership, participation and connection can only be achieved by inserting a structured Aboriginal Family Led Decision Making (AFLDM) process into the Act that reaches into the child's family and community and puts them at the helm of decision making.

I believe this can be done best by the Aboriginal Family Care Program (AFCP) that I have advocated for since my appointment in 2019. The AFCP requires **existing** Aboriginal Community Controlled Organisations (ACCO) to be appointed as RATSIO's in all Aboriginal communities. A RATSIO that is connected to the child's community should be the first point of contact when an Aboriginal child is subject to an intake under the Act. At this point the ACCO takes the leadership on '*family finding*' equipped with strong community intelligence about those who have cultural or familial responsibilities for the child. They are trusted, culturally safe and understand the detail of Aboriginal attachment relationships.

No decisions about the child can be made until the right people are assembled, facilitated by the RATSIO/ ACCO, and mandatory, structured and culturally safe Aboriginal Family Group Conferencing (AFGC) occurs, conducted by an independent Aboriginal facilitator, with relevant ACCO service providers present. At the AFGC decisions can be made and ***safety plans*** can be developed. Decisions are to be implemented by the CE if compliant with an expanded section 7. Further AFGCs should be held where there is any slippage, or a different decision is to be made about the child. This structure should be inserted in the legislation and titled the Aboriginal Family Care Program (AFCP).

Section 12(3)(c) already provides a consultative role for ACCOs as recognised Aboriginal or Torres organisations (RATSIO's) and the RATSIO role should be widened to encompass family finding and facilitation of AFLDM in the AFCP model. It should be mandatory for RATSIO's to be appointed for all Aboriginal communities in SA, metropolitan, regional and remote.

But for the ATSICPP to have any impact on removals and facilitate early intervention, section 7 of the Act must be amended to provide that all five elements of the ATSICPP (Prevention, Partnership, Participation, Connection and Placement) together with safety, well-being and best interests, is to be applied as a paramount consideration in all decisions about the administration, operation and enforcement of the Act.

The Act should also provide that the ATSICPP should be applied to the standard of active efforts and active efforts can be demonstrated in relation to a significant decision about an Aboriginal child by amending the Act to provide for the application of AFCP before any such decision is made about an Aboriginal child.

The marginalization of family and community in decision making, and as the essential link to cultural connection for Aboriginal children, is a story that has been repeated to me many times by community members and Aboriginal children and their families. In the course of my community consultations in 2019 and 2021, and in 2022 through my current statutory Inquiry into the application of the ATSICPP, I have heard heartbreaking stories of grief and loss. Many have said "if only I had known I would have looked after that child".

Whilst I cannot pre-empt my Inquiry findings, I must pay heed to these voices in making my submission. This is what I know to be true: the Aboriginal people that are best equipped to make decisions that cement connection to family, community and culture into the Aboriginal child's life are the child's Aboriginal family and community.

Enabling AFLDM through the AFCP enables Aboriginal people's human rights. It enables Aboriginal self-determination, sanctioned in the United Nations Declaration on the Rights of Indigenous People (UNDRIP). This in turn enables and supports the Aboriginal child's right to be heard, to remain connected and practice their culture in company with their community (United Nations Convention on the Rights of the Child, Articles 12, 8,20).

Fundamental to any reform of the legislation is not only the application of all five elements of the ATSICPP to prevent removals, but the need to have a structured and appropriately resourced early intervention mechanism in the Act to guide its proper application in early intervention. This is crucial.

A detailed mechanism addressing early intervention is currently missing in the current Act. With its focus on safety, it drives removals and has led to the dire overrepresentation of Aboriginal children in state care. The wellbeing and best interests of Aboriginal children are overlooked by eyes that do not see that it is poverty, social marginalization, racism and systems mistrust that need to be addressed by early help before situations deteriorate to crisis.

In this regard, the paramount considerations in section 7 of the legislation should be widened to provide for both the wellbeing and best interests of children, as well as their safety.

Using wellbeing as the statutory mechanism to enable culturally safe early intervention will arrest the current policy confusion and resourcing drift away from early intervention; putting a structure for early intervention in the legislation that anchors the ATSICPP, and its core enabler AFLDM through the AFCP to these fundamentally important measures will do much to arrest the current rate of removals of Aboriginal children.

The legislation should also provide for strong judicial oversight of the application of the ATSICPP when a matter is before the Youth Court, where the Act should provide that the court may only make guardianship orders as a last resort and only after being satisfied that the ATSICPP has been applied. It must itself apply the AFCP process before making orders.
The Act should be amended to ensure that the court has specific powers to make decisions about reunification and contact of its own motion when a guardianship application is before it, again after first ensuring that the mandatory AFLDM/AFCP process takes place.

The Act should provide that the South Australian Civil and Administrative Tribunal (SACAT) should have enhanced powers to review contact decisions made by the Chief Executive or by the Contact Arrangement Review Panel (Chapter 7 Part 4) if both are to be retained as decisions makers. But it must first ensure the mandatory AFLDM/AFCP process is undergone.

The Act should provide for transparent regular independent audits of the application of the ATSICPP to the standard of active efforts, preferably by an Aboriginal Child Protection Peak Body and for the provision of transparent disaggregated data to the public and such other data as the Peak requests.

I have set out detailed recommendations that deal with all of these matters and other ancillary matters by reference to specific sections of the Act in the body of my Submission.

I urge the Minister to give attention the detailed amendments that I have proposed in the body of my Submission, as all recommendations, if implemented will ensure that Aboriginal children are removed only as a last resort. Decisions will only be made after their voices have been heard and with the full and deep participation and lead of their family and community in decision making, where their connection to family, community and culture is fully enabled.

I note that the government of South Australia has committed to the first 5-year Aboriginal Action Plan (AAP) that falls under the National Framework for Protecting Australia's Children (2021-2013): Safe and Well and submit that the recommendations I have made will ensure that the ATSICPP is enshrined in the legislation in line with this commitment and will progress other aspects of the AAP.

In summary I propose:

1. Amend the current Act to introduce international human rights guarantees of self-determination of Aboriginal people in decisions that affect their children under the United Nations Declaration on the Rights of Indigenous People (UNDRIP); and rights of the child to have their best interests considered and to be heard; and the right of Aboriginal children to practice their culture with their family and community under the United Nations Declaration on the Rights of the Child (UNCRoC). Both to underpin the proper application of the five elements of the ATSICPP.

2. Amend the Priorities and Principles in the operation of the Act section 7 to include the “wellbeing” and “best interests” of the child as well as safety and for Aboriginal children repeal section 12 of the Act and replace it with Five Elements of the Aboriginal and Torres Strait Islander Placement Principle enshrining the application of the five elements (Connection, Prevention, Partnership, Placement and Participation) of the ATSICPP (as defined see section on ATSICPP in my Submission) as the paramount consideration/principle for Aboriginal children in current section 7.

3. Amend the Act to include a mandatory statutory mechanism for early intervention decisions to be made in Chapter 5 Part 1 and 2 and mandate a mechanism for early intervention services are to be delivered, utilizing AFLDM/AFCP and including culturally safe services delivered by ACCOs with a mechanism to ensure referral back to a child protection response from a service response or from a child protection response to an early intervention service response.

4. Insert a new section into the Act to provide that all five elements of the ATSICPP must be applied to all significant decisions about Aboriginal children from the point of early intervention to removal, placement, cultural planning and annual reviews, including reunification and contact through AFLDM.

   Decision making about Aboriginal children in line with ATSICPP should occur through mandatory AFLDM. The mechanism for conducting AFLDM is through the Aboriginal Family Care Program model (AFCP). Engagement with the AFCP for AFLDM should take place before significant decisions are made by the CE or court and where there is an early intervention service response.

   The AFCP model requires the DCP worker assigned to the matter, or other case worker from an agency or NGO providing a service response, to immediately contact the appropriate Recognised Aboriginal or Torres Strait Islander Organisation (RATSIO) from the child’s community who must identify, assemble and facilitate all relevant family and community to attend a purpose built and independently facilitated AFGC where a significant decision about the child is to be made. The AFGC should be conducted regarding cultural safety by an independent Aboriginal facilitator (preferably from an ACCO or Aboriginal led service program).

The Act should provide for mandatory trigger of the AFCP process on the intake of an Aboriginal child by DCP, or by the referral by DCP to an early intervention service or by self-referral or through referrals from mandatory reporters to such services. The AFCP and the AFLDM process must also be applied before the Chief Executive (CE) or the Youth Court makes any 'significant decision' about an Aboriginal child.

The purpose of the AFCP process is to ensure the ATSICPP is applied by allowing the child, family and community take the lead in decision making. Relevant ACCO service providers should be present and contingency planning should occur. The CE must implement all decisions reached by agreement in AFCP except where the decision does not address safety, best interests and well-being concerns in line with the ATSICPP.

The purpose of the AFCP process is to keep the child connected with culture in accordance with five elements of the ATSICPP, by addressing the concerns or issues that are before it that affect the child. It should be a child centred and child safe process, where the child is entitled to the presence of a culture mentor/cultural communication partner and where there is legal representation for the child where necessary.

This AFCP process should be mandated to apply at all significant decision-making points, before those decisions are made or, in the event of an emergency removal as soon as possible after. The AFCP process should be mandatorily applied whether decisions are made by the CE or the Court or where a child and family are referred for a service response.

The Act should provide that the ATSICPP must be applied to the standard of "active efforts" which must be demonstrated, recorded and subject to scrutiny though a regular independent audit process. Transparent accountability should also be a legislative requirement through the provision of published reports by the independent auditor and the public provision of disaggregated data in annual reports.

The Act should also provide that all decisions where the Chief Executive refuses to apply to implement decisions reached through AFCP are subject to review by the SACAT.

The Act should specify that the appointment of a RATSIO (as defined and appointed in current section 12) is mandatory for all Aboriginal communities including but not limited to APY Lands, Coober Pedy, Ceduna, Yalata, Port Lincoln, Whyalla, Port Augusta, Port Pirie, Yorke Peninsula, Berri, Mt Gambier, Murray Bridge, and 3 metropolitan areas (Western, Northern and Southern). The Act should require that the RATSIOs must be an *existing* Aboriginal Community Controlled Organisation (ACCO) or and Aboriginal led service with strong community connection. The legislation should provide that RATSIOs must be fully funded to perform their functions.

The Act should specify that the RATSIOs role be expanded to be the mechanism for family finding and facilitation of AFLDM as part of the AFCP. Should AFCP fail to reach agreement, then in that event the Chief Executive, or the Youth Court “must” (as opposed to ‘where reasonably practicable’ - see current section 12 12(30 (c) Child Safety Act) have regard to submissions of a RATSIO.

Submissions should be made orally and deal with what active efforts have been made to apply the ATSICPP, what regard has been paid to Aboriginal attachment relationships and whether the AFCP process has been complied with. If AFCP has been complied with and no agreement reached, then RATSIO should advise the options that most align with ATSICPP.

Section 7A should provide that the RATSIO must ensure that the AFCP is facilitated by arranging the attendance of Aboriginal people from the child’s community, who are holders of authority in the community by custom and practice and those who have cultural responsibility for the child within family and community at a culturally safe mandatory AFGC with the child’s views enabled and the child supported by a cultural mentor in the AFLDM process

The new section 7A dealing with the AFLDM/AFCP process should specify that all “significant decisions” include decisions made pursuant to current Chapter 5 Part 1 and 2 at intake and should be applied to always consider what the appropriate response is at this early stage, especially where considerations of “wellbeing” in new section 7, rather than safety are in focus. The opportunity for referral to services and contingency planning sourcing culturally appropriate placements should start here through the AFCP process.

5. It should be noted that Chapter 5 Part 1 and 2 will require amendment to ensure that there is a mechanism for considerations of “wellbeing” to be dealt with by an early intervention response through the AFCP model and the provision of culturally safe services and a culturally safe referral body.

6. Amend the provisions of the Act that deal with early intervention, reunification, placement, contact, annual reviews, case planning and cultural planning, the voice of the child, and legal representation of children to reach the standard of “active efforts” to be applied to Aboriginal children by the application of AFCP process in the new section 7A, transparency of oversight and review by SACAT, and oversight of the application of the ATSICPP through the AFCP and reporting of active efforts by CE.

7. Insert provisions in the Act that provide a transparent process for reunification to be considered and amend Part 2 Chapter 6 – Courts Powers, to enable the court to specifically make reunification orders applying the ATSICPP through mandatory court ordered AFGCs utilizing

the AFCP. The courts powers should include powers to case manage the reunification process and make ancillary orders for contact and placement to ensure compliance with ATSICPP.

8. Mandate judicial oversight of the application of the ATSICPP by Youth Court, including a direction that permanent removal should be an order of last resort and guardianship orders should not be made until the court is satisfied that the ATSICPP has been complied with to the standard of active efforts.

