COMMISSIONER FOR
ABORIGINAL CHILDREN
& YOUNG PEOPLE

PRELIMINARY REPORT

THE INQUIRY INTO THE APPLICATION OF THE ABORIGINAL AND TORRES STRAIT ISLANDER CHILD PLACEMENT PRINCIPLE IN THE REMOVAL AND PLACEMENT OF ABORIGINAL CHILDREN IN SOUTH AUSTRALIA

WITH RECOMMENDATIONS TO INFORM THE SOUTH AUSTRALIAN GOVERNMENT'S PLANNED AMENDMENTS TO THE CHILDREN AND YOUNG PEOPLE (SAFETY) ACT 2017

OCTOBER 2023

Acknowledgment of Country

The Inquiry would like to acknowledge the Kaurna people as the true custodians of the lands and waters of the Adelaide region on which the office of South Australia's Commissioner for Aboriginal Children and Young People is located.

The Inquiry acknowledges all custodians throughout South Australia for whom the Commissioner seeks to serve the best interests of their Aboriginal children and young people. In doing so, we pay respect to Elders and families, both past and present, and pay reverence to today's Aboriginal children and young people as they emerge as our future leaders.

The Inquiry recognises the existing and ongoing spiritual connection to the land and waters.

The Inquiry recognises the historical, contemporary, and ongoing impacts of the Stolen Generations and intergenerational trauma. Our trauma does not define our children or our future generations. It is our cultural resilience and optimism that ensures our children will flourish.

Note regarding language: The Commissioner for Aboriginal Children and Young People uses the term 'Aboriginal' to refer to people who identify as Aboriginal, Torres Strait Islander, or both Aboriginal and Torres Strait Islander. This term is preferred by Aboriginal South Australians and the Commissioner. The terms children and young people are used interchangeably to refer to all children, families and communities with whom the Commissioner engaged.

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Summary of recommendations

This Preliminary Report makes 17 recommendations:

1. The *Children and Young People (Safety) Act 2017* be amended to insert the five elements of The Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) and include that they be applied as the paramount consideration for Aboriginal children when considering their safety, wellbeing and best interests. The principle should be applied to the standard of Active Efforts in all significant decisions which must be purposeful, thorough and timely.

2. The *Children and Young People (Safety) Act 2017* be amended to include that the Youth Court (the Court) should satisfy itself that the five elements of the ATSICPP have been applied to the standard of Active Efforts before making an order under the Act. If it is not so satisfied the Court should have the power to make specific orders requiring the Chief Executive of the Department for Child Protection (CE DCP) to comply with the obligation to implement the ATSICPP to the standard of Active Efforts.

3. The *Children and Young People (Safety) Act 2017* require that at least one local level Recognised Aboriginal or Torres Strait Islander Organisation (RATSIO) for each regional community with proven strong community knowledge and connections be gazetted and fully funded to perform legislated functions.

4. The *Children and Young People (Safety) Act 2017* be amended to broaden the function of RATSIOs to provide that the RATSIO assist Aboriginal families and their children at all significant decision-making points about the child's wellbeing or safety including by:
   a. providing cultural advice to DCP, the Youth Court, other state authorities and where necessary South Australian Civil and Administrative Tribunal (SACAT) on:
      i. safety and wellbeing assessments
      ii. family support needs for prevention of removals
      iii. care options for children without orders
      iv. placements for children where a removal is necessary
   b. undertaking family scoping for:
      i. identification of family and kin to be involved in decision making
      ii. identification of family, kin and community placement options
   c. development of cultural maintenance plans
   d. attendance at reviews conducted under section 85 of the Act
   e. attendance at Family Group Conferences (FGC)
   f. contributing to the design of relevant policies and programs
   g. appointment of an Aboriginal cultural support person or child advocate to ensure the participation of children and young people in significant decisions or to advocate on their behalf
   h. reporting to the Court about the efforts that have been made by the CE DCP to comply with the ATSICPP to the standard of Active Efforts before a guardianship order is made.

5. The *Children and Young People (Safety) Act 2017* should be amended to specifically provide for the delegation of the CE DCP's powers to RATSIOs.

6. The *Children and Young People (Safety) Act 2017* be amended to mandate that if the CE DCP, the Court or a state authority suspects that an Aboriginal child or young person is at risk or there

are concerns for their wellbeing, then the CE DCP, the Court or the state authority must convene an FGC which is independently facilitated by an Aboriginal-led program prior to any significant decisions being made about the child.

7. That the legislated functions of RATSIOs be expanded within the *Children and Young People (Safety) Act 2017*, in line with recommendation 4, to include appointment of an Aboriginal cultural support person or child advocate to ensure the participation of children and young people in all significant decisions and to advocate on their behalf generally and where the Act provides they have right to be heard or to have a decision reviewed.

8. The *Children and Young People (Safety) Act 2017* be amended to provide that where there are Aboriginal child wellbeing concerns the family may self-refer to culturally safe services through the CFARN pathway, and that where mandatory reporters and the CE DCP have concerns about the wellbeing of Aboriginal children, they must refer the matter to Child and Family Assessment and Referral Networks (CFARNs) for culturally safe assessment and referral.

9. Restore 'best interests' as the paramount consideration within the *Children and Young People (Safety) Act 2017* and that for Aboriginal and Torres Strait Islander children their best interests are determined in the context of the application of the 5 pillars of the ATSICPP as a paramount consideration.

10. Reverse the onus of proof within the *Children and Young People (Safety) Act 2017* so that it lies with the applicant to prove on the balance of probabilities that the orders they seek should be made.

11. The *Children and Young People (Safety) Act 2017* be amended to require the CE DCP to give consideration to enabling the Federal Circuit and Family Court of Australia proceedings to be taken by Aboriginal kin with whom the child is to be placed, before making an application for a guardianship order.

12. That the legislated functions of RATSIOs be expanded within the *Children and Young People (Safety) Act 2017*, in line with recommendation 4, to include family scoping for identification of family and community placement options for Aboriginal children, and that mandatory family group conferences be held early, in line with recommendation 6, to enable Active Efforts to be made to place Aboriginal children in accordance with the placement hierarchy.

13. That the *Children and Young People (Safety) Act 2017* be amended to:
    a. remove the power conferred to the CE DCP in section 93 and give powers to the Youth Court to make orders in relation to contact with family, and
    b. abolish the Contact Arrangements Review Panel.

14. The *Children and Young People (Safety) Act 2017* and *Children and Young People (Safety) Regulations* be amended to expand the functions of RATSIOs to include the development of cultural maintenance plans for Aboriginal children, in line with recommendation 4.

15.The *Children and Young People (Safety) Act 2017* be amended to require that the Court and the CE DCP must have regard to Aboriginal attachment theory and Aboriginal child rearing practices, when making decisions about reunification and long-term orders, .

16. The *Children and Young People (Safety) Act 2017* be amended to provide for regular consideration of the viability of reunification at annual reviews after children have been placed under long term guardianship orders.

17. The *Children and Young People (Safety) Act 2017* be amended to give the Court power to make reunification orders. That such orders require reviews every two months and to make consequential orders at reviews. The Court should have discretion to extend orders if substantial progress has been demonstrated.

Scope of the report

The purpose of this preliminary report is to draw attention to early issues identified from the Inquiry into the application of the Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) in the removal and placement of Aboriginal children in South Australia. This preliminary report makes early recommendations to the South Australian Government's proposed reform of the *Children and Young People (Safety) Act 2017*. It should be read in conjunction with the Commissioner's submission to the Statutory Review of the *Children and Young People (Safety) Act 2017*.

This Inquiry is investigating recent past and current policies, practices and procedures of State authorities relating to the application of the wider ATSICPP[1] in the removal and placement of Aboriginal children in South Australia, and as required by section 12 of the *Children and Young People (Safety) Act 2017.*

Early observations are that these policies, practices and procedures are not leading to the effective implementation of the wider ATSICPP, and as a result, the objectives are not being achieved of reversing the numbers of Aboriginal children and young people removed from their families; and ensuring, that if removed they grow up safely in the care of their kin, community and culture. In order to fully achieve the objectives of the ATSICPP strong statutory guidance is required.

Inquiry process to date

On commencement of the Inquiry, the Commissioner invited a number of key stakeholders to make submissions regarding the application of the ATSICPP. A total of 44 submissions were received from 21 organisations and 23 individuals (see Appendix A).

The Commissioner hosted 14 Aboriginal community forums across metropolitan and regional South Australia. The Commissioner heard from 253 registered participants including parents and families of Aboriginal children who had been removed, Elders, community members with experience as kinship or foster carers, community members who had experience working in or alongside the child protection service system and young people with recent experience of being in out-of-home care.

A further 29 private sessions were held with individuals and families, most of whom were Aboriginal mothers, aunties and grandmothers who had experienced the removal of their children in the present and across the generations. Four sessions were held with Aboriginal children and young people who had been or were currently in state care.

The Commissioner hosted 16 stakeholder workshops and meetings to hear from people working within the child protection and family support service system, including the Department for Child Protection, Department of Human Services, SA Health, Department for Education and non-government organisations, including Aboriginal community-controlled services.

BetterStart Health and Development Research Group (BetterStart) from the University of Adelaide were commissioned to provide a detailed data analysis of Aboriginal child protection contact patterns in South Australia.

Arney Chong Consulting undertook an extensive literature review of 390 documents relating to best practice for the application of the wider ATSICPP.

In addition, a review of over 500 policies, procedures and guidelines that impact the application of the ATSICPP by state authorities was conducted.

Twenty-two case file audits had been completed with a further eight remaining when this report was being prepared.

The Aboriginal and Torres Strait Islander Child Placement Principle

The ATSICPP aims to enable systemic change to address the needs of Aboriginal children and families, which are not being met within the current legislative and policy frameworks. It is based on the presumption that removal of Aboriginal children from their families should be a measure of last resort, with priority being instead given to the capacity for communities towards self-determination and the knowledge and experience of Aboriginal people to make the best decisions concerning their children.[2]

The ATSICPP is a rights-based principle that fulfills governmental obligations contained in the United Nations Convention on the Rights of the Child (UNCRC) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Notably, it ensures the rights of children to be protected from harm including through preventative social programs (UNCRC, Article 19), the enjoyment of their cultures in community with their cultural groups (UNCRC, Article 30; UNDRIP, Articles 11-13) and the rights of Aboriginal children, families and communities to participate in decisions that impact upon them (UNCRC, Article 12; UNDRIP, Articles 3-5, 18-19).

"The application of the ATSICPP must measure up to the standard of Active Efforts. This ensures that all efforts are exhausted in all of the elements of the ATSICPP and that its application does not become tokenistic. Active Efforts are purposeful, thorough and timely efforts that are supported by legislation and policy and enable the safety and wellbeing of Aboriginal children".[3]

Implementing the ATSICPP to the standard of Active Efforts is one of the actions of the first *Aboriginal and Torres Strait Islander First Action Plan 2023-2026,* an integral part of *Safe and Supported: the National Framework for Protecting Australia's Children 2021 – 2031*.[4] It recognises that in line with the ATSICPP, the key enablers for change are self-determination and partnership in decision making.[5] The South Australian Government, along with all other jurisdictions, has signed on to implement these national reforms.

The ATSICPP is structured around five core elements, which are summarised below.[6] These five core elements should be applied to the standard of Active Efforts. The trends in the evidence before the Commissioner, whilst yet to be fully analysed and tested, have been measured against these five elements.

Prevention

The prevention element of the ATSICPP aims to protect the rights of Aboriginal children to be raised among their own family, culture and community, by ensuring that families have access to the required services and supports that respond to the social determinants that give rise to child protection concerns, and allow them to care safely for their children. It prioritises early intervention pathways and the targeted provision of intensive and holistic support services, to ensure that vulnerable families are provided with the opportunity to address familial issues prior to government intervention. The prevention element recognises and respects the broad definition of 'family' within Aboriginal culture, which embraces a collective approach to parenting extending beyond the western cultural ideal of a two-parent nuclear family.

Participation

The participation of Aboriginal children and families in decisions which affect them is a key component of the ATSICPP. The participation element acknowledges that Aboriginal family members and communities have the best knowledge of their own caring strengths and have a right to be involved in decisions relating to best interests of their children. The participation element is underpinned by the need for professionals in the child protection jurisdiction to have high levels of cultural competency and the ability to engage with families in a culturally responsive and safe manner. Another key component of the participation element is the involvement of Aboriginal children in decision-making, including ensuring the adequate representation of children and the availability of and access to child advocacy services.

Partnership

Aboriginal communities comprise Aboriginal individuals, families and organisations that relate to each other in a complex network of communal and cultural obligations. The partnership element of the ATSICPP highlights the critical importance of involving Aboriginal communities in all aspects of child protection decision-making. This includes but is not limited to prevention and early intervention; intake and assessment; care and placement decisions and involvement in the judicial process.

The partnership element requires that there be genuine and meaningful engagement with Aboriginal communities, including the empowerment of communities to design and implement policy and service models. It is crucial that community are consulted about decisions that relate to individual children and are active in ensuring that Aboriginal children remain safe with family community and culture.

Placement

The placement element endorses a hierarchical model for placement of Aboriginal children in out-of-home care, to ensure that the highest possible level of connection is maintained for a child to their Aboriginal family, community and culture. This placement element calls for placement options of Aboriginal children to be prioritised as follows:

1. with Aboriginal relatives or extended family, or other relatives or extended family members; or
2. with other members of the child's Aboriginal community; or
3. with Aboriginal family-based carers.

It is only in circumstances where the placement hierarchy is not complied with, that Aboriginal children are placed in residential care or non-Aboriginal family-based care. In those care arrangements, connection with family, community and culture must be maintained. Active engagement with a child's family and other community representatives is essential to ensuring that all possible higher-order placement options are scoped and considered. This requires an appropriate mechanism to gather community level knowledge appropriate to that child, their family, their community, and their culture. It is also critical that children's Aboriginal and/or Torres Strait Islander status is identified as soon as possible, so that such placement options are able to be explored.

Connection

The connection element of the ATSICPP is to ensure that in the event of placement of Aboriginal children in out-of-home care, they are actively supported to maintain connection to their family, community and culture. This objective requires the development and resourcing of cultural care plans for every Aboriginal child in out-of-home care, developed in partnership with their family and community. Further, there must be accountability mechanisms in place to monitor the requirement of state authorities to support Aboriginal children and young people to maintain their cultural connections on an ongoing basis. Reunification of Aboriginal children with their families and kin must also be prioritised. This extends to continued scoping of the viability of reunification, in partnership with family, kin and community, even after the making of long-term guardianship orders.

This Inquiry examines the application of the five elements of the ATSICPP within the policies, practices and procedures of State Authorities, in relation to the removal and placement of Aboriginal children in South Australia.

As this preliminary report addresses legislative reform of the *Children and Young People Safety Act 2017* (CYPS Act) its focus is on the Department for Child Protection (DCP).

Currently the CE DCP has a statutory obligation to implement the placement element of the ATSICPP (as prescribed in section 12 CYPS Act, in line with the objects of that section). The CE DCP must also make all other relevant statutory decisions under the CYPS Act that impact the removal of Aboriginal children.

The CE DCP has also sought to insert the five elements of the ATSICPP to the standard of Active Efforts in policy and procedure relating to all significant decisions made under the CYPS Act about an Aboriginal child.

The recommendations are based on preliminary observations of the policies, procedures and practices of DCP, strengthened by the evidence and data obtained throughout the Inquiry process. The recommendations are in line with the objectives of the Inquiry to:

- reduce the rate of removal of Aboriginal children from their families;
- increase the rates at which Aboriginal children, if removed, are then placed with Aboriginal family or kin;
- improve the fulfillment of the objectives and the application of the ATSICPP;

so that Aboriginal children grow up safely within family and community, connected to culture and country. This is their inalienable right.