9. **Restore the Youth Courts' powers to make rights-based decisions about contact and repeal sections 92 - 95 under the heading Contact Arrangements in Respect of Children. Contact is a rights-based decision, and the Act should be amended to ensure that it reverts to the Youth Court.**

10. Part 3 Principles of the Act should be amended to mandate that decision makers (the Youth court and CE) should apply Aboriginal attachment theory and have regard to Aboriginal child rearing practices in permanency decision making in the absence of agreement at AFCP. Current section 36 should be amended to ensure consideration of "Aboriginal Attachment Theory and Child Rearing Practices" as defined when undertaking parenting assessments.

11. The Act should be amended to provide a mechanism for referral to the Family Court Aboriginal and Torres Strait Islander list where agreement is reached at AFCP and the family is satisfied that the child would be cared for in a safe, supported, culturally responsive family environment. This referral does not guarantee the Family Court orders sought will be made but allows genuine AFLDM to occur and diversion from the child protection system when appropriate family-based care can be provided.

12. In line with the Safe and Supported the National Framework for Protecting Australia's Children, Aboriginal Implementation Plan Action 6: Improving the availability and quality of legal supports for children the statutory requirements for legal representation for children. Section 63 Child Safety Act should be amended to provide that the Aboriginal child's representative (ICL) must ensure the cultural safety of the child, and this includes the inclusion of the child's cultural support person appointed by the RATSIO as a communication partner and an obligation to consult with the RATSIO to assess the child's cultural needs. There should also be an obligation for the ICL undertaking cultural competency training.

    Section 63 should also provide that ACCOs be resourced to provide legal representation of Aboriginal children in line with the CTG and National Plan obligations.

PROPOSED AMENDMENTS

Title - Children and Young People (Safety) Act 2017

RECOMMEND

-Amend the title of the Act to:

Children and Young People (Wellbeing and Safety) Act 2017

-Amend the purpose statement of the Act to:

An Act to ensure the best interests, well-being and safety of children and young people.

CHAPTER 2: GUIDING PRINCIPLES FOR THE PURPOSES OF THE ACT

Section 4 - Parliamentary declaration

RECOMMEND

-Amend title of section 4 to "Objects of the Act" and remove references to "Parliamentary Declarations".

-Insert new section 4 to outline the objects of the Act, and in particular these objects must include for Aboriginal children and young people:

"It is the State's responsibility to implement measures to safeguard and promote Aboriginal and Torres Strait Islander children's cultural identity and enable Aboriginal self-determination in line with international human rights obligations, by ensuring connections to family, community and culture are maintained at the highest level, and decisions are made in partnership with Aboriginal children, families, and communities, with investment into Aboriginal led services commensurate with need, to remedy the ongoing effects of Aboriginal child removals".

"A decision maker under the Act must seek to give effect to the rights set out from time to time in United Nations Convention on the Rights of the Child and the United Nations Declaration on the Rights of indigenous People and any other relevant human rights instruments affecting Aboriginal children and young people."

Discussion: Objects of the Act

South Australia has an obligation to give effect to the United Nations Convention on the Rights of the Child (UNCRoC) and the United Nations Declaration on the Rights of indigenous People (UNDRIP) to which Australia is now a signatory.

To ensure that the Aboriginal child's human rights are protected and implemented, the Guiding Principles of the Child Safety Act should be amended as set out above to require a decision maker under the Act to seek to give effect to the rights set out from time to time in UNCRoC and UNDRIP and any other relevant human rights instruments affecting Aboriginal children and young people.

The UNDRIP recognises self-determination rights for Indigenous peoples, including: to practise and revitalise their cultural traditions and customs; to manifest, practise, develop and teach their spiritual and religious traditions, customs, and ceremonies; to revitalise, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures; and to participate in decision making in matters which affect their rights.

Relevantly, the UNCRoC supports the family as the basic unit of society that should be upheld and provides for best interests in decision making; the voice of the child in decision making and the Aboriginal children's right to community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

These human rights of Aboriginal children underpin the five elements of the ATSICPP. Properly applied through the human rights lens, the five elements of the ATSICPP will provide for self-determination, enabling the voice of the child and ensuring the child retains connection with family, community, and culture. It is already the responsibility of each state agency in South Australia to enshrine these principles in policy practice and procedures (*Section 5 Children and Young People (Oversight and Advocacy Bodies) Act 2017*). This responsibility should now extend to statutory responsibilities in child protection to ensure clear human rights underpinnings for decision making.

Section 7 - Safety, Wellbeing and Best Interests and the ATSICPP of Paramount Principles.

RECOMMEND

-Amend Section 7 to state:

> The paramount consideration in the administration, operation and enforcement of this Act must always be to ensure the best interests, well-being, and safety of children and young people. For Aboriginal and Torres Strait Islander children and young people, the paramount consideration is the application of all five elements of the ATSICPP (Prevention, Participation, Partnership, Connection, Placement) to the standard of active efforts.

The five elements of the ATSICPP are defined as follows: -

a. Prevention: that a child has the right to be brought up within the child’s own family and community decisions about which are made in accordance with new section 7A Aboriginal Family Care Process (AFCP):
b. Partnership: Aboriginal and Torres Strait Islander people have the right to participate in significant decisions under the Act about their children in accordance with the AFCP in new section 7A and who must be consulted and lead the design of policies, practices and procedures that relate to Aboriginal children under the Act:

c. Placement: that if a child is placed in care, it must be done in accordance with placement hierarchy that is currently set out in in section 12(3) of the Act in line with AFCP in new section 7A:
d. Participation that a child and those that have cultural and familial responsibility for a child have a right to participate in ana administrative or judicial process for making significant decisions about the child in accordance with the AFCP in new section 7A.
e. Connection that a child has the right to be supported to develop and maintain a meaningful connection with the child's family, community and culture developed and maintained through the application of section 7A.

Insert a new subsection 7(1) that states:

In determining the best interests, wellbeing and safety of children and young people, the following factors must be considered

a) All needs referred to section 8 [see proposed amendments to section 8 on page 15 - 17]
b) The Voice of the child
c) The provision of a nurturing stable environment.
d) In relation to an Aboriginal child, to protect and promote his or her Aboriginal cultural and spiritual identity and development by, wherever possible, maintaining and building their connections and attachment to their Aboriginal family and community, by the application of the five elements of the ATSICPP in accordance with AFCP in new section 7A with the primary objectives of firstly of achieving early intervention to prevent removal and where this is not possible by consideration of reunification of an Aboriginal child with his or her family and community either on first application of AFCP at intake or at any time thereafter when a long-term guardianship order is made.

Discussion: Paramount Principles Safety, Wellbeing and Best Interests and the ATSICPP

Currently the paramount consideration in all decision making under the Act is that a child should be protected from harm (section 7 Child Safety Act).
This consideration does not align with Article 3 CRoC, which provides that the paramount consideration in decision making about children should be the best interests of the child. It is South Australia's obligation to enshrine the child's rights in line with this convention.

This paramount consideration principle was contained in the repealed Children's Protection Act (1993). There was no recommendation made in the *Royal Commission on South Australia's Child Protection Systems 2016* (Nyland Royal Commission) to remove it. It is a paramount consideration that is included in the *Family Law Act 1975* (Cth) and all other state child protection legislation.

Concerns have been expressed in the DCP Discussion Paper to the Review about the pressures on the child protection system by increased removals, and whether the thresholds for removal have any bearing on this and require amendment.

It is my view that the focus on the protection of children from harm and the risk of harm, albeit "serious" harm, for removal to be considered (section 41 Child Safety Act) has narrowed the decision-making focus on children to one issue, and often one response.

It has resulted in a lack of contextualized decision making which has failed to consider the totality of the Aboriginal child's circumstances and needs, and what measures can be put in place to build on the strengths that inure in family, community, and culture. There is no clear statutory pathway to culturally safe early intervention by consideration of the best interests and wellbeing of the Aboriginal child through the lens of the paramountcy of cultural connectedness, the strength and self-esteem and sense of belonging that is given to a child through cultural identity.

Child protection concerns, if thought about in a more nuanced way, can be amenable to other responses; but the current Act does not open up such responses because of its narrow statutory approach. It is interesting to observe that since the introduction of the "safe from harm" approach in the Safety Act that the numbers of children in care have doubled (see Trust in Culture Report - Kate Alexander November 2022).

For Aboriginal children, such a narrow focus often results in children being removed from their family, community, and culture, without consideration of the child suffering deep and permanent cultural harm as a result. The definition of "harm" in section 17 should therefore be amended to include "cultural harm", as this will require the decision maker to think about the effect of removal upon a child and how such harm can be mitigated.

Without the statutory ability of the decision maker to consider the best interests of the Aboriginal child and their wellbeing, their rights to remain connected to family community and culture, as well as the notion of cultural harm perpetrated by removal, the options for Aboriginal children who come to the notice of the DCP are automatically limited. It is necessary to include "wellbeing" and the application of the Aboriginal and Torres Strait Islander Child Placement Principle as paramount considerations to provide a means to direct attention at early intervention, drive efforts to reunification, mitigate removals by encouraging placements with family and community in safety planning without orders and ensure that if Aboriginal children are removed, they are placed with family and community.

In this regard it is worth noting the observation in Nyland Royal Commission Report about the balancing exercise that is encouraged by introducing a multiplicity of paramount considerations for Aboriginal children:

> *"There is potential for tension between the right of Aboriginal children to life, care and protection, and healthy development, and 'the collective rights of Indigenous peoples to know who they are, where they come from and maintain contact with their culture and family'.*

> *Clearly, children's right to life and safety is paramount: no right for a community to remain intact can trump a child's right to be safe. Yet this should not overlook the fact that Aboriginal children flourish in their community, where they remain connected to family and culture and can draw on their cultural and spiritual heritage. The better view is not to regard individual and collective rights in 'simple competition', but as mutually beneficial and interdependent1." Nyland page 448.*

It is also essential that the legislation recognises that in Aboriginal families and communities, attachment relationships are formed with others who have cultural responsibility for them, not exclusively with the parent as in the Western paradigm. Regard must therefore be had to cultivating these attachment relationships through reunification, custody, placement, and contact decisions in line with ATSICPP, and through the principles of AFLDM through the AFCP model which I am proposing in this submission. The need for a child to remain connected to family and community through early intervention and reunification should be matters that are at the forefront of the CE and Courts mind when applying the ATSICPP so that it is not left too late to apply it other than in placement decisions.

Discussion: The ATSICPP as a Paramount Consideration

The current iteration of the ATSICPP in section 12 is of limited use as a paramount consideration in its current form.

There is no doubt that an expanded 5 elements version of the ATSICPP should be applied as a paramount consideration with the proposed new principle in section 7 to the standard of active efforts. Without it, there is no purpose-built statutory mechanism that requires DCP to tackle the overrepresentation of Aboriginal children in the child protection system and their continued disconnection from family, community, and culture once there.

The National Action Plan for Protecting Australia's Children 2021-2031 will, for the first time, contain an Aboriginal Action Plan for Aboriginal Children. The SA government has been active in supporting this plan. It commits to the implementation of all five elements of the ATSICPP to the standard of "active efforts". Pursuant to the Plan, the 5 elements of the ATSICPP must be enshrined in legislation, but it must do so within a strong statutory structure to ensure early intervention efforts are applied to divert removals, preserve connection, and ensure reunification efforts are open at all stages. It must do this in participation with and in partnership with Aboriginal children, their families, and communities.

To maintain the child's connection to family, community, and culture, the 5 Elements of the ATSICPP requires decision makers to act early to prevent removals and preserve Aboriginal attachment relationships; to always consider reunification and make efforts towards reunion even where a child has been permanently removed. It also requires the location of family, community, and culture in an ongoing and meaningful way in the life of a child that has been removed, by placing the child with family and community as a priority and giving

full access to all people from the child's attachment network. As a last resort, the five elements of the ATSICPP mandates ongoing contact with family, community, and culture where placement cannot be made with family and community.

Core to the application, is the requirement for partnership in decision making with family and community, who are entitled to participate in the child's future and cement connection to culture. This is in the best interests of an Aboriginal child. It is this aspect of the Five Elements of the ATSICPP that needs to be detailed in the legislation, as there has been a demonstrable failure by DCP to include family and community.

The ATSICPP was inserted in the regulations to the Children's Protection Act 1993 in 2009 and these provisions were largely replicated in section 12 of the Act, but to only applied once removal occurs.

When considering the ATSICPP in the now repealed Children's Protection Act, the Nyland Royal Commission found, despite the requirement for partnership in decision making in the ATSICPP contained in that Act, the essential element requiring Aboriginal family and community's participation in decision making about placement was not being achieved.

Originally conceived as the enabler of family and community input into locating suitable family placements, the role of recognized Aboriginal and Torres Strait Islander Organisations (RATSIOs) in the ATSICPP had diminished to a tick box exercise by one Adelaide based and underfunded RATSIO, Aboriginal Family Support Services (AFSS), by the time the Nyland Royal Commission put them under the microscope.

Nyland found the overreliance on Principal Aboriginal Consultants to find family was not up to the task and inappropriate. Nyland's recommendation was that more locally based RATSIOs should be gazetted to enable the child's family and community to be integrated into and the focus of the placement effort.