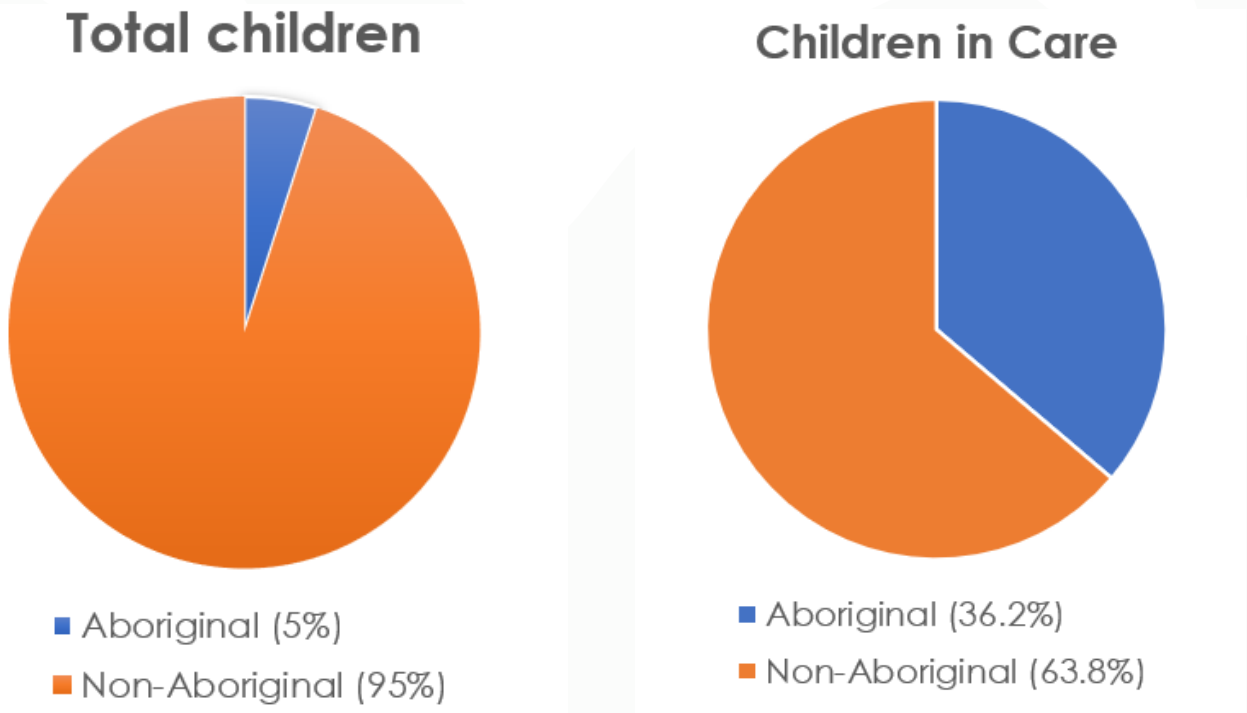
Introduction

Aboriginal children have historically been and continue to be disproportionately overrepresented in the child protection system in Australia at every level, from the notification and investigation stages to removal and out-of-home care rates.[7]

Data analysis conducted for this Inquiry indicates that Aboriginal children in South Australia come into contact with child protection at a staggeringly disparate proportion when compared to non-Aboriginal children, and that disparity commences from pregnancy right throughout their childhood. One out of every two Aboriginal children were subject to at least one child protection notification in 2020-21, while for non-Aboriginal children these rates decreased to just one in every 12 children. For unborn child concerns, one in every three Aboriginal children were subject to an unborn child notification, as compared to just one in 33 non-Aboriginal children.

The DCP Annual Report 2021-2022 data shows that Aboriginal children comprised 36.2% of children placed on child protection orders in the 2021-22 reporting period,[8] despite Aboriginal children and young people representing only 4.5% of the State's population between the ages of 0-17 years.[9] This demonstrates that Aboriginal children and young people are subject to child protection orders at a rate at least eight times higher than their non-Aboriginal counterparts.

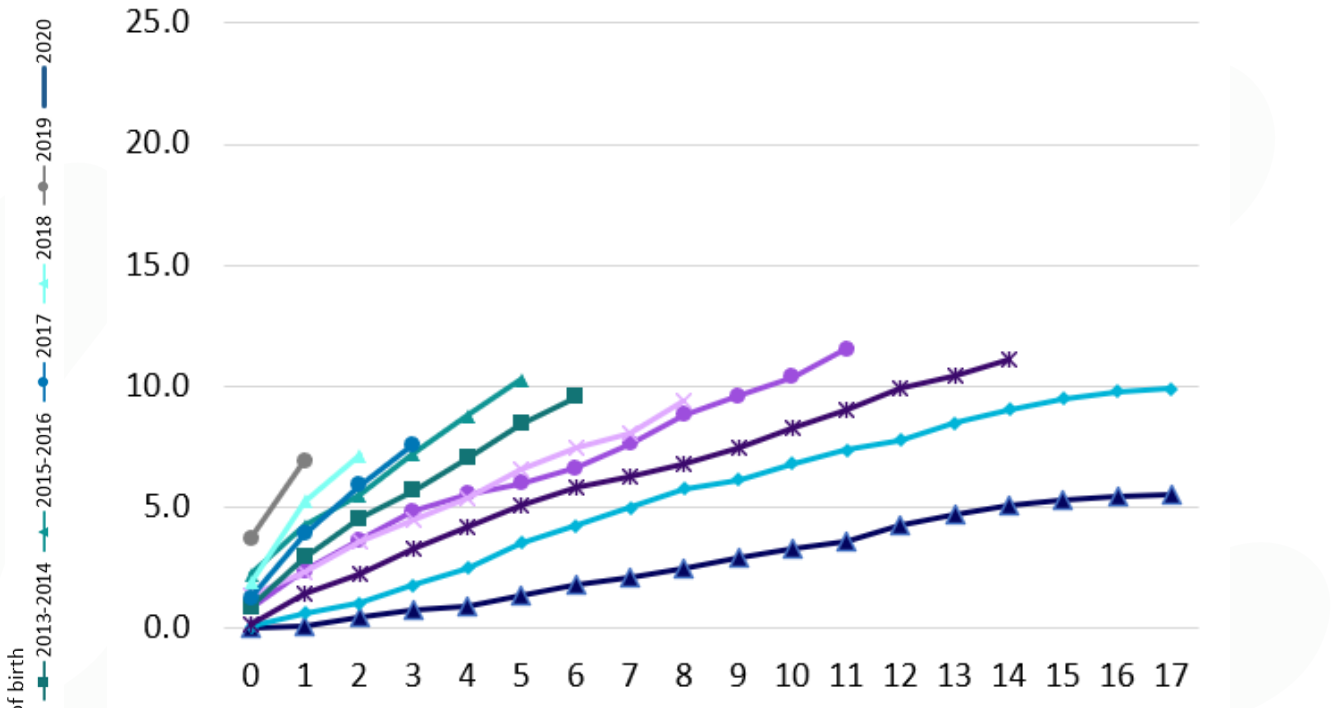
Percentage of Aboriginal children, total population (State) compared to population in out-of-home care



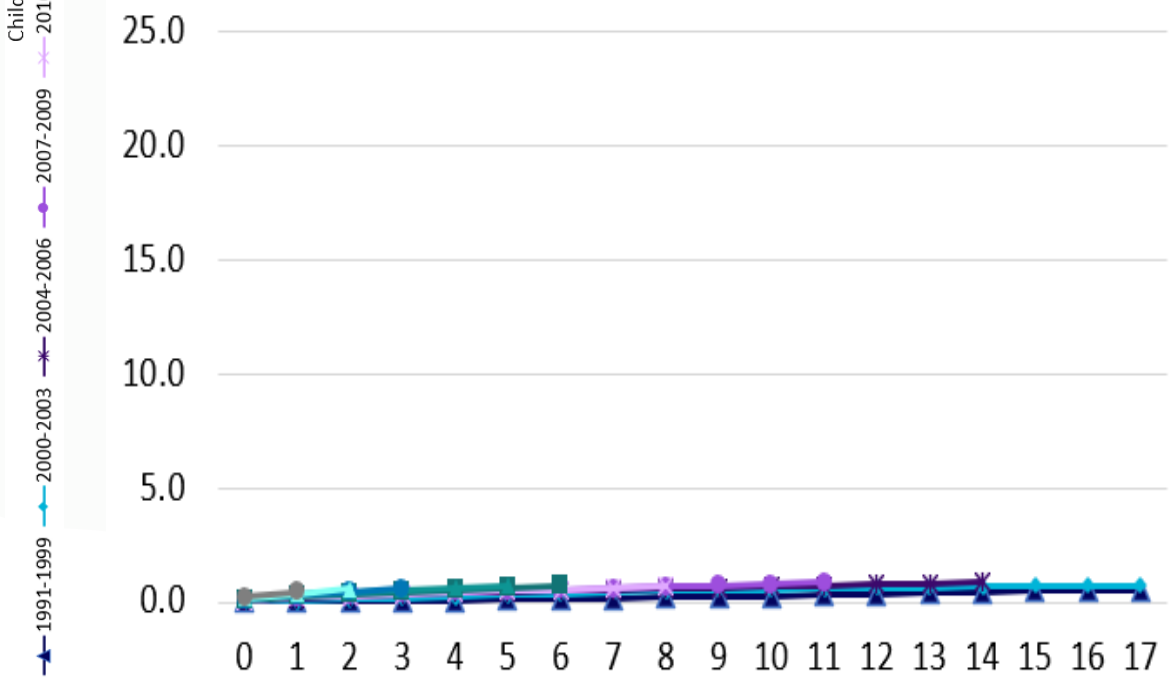
The high rates of removal of Aboriginal children and young people is further compounded by declining rates of Aboriginal children being placed with family or kin. Further, despite the aim of child protection systems to prioritise reunification of children with parents wherever possible, at the national level just 16.4% of Aboriginal children were reunified with their birth families in the 2020-21 reporting period.[10] In South Australia it is even lower at 9.9% in the same reporting period, the third lowest rate in the nation.[11]

South Australia is a party to the National Agreement on Closing the Gap. Target 12 of the Agreement aims to *'By 2031, reduce the rate of over-representation of Aboriginal and Torres Strait Islander children in out-of-home care by 45 per cent'*.[12]

However, current data indicates that despite this target, the rates of over-representation of Aboriginal children in out-of-home care have in fact been trending upward in all jurisdictions over the past 10 years. If the current trends continue, it is anticipated that the number of Aboriginal children living in out-of-home care will increase by a further 50% over the next decade, in stark contrast to the projected increase of 13.5% for non-Aboriginal children.[13] In South Australia it is predicted that without change, by 2031 there will be as many as 140 of every 1000 Aboriginal children in State care.[14]



Aboriginal and/or Torres Strait Islander children by age at first Guardianship to Minister until 18 years old order



Non-Aboriginal and/or Torres Strait Islander children by age at first Guardianship to Minister until 18 years old order

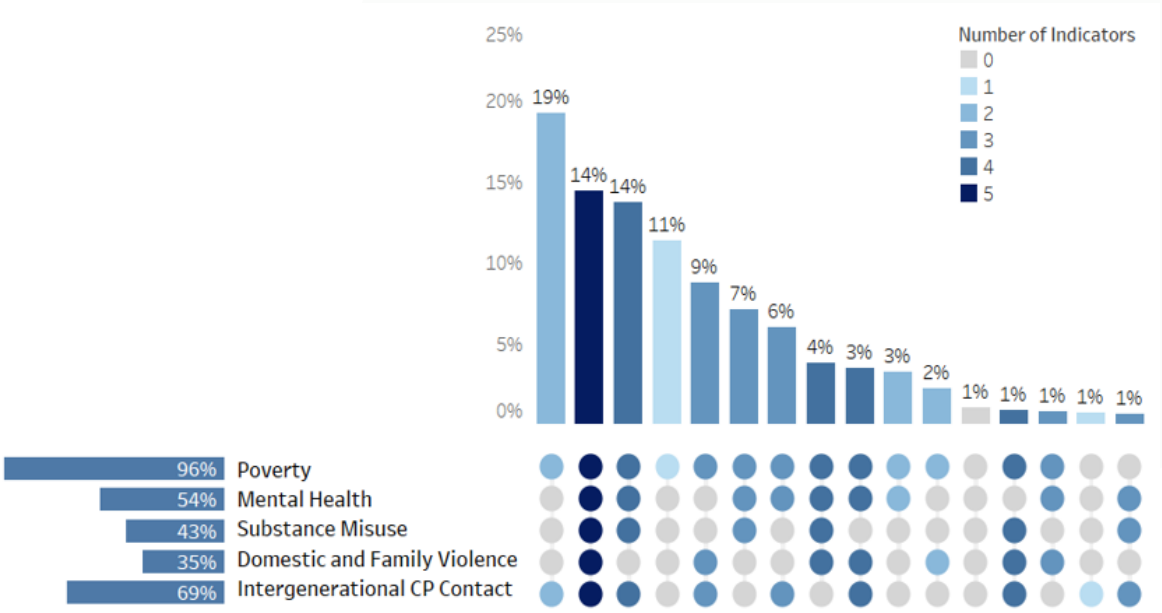
If this predicted increase is realised, Aboriginal children will be being removed in numbers close to those of the Stolen Generation, the historical, systemic removal of Aboriginal children from their families, where it is estimated that between 10-33% of all Aboriginal children were removed between 1910 to 1970.[15]

In 1997 the South Australian Parliament and in 2008 the Australian Parliament apologised to all Aboriginal people for the Stolen Generations. These past policies of widespread removal of Aboriginal children from their families resulted in intergenerational trauma and a disconnection of Aboriginal people from their families, communities and culture.[16] What is yet to be rectified is the continuing impact of the trauma of these removals on the lives of Aboriginal people.

There is no dispute about the evidence concerning the impact of intergenerational trauma on Aboriginal people and its contribution to parlous life outcomes. It is based on solid data. Australia's history of colonialisation and systemic racism continue to impact Aboriginal people across all key areas of wellbeing, including but not limited to socioeconomic disadvantage, adverse physical and mental health outcomes, poorer education outcomes and higher incarceration rates.[17] But what the Commissioner has also observed is that the child protection system bears an imprint from the historical removal policy that remains to this day.[18] It results in greater visibility of Aboriginal children to a system which unconsciously still operates to identify and separate Aboriginal children from their families and communities and perpetuates the highly disproportionate rates of removal compared to non-Aboriginal children. The Commissioner's initial observation is that despite the presence of the five elements of the ATSICPP in current DCP policy, the way it is described in policy and applied in practice in the child protection system simply does not address the truth for many Aboriginal children, that removals beget removals.[19]

BetterStart analysed key indicators across five areas of parental disadvantage in connection with children in out-of-home care in South Australia in 2016. The areas of disadvantage that were analysed were poverty, mental health, substance misuse, domestic and family violence and inter generational contact with child protection. In the data studied, the parents of Aboriginal children in out-of-home care met at least one of the key indicators for disadvantage at the following rates:

- 94% had at least one indicator of poverty;
- 54% had at least one indicator of mental health;
- 43% had at least one indicator of substance misuse;
- 35% had at least one indicator of domestic and family violence; and
- 69% had at least one indicator of intergenerational child protection contact.



Indicators of disadvantage for Aboriginal and/or Torres Strait Islander children in out-of-home care

This data is indicative that structural and policy reform is required across all key areas of disadvantage to counter the current upward trends of Aboriginal children in care.

However, until the inequities in those key areas are addressed, the higher rates of disadvantage for Aboriginal families emphasise an even greater and more urgent need for effective implementation of the ATSICPP.

The ATSICPP and Active Efforts in legislation

Currently section 12 CYPS Act sits as a third-tier consideration after safety (section 5 CYPS Act) and the generic placement principle (section 10 CYPS Act). It only applies to the placement of Aboriginal children on removal. The primacy of Aboriginal children's rights to be brought up within their family and culture and the rights of Aboriginal people to self-determination should be front and centre. This does not compromise children's safety. The two are not mutually exclusive. Safety can be found in family, community and culture.

The Commissioner has heard from community that children are being denied safety within culture. In the current review of the South Australian CYPS Act, there is an opportunity to ensure that all five elements of the ATSICPP are enshrined in legislation to the standard of Active Efforts. The purpose of this is to protect Aboriginal children from the impacts of further disconnection from family and culture, and disrupt the intergenerational cycle of disadvantage, poverty and trauma. In doing so, South Australia will fulfil its obligation under the *National Aboriginal and Torres Strait Islander First Action Plan 2023-2026*.

The Commissioner has detailed in her submission to the review of the CYPS Act that this provision should be included in a new separate part of the Act that specifically deals with Aboriginal children. The preliminary recommendations below should be read as including all recommendations from that submission about the positioning and content of the ATSICPP.