This recommendation has not been implemented. The DCP understanding and application of the ATSICPP in section 12 of the Act, which currently only applies to placement decisions post guardianship is poor.

My recent discussions with AFSS workers has confirmed that AFSS as a RATSIO lacks deep community connection as it is staffed predominantly by non-Aboriginal people. This, in combination with few staff and late consultation, results in AFSS being unable to meaningfully consult on placement or become actively involved in finding family and community to assist with proper application of the ATSICPP.

Section 12 currently provides a nod to the five elements ATISICPP as it has as its object that placement decisions should be made to ensure connection is maintained (section 12 (2)(a) Child Safety Act) and that Aboriginal people should participate in the care and protection of their children (section 12(2)(b) Child Safety Act).

Importantly, section 12 also provides that in achieving the objects it should do so by "encouraging Aboriginal and Torres Strait Islander people, their children and young people, and State authorities to act in partnership when making decisions about the placement of Aboriginal and Torres Strait Islander children and young people under the Act" (Section 12(2)(c) Child Safety Act).

Unfortunately, the DCP has manifestly failed in this partnership objective. Until recently there was no structured policy or practice produced that ensures all family are present, active, and included as partners in decision making about placement. Family is defined in section 16 as "the child or young person's extended family; and (b) members of the child or young person's family who are not biologically related to the child or young person; and (c) in relation to an Aboriginal or Torres Strait Islander child or young person—any person related to the child or young person in accordance with Aboriginal or Torres Strait Islander traditional practice or custom (as the case requires)".

The current Aboriginal Family Led Decision Making (AFLDM) policy, whilst welcome, still lacks a demonstrable link to family and community beyond the parents of the child who exercise control over who participates, often to the detriment and not in the best interest of the child. There is no requirement for a structured family group conference process to be undertaken. RATSIOs do not feature in the effort to locate family and community, and apart from limited input from PACs and some help at preparing family genograms from within the department, there is no structured interface with wider family and community.

As Commissioner for Aboriginal Children and Young people I have heard heart breaking accounts from Aboriginal families and communities of how children are lost to their families because none of them were informed of imminent removal of a child, or that DCP had care concerns for a child and family. Repeatedly, I have been told that if family members had known they would have taken the child and the loss of connection would have been avoided.

What is required is not more of the same. Simply including the five elements of the ATSICPP as defined without more and embedding this in the current section 12 Safety Act structure, with the rest left to policy will not see a strong path forged to enable partnership and participation in decision making to keep connection alive and prevent removals.

The five elements of the ATSICPP should be elevated to a paramount consideration as part of a new section 7, with a new section 7(1) and 7A that contextualises the best interests of Aboriginal and Torres Strait Islander children and young people, by applying the ATSICPP as a paramount consideration. It is currently positioned as a third-tier consideration in section 12, after section 7's paramount consideration of safety. The ATSICPPs currently only to placement decisions and post guardianship orders.

The ATSICPP is dominated by the overbearing presence of section 7 which often sees recourse to section 41 and quick fix placements, without proper consideration of section 12 or consultation prior to placement because "it is not reasonably practicable". It also suffers from a lack of statutory guidance about

how the connection, partnership, and participation objects (section 12(2) Safety Act) are to be achieved.

To ensure that the balance is properly struck between all of the paramount considerations for Aboriginal children, the five elements of the ATSICPP should be applied to all decisions about Aboriginal children and provisions dealing with five elements of the ATSICPP should be part of section 7 much in the same way that the *Child Protection Act* (1998) (Queensland) deals with these threshold issues. The five elements of the ATSICPP should be applied to the standard of active efforts.

Aboriginal Family Led Decision Making.

Recommend

-Insert a new Subsection 7A: Aboriginal Family Led Decision Making that states:
In applying the five elements of the ATSICPP, Aboriginal Family Led Decision must take place in accordance with Aboriginal Family Care Process which must be undertaken for all significant decisions relating to Aboriginal children and young people to the standard of active efforts.

-Insert new subsection 7A (1) – the Aboriginal Family Care Program
This section should outline the process of AFLDM through the Aboriginal Family Care Program; it sets out the functions, role, and process of the AFCP to enable AFLDM.

The legislation must set out the AFCP process as follows:

- As soon as an Aboriginal child is subject to an intake into the child protection system, either as a result of wellbeing concerns (see my submission on early intervention at page) or safety concerns the Chief Executive or organisation responsible for early intervention(potentially CFARN) must notify the gazetted Recognised Aboriginal or Torres Strait Islander Organisation (RATSIO) and must immediately facilitate the gathering together of as many family and community members who have cultural or familial responsibility for the child using the community intelligence of the RATSIO.
- No significant decisions can be made about the child until a purpose built mandatory Aboriginal Family Group Conference is held that is culturally safe, convened by RATSIO and facilitated the by an accredited culturally competent service provider independent of DCP (the Facilitator). Where any significant decisions are to be made following the first AFGC then further AFGCs must be held for this purpose.
- Where there is an emergency removal then the AFCP process must take place as soon as possible but early intervention action must be taken before the situation deteriorates to emergency (see my Submission about Early Intervention, section 30 - 33 and section 41).

- The Convener and Facilitator must ensure that the AFGC must take place in a culturally safe place.
- The CE must outline what the concerns for the child are and the proposed action the department has taken or will take.
- The decision-making process and power are transferred to the assembled family, community, and child (and their cultural mentor/communication partner) to address the concerns or issues and develop a plan for the child in line with the ATSICPP in the absence of the department.
- If an investigation into the child or young person's circumstances has been carried out, the person who has done this must have the opportunity of being heard but does not remain present in the conference unless the family and community agree.
- A legal practitioner, cultural advocate or cultural mentor for the child must also attend and it is the obligation of the Convenor to arrange this.
- The Facilitator of the AFGC may exclude any person, if the child expresses a wish for that person to be excluded or where the child is too young to express a view, the child's legal representative or cultural mentor believe it is not in the child's best interests.
- If a person is excluded or unable to attend the Facilitator should ensure that person can express their views fully apprised of the outcomes agreed and the concerns or issues that should be addressed.
- The Convenor and the Facilitator must ensure that all family and community that have been identified by the RATSIO as having familial or cultural responsibility or other close community associations with child have the opportunity to attend the conference.
- The Convenor and Facilitator should invite relevant culturally competent service providers (preferencing ACCOs and culturally competent CFARNs) to attend to ensure culturally safe service provision is locked into any safety, wellbeing, reunification, or cultural plan prepared by the family and community.
- The Convenor should ensure that contingency planning occurs when dealing with early intervention or reunification.
- As with current section 26, the Chief Executive should implement the agreed outcomes of the AFCP, unless these conflict with Principles of the Act. In addition, section 157, and Chapter 12 Part 2 should apply to these decisions to enable independent review by SACAT of a decision not to implement the outcomes agreed by all except the CE.
- Where the AFCP process does not reach accord because not all family and community and the CE cannot agree, then new section 7A(2) must provide that the CE or the Court must consult with a RATSIO (as is currently required by section 12 (3(c)), but this consultation is to be expanded to all "significant decisions", not just placement decisions post guardianship and it must occur before decisions are made not "where reasonably practicable" as is now the

case. For consultation, the RATSIO may have regard to any recommendations about the decisions to be made by AFCP that are not agreed and must provide a report to the Court about the AFLDM process and any recommendations about how the ATSICPP could be applied to the standard of active efforts to ensure optimal connections to Aboriginal family, community and culture are maintained.

- New Section 7A (2) must provide that RATSIO consultation must be formalised and allow for oral discussion which is recorded and available to all participants at AFCP and must occur both before the Youth Court or the CE make a significant decision About the child.

- The appointment of RATSIO's must also be set out in new section 7A (2). As with current section 12 this section will outline the role and functions of the RATSIOs. RATSIOs must be local level and gazetted in: APY Lands, Coober Pedy, Oodnadatta, Ceduna, Yalata, Port Lincoln, Whyalla, Port Augusta, Port Pirie, Yorke Peninsula, Berri, Mount Gambier, Murray Bridge, Victor Harbour, and 3 metropolitan areas (Western Metro, Northern Metro, Southern Metro). The RATSIO must have a demonstrated strong community connection and be a local level Aboriginal Community Controlled Organisation or Aboriginal led service. (Noting that, strong community connection refers to Aboriginal leadership and management, Aboriginal governance, and significant Aboriginal staffing numbers). RATSIOs are only gazetted after a community led selection process (as is currently required in section 12). The role of the RATSIO is to coordinate the AFCP in accordance with the proposed new section 7A (1) and to consult with the Youth Court or the CE in the event that AFCP does not reach agreement.

- The Act should specify that the AFCP process applies at early intervention (see my Submission on Early Intervention)

- The Act should also specify that the AFCP process in section 7A specifically applies to section 41 decisions before they are made and where any decisions are made by the CE pursuant to section 84 of the Act (in particular placement); where contact decisions are made under current Chapter 7 Part 4 either by the CE or the CARP. In the event that these decisions can be made by the Youth Court or the SACAT (see my Submission on Contact) before these decisions are made.

- Section 7A AFCP should apply to case planning to develop a cultural maintenance plan pursuant to Chapter 4 Part 3 Safety Act of the Act (or to any bespoke process for Cultural Case Planning contained in the legislation (see my Submission on Cultural Planning). It should apply when the CE considers reunification pursuant to section 50 (4) when the Court considers any guardianship order so that the possibility of a reunification can always be canvassed dealing (see my Submission on Reunification and the Court).

- Section 7A AFCP should also be applied at section 85 Annual Reviews, where requested by the child, the child's family or community, or the child's cultural mentor; if there is non-compliance with a case plan, or in the event that there has been a change of circumstances (such as multiple placement changes; an opportunity for reunification or contact with family or community.

- Likewise, the Youth Court should give effect to agreed outcomes of the AFCP by making consent orders (section 54 Safety Act); these should include the ability to make a contact, placement, or reunification order with other ancillary orders, or at the very least make the order subject to the agreed placement or agreed contact if my submissions regarding the Courts powers are not taken up.

Discussion: Aboriginal Family Led Decision-Making / Aboriginal Family Care Program

A new section should be inserted into the Act at section 7A, to mandate and outline the process of Aboriginal Family Led Decision Making through the Aboriginal Family Care Program as outlined above. Mandatory Aboriginal Family Led Decision Making through the AFCP, which includes mandatory Aboriginal Family Group Conferencing should occur at all points in the Act where significant decision-making is contemplated and it is to be stated that the application of AFCP is designated as active efforts to apply the ATSICPP. AFCP must be applied prior to any application to the Court for orders and/or removal, even if there has been an earlier attempt at AFCP.

The importance of AFCP cannot be overstated. It is central to the application of the five elements of the ATSICP. It is Aboriginal Family Led Decision making (AFLDM). When properly done, it enables Aboriginal self-determination, the voice of the child and maintains the child's connection with family, community, and culture at the optimum level by delivering early intervention and prevention as a priority, with removal and placement in accordance with the current placement hierarchy contained in in current section 12 Safety Act, but now included in new section 7 as a last resort.

It is my view that given the expanded five elements of the ATSICPP requires decisions to be made about relationships that are determined according to Aboriginal custom and practice, that a deeper reach into the child's family and community is legally required and proper consideration should be given to Aboriginal Attachment goals, as it manifests in each community through cultural practice.

But there must be a clear statutory mechanism for doing this. RATSIOs, and through them the possibility of AFLDM, have been around for a long time now and DCP have failed to utilise either. The expanded five elements of the ATSICPP, the guiding principles of self-determination and the right of the child to be heard requires fully enabled participation and partnership in decision making and this requires a clear statutory mechanism. **It cannot be left to policy.**

The Act must legislate an expanded role of Recognised Aboriginal and Torres Strait Islander Organisation to include the Aboriginal Family Care Program as a necessary partnership with the Aboriginal community and Aboriginal Community-Controlled Services to facilitate consultation and mandatory Family Led Decision Making at all significant decision-making stages of the Aboriginal child and family's contact with the system. This AFCP is not a new concept in south Australia, it was previously implemented across this state for Aboriginal children in the 1990's and Aboriginal families and communities and achieved

successful outcomes until tragically funding was reassigned to other purposes. This was not because AFCP failed; it was just another example of institutional racism.

The Voice of the Aboriginal Child - Aboriginal Family Care Program

Recommend

Insert into the new section 7A (4) that:

> The voice of the Aboriginal child must be fully enabled in the AFLDM process by the appointment of an Aboriginal child advocate or cultural mentor and the process must be child-centred, culturally safe; this role must be appointed by the RATSIO. The child should be fully informed of their rights and where AFLDM takes place in Court/SACAT/CARP (if it to be retained which I oppose) circumstance, the child has a right to have a lawyer present.

-Insert into the new section 7A (5) that:

> Where decisions are made about the child without the AFLDM process, the child should still have access to the support of the cultural mentor. The RATSIO should be advised when any decision is to be made about a child to ensure that AFLDM is enabled.