The recommended new section of the CYPS Act should have stated objects of implementing the child's rights to family, community and culture in accordance with the UNCRC and to enable self-determination in accordance with the UNDRIP. It should also be an object of the ATSICPP that the removal of an Aboriginal child from family, community and culture is a measure of last resort.

Preliminary recommendation 1

The *Children and Young People (Safety) Act 2017* be amended to insert the five elements of the ATSICPP to be applied as the paramount consideration for Aboriginal children when considering their safety, wellbeing and best interests. The principle should be applied to the standard of Active Efforts in all significant decisions which must be purposeful, thorough and timely.

The need for transparency and accountability when applying the ATSICPP and the role of the Youth Court

Although the South Australian Government has committed to implementing policy change through the application of the ATSICPP to the standard of Active Efforts within the child protection system,[20] it is clear that the current frameworks are not meeting the urgent need for systemic reform. Ten submissions to the Inquiry called for greater accountability and transparency in relation to the child protection system and the application of the ATSICPP[21] and seven specifically sought greater emphasis on Active Efforts in relation to its current application, noting inadequate or inconsistent efforts currently, potentially as a result of ritualism where the application of the ATSICPP becomes a box ticking exercise with the intended outcome being lost.[22]

> *'Active efforts' need to be made to ensure that the administration that took responsibility for removing children also takes responsibility for providing families with the support they need to resume their care. [Submission from South Australian Council of Social Service, page 7]*

Currently the CE DCP and the Court must consult with a Recognised Aboriginal and Torres Strait Islander Organisation (RATSIO) pursuant to section 12(3)(c) CYPS Act. This "consultation" only applies to the placement aspect of the ATSICPP. The Commissioner has observed that the template form that DCP submits to the RATSIO and the Court makes no provision for consideration of "Active Efforts" and is a tick box exercise. This is clearly not a strong enough legislative requirement.

Anecdotal evidence from sector stakeholder engagement suggests that this consultation is often cursory and belated. Where the RATSIO comments adversely on practice with respect to the ATSICPP these comments are not heeded or discussed. For DCP practitioners, the experience of consultation with South Australia's sole RATSIO was that advice could be generic and did not provide helpful information about the family.

The Commissioner has heard many accounts from community about the removal of Aboriginal children who are disconnected from their families, community and culture for years, only to find out that there was one or more members of their family or community who could have brought them up. Children themselves have expressed to the Commissioner their disbelief, sadness and anger at this loss.

> *If DCP say there aren't extended family, they are lying because there is! We need DCP to look at family through our lens, not through a white perspective. [Murray Bridge Community Forum]*

Having stronger independent oversight by the Court is one way to ensure that Active Efforts have been made from prevention through to removal to apply all five elements before a long-term order is made.

It is the Commissioner's view that to encourage compliance with policy, greater transparency and accountability is required of DCP in relation to decision making where the ATSICPP is applied to seek guardianship orders.

Preliminary recommendation 2

The *Children and Young People (Safety) Act 2017* be amended to include that the Youth Court should satisfy itself that the five elements of the ATSICPP have been applied to the standard of Active Efforts before making an order under the Act. If it is not so satisfied the Court should have the power to make specific orders requiring the CE DCP to comply with the obligation to implement the ATSICPP to the standard of Active Efforts.

Partnership

Increasing the number of RATSIOs with local community knowledge and connections

Active Efforts to partner with Aboriginal Community Controlled Organisations (ACCOs) bolsters rights of self-determination and can assist Aboriginal children and young people to realise their rights to remain connected to family, community and culture.

Currently Section 12(3)(c) CYPS Act requires the CE or the Court to consult a Recognised Aboriginal or Torres Strait Islander Organisation (RATSIO) and have regard to any submissions they make about the placement of an Aboriginal child, in the context of the ATSICPP as it applies in section 12 CYPS Act. RATSIOs are gazetted pursuant to section 12(8) CYPS Act after community consultation. There is currently no requirement about the number of RATSIOs that can be appointed, it is left to the discretion of the Minister.[23]

Throughout the community engagement forums, community members raised concerns that the child protection system does not effectively tap into local community knowledge to support families and inform safety assessments, and removal and placement decisions. Community emphasised the importance of local engagement with Aboriginal community organisations, who could provide a collective voice to inform decision making and provide external support and advocacy for families and children. Community highlighted the value of partnering with locally based ACCOs when intervening with at-risk families and the important role that ACCOs play by providing a culturally safe and supportive environment to access support services.

Several submissions called for more RATSIOs to ensure local level knowledge from organisations with connections to community members and elders, specifically within regional communities.[24]

> *ALRM supports there being a greater number of Aboriginal Community Controlled Organisations to be gazetted as [RATSIOs], specifically, within regional communities, as metropolitan offices may not have the same connection to community as the local services have. [Submission from Aboriginal Legal Rights Movement, page 3]*

In 2016 the South Australian Child Protection Systems Royal Commission Report (the Nyland Report) recommended that the South Australian Government fund multiple Aboriginal organisations, including those with strong connections to specific communities, to provide more targeted and specific consultation.[25] The South Australian Coroner on 6 April 2023 made a recommendation to the same effect.[26] Whilst DCP report that the Nyland Report recommendation has been implemented, there is currently only one gazetted RATSIO, Aboriginal Family Support Services (AFSS).

It is the Commissioner's view that RATSIOs should have local cultural connections and knowledge to assist in the identification and scoping of family and kin for placement and participation in decision making, and to advise on relevant child-rearing practices and provide cultural intelligence relating to the local Aboriginal or Torres Strait Islander community.

There are distinct differences in the culture and practices of different regions and Aboriginal communities, and therefore each regional community must have its own RATSIO.

This will require the mandatory gazetting of RATSIOs from all regional areas, including but not limited to the APY Lands, Coober Pedy, Ceduna, Yalata, Port Lincoln, Whyalla, Port Augusta, Port Pirie, Kadina, Berri, Murray Bridge and Mount Gambier, as well as the Adelaide metropolitan regions. A relevant RATSIO should be identified for Torres Strait Islander children and families.

Wherever possible, existing ACCOs that are already active in local communities should be appointed and gazetted as RATSIOs. Such appointments ensure local trusted community are partners in decision making which supports the rights of Aboriginal children, families and communities to self-determination and the rights of the child to remain connected to community and culture.

Preliminary recommendation 3

The *Children and Young People (Safety) Act 2017* require that at least one local level RATSIO for each regional community with proven strong community knowledge and connections be gazetted and fully funded to perform legislated functions.

Expanding the legislated functions of RATSIOs

The ATSICPP in current Section 12 of the Act requires that:

> 'the Chief Executive or the Court (as the case requires) must, where reasonably practicable, consult with, and have regard to any submissions of, a recognised Aboriginal or Torres Strait Islander organisation'.

One of the major barriers to implementing the ATSICPP identified across the literature is the inconsistent involvement of Aboriginal and Torres Strait Islander organisations and individuals in decision-making. The literature emphasises that consultation alone is not enough when it comes to redesigning collaborative systems that support raising strong Aboriginal children and young people. Such models must be more than a box-ticking exercise.[27] In culturally-led models, it is crucial to recognise and support Aboriginal self-determination to achieve better outcomes for Aboriginal children and young people and families. Partnerships between Aboriginal organisations and non-Aboriginal organisations in child and family services can support self-determination when they extend beyond consultation and instead enable Aboriginal communities to make decisions about children and young people's wellbeing and to design and implement policy and programs.[28]

Many jurisdictions have moved beyond consultation to a devolution agenda with increasing efforts to transfer some elements of child protection functions, delegations and resources to the ACCO sector. This is referred to as "delegated authority" in which "decision making normally vested in the Minister or Secretary" are delegated to ACCOs.[29] Through *Safe and Supported: the National Framework for Protecting Australia's Children 2021-2031*, the Commonwealth, State and Territory Governments have made a commitment to "undertake reform in each jurisdiction's next review of relevant legislation and policy, with a view to...supporting delegation of authority in child protection to families, communities and Aboriginal and Torres Strait Islander community-controlled organisations".[30]

In the late 1980s to the mid-1990s the Aboriginal Family Care Program was a statewide initiative that operated in local ACCOs in regional locations. The program involved the assembly of cultural authorities known as Aboriginal Family Care Committees at the time a child came to the notice of the Department. The Committees were supported by an Aboriginal Family Care Coordinator employed by the local ACCO. The Committees comprised local Aboriginal people who were connected to the Aboriginal community in which they worked and had cultural connections to children and families. They worked closely with the local departmental office, developed plans with parents and family and those culturally responsible for the child to avoid the child being removed, and ensured the provision of support services for the family. They also made recommendations for placement and ongoing connection of a child to family and community if a child was to be removed, and those decisions were respected and implemented by the child protection authority. This program was evaluated as successful in supporting children's safety in family arrangements within their communities.[31] At the time, each ACCO that auspiced an Aboriginal Family Care Program was gazetted to provide mandatory cultural consultation to child protection services.

The Aboriginal Family Care Program was an example of what Active Efforts for partnership with the Aboriginal community could look like in supporting early intervention and prevention, participation of family and community in decision making and local level scoping for family placement. Features of this program could be revived quickly through the gazetting of existing locally based ACCOs with strong community connections. The idea of reviving this model is not new. In 2002, the Review of Alternative Care in South Australia made clear recommendations "that Aboriginal Family Care Committees and workers be established in strategic locations to ensure close liaison with Aboriginal communities, families and individuals…".[32]

It is the Commissioner's view that the function of RATSIOs should be expanded within the CYPS Act from a purely consultative mechanism on placement decisions to an active partner that participates with the family in all significant decisions about an Aboriginal child. The inclusion of the RATSIO as partner in significant decisions represents Active Efforts to apply the ATSICPP across all of the other four elements of the ATSICPP. It is required to optimise participation, connection, prevention and placement.

Over time, the functions of these RATSIOs could expand to include provision of family support services and convening of family group conferences. With resourcing and support, RATSIOs could take on additional functions currently performed by DCP, such as the case management of Aboriginal children and young people in out-of-home care and decisions about removal through the delegation of powers. There is a working precedent for the successful delegation of powers to ACCOs operating in Victoria and Queensland.

Preliminary recommendation 4

The *Children and Young People (Safety) Act 2017* be amended to broaden the function of RATSIOs to provide that the RATSIO assist Aboriginal families and their children at all significant decision-making points about the child's wellbeing or safety including by:

a. providing cultural advice to DCP, the Court, other state authorities and where necessary SACAT on:

i. safety and wellbeing assessments
ii. family support needs for prevention of removals
iii. care options for children without orders
iv. placements for children where a removal is necessary

b. undertaking family scoping for:

i. identification of family and kin to be involved in decision making
ii. identification of family, kin and community placement options

c. development of cultural maintenance plans

d. attendance at reviews conducted under section 85 of the Act

e. attendance at Family Group Conferences

f. contributing to the design of relevant policies and programs

g. appointment of an Aboriginal cultural support person or child advocate to ensure the participation of children and young people in significant decisions or to advocate on their behalf

h. reporting to the Court about the efforts that have been made by the CE DCP to comply with the ATSICPP to the standard of Active Efforts before a guardianship order is made.

Preliminary recommendation 5

The *Children and Young People (Safety) Act 2017* should be amended to specifically provide for the delegation of the CE's powers to RATSIOs.

Participation

The Participation element of the ATSICPP, when conducted to the standard of Active Efforts, is core to implementing the ATSICPP elements of prevention, placement and connection. The participation of Aboriginal children and their families and communities in a culturally safe, formal and independent process of Aboriginal family led decision making ensures that the right of Aboriginal people to self-determination and the rights of the child to be heard and to be connected to culture can be fully implemented.

Active Efforts at participation require early participation by family, community and the child to provide an opportunity for parents to access early intervention supports and for safety plans to be developed by family, community and ACCO service providers to divert the child from a statutory response. Ongoing participation in decisions about removal ensures that children remain connected to family, community and culture.

It is the Commissioner's view that FGCs, conducted pursuant to an amended Chapter 4 Part 2 CYPS Act, encompassing all Aboriginal family as defined in section 16 CYPS Act and refined to ensure cultural safety, offers the best model for optimum engagement to ensure that Active Efforts are applied at all significant decision-making points. The Commissioner's submission to the legislative review positions FGCs for Aboriginal children in a specifically designed section of the CYPS Act for this reason.

Expert academic opinion highlights the importance of engaging families using a restorative and relationship-centred approach and key operating principles, which include participation and inclusion in processes, effective communication and listening, respecting cultural rights, shared decision-making, and sustained support and time to change.[33]

Throughout engagement with Aboriginal communities, community members said that families were being given insufficient opportunities to participate in decision-making and that decisions were routinely being made about children and families without the involvement of family. Community members said that FGCs under the CYPS Act were rarely offered and questioned whether they were always considered or valued by the department. Community also expressed deep concern that FGCs, when offered, placed too much focus on parents identifying and nominating family participants, which could result in family and/or community not being invited or excluded from the conference for reasons such as shame or family conflict, impacting on decision-making and outcomes for the child. This practice focuses on the needs of parents at the expense of the rights of children to their family and community. Community discussed that when FGCs were offered, they were not happening early enough and were largely tokenistic as decisions had already been made.

These views were echoed in submissions to this Inquiry. A large number of submissions drew attention to the lack of involvement of family and community in decision making in practice, with eight submissions highlighting that there was not enough involvement of family and community[34] and seven providing examples of family members being excluded or where there was no family involvement at all in the process.[35]

> *"...the legislation governing Family Group Conferencing... is not directive enough and continues to rest too much decision-making power directly with DCP individual workers and offices with no outside accountability. [Submission from Child and Family Focus SA, pages 18-19].*

Families, not systems, should make decisions about how to keep their children safe. Active efforts to increase family participation in decision-making are vital. [Submission from Relationships Australia South Austalia, page 6]

There was a strong focus in submissions on the timing of FGCs, with a consistent view that this should occur at an early stage in the family's involvement with services.[36] It was noted that participation does not always include significant extended and cultural family members.[37] The Department of Human Services identified current structural barriers which inhibit referrals being made directly from family preservation services, and that instead they can only be made through DCP.[38] The Commissioner notes that there have been some encouraging attempts to formalise FGCs for unborn child concerns by making these mandatory in policy and to link through this process to CFARN's in an attempt to implement early intervention to prevent removals.[39]

The participation of extended family and kin who have knowledge and insight should occur as early as possible in child protection interventions. The scope of the current legislation is too broad and does not mandate the convening of a FGC, or at what stage(s) of the decision-making process this should occur.

Preliminary observations of the DCP policies about FGCs is that they do form a method by which Aboriginal families can participate in decision making in accordance with the broadly stated ATSICPP Practice Paper,[40] but they are optional and other less formal methods of family led decision making may also be considered.[41] It is the Commissioner's view that the other methods do not appear to reach the standard of Active Efforts as they dilute cultural safety and independent oversight of the process and are not engaging of wider family and community.

Overall, whilst the ATSICPP requirement for participation is often flagged in policy as an ATSICPP prompt, it is largely a discretionary matter as to how this is done,[42] and there is little or no guidance about how to reach extended family and community or a requirement to do so. Preliminary observations about practice from case file reviews indicates inconsistent attention to family led decision making and family group conferencing and inadequate scoping of family to participate in decision making.

The submission from DCP acknowledges the importance of family led decision making for improving the outcomes for Aboriginal children and families,[43] but it is the Commissioner's preliminary observation that current policy fails to provide strong enough instruction and guidance as to how this is to be done.

The expert academic evidence provided in the literature review suggests processes such as family led decision making though family group conferencing, when embedded in legislation and independently facilitated, can successfully formalise participation of children, young people, families and communities in major decisions that affect them and can lead to empowerment, safety and collective responsibility.[44] Given my preliminary observations about policy and practice, my view is that these FGCs must be mandatory.