Discussion: Voice of the Aboriginal Child

Currently the Child Safety Act provides the need of the child to be heard and have their views considered (section 8 (a) Safety Act); the voice of the child should be heard and given due weight generally in the operation of the Act (section 10 Safety Act); at Chapter 4 Part 2 Safety Act FGCs, with an advocate who need not be a legal practitioner (section 23 Child Safety Act); when matters are before the court with a right to independent legal representation (section 62 Safety Act); when the CE exercises any powers under section 84 Safety Act; at Annual reviews (section 85 ss(3(iii)and ss(4) Safety Act) accompanied by a support person if they wish; when a contact review is before CARP (section 95 Safety Act) if the child applies for contact review; at SACAT Review (s159 Safety Act) with no right to legal representation and no right be accompanied by a support person.

The Act currently contains sufficient recognition of the rights of the child to be heard but children describe their voices being lost and processes as lacking child focus and cultural safety. What is needed is an enabler in the legislation to ensure that this happens.

I have considered the DCP Supporting the Participation of Children and Young people Decision Making Practice Paper. It refers to seeking the views of Aboriginal children at various points, including placement and about connection to culture, developing the Aboriginal Cultural Identity Support Tool (ASCIST) and in their life story book. It provides for the option of having another person connected to the child to help convey information on behalf of the department. For an Aboriginal child this might be an Aboriginal community member (page 4). A Principal Aboriginal Consultant (PAC) can provide advice on engagement with

an Aboriginal child, family and community and can co-work. The social worker is urged to seek advice and to undergo ongoing professional development and cultural training.

These are all useful tools to assist the process of interacting with a child but do not address a deep cultural divide and the child's own experience of racism, nor the power imbalance between children and adults. I have heard from many Aboriginal children that they do not feel like they can have their voice heard and are not supported to do so.

I see the provision of an advocate/support person/communication partner from the same cultural background as the child as an absolute necessity in all-decision-making processes involving an Aboriginal child where the child is entitled to be heard, and this should be a statutory requirement.

An independent child advocate from the child's community and culture should always be present, even where a child is unable to express their views because of age, language, or other reasons, such as disability. This could be an additional requirement in section 10, even where section 10 is repositioned in section 7 ATSICPP provisions for Aboriginal children.

The AFLDM process should always provide for support and advocacy for the child, and if my submission about the AFLDM process is taken up, this will happen at the first point that the child comes into contact with the system. The Act should require that the RATSIOs with the AFCP should be required to source a person from the child's community to fulfil this role at the very first intake through the RATSIO/AFCP model that I have proposed.

Currently the child is entitled to have legal representation at a formal Part 2 Child Safety Act FGC and at court, but it should be mandatory for the child to have legal representation before the SACAT by amending Section 159 to provide that a child is entitled to legal representation before the SACAT, and an Aboriginal child is entitled to be accompanied by a cultural mentor/cultural communication partner.

Furthermore, it should be a statutory objective of the AFLDM process, or any process involving the Aboriginal child, that the process is culturally safe, child centred and all the adults in the room are focussed on the needs of the child, not their needs. The child should be able to safely articulate their views in a culturally safe environment, fully informed about their circumstances.

All adults must understand the child's views and all decisions must give due weight to the child's views. The child should feel that this has occurred and that they are protected from repercussions from expressing their views, especially where there is to be an ongoing relationship with family members.

I am also concerned that the voice of the child in the application of the ATSICPP has been diminished in the Child Safety Act. Regulation 4(c) of the now repealed Children's Protection Regulations 2006 (CP Regulations) provided (in line with the recommendations in the Bringing them Home Report) that if the placement

of a child in alternative care in accordance with the placement hierarchy is objected to by the child on reasonable grounds, the child should be placed with next available person as determined by the order of priority. This should be reintroduced into the ATSICPP placement pillar in the Act.

I submit that the robust AFLDM process as described, enshrining the child's voice, supported by a cultural mentor, and the presence of a cultural mentor in all other decision-making points will bring the child's voice into powerful focus.

Family Matters has identified that in SA there is no requirement for Aboriginal and Torres Strait Islander children's participation to be supported by an Aboriginal and Torres Strait Islander agency and recommends stronger, resourced and clearly defined roles for Aboriginal and Torres Strait Islander agencies to provide culturally appropriate support to children to participate in child protection processes; Insertion of the statutory provision suggested by me will remedy this deficit.

It is critical that the amendments that I have suggested are taken up.

Identification- Recommendation

- New section 7B be inserted into the Act "All intake information relating to children where Aboriginal identity is not claimed is provided to a panel of RATSIOs to determine if a RATSIO should make further investigation into a child's Aboriginal identity.

- If Aboriginal identity is established by the RATSIO in accordance with (new) section 16 then this must be noted on the child's case plan and the ATSICPP applied to any decisions made about the child.

- Self-identification by a child and/or the child's family and community should be the only requirement for the CE to begin applying the ATSICPP

Identification -Discussion

There should be a provision in the legislation in section 7B that deals with identification and creates a mechanism for all children who encounter the child protection system to be filtered to establish Aboriginal identity in accordance with the definition in current section 16. Many children and their parents may not claim Aboriginality for a number of reasons and often an Aboriginal child remains unaware of their Aboriginality and their connections are lost.

There is potential for early identification by RATSIOs who may consult with the child and their family. The Act should provide that RATSIOs be notified of all child protection or wellbeing concerns where Aboriginality is not claimed, and a Panel of RATSIOs could filter Aboriginal children in for further investigation of their Aboriginality. The RATSIO should ensure that all children and families, including maternal and paternal extended family members, where appropriate, are asked by the RATSIO whether the child is Aboriginal and/or Torres Strait Islander.

It should be stipulated in the Act that self-identification by a child and/or the child's family and community should be the only requirement for practitioners to begin applying the ATSICPP in their work with children and families, and that executive approval be required to de-identify Aboriginality in consultation with the child's RATSIO.

Section 8 – Other needs of children and young people

RECOMMEND

Rather than making section 8 subject to Section 7, Section 8 should be used to inform decision making in line with the proposed amended Section 7 on paramount considerations to emphasise the needs of children and young people, and to contextualise the assessment of best interests, wellbeing, and safety.

-Amend the title of Section 8 so that the title reads as:
Needs of Children and Young People

-Amend Section 8 (1)(b) to read as:
(b) the need for love and care

-Insert a new Section 8 (1)(e) to read as:
(e) the need to belong and have an attachment

-Insert a new Section 8 (1)(f) to read as:
(f) the need to give the widest possible protection and assistance to the parent and the child as the fundamental group unit of society, and to ensure that intervention into that relationship is limited to that necessary, for the best interests, wellbeing and safety of the child or young person.

-Insert a new section 8(1)(g) to read as:
(g) the need to strengthen, preserve and promote positive relationships between the child, the child parents, family members and persons significant to the child or young person.

-Insert new section 8(1)(h) to read as:
(h) for Aboriginal children, the need to maintain their cultural identity, wellbeing, and self-esteem through maintaining and building their connections and attachment with family, community and culture.

Discussion – Needs of Aboriginal Children - Attachment for Aboriginal children

Section 8 needs of children and young people should be expanded to further contextualise the paramount considerations of best interests, wellbeing, safety protection from harm, and the five elements of the ATSICPP.

For Aboriginal children, this should include the need for love, belonging and attachment within a culturally safe paradigm. Attachment relationships for an Aboriginal child are moulded by cultural norms that apply to that child's family and community and these should be considered (ref Aboriginal attachment theory, Dr Tracy Westerman). If regard is paid to the totality of an Aboriginal Childs attachment relationships when the ATSICPP falls for consideration through the AFCP process, then the current practice of pre-emptive removals to non-Aboriginal families should be mitigated and can also ensure that the removal option is mitigated by safety planning within the compass of the Childs attachment relationships. Including consideration of Aboriginal attachment as a need of the Aboriginal child in section 8 will ensure the proper application of the ATSICPP.

SECTION 9 - Early intervention

RECOMMEND

- Include new section 9A Early Intervention Prevention for Managing the Risks without Removal for Aboriginal Children

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- Section 9A "The Court or the CE or the early intervention provider when considering the best interests, safety, well-being and ATSICPP in relation to an Aboriginal child:-

1. must always first give consideration to a referral to fully funded early support and services which are culturally safe and delivered by ACCOs commensurate with the needs of such children after application of AFCP pursuant to (new) section 7A which is conducted upon intake or where a matter is referred to another agency or provider for wellbeing concerns pursuant to (new) sections 30-32 to
   a. Improve the safety and well-being of a child at risk of harm
   b. Reduce the risk that a parent may be unwilling or unable to care for a child. (Noting the definitional changes proposed to "risk" and "harm" in my Submission).
2. No application may be made for guardianship orders pursuant to section 50 (3) without compliance with section 9A (1) and in accordance with a section 9A (4) Plan.
3. The support or services supplied to a child must strengthen and support the child's family and community to enable them to
   a. Care for the child or any other or future child of that family
   b. Nurture the well-being and development of that child or young person
   c. Recognise and promote the child's culture and cultural rights and responsibilities and
   d. Should be undertaken on a consensual basis in partnership and with participation of the family and community.

-Insert new Subsection 9A (3) to read as:

All decisions about early intervention and actions must observe (new) subsection 7A relating to the consideration of the five elements of the ATSICPP through the Aboriginal Family Care Program.

Inset and new section 9A (4)

1. "Without derogating from the requirements of ss 9A (1) the Minister must immediately develop an early intervention plan in partnership with Aboriginal children their families and communities that must prioritise the funding of ACCOs to provide services and must fund ACCOs to perform the services commensurate with the needs of Aboriginal children and must otherwise provide early intervention pathways that are culturally safe.
2. The Minster must by notice in the gazette publish the section 9A (1) plan
3. Each person or body engaged in the administration, operation or enforcement of the Act must comply with the Plan.

A new s 9B should be inserted to provide that unborn child concerns must be immediately referred through the section 9A process.

Unborn children
(1) Section 9A applies if, before the birth of an Aboriginal child if the chief executive reasonably suspects the child's wellbeing, safety or best interests may be at risk after he or she is born.
(5) The purpose of this section is to reduce the likelihood that the child will need protection after he or she is born (as opposed to interfering with the pregnant woman's rights or liberties)

Discussion: Early Intervention Prevention

The current Act fails to provide any structural guidance on how early intervention prevention is to be applied.

The current Act simply refers to early intervention as an object (section 9 Child Safety Act) and refers in a vague way to Child and Family Assessment and Referral Networks (CFARNs) in section 20. It is contemplated by Section 32 (3)(b) that an alternative response can be given to addressing the "risk" to the child without investigation and/or that pursuant to section 32(3)(c), the matter can be referred to a State authority under section 33. Presumably this is the lever where early intervention services can be applied, but that assumes a referral will be made in that direction. The pathway is very opaque.

In addition, there are no clear statutory mechanisms for applying the ATSICPP early when the child comes to the attention of the department, so there is no clear process to ensure timely consideration of the possibility of diverting Aboriginal children and their families away from removals using family and community who have cultural responsibilities for the child to enable this.

Well-being concerns, even if reported to CARL, could trigger an intake, but there should be a transparent statutory mechanism for an early intervention response to these concerns, to be delivered through a referral to CFARN, for example, as part of the (new) section 7A AFCP process, to work out an early intervention plan with service providers. The early intervention response should be notified to child protection as well as any failure to co-operate by the family.

I have given consideration to using Part 3A of *the Children's Youth and Families Act (Victoria) 2005* as a model, which provides a mechanism for an early intervention response by referral to a service rather than an intake where wellbeing concerns are raised. This has also involved reworking section 32 which

deals with responding to risk to consider a response that de-escalates the response to an early intervention response based on wellbeing concerns.

I have adopted this approach in the amendments I have suggested to section 7 to include “wellbeing” and sections 30-32 to provide a pathway for wellbeing concerns to be dealt with other than by an intake or removal response at pages to 31-34 of my Submission and to include section 20 CFARNs at page 28 of my Submission.

A service response of this nature for Aboriginal children and their families should also be in contemplation even where there are safety concerns notified to DCP. The new section 9A I have suggested provides legislative direction for this to occur through AFCP.

The Act should provide that a decision about making an application to the court (except in a genuine emergency) should not be made until the AFCP process has been applied and where the opportunity to make a safety plan that provides for early intervention to address the concerns has been developed in line with this process. This should also stop matters sliding to an emergency response before AFCP process has been undertaken. See new section 9A (3).

Without the statutory application of an AFCP process (that I have advocated for at pages 11 -19) early before action is taken to remove a child, there is no mechanism for timely prevention in compliance with the five elements of the ATSICPP, nor the participation and partnership of family and community in decision making. Without the assistance of ACCO services hardwired into this process, there is no guarantee of an early intervention service response that is culturally safe and resourced according to need.