A number of recent royal commissions and inquiries have identified high quality family group conferencing as the best means for enabling family-based decision making and case planning in child protection matters, as FGCs enable family participation and engagement in attempts to resolve concerns in a way that is consistent with Aboriginal traditions and culture, allow family members to formulate plans or agreements that address the child protection concerns, assist with identification of potential kin placements, and enable connection to culture and community and centralises its importance in decision making.[45]

A strength of FGCs for Aboriginal families is the extensive work that occurs to bring in extended family members, in ways which are culturally congruent with the concept of kin, including family members who may have been estranged from the children and young people or each other for some time.[46]

However, it has been noted that despite repeated calls for family group conferencing, family decision making processes are not mandated, referrals are inconsistent, and family group conferences have been "inconsistently applied, under-funded, under-utilised, not implemented as agreed or used too late in the decision-making process, limiting potential impact on demands on the child protection system".[47]

Section 10 (d) of the Act allows for FGCs as follows:

> *'In each case, consideration should be given to making arrangements for the care of a child or young person by way of a family group conference if possible and appropriate.'*

Although Chapter 4, Part 2 of the Act makes provisions for FGCs, such conferences are not a legislative requirement. Referrals to FGCs should be mandatory to ensure the involvement of the family, kin and community in decision making at an early point, before the removal of a child.

It is also important to recognise the FGCs can serve different purposes at different decision-making points. Currently for valid decisions to be made at a FGC, the agreement of the biological parents is required. This requirement can run counter to proper consideration of the ATSICPP in placement decisions where parents may not be co-operative, but it is essential to explore the placement hierarchy. It is not necessary for parental consent to make a placement decision when a guardianship order is made, so the requirement should simply be for consent of the family/kin and the child. The parents should still have the opportunity to be present.

Preliminary recommendation 6

The *Children and Young People (Safety) Act 2017* be amended to mandate that if the CE DCP, the Court or a State Authority suspects that an Aboriginal child or young person is at risk or there are concerns for their wellbeing, then the CE DCP, the Court or the State Authority must convene a FGC which is independently facilitated by an Aboriginal-led program prior to any significant decisions being made about the child.

Supporting the participation of children and young people in decision making

Article 12 of the UNCRC states:

> *'1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
>
> *2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'*

Throughout engagement with community, community members spoke about their concerns that children were not consistently being given opportunities to participate in decisions that impacted them. Targeted sessions with Aboriginal children and young people in out-of-home care indicated mixed experiences with some young people feeling as though they had a role in decision making and others feeling they had no say at all.

Submissions to the Inquiry identified that the views of children and young people were often being insufficiently represented or they were excluded from decision-making processes and that improvements were needed to ensure children and young people's views were better represented.[48]

The Commissioner's view is that the appointment of a cultural support person or child advocate for each Aboriginal child, nominated by the local community RATSIO, will ensure that the child is supported to have their voice heard, the child is aware of their rights to be heard and to take actions to challenge decisions made about them, building their agency in decision making. It will ensure cultural safety and an enduring connection to family and community by opening a pathway for the child to pursue meaningful participation in annual reviews, case planning, contact decisions and placement decisions. These are all points where the child currently has a right to be heard in the CYPS Act but what the Commissioner has heard is they are often overlooked or reluctant to participate.[49]

Preliminary recommendation 7

The *Children and Young People (Safety) Act 2017* be amended to mandate that if the CE DCP, the Court or a State Authority suspects that an Aboriginal child or young person is at risk or there are concerns for their wellbeing, then the CE DCP, the Court or the State Authority must convene a FGC which is independently facilitated by an Aboriginal-led program prior to any significant decisions being made about the child.

Prevention

Currently the CYPS Act does not provide a clear legislative pathway to early intervention, let alone early intervention in accordance with the ATSICPP.[50] Referral to another state authority can happen after an assessment is made pursuant to section 32 CYPS Act but there is no legislative pathway to early intervention prior to this point.

One of the strong themes to emerge from engagement with the Aboriginal community during the Inquiry was the lack of early intervention support available for vulnerable families. Community identified that child protection notifications were being made, particularly from the health and education sectors, when what was needed was a family support response. Community spoke of many experiences that once a notification was made, families would get caught up in the child protection system and were on an imminent path to child removal.

> *"All the money we get given when we go into the system, why can't it go to our families to help keep us together and to make things better". [CREATE youth engagement forum]*

> *"If our parents aren't capable then help them get capable". [CREATE youth engagement forum]*

Submissions to this Inquiry identified concerns about DCP not responding to notifications until it was too late, with intervention not occurring until issues have escalated to the point where a child is no longer safe, at which point the DCP response was removal rather than support to the family.[51] A number of submissions focused on infant removals and the concern that too many children were being removed at birth without giving the parents and extended family a chance to demonstrate their ability to care for a child.[52]

A contributor to the growth in the number of children known to child protection and in the disproportionality for Aboriginal children and young people is the design and operation of contemporary child protection systems. This includes multiple levels of screening, assessment, referral or case closure without action being taken for children and young people or appropriate supports being provided to their families. The Alexander review notes the emphasis placed in the South Australian child protection system on responding to and investigating "incidents" of reported harm and abuse for children and young people.[53]

For the past two decades, there has been an increasing call for system reform based on the understanding that risks to children and their families known to child protection are not often single 'incidents' but are rather intergenerational, chronic and accumulate over time.[54] To manage demand, Australian child protection systems screen and 'triage' concerns and reports about individual incidents or events and often focus on immediate risks to children's safety or prediction of future harm, as opposed to responding to adverse factors which pose longer term risks to children or risks which are chronic and accumulate over time, causing cumulative harm and affecting the social and emotional wellbeing of children.[55]

This includes factors such as chronic exposure to domestic and family violence, emotional abuse and chronic neglect, which often will not meet a threshold for a child protection response, despite their significant long-term impacts on child development.[56]

One of the problems with the system is that if intensive services are only available to those at the highest risk thresholds, there will always be continuing and escalating demand if the needs of other families experiencing complexity and risk are not met.[57] Voluntary, intensive family supports, should be made widely available and be developed based on an understanding of children and young people's multiple and complex needs, and those of their families.[58]

Aboriginal families require equitable access to supports and services, including culturally safe early childhood, education, health and social services. They also require intensive and targeted supports to address issues in family functioning and to address trauma, mental health issues, substance misuse, family violence and poverty.

Most importantly families require referral pathways to early intervention prior to engaging with the statutory child protection system, and a holistic and integrated service system providing vulnerable families the opportunity to engage with services that are culturally safe and designed to meet their specific needs.

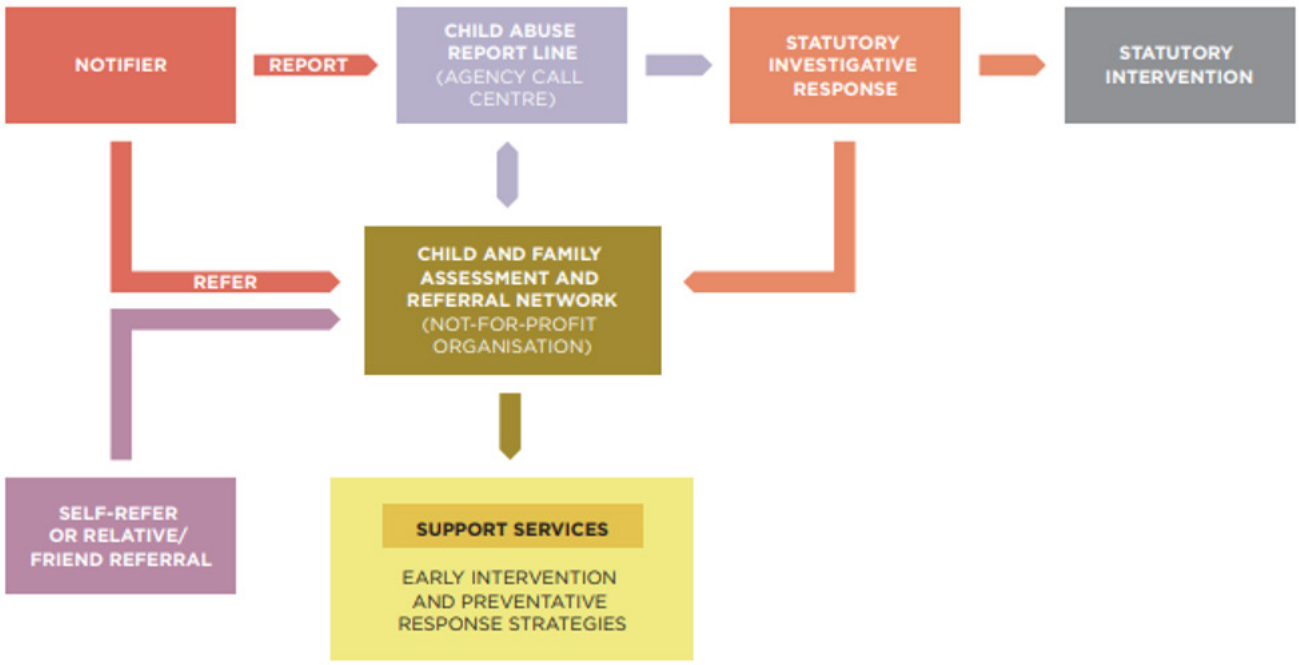
This requires Active Efforts towards prevention to manage risk without removal for Aboriginal children, with a primary focus on the strengths of Aboriginal families and how those strengths can be increased and supported. It also requires the current legislation to give clear instruction that a pivot to early intervention is required.