South Australia lags in the delivery of early intervention and provision of culturally safe services to Aboriginal children in particular, due in large part to the lack of statutory requirements for early intervention. It has resulted in ad hoc policy development and lack of investment and appropriate funding.

There are culturally appropriate, evidence-based models that are being applied by ACCOs to deliver early intervention services, but there are not enough of them, and they are not hardwired into the system to ensure they are offered and accessed at points where they could be taken up to prevent removal or enable reunification.

The Nyland Royal Commission considered the too little too late approach to early intervention and made several observations and recommendations (Page 152 to 175).

It was recommended that the now repealed *Children’s Protection Act 1993* be amended to permit mandated notifiers to discharge their obligations by reporting to the Agency’s Call Centre (Child Abuse Report Line); or to designated child wellbeing practitioners, or by referral to a child and family assessment and referral network (CFARN) where the notifier believed a child’s

circumstances would be adequately attended to by a prevention or early intervention program.

Whilst the mechanism to enable early intervention referral should be embedded in the Act, the detail of early intervention service provision should be included in an early intervention plan for Aboriginal children and young people prepared by the Minister in partnership with Aboriginal children, their families, and communities in line with the Aboriginal Action Plan in the National Framework for Protecting Australia's Children 2021-2031 and the National Agreement on Closing the Gap.

Section 10 – Principles of Intervention

RECOMMEND

-Repeal section 10 but acknowledge that section 10(b) is addressed in the new subsection 7A

Discussion: Principles of Intervention

The principles of intervention currently include timely achievement of permanency objectives (section 10(1)(a) Safety Act). Without the requirement to consider the ATSICPP as a paramount consideration, this requirement has resulted in the application of permanency planning with undue haste and without fulsome consideration of the ATSICPP.

It has resulted in early disconnection of an Aboriginal child from their family, community, and culture, particularly where Western European/Anglo-Saxon attachment theory is applied to very young children who have been placed in non-Aboriginal care pending assessments and reunification efforts.

As SNAICC have pointedly observed: "Permanency measures tend to reflect an underlying assumption that a child in out-of-home care experiences a void of permanent connection that needs to be filled by the application of permanent care orders. This understanding is flawed in its failure to recognise that children begin their out-of-home care journey with a permanent identity that is grounded in cultural, family and community connections. This is not changed by out-of-home care orders. For an Aboriginal and/or Torres Strait Islander child, their stability is grounded in the permanency of their identity in connection with family, kin, culture, and country" (Family Matters Report 2021).

The argument for paramountcy of the ATSICPP means that section 10's intervention principles should not apply to Aboriginal children. If they are to be retained, they should be included as contextualising considerations in the new section 7 and include specific objectives in section 10(1)(a) that decisions made under the Act do Aboriginal children no cultural harm and should consider Aboriginal Attachment Theory when permanency decisions are being made.

It would be preferable to include these principles for Aboriginal children within a purpose-built part that deals with the extended application of the five

principles of the ATSICPP, and that clear bespoke principles are set out to avoid the current conflation of mainstream permanency planning in considerations about the placement of Aboriginal children.

Having purpose-built principles that apply to Aboriginal children through the AFLDM process to will also ensure that there is a mandatory requirement for Family Group Conferencing, not discretionary (see section 10 (1)(d) Safety Act).

The current Section 10 Principles of Intervention should not apply to Aboriginal children. It is arguable that if the five elements of the ATSICPP apply to Aboriginal children as a paramount principle, that these principles apply when intervention is being considered.

However if section 10 is to apply, it should be amended to provide that for Aboriginal children, removal is the last option, that consideration should be given to other interventions before removal, that considerations of permanency and stability for Aboriginal children must not cause cultural harm, and should take into account Aboriginal attachment theory, and that the ATSICPP and the AFLDM model should be applied to any intervention decision at the first point the child has contact with the system.

Section 12 – Aboriginal and Torres Strait Islander Child Placement Principle

RECOMMEND

-Repeal section 12 and see page 8-9 for recommendations on insertion of all five elements of the Aboriginal and Torres Strait Islander Child Placement Principles – Participation, Partnership, Connection, Placement and Prevention – to the standard of active efforts, at all points of significant decision-making and early intervention, as a paramount consideration in new section 7 for Aboriginal children and young people. Include in this section, a non-exhaustive list of actions that demonstrate active efforts in both policy and practice, for all five elements of the ATSICPP, partnering with the Aboriginal community.

Section 16 - Interpretation

RECOMMEND

-Amend section 16 definition of parent to include:

For Aboriginal children, parent includes cultural parents such as grandparents, aunties and uncles, or as otherwise defined in that Aboriginal child's kinship structure.

-Amend Section 16 to define concepts of "cultural safety" and "cultural competency". The Act must also specify the role of "Aboriginal community-controlled organizations (ACCOs) and Aboriginal led services as defined in performing statutory functions.

Discussion: Definitions

The definition of Aboriginal child needs to change (section 16 Child Safety Act) so that self -identification as Aboriginal is a requirement but is also a factor that can be overridden where the child may not identify because of a lack of knowledge of their Aboriginality or other reasons and provided they are identified by the child's family and community in those circumstances.

Once identified it should be requirement of the Act that a child's cultural status should be included on a register and prominently featured on their profile; and all systems should require mandatory completion of Aboriginal status fields. It should also identify the child's RATSIO and cultural mentor, and the number of Aboriginal children on the register, including new entries and exits, should be reported annually.

Section 17 – Meaning of harm

RECOMMEND

-Amend section 17 to read:

> For the purposes of this Act, a reference to harm will be taken to be a reference to actions that compromise the child or young person's best interests, physical safety, wellbeing, psychological safety and cultural safety (whether caused by an act or omission) and, without limiting the generality of this subsection, includes such harm caused by sexual, physical, mental or emotional abuse or neglect.

Section 18 - Meaning of *at risk*

RECOMMEND

-Amend section 18 to read:

> For the purposes of this Act, a child or young person safety and wellbeing will be taken to be *at risk* if:
>
> (a) the child or young person has suffered harm (being harm of a kind against which a child or young person is ordinarily protected); or
>
> (b) there is a likelihood that the child or young person will suffer harm (being harm of a kind against which a child or young person is ordinarily protected); or

Section 20 – Child and Family Assessment and Referral Networks

RECOMMEND

-Amend section 20 to insert subsection 20(3)(a) to provide that CFARN must perform functions in the coordination of culturally safe early intervention services for Aboriginal children pursuant to the section 9A(4) Early Intervention Plan for Aboriginal Children.

(b CFARN for Aboriginal children and their families, must be an ACCO or Aboriginal led service that is centred in a local-level RATSIO.

Discussion: Early intervention CFARNs

Despite several strong recommendations made by the Nyland Royal Commission about how early intervention could be applied through CFARNS and a promising pilot of CFARNs, they have become a lame duck in the legislation as it doesn't set

out their purpose, nor when they are to be accessed in the removal process, including before or after intake into the system. No regulations have been made to illuminate their powers or functions or their place in the legislative scheme of the Act.

I have discussed how CFARNs could become active in early intervention in my submission on Early Intervention.

Section 21 – Purpose of Family Group Conferences

RECOMMEND

It is my submission that section 21 does not apply to Aboriginal children and young people as the new subsection 7A will be the preferred Family Group Conferencing process for Aboriginal Family Led Decision Making through the Aboriginal Family Care Program.

Section 28 – Chief Executive to prepare case plan in respect of certain children and young people

RECOMMEND

-Amend section 28 to provide:

That a Cultural Maintenance Plan (CMP) for an Aboriginal child should be developed in an AFLDM process, and should be consistent with the paramount principles pursuant to proposed new section 7A, and protect the child from cultural harm by providing a plan for:

- reunification, both immediate or at any time, in the event that certain threshold requirements are met and the child agrees.
- if a child is placed in non-Aboriginal or non-kinship care, specific provisions for regular contact with family, community and culture, compliant with current section 12(4)
- Ensure that a cultural mentor from the child's community is appointed to facilitate cultural safety for the child, assist the child to make their wishes known, mentor and advocate for the child's placement, and contact arrangements to be regularly reviewed to ensure optimum compliance with the ATSICPP.
- Identify the child's Country and the individuals who have cultural and familial responsibility for the child and develop cultural attachment goals to allow the provision of continuing regular contact with them, or placement with them as an objective in the event of reunification with parent or placement failure with other kin.
- Placement should be proximate to the child's family and community.
- Regular visits to ensure significant family and cultural events, including funerals are attend by the child
- Provision for learning language and cultural learnings provided by family and community
- Appointment of translator where English is a second language.

Discussion: Case Planning, Cultural Plans & Active Efforts

Case management plans (CMPs) must be prepared for all children subject to guardianship or custody orders. Currently the CMP must set out decisions made at FGC, cultural maintenance, reunification, contact arrangements and how disputes are to be resolved.

Where Aboriginal children are concerned, there needs to be a reassessment of attachment goals, and these can be best achieved by cultural safety planning and the integration of closer family and community care support through the proper application of the ATSICPP by AFLDM. For example, this would allow reunification to proceed after the twelve-month period has expired, at any time when the child is under guardianship orders.
The object of a cultural maintenance plan should be to implement the five elements of the ATSICPP to the standard of active efforts. The measure of success should be that an Aboriginal child is not visiting culture but living culture.

The Regulations provide that a person from the child's community or an ACCO is consulted in cultural planning (Regulation 8(3) Children and Young people (Safety) Regulations and section 156 Child Safety Act). Despite the statutory requirement, worryingly there is no data provided on the extent to which this happens. Anecdotally this does not happen. Most cultural management plans are not prepared through consultation.

Despite the existence of the Aboriginal Cultural Identity Support Tool (ACIST) to be used in cultural planning and making provisions for the appointment of a cultural mentor, anecdotally I have heard that this does not happen; neither is the required data being collected, as apparent in the DCP Annual Reports.

These blatant failures to comply with statutory provisions designed to benefit Aboriginal children in line with the five elements of the ATSICPP, and to be transparent do not auger well for the future application of the five elements of the ATSICPP. The case is therefore made for cultural planning through the AFLDM process and expanded CMP cultural plan specific to Aboriginal children that deals with the five elements of the ATSICPP.

Currently DCP use the ACIST to do cultural planning but fails to include ATSICPP objectives such as reunification, family contact and optimum kinship placement as goals for cultural planning.

If the submissions that I have made with respect to the ATSICPP are adopted, the standard of active efforts requires that all CMPs must have reunification, contact and placement aims to prevent cultural harm. They must be made in partnership with and the participation of Aboriginal children, their families and communities through the AFLDM process. This is what active efforts looks like with respect to CMPs.

Section 29 – Chief Executive etc to give to effect to case plan

RECOMMEND

-Section 29 should be amended to remove "to the extent that it is consistent with section 7", due to the failure to comply with the Act and regulations.

-Repeal section 29(2) to enable the child or any other person to seek a review of a decision not to implement a case plan, including by failure to do so through the Chapter 12 process to SACAT if necessary.

Chapter 5 - Children and Young People at Risk

RECOMMEND

-Amend the title of Chapter 5 to "Children and Young People at risk or wellbeing concerns".

Section 30 – Reporting of suspicion that child or young person may be at risk

RECOMMEND

-Amend title of Part 1 so that it reads as:
Reporting of Suspicion that child or young person may be at risk or concerns for their wellbeing

-Amend section 30 (1) so that after the words "be kept safe from harm" it reads "and their wellbeing and best interests are not compromised".

Discussion: Wellbeing and Safety Concerns

I submit that the recommendations about early intervention made by the Nyland Royal Commission are revisited with a view to enabling them in the legislation.

To do this, I have submitted (at page 11-15) that the Child Safety Act could be amended to include a mechanism that enables a response to "wellbeing" concerns and requires a service provision response through the AFCP process referred to in new section 9A (at page 23-25 of my Submission) that deals with early intervention and prevention.

Wellbeing must be included as a paramount consideration in section 7, as this provides a statutory lever that enables concerns about wellbeing to be dealt with under the Act.

If "wellbeing" is included in section 30 and section 31, this then provides the mandatory notifier with the ability to contextualise their concerns.

Instead of only being given one reporting option ("risk") that may drive a removal response, the legislation should provide the opportunity for an outreach early intervention response to be offered to a family that may be struggling with

poverty, homelessness, mental health and other issues, through the new early intervention provisions under the Act.

Relying solely on the language of 'risk' may also lead to late reports of children whose wellbeing is compromised and who then do not benefit from early interventions that prevent the situation from escalating.

Section 31 – Reporting of suspicion that child or young person may be at risk

RECOMMEND

-Amend the title of Section 31 to "Reporting of suspicion that child or young person may be at risk or wellbeing concerns.

-Amend Section 31 (1)(a) to include the words "or their wellbeing or best interest is compromised".

Discussion: Notifications

Section 31 could be amended to enable mandatory reporting about well-being concerns to a designated child wellbeing practitioner or CFARN, as well as CARL, who must put a service response in place. Wellbeing practitioners and CFARNs should be required to notify their response to DCP and make a report to DCP if wellbeing concerns escalate to risk. The well-being plan should also be provided to child protection.

Part 2 – Responding to reports etc that child or young person may be at risk

RECOMMEND

-Amend the title of Part 2 to read as:

Responding to reports etc that child and young person may be at risk or wellbeing concerns.

Section 32 – Chief Executive may assess each report indicating child or young person may be at risk

RECOMMEND

-Amend Section 32(3)(b) to read as:

If the Chief Executive is satisfied that an investigation under Section 34 is unnecessary because it raises wellbeing and best interest concerns, then the Chief Executive must refer the matter to the CFARN model for a response, and pursuant to the new section 20 (3) (a) the CFARN must immediately instigate Aboriginal Family Led Decision-Making under the proposed new section 7A.

Section 33 – Chief Executive may refer matter

RECOMMEND

-Amend Section 33(1) to read as:

If, following an assessment to a matter under section 32, the Chief Executive determines that it is more appropriate that a government or community-based child and family service or other service agency to provide advice, services and support to the child and family, the Chief Executive must refer the matter to that service'.

-Amend section 33(2)(a) a matter may be referred to more than one service.

-Amend Section 33(4) so that there is regard to the need to ensure that children and young people are protected from harm by having their safety, wellbeing and best interests considered.

-Insert new section 33(5) so it reads as:

Where the Chief Executive receives a report that relates to section 31(e) and the report relates to an Aboriginal child, the Chief Executive must arrange for the Aboriginal Family Led Decision-Making process inclusive of the CFARN model, for the purpose of facilitating the participation of the pregnant woman and unborn child's family to offer support and services.

Section 34 – Chief Executive may investigate circumstances of a child or young person

RECOMMEND

-Amend section 34(1)(a) to read:

The Chief Executive expects on reasonable grounds that the child or young person's safety is at risk, or the wellbeing or best interests of the child or young person is compromised.

-Insert a new Section 34(2) so it reads:

The Chief Executive must provide written notice to the parent(s) of their cause to carry out an investigation into the circumstances of a child or young person.

-Insert new Section 34(3) so it reads:

An investigation must start immediately and conclude within 30 days.

-Insert a new Section 34(4) so it reads:

For Aboriginal children and young people, AFLDM pursuant to new section 7A FGC through the local level RATSIO must be undertaken during the investigation.

-Insert new subsection 34(5) so it reads:

An investigation must be undertaken pursuant to this section before an application pursuant to section 41 is made, except in the event of an emergency.

Section 35 – Chief Executive may direct a child or young person be examined and assessed.

RECOMMEND

-Insert a new subsection 35(1)(a) who is subject to a voluntary custody agreement has been reached through Aboriginal Family Led Decision Making process exclusively for this purpose; or

-Amend section 35(1)(b) who having been removed under section 41, but only if a voluntary custody agreement pursuant to 35(1)(a) has not been entered into.

-Amend Section 35(3) to add if the child or young person is Aboriginal or Torres Strait Islander, they must be accompanied by a person known to the child from their family or community appointed by the local level RATSIO.

Section 36 – Chief Executive may direct person to undergo certain assessments

RECOMMEND

-Amend Section 36 (2) to read as:

If the Chief Executive determines by assessment that a parent's disorder impacts on the child or young person or the effectiveness of current treatments for the parent's disorder is inadequate, or a parent's unwillingness to engage in services or seek help for the disorder, then the Chief Executive may, by notice in writing, direct the parent, guardian, or other person to undergo an approved parenting capacity assessment.

-Insert new Section 36 (2)(a) a parenting capacity assessment pursuant to section 36 (2) must be done by a culturally competent assessor using a culturally responsive tool.

-Insert new Section 37 (8) A copy of the original test results must be provided to the person who has undertaken the drug and alcohol test.

-I suggest contracting reputable professionals such as Dr Tracy Westerman to develop a suite of culturally responsive assessment tools for practitioners and clinicians.

Section 41 – Removal of child or young person

RECOMMEND

-Repeal and replace section 41(a) with the following:

a child or young person has suffered, or there is an unacceptable risk of significant harm to the child or young person.

-Repeal and replace section 41(c) with the following:

a child can only be removed pursuant to this section as a last resort.

-Insert new section 41(d) to provide:

Planned child removals pursuant to this section must be undertaken only after Aboriginal Family Led Decision Making is conducted pursuant to section 7A.

-Insert new subsection 41(2) to provide:

If there is an emergency removal of an Aboriginal child, the RATSIO for the child must be contacted to determine a recommended person and the CE must place the child with the recommend person pursuant section 77(1) and AFLDM pursuant to section 7A must take place as soon as practicable after removal and within 30 days.

-Insert a new section 41(3) to provide: without derogating from [proposed new] Section 41(2), the child protection officer cannot use section 41 when section 34 investigation is underway.

Discussion: Removals under section 41

Anecdotal evidence suggests that Practitioners utilise section 34 investigation period to plan and undertake section 41 removal, rather than offer families referral to support services.

To stem the gross over representation of Aboriginal children in removal responses the threshold for removal in section 41 in the Act should be amended and the removal threshold restricted to “unacceptable risk of harm” and as a “last resort”. For Aboriginal children it should be subject to the proviso that consideration is given to the child's wellbeing and best interests by the application of active efforts to the five elements of the ATSICPP as a paramount consideration as recommended by me in this Submission. Section 41 must be amended to provide for the application of the AFLDM process and consideration of mitigation of the cultural harm that results from removal to ascertain if there is a reasonably practicable alternative to removing the child pursuant to section 41(1) (c) of the Act.

The Act should provide that in a genuine emergency/unplanned removal, the RATSIO should be immediately informed of the urgent need to remove the child and the RATSIO or a cultural support advocate for the child appointed by the RATSIO attend during the process. The RATSIO is, as a result, given the opportunity to support the child and begin the family finding exercise to conduct an FGC within the AFLDM /AFCP Model as soon as possible. The Act should be amended to ensure that where a removal is done without AFLDM an emergency section 77 Safety Act a temporary placement should be made to a person nominated by the RATSIO from the child’s family or community. Regulation 18A should be inserted in section 77 and amended to make it clear that having regard to Chapter 2 includes the prevention of cultural harm without the formal application of the AFLDM process in the ATSICPP but having regard to the five elements of the ATSICPP. Often child removal traumatises a child. Once removed, child remains locked in the removal pathway and reunification undermined.

There is currently no timeframe for investigations and practitioners often use the investigation period to plan for a Section 41 removal in the way of an emergency, which bypasses a FLDM and the ATSICIPP.

Section 49 – When application can be made for court orders

RECOMMEND

-Insert new subsection 49(d) to include:
A parent or family member

Section 53 – Orders that may be made by the Court

RECOMMEND

-Amend section 53 to include a new subsection (53)(m) to provide:
The Court may make an order for contact with a person

-Insert new subsection 53(5) to provide that:
The Court must be satisfied that the five elements of the ATSCIPP have been complied with before making an order for an Aboriginal or Torres Strait Islander child or young person. The Court must, before making an order, consider the recommendations made by a RATSIO and ensure that AFLDM has occurred.

-Insert new subsection 53(6) to provide:
That the Court may only make long-term guardianship orders as a last resort.

-Amend the Act to give the Youth Court the power to order assessments prepared by experts who have cultural competence in Aboriginal attachment theory, and to otherwise seek expert advice on the cultural norms of child rearing within the child's family and community.

Amend section 53 to time limit orders for guardianship or custody for the purpose of conducting assessments pursuant to section 53 (b) and (c) to be time limited to 42 days.

Amend Section 53 to provide the court may order matters with respect to Aboriginal children to be dealt with in an Aboriginal (Nunga) Court in accordance with the regulations.

Discussion: Court orders and powers

The Role of the Court (Active Efforts)

Strong judicial oversight of the application of the five elements of the ATSICPP as a paramount consideration is essential to ensure that shortcomings in the current iteration of the ATSICPP are mitigated, and early intervention measures are applied, and the alarming rate of removals of Aboriginal children does not continue.

I have grave concerns about the effectiveness of the powers that the Youth Court have to ensure that the ATSICPP has been considered and applied at the point where orders are made for removal pending examination and assessment; where reunification is in prospect and where a guardianship order to 18 is sought.

Whilst the parents and the child may contest the making of any order, this may not happen for many reasons, and what is required of the court is to centre the interests of the child by ensuring that the connection to family and community is maintained through the process of applying the ATSICPP to the standard of active efforts through AFLDM both before, during and after a removal application is made.

I submit that consideration should be given to the inclusion of section 59A Child Protection Act Queensland (Annexed) which provides for the ATSICPP to be applied by the court. This means that placement, contact and reunification decisions should be rights-based after AFLDM takes place, whilst the court is seised of the matter.

Section 53 of the Act should be amended to provide that the Youth Court should not make a long term guardship order except as a last resort and should not, as a general rule, consider making such an order in relation to a child unless it is satisfied that no other order would, in all the circumstances of the case, be appropriate and that active efforts have been made to apply the ATSICPP. It should always consider the possibility of reunification and ensure further opportunity for AFLDM to take place before a final order is made.

The court should consider implementing the recommendations of the AFLDM process in whole or part, despite the failure of the CE to concur with AFLDM recommendations.

There should be a requirement for statutory agencies to clearly document and articulate to the courts the active efforts taken to implement the five elements of the ATSICPP, prior to seeking an order to remove a child and place them into out-of-home care.

Where final orders are made, and a child placed with non-Aboriginal carers, DCP must demonstrate the support to maintain family, community, cultural and country connections, through a cultural maintenance plan developed through the AFLDM process that I have proposed.

The Court itself has the power to order FGCs pursuant to section 67, these should apply to the section 7A AFCP process set out in my submission and be mandatory before the court makes a guardianship order no matter what duration.

It is also important to reintroduce timeframes for investigation and examination orders to 42 days, as I am seriously concerned that DCP is taking a longer lead in time without assessments and investigations being done, and without provision of a case plan. Multiple adjournments occur for up to 6 months without reunification being progressed or a case plan being developed. This seriously prejudices the reunification effort and may result in an inappropriate focus on the developing attachment that may be being made within a non-Aboriginal placement.

In this situation, if the case plan provides for a reunification plan, the usual 12-month order is not sought, and it has become common for a 6-month order to be

sought to make the total time that a child is in a temporary placement shorter; this results in the child and his or her parents remaining in limbo for lengthy periods of time. The important opportunity to ensure the early healing of the child's relationship with family and community, is lost; the child can develop attachments with its carers without full consideration of the ATSICPP.

In addition, pursuant to section 37 CPA (repealed), a guardianship order could only be made after the investigation and assessment process had been completed. Section 39 CP (repealed) provided for a 10-week period between lodgement and finalisation of the order or trial. These provisions should be reintroduced.

As previously referred to in this submission, the courts power to order parenting assessment reports must consider Aboriginal attachment theory and Aboriginal child rearing practices, and this should be specified in the legislation. Assessments for parenting capacity must be culturally safe with a demonstrated understanding of Aboriginal attachment theory and parenting practices. Assessments of Aboriginal children should be culturally safe and focused on Aboriginal cultural practice as well as being trauma informed, both for intergenerational trauma and trauma of removal from family, community and culture.

The court should be required to consider making custody orders pursuant to section 53(i) in line with AFCP proposed new section 7A, instead of guardianship orders when an investigation or examination pursuant to section 53(b) or 53(c) is being undertaken. These orders should be restricted to the period of adjournment and the court should ensure that AFCP has occurred before a custody order has been made.

Aboriginal and Torres Strait Islander List

To facilitate the Courts' focus on the ATSICPP and in the interests of cultural safety, I recommend that all matters involving Aboriginal and Torres Strait Islander children be dealt with in a purpose-built list. The Safety Act or the Youth Court Act or both, should be amended to mandate this approach. Its purpose is to further enhance the participation of Aboriginal children, their families and communities, and ACCO service providers in decision making in a culturally safe environment. The regulations should set out the procedures that apply after consultation with Aboriginal children, their families and communities. Consideration should be given to the participation of RATSIOs, AFCPs and others who have participated in AFLDM.
Where there are slippages on objectives being met, the Court should be required to refer the matter for a further AFLDM process to develop an amended plan.

Reunification - Courts Powers

Recommendation:

Insert a new subsection 53(1)(e) to provide that:
The Court may make a reunification order for such period as it deems appropriate, in accordance with a reunification plan developed through AFCP

pursuant to proposed new section 7A and make such ancillary orders for contact, placement and otherwise for compliance with the reunification plan.

Section 53 (e)should also provide that the Court must refer any matter where long term guardianship orders are sought to AFCP for the purposes of considering reunification where no consideration has been given to reunification by AFCP at any earlier stage.

Section 53(e) should provide that the court may oversight the process of reunification and may make ancillary orders to ensure reunification goals are met.

Discussion: Reunification (Active Efforts)

As SNAICC have observed there is no transparent mechanism in the current Act that deals with reunification and enables court oversight of this process. I believe that because of this, and in the absence of AFLDM in decision making about reunification, the reunification rates in SA are the lowest in the country (7%).

Currently the CE fails to properly consider reunification pursuant to section 50(4) of the Act which provides that the CE must assess the likelihood of reunification occurring and if reunification is likely, the period within which it is likely to occur.

When it does occur, the observations made about parental interactions during the short and infrequent contact visits that occur during the process, by non-Aboriginal DCP workers, lack insight into the way in which Aboriginal parenting is carried out and this negatively impacts the process. Children are often placed in non-Aboriginal placements without regard for the ATSICPP. The incidence of partnership and participation of Aboriginal children, their families and communities in reunification planning is low. FGCs are rarely used and the application of a true AFLDM through AFCP is absent.

Currently decisions about contact and placement are made by the CE pursuant to section 84 and 93 and section 28(2)(c) case planning, without proper consideration of the ATSICPP. Contact arrangements to facilitate the transition back to the parent are often for short duration and occur in environments that do not facilitate cultural safety; case planning and case planning service provision may not be culturally safe and delivered by ACCOs and placements pending reunification are not compliant with ATSICPP.

The Youth Court itself has been concerned to provide some oversight of the process and has created a “Reunification Court” that performs a “case management’ function, including a dedicated list for Aboriginal parents who are being assessed for reunification with their children. However, without the ability to exercise any judicial powers to make orders, the reunification court is reliant upon the co-operation of all parties. Apart from the legal representative for the child, no other legal representation is permitted, nor are family members of the child.

I have argued that there is a strong need for AFCP ordered by the court when a guardianship application is before the court. This may result in a reunification objective, but the court needs more powers to implement these decisions and to act to explore the possibility of

reunification of its own motion and oversight the process. For this reason, the court should have the power to make reunification orders.

It is my submission that the court should have specific section 53 powers to make reunification orders, but it should only do so after (new) section 7A AFCP process is undertaken pursuant to new section 67. The court should also have the power to make contact and placement orders when it has oversight of the reunification process and to case manage the process including by the making of ancillary orders.

In my submissions to section 7 and section 7A I have proposed that the application of ATSICPP includes a principle that reunification of an Aboriginal child with his or her family and community must always be considered as a primary objective for achieving attachment, stability and permanency for the child, unless it is determined by consideration of the ATSICPP in the AFCP process that reunification is not achievable. The Court as well as the CE should be guided by this provision.

In addition, the Act must be amended to specify minimum requirements for culturally safe reunification supports delivered by ACCOs where possible at early stages and at any point it is viable whilst the child is subject to permanent orders.

A reunification plan must be made through the new section 7 and 7A AFCP process as part of the overall cultural maintenance plan (see section on Case Plans) with contact and placement arrangements tuned to fully implement Aboriginal attachment and connection, in accordance with the ATSICPP and the views of the child sought and implemented where possible.

Section 55 – Order for variation, revocation, or discharge of orders Reunification

RECOMMEND

-Amend section 55 to provide that the Court may on application by the child parent or family member, discharge an order made pursuant to section 53, or vary it to make a reunification order, where the parent or family member or child can demonstrate a change in circumstances.

Discussion- Order for variation, revocation, or discharge of orders Reunification.

Permanency planning and euro-centric attachment theory should not trump the rights of the child to a reunion with their family, community and culture and for proper consideration being given to their wishes. This is especially where a child is placed with a non-Aboriginal carer, in residential care or subject to multiple changes in placement and where contact arrangements with family and community are non-existent or weak.

A reunion objective, not just contact with family and community, must be articulated in every section 28 case plan/cultural plan after being considered and planned for in the AFCP process. This will enable proper consideration to actively be given to the cultural harm of the separation from family and community through annual reviews.

An AFCP process for this purpose should be enabled at an annual review if circumstances change and an application for reunification enabled through this process.

Section 59 – Onus on objector to prove order should not be made

RECOMMEND

-Amend the title of Section 59 so that it reads:
Onus on applicant to prove order should be made

-Amend Section 59(2) as the burden of proof should lie with the applicant, to prove on the balance of probabilities that the orders they seek should be made.

Discussion: Onus

Currently Section 59 provides the burden of proof falls on the respondent to prove on the balance of probabilities why the order should not be made. This was not recommended by Nyland to apply to all orders; it was recommended to apply to other party guardianship orders only. It should be repealed in its entirety.

I strongly object to the reversal of the burden of proof, if a person other than the child seeks to challenge the making of an order for guardianship. The respondents are strongly disadvantaged in this process as they must produce independent evidence to establish that they are no-longer a risk to the child and can protect the child from harm, even where the prima facie evidence of risk may be flimsy at most. They may need to provide independent evidence of their parenting capacity and psychological reports to establish attachment.

In addition, there are no sound policy reasons why the burden of proof should reverse.

Other Party Guardianship Orders

The court should be prohibited from making other party guardianship orders for Aboriginal children where they are to be made, other than in favour of the child's Aboriginal family or community as they are in clear breach of the ATSICPP. The ATSICPP requires the connection to family, community, and culture to be maintained. Once these orders are made, the Court and the CE lose control of enforcement of this aspect of the ATSICPP and so the current requirement to consider the ATSICPP is abrogated. Should the ATSICPP become a paramount consideration then the argument is strengthened.

Section 62 – Views of child or young person to be heard

RECOMMEND

-Insert a new subsection 62(4):

The Court must have regard to the views expressed on behalf of the child by their cultural mentor or communication partner.

Section 63 – Legal practitioners to comply with this section when representing a child or young person

RECOMMEND

-Insert new subsection 63(3) to provide that:

A legal practitioner, when acting for an Aboriginal or Torres Strait Islander child or young person, must have regard to the child's cultural safety, including by ensuring that a cultural mentor is present at all times, that the legal practitioner has cultural proficiency accreditation in accordance with the Regulations, and that the legal practitioner endeavours to ascertain the views of family and community when making decisions about the best interests of the child or young person.

Section 67 – Court may refer a matter to a family group conference

RECOMMEND

-Insert new subsection 67(2):

Where the Court is dealing with a matter involving an Aboriginal child or young person, the Court must refer the matter for AFLDM in accordance with new proposed section 7A, before making an order pursuant to section 53. If agreement is reached in AFLDM, then the Court can proceed by way of consent orders.

Section 77 – Temporary placement of child or young person where approved carer not available

RECOMMEND

-Insert current Regulation 18A as a new section 77(2)(d) within the Act as follows:

(1) Pursuant to section 77(4) of the Act, the Chief Executive may place a child or young person with a person under section 77(1) of the Act despite it being reasonably practicable to place the child or young person in the care of a particular approved carer if the Chief Executive is satisfied that to place the child or young person under that subsection is (having regard to the operation of Chapter 2 of the Act as well as the circumstances relating to the child or young person) preferable to placing the child or young person with the approved carer.

(2) Pursuant to section 77(4) of the Act, section 77(2)(b) of the Act will be taken not to apply to the placement of a child referred to in subsection 77(2)(d).

-Insert new subsection 77(3) to provide:

Where a recommendation is made by a RATSIO, that a child or young person be placed with a carer pursuant to section 77(1), the Chief Executive must place the child with the recommended carer.

Section 93 – Contact arrangements to be determined by Chief Executive

RECOMMEND

-Repeal section 93 and the amendments proposed relating to section 53 be implemented for contact arrangements to be determined and orders made by the Court.

If section 93 remains:

-Repeal and insert new section 93(2) as follows:

To avoid doubt, the CE may only determine there is to be no contact between a specified child or young person and a specified person, in the event the child's safety will be compromised, and for an Aboriginal or Torres Strait Islander child, after applying ATSICPP, in accordance with AFCP pursuant to the new proposed section 7 and 7A.

-Repeal section 93(3)(b) as it contravenes the United Nations Conventions on the Rights of the Child – the right to family, and it undermines the five elements of the Aboriginal and Torres Strait Islander Child Placement Principle.

-Insert new subsection 93(3)(b) as follows:

The Chief Executive, in making a decision about contact in all the circumstances, must have regard to the ATSICPP and best interests, wellbeing and safety of the child, their wishes, and for Aboriginal children and young people, the Chief Executive must apply the ATSCIPP in new section 7A including by AFCP for this purpose and must implement the agreed decision of the AFCP in accordance with new section 7 and section 7A.

If no agreement is reached at AFCP then the CE must consult the RATSIO in accordance section 7 and section 7A.

The RATSIO, the child, the child's cultural mentor and legal representative and the child's family must be informed of the decision of CE with reasons in writing immediately.

-Repeal section 93(4).

If section 93 remans by section 94 is repealed then section 93 should be amended to provide that provide that if a person aggrieved by a decision of CARP may seek a review of that decision by SACAT. (Noting this may be better achieved by amending section 157 and

section 158 and making contact decisions amenable to the same process as other Chapter 7 decisions.)

Section 94 – Contact Arrangements Review Panel (CARP)

RECOMMEND

-Repeal section 94.

Section 95—Review by Contact Arrangements Review Panel (CARP)

RECOMMEND

-Repeal section 95.

If section 94 and 95 remain, and CARP is not abolished.

Amend section 95 to provide that a person aggrieved by a decision of CARP may seek a review of that decision by SACAT. (Noting this may be better achieved by amending section 158).

Amend section 95 to provide that an Aboriginal child's views must be sought about any contact decision review and AFCP in accordance with new section 7 and 7A conducted applying the ATSICPP before a contact review decision is made.

Amend section 95 to provide that an Aboriginal child is entitled to legal representation and the presence of a cultural mentor before the CARP.

Discussion: Contact (Active Efforts)

I submit that contact decisions should be rights-based decisions made by the Youth Court. Previously the Youth Court could make consequential or ancillary orders regarding access, or during a period of adjournment (section 38(f) *Children's Protection Act 1993)*; it is now an administrative decision made by the CE, not a rights-based decision.

For Aboriginal children, this has removed a right guaranteed to them in the UN Declaration on the Rights of the Child (CRoC, Article 9(3) Article 30). Without this guarantee of connection, the child's rights are abrogated.

The right to grow up in culture is a fundamental human right for good reason. It results in self-esteem, self-worth and pride. It cements a sense of belonging in a child's experience where racism can scar and wound and culture and family provides a shield and sense of pride.

The right to family, culture and community is why the ATSICPP is in the legislation and contains the last resort for maintaining connection after a child is removed, and where placement in accordance with the hierarchy currently contained in section 12 is not achieved. Section 12(3)(b) provides that if 'if an Aboriginal or Torres Strait Islander child or young person is unable to be placed with a person referred to in paragraph (a), or it is not in the best interests of

the child or young person to do so, the child or young person should be given the opportunity for continuing contact with their family, community or communities and culture (determined in accordance with Aboriginal or Torres Strait Islander traditional practice or custom)".

Contact with family and community is vitally important to prevent cultural harm to an Aboriginal child removed from their family. Lengthy and frequent contact is especially important where babies are removed and in their early years, where attachment relationships are formed as well as for reunification. It should take into account the need to establish and maintain all Aboriginal attachment relationships and not be solely focused on parental contact.

Currently Part 4 of the Act is being used to require family and community, not just the parents, to seek contact orders. Unfortunately, the CE is applying a de facto presumption that familial and community attachment relationships are unsafe. This may not be the intention of section 93, but it is the way it is operating in practice and further bolsters the need for rights-based court ordered contact.

It is my submission that the Nyland Report recommendations regarding contact decision making powers should revert to an administrative decision of the Chief Executive for no other reason other than the order was difficult to change in changing circumstances was not compelling. The Family Court of Australia varies contact arrangements on application; in the same way, so could the Youth Court. The Youth Court undertook this role under the Child Protection Act. It is a vital role to ensure the very minimum standard of active efforts and compliance with the ATSICPP occurs. It should be a rights-based decision and the Act should be amended to ensure that it reverts to the court.

If section 93 it is to stay in the legislation, it should be amended to make clear that the CE when making a contact decision must apply the ATSICPP in new section 7 and 7A and contact must occur with family and community as set out in cultural maintenance plan after AFCP pursuant to new section and 7A takes place.

So far as the existing review process through CARP is concerned, I have heard many heart-breaking stories of Aboriginal grandparents, parents and other family being denied a fair hearing or being subject to unreasonable decision making. In most cases there has been a failure by CARP to apply the ATSICPP currently set out section 12 (3) (b).

In making decisions about contact, the CARP should pay regard to section 12 (3) (b), but this is not explicit; attention is focused more on whether the child is to be reunified or not, but this should not be the only consideration.

The CARP is not required to give reasons for its decisions and if it makes a recommendation to the CE, this can be overridden by the CE without having to give reasons. There is no transparency about its procedures, so whether it abides with procedural fairness obligations is not clear.

Children may be heard and are entitled to representation, but there is no data on how many children have been heard or how many have made applications to CARP. Anecdotal evidence describes the experience as less than satisfactory with CARP declining to make anything other than a non-binding recommendation which the CE habitually overrides.

The CARP Panel is largely appointed from within the department and consists of people with qualifications in social work and psychology. An Aboriginal person must be a member if the matter relates to an Aboriginal child.

The only way its processes can be reviewed is by expensive judicial review. But judicial review to the Supreme Court is not a viable or equitable option for Aboriginal people facing these issues and unlike many other administrative decisions under the Act, the CARP decision is not reviewable by SACAT.

If the CE is to be retained as the decision maker for contact and CARP abolished, then I submit that the CEs decision should be reviewable by the SACAT in the same way that other section 53 CE decisions are reviewable and that is to the SACAT through section 157 and section 158 using AFCP in new section 7 and section 7A in both of these processes.

If CARP is retained, then the Aboriginal child should have right to be heard when contact decisions are reviewed by CARP. Section 95 should be amended to include a new section that provides that the views of the child should always be considered by CARP and for that purpose the child is entitled to legal representation and a cultural mentor. It should be explicit that the ATSICPP must be applies by CARP and AFCP in accordance with new section 7 and 7A should occur before decision making occurs.

Serious denials of natural justice occur in this process as decisions are made on the papers, the child is not required to attend and may feel intimidated if unaccompanied, so may choose not to participate. There is huge power imbalance that can only be rectified by the inclusion of a community companion or advocate and the opportunity for the child's community to be heard about the application of the principle.

In any event there should be a right of review from CARP to SACAT with AFCP in accordance with new section 7 and 7A inserted before any decision is made by either body.

If none of these submissions are taken up, I recommend that:

(1) section 93 be amended to clarify that the child, parents, family and RATSIO's are to be notified of all contact decisions and the timeframes that apply to review of these decisions once they have been notified.

(2) Section 93 should also provide a clear mechanism for an application for contact to be made by the child, his or her parents or family, or an appropriate community member at any time so that the notification provisions in the Act flow from the decision made on these matters as do the review process.

Section 85 - Review of circumstances of prescribed child or young person

RECOMMEND

-Insert new subsection 85(3)(b)(i)(C) to provide:
  Whether the ATSICPP is being applied to standard of active efforts, including placement, contact and reunification.

-Amend section 85(3)(b)(ii) to provide:
  The RATSIO must be notified.

-Amend 85(4) to provide:
  For an Aboriginal or Torres Strait Islander child or young person, this means a cultural mentor, as appointed by the RATSIO.

-Insert new subsection 85(7)(c) to provide:
  The RATSIO for the Aboriginal or Torres Strait Islander child or young person.

-Regulations should be made pursuant section 85(8) to provide:
  For the mandatory AFLDM process to occur or the inclusion of an Aboriginal cultural mentor for the child person or a person from the relevant RATSIO on the panel or who may attend the panel with child and be heard.

-That section 85 be amended to require the Chief Executive to:
  Communicate the decision whether to adopt any of the recommendations made by the panel at the Annual Review by notice to the child, the child's family and the RATSIO for the child so that a review of the CEs decision can be taken pursuant to section 157 and section 158 of the Act.

-If the CE does not adopt any of the recommendations made in the annual review, the RATSIO can seek a review of the CE's decision pursuant to section 157 and sect6ion 158.

Discussion: Annual Reviews (Active Efforts)

Regular reviews of a child's placement, contact arrangements and cultural maintenance plan are a key requirement to comply with the 5 elements of the ATSICPP. One of the objects of an annual review is to enable monitoring of compliance with a case management/cultural maintenance plan to ensure that active efforts are being made to comply with plan.

The Act should be amended to ensure that there must be regular and comprehensive reviews of lower-level placements with a goal to reconnect with a prioritised placement or reunify with family, increase contact or revise of a cultural plan – these reviews should be recorded. The legislation should provide that placement reviews should be conducted in an AFLDM process or provide for the mandatory inclusion of a child's cultural mentor or an Aboriginal person from the relevant RATSIO. The DCP should be required to report on progress to implement the plan.

The Act should be amended to ensure formal notification of decisions made at the review to the child, family and RATSIO to enable a review to be sought by any of these parties about decisions made in respect of a child, through the Chapter 12 process to SACAT.

Pursuant to s 85(1)(a) a review of the circumstances of the child can be requested ahead of a 12-month review. This option is open to the child or any person who in the opinion of the Minster has a legitimate interest in the affairs of the child. The regulations should spell out that this includes the parents and family of the child or the RATSIO.

The Review Panel currently only has power to write a report for consideration the Chief Executive. There is no requirement for the Chief Executive to act on those recommendations. Certainly, there is no requirement for the Chief executive if he or she does act on those requirements, to communicate any changes made because of the recommendations to anybody.

I understand that is common practice for recommendations on review to be made by one panel member after hearing from the case worker. This presents a serious denial of natural justice as decisions are made on the papers, the child is not required to attend and may often be intimidated if unaccompanied and so choose not to participate.

There is huge power imbalance that can only be rectified by the inclusion of a community companion or advocate and the opportunity for the child's community to be heard about the application of the Principles where relevant.

Section 146 Powers of delegation (Service Delivery by ACCOs Active Efforts)

RECOMMEND

-Amend the Act to enable a delegation of Chief Executives powers to:
  Make decisions about Aboriginal children to Aboriginal Community Controlled Organisations, through the development of a plan and roadmap, with participation and partnership of the Aboriginal community and ACCO sector.

-The delegation of authority must be consented to by the ACCO and funding to fulfil the delegation must be provided to the ACCO, commensurate with the need of the region the ACCO services.

-Include within this section, a list of criteria and prerequisites of both the ACCO and DCP before delegation can be made.

-Amend the Act to provide:
  that service provision and support for Aboriginal and Torres Strait Islander families and children should be undertaken by an ACCO as preference to ensure culturally safe and responsive support is provided and that there is funding commensurate with need.

-Amend section 14 (2) Functions of the Minister to read:

> partner with and assist Aboriginal and Torres Strait Islander children, families and communities to develop and implement strategies to ensure that Aboriginal and Torres Strait Islander children and young people's connection to family community and culture, wellbeing and protection from harm in accordance with the five elements of the ATSICPP.

Discussion: Delegation to ACCOs

The delegation of decision-making power to ACCOs enables the ultimate exercise in Aboriginal self-determination, if coupled with the structure of AFLDM decision-making that I have proposed.

Delegation of decision-making power to ACCOs is an aim of the draft Aboriginal Action Plan that falls under the National Plan for the Protection of Australia's Children 2021-2031. In line with this, SA has an opportunity to provide a mechanism for delegation to be put in the Child Safety Act. The Act should provide that a plan is to be prepared in partnership with Aboriginal children, their families and communities that sets out the road map to delegation and contains guaranteed funding for capacity building for ACCOs to qualify for a delegation.

Section 18 Children's Youth and Families Act (Victoria) provides a template for delegation that should be given consideration.

But clearly what is required before that, is guaranteed investment in ACCOs as service providers at a level that will guarantee capacity is built. SA has committed to investment of 30% of the early intervention budget into ACCO service provision. This is commendable but unfortunately represents a small investment in reality, as SA expenditure on early intervention is very low (8% of overall child protection budget). ACCOs are now funded to hold FGCs, to support kinship carers, as foster care providers, and as providers of early intervention and other support services. AFFS is funded, albeit at an inadequate level to perform the statutory RATSIO role.

To add impetus to this move and ensure that ACCOs are preferred providers, the legislation should be amended to provide that wherever a service is to be provided to Aboriginal children, their families or communities in accordance with the Act, it should be provided by an ACCO that is funded commensurate with the need for that service or where relevant, by a culturally competent individual.

This would apply to RATSIOs, also to the proposed early intervention services under a new Part of the Act that deals with early intervention, provision of FGC services, reports and assessments done pursuant to Chapter 5 Part 2 of the Act and ordered by the court under Chapter 6 Part 2 of the Act, provision of a cultural support person for Aboriginal children both pursuant to a cultural maintenance plan and at the point of interface with the Act.

The process towards delegation of powers to ACCOs should be undertaken gradually. It is vital that the ACCO determines what powers they want delegated to them, and what resourcing and support would be required for the efficient

exercise of powers and successful outcomes for Aboriginal children and families.

Central to proper coordination of the expanded role of the RATSIO's should be the formation of a Peak Body with secretariat support to assist with the process of matching the child with the appropriate RATSIO and coordinating meetings; including as a matter of priority, Family Group Conferences with appropriate Aboriginal service providers in attendance and links to early intervention Aboriginal child centric hubs that are in development by the Early Intervention Research Directorate of the Department of Human Services.

I submit that Aboriginal community entities must be involved in partnership with government in the design of regulations, statutory guidelines and delivery of services that enable early intervention and at all decision-making points in the legislation involving Aboriginal children in accordance with the 5 elements of the Aboriginal and Torres Strait Islander Child Placement Principle and that guide DCP practitioners, including Principle Aboriginal Consultants.

Part 5 Section 14 should be amended to provide that the Minister should prepare a Jurisdictional Plan for the implementation of the 5 elements of the ATSICPP to the standard of active efforts in partnership with Aboriginal children, families, and communities and to otherwise implement the National Plan for the Protection of Aboriginal Children and the Closing the Gap Agreement for time to time and it should be measured against the indicators of wellbeing for Aboriginal children.

The Act should provide that all State agencies and NGO service providers should be required to implement the State ATSICPP Plan, performance against the Plan should be measured by disaggregated data annually and remedial actions recommended by Aboriginal children, their families and communities in partnership with government agencies should be implemented to the standard of active efforts.

It is necessary to facilitate the partnership actions under the legislation that an Aboriginal Child Protection Peak Body is created. I am aware that the DCP has committed to the creation of such a body and that report has been commissioned and provided by SNAICC after extensive community consultations. The Act should provide for its establishment composition and functions.

If it is not possible at this stage to fully outline the composition and functions of this body this could be left to regulations. Although one of its purposes to enable structures to enable partnership making with Aboriginal children, families their communities could be inserted in the Act ahead of this.

Section 158 and section 159 -Review of Decisions by SACAT.

Recommend:

Amend section 157 (1) (a)to delete "other than a decision under Part 4 of that Chapter).

Amend section 157 to provide that when the SACAT review a decision about an Aboriginal child that it must apply the ATSICPP and AFCP. If agreement is reached at AFCP implement

the decision by consent. In the event that agreement is not reached then the SACAT must consult with the RATSIO before making its decision.

Insert a new section 157A to provide that when the SACAT reviews a placement decision it may make a contact decision if agreed by AFCP or recommended by the RATSIO when consulted.

Amend section 159 (3) to provide that an Aboriginal child must be legally represented at the SACAT and be entitled to the support of a cultural mentor.

Discussion:

The amendments proposed are in line with my submission about contact, the Voice of the Child and the ATSICPP and AFCP in new section 7 and section 7A. The SACAT should be able to review all decisions including contact decisions made by the CE or CARP

Other Amendments

Placement Finding - Licence to Carry on the Business of a Foster Care Agency- Finding Family (Active Efforts)

RECOMMEND

-Insert a new section 99(3)(g) as follows:

> For Aboriginal children and young people, the person (agency) is an Aboriginal Community Controlled Organisation or Aboriginal led service with experience in Aboriginal out-of-home care, has demonstrated Aboriginal leadership and governance, deploys Aboriginal community engagement strategies, active Aboriginal employment and demonstrates the application of the five elements of the ATSCIPP pursuant to new proposed section 7A.

Discussion: Licence to Carry on the Business of a Foster Care Agency- Finding Family

The role and responsibility of locating Aboriginal family lays with the Aboriginal community through the support of the ACCO sector. Anecdotally, I have heard that DCP and foster care agencies are unsuccessful in finding family for the Aboriginal child or young person, who may actually come from a large extended Aboriginal family and community. Finding family is an intrinsic principle of the Aboriginal Family Care Program; this process is an act of self-determination and not the role of government. It should be a requirement that an AFCP process is conducted before anything other than a very short-term placement in an emergency is recommended by a foster care agency, to avoid quick fix placements being made that do not comply with ATSICPP. Section 99(3) (f) should be amended to provide that the procedures proposed by the agency for the placement and supervision of children are appropriate and comply with the ATSICP in section 7 and 7A of the Act.

Data Sovereignty

National Aboriginal Action Plan Action 3: this action aims to ensure that Aboriginal and Torres Strait Islander people determine, collect and use their own data, and lead their own research, to inform and determine policies and programs

based on evidence and data led by Aboriginal and Torres Strait Islander people. This should be a legislative requirement.

Conclusion:

I ask that you give the proposals made in my submission your deep consideration. I have sought to address the structural problems in the current legislation that I have perceived through my own considerable experience with and understanding of the child protection system and its impacts on my people and their children.

My proposals have been informed by my own going deep conversation with the Aboriginal people of this state, their families and communities and their children. They see this legislative reform as an opportunity to be heard and to be given the power to take the lead in decision making about their children's lives. It is a cry from the heart and an offer to work together where others have failed, to raise their children in culture with pride and full support when that support is needed.