The Commissioner has argued in her Submission to the Review of the CYPS Act, that the legislation should include clear requirements for early intervention, otherwise much needed early intervention simply won't happen. Likewise, the legislation should provide that for Aboriginal children and their families the services that are accessed should be culturally safe and where possible delivered by ACCOs and that the RATSIO is to play a pivotal role in the system to ensure that Active Efforts to apply the ATSICPP are being made.

A strong legislative pathway will ensure that funding is allocated appropriately and that funding service delivery by ACCOs and the strong role of the RATSIO lines up with the cultural safety and self-determination objectives of the Closing the Gap Agreement and Safe and Supported: the National Framework for Protecting Australia's Children. It ensures the application of Active Efforts to prevention through partnership and participation in line with the ATSICPP.

The Commissioner is of the view that inserting a requirement in the CYPS Act that family and community as well as all mandatory reporters can consider an Aboriginal child's 'wellbeing' (as well as safety), provides a legislative hook to an alternative pathway to culturally safe early intervention services, through assessment and referral.

This accords with recommendations from the Nyland Report that mandatory notification requirements can be discharged though a referral to an alternative early intervention pathway. In that report the Royal Commission developed a proposed reform model to be established in legislation. The proposed reform model is reproduced below.[59]



The model in the Nyland Report positions the Child and Family Assessment and Referral Network (CFARN) as the assessor in the alternative referral pathway. Assessors are to have the same qualifications as required for the DCP Child Abuse Report Line (CARL). In line with the need to move away from incident-based reporting, the assessor will conduct a holistic assessment of the family's needs and refer to appropriate services. The case worker is to be the main contact point for the client and services to ensure monitoring and co-ordinated service delivery. As a mandatory reporter the CFARN must make appropriate reports to CARL. The model envisages self-referral, referral from mandatory reporters and DCP.

The Commissioner supports the Nyland Report model, provided it is set out in detail in legislation, with the necessary addition of the local level RATSIO positioned as a partner with the regional CFARN to ensure the proper application of the ATSICPP to the standard of Active Efforts.

The addition of the RATSIO will ensure that when an Aboriginal family is referred, compliance with the ATSICPP occurs, with the RATSIO performing its functions of giving advice and assistance, ensuring the participation of family and community and ensuring that culturally safe holistic assessments and referrals are made, including referrals to family group conferences where appropriate (see discussion regarding the role and function of RATSIOs in the Partnership section of this report).

The role of CFARNs is not set out clearly in current section 20 CYPS Act and their initial success has not been fully supported and incorporated in a universal service delivery model as was envisaged in the Nyland Report.

The literature review found that currently CFARNs (now known as Safe Start) are operating in the first 1000 days of a child's life, they may accept referrals from hospitals as well as DCP. An evaluation of CFARNs was done by the Telethon Kids Institute in partnership with BetterStart, University of Adelaide which showed that the service was achieving its objective of creating a 'dual

pathway' system as was recommended and that CFARNs provided an alternative to involvement with the statutory agency.[60] CFARN was first established as a pilot and as it was assessed as meeting its diversionary goals, it no longer has pilot status, but neither is it being supported in legislation and so implementation has stalled.

Preliminary recommendation 8

The *Children and Young People (Safety) Act 2017* be amended to provide that where there are Aboriginal child wellbeing concerns the family may self-refer to culturally safe services through the CFARN pathway, and that where mandatory reporters and the CE DCP have concerns about the wellbeing of Aboriginal children, they must refer the matter to CFARNs for culturally safe assessment and referral.

Restoring 'best interests' as a guiding principle in South Australia's child protection legislation

Submissions to the Inquiry noted that South Australia's child protection legislation had shifted away from the 'best interests' of children as a guiding principle, towards one of 'safety', despite Article 3 of the United Nations Convention on the Rights of the Child enshrining children's right to have their best interests taken as a primary consideration in all actions that affect them, and that this shift should be reversed.[61]

The paramount consideration of the CYPS Act as set out in Chapter 2, Part 7 is that:

> *'consideration in the administration, operation and enforcement of this Act must always be to ensure that children and young people are protected from harm.'*

Whereas Article 3 of the UN Convention on the Rights of the Child states:

> *'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'* [62]

Therefore, the guiding principles of the CYPS Act should include the reference to the best interests of the child, and the definition of that principle should also be clearly articulated.

The narrow scope of the primary consideration under the current Act limits the focus of the statutory authority to the 'protection from harm', to the exclusion of all other considerations. This provision does not account for the critical importance of cultural safety when determining the best interests of Aboriginal children.[63]

As already outlined, the primary consideration of the CYPS Act must position the application of the ATSICPP as the means to achieve safety, wellbeing and best interests, so that statutory responses are directed not only to reactive measures, namely the removals of children, but rather to nuanced and targeted approaches in accordance with the core tenets of the ATSICPP. This will ensure that responses will prioritise preventative and early intervention measures, together with the requirement for Aboriginal peoples' self-determination and community-led decision making in accordance with the principles of the ATSICPP.

Preliminary recommendation 9

Restore 'best interests' as the paramount consideration within the *Children and Young People (Safety) Act 2017* and that for Aboriginal and Torres Strait Islander children their best interests are determined in the context of the application of the five pillars of the ATSICPP as a paramount consideration.

Reversing the onus of proof

Another theme that emerged in discussion with community is the power imbalance that exists in interactions between families and DCP. Community discussed that families often have a lack of understanding about their rights and child protection processes, and this leads to families feeling disempowered in their interactions with the system. Families often felt talked down to, over-surveilled, bullied, gas-lit and manipulated, highlighting what they perceived as a misuse of power, including through workers ignoring or misleading families or withholding information.

Despite this significant power imbalance, and the normal judicial conventions of proof, the CYPS Act currently places the burden of proof on the objector rather than the applicant. This further disadvantages and disempowers families with limited, if any, access to resources, more so for those Aboriginal families who experience poverty. These families generally lack knowledge of systems to 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 questionable.

Preliminary recommendation 10

Reverse the onus of proof within the *Children and Young People (Safety) Act 2017* so that it lies with the applicant to prove on the balance of probabilities that the orders they seek should be made.

Diversion to the Federal Circuit and Family Court of Australia (FCFCOA)

During stakeholder engagement, it was suggested that Aboriginal children should be diverted from the statutory child protection system by DCP supporting extended family to obtain FCFCOA Orders. While there are currently no legislative impediments to pursuing this option as an alternative to DCP making an application for guardianship orders in the Youth Court, it does not appear to be widely considered.

The DCP Manual of Practice suggests that when a FGC is being held under the CYPS Act that consideration may be given to this option,[64] but preliminary observations on case files suggests that the option of FCFCOA is rarely pursued, and FGCs are not always offered. Diversion to the FCFCOA enables Aboriginal self-determination whilst ensuring that the best interests of the child are protected. There are a number of reasons why Aboriginal family may choose not to pursue custody arrangements through the FCFCOA but this option should be one that families are encouraged to consider when making decisions about the arrangements for the care of children.

Preliminary recommendation 11

The *Children and Young People (Safety) Act 2017* be amended to require the CE DCP to give consideration to enabling FCFCOA proceedings to be taken by Aboriginal kin with whom the child is to be placed, before making an application for a guardianship order.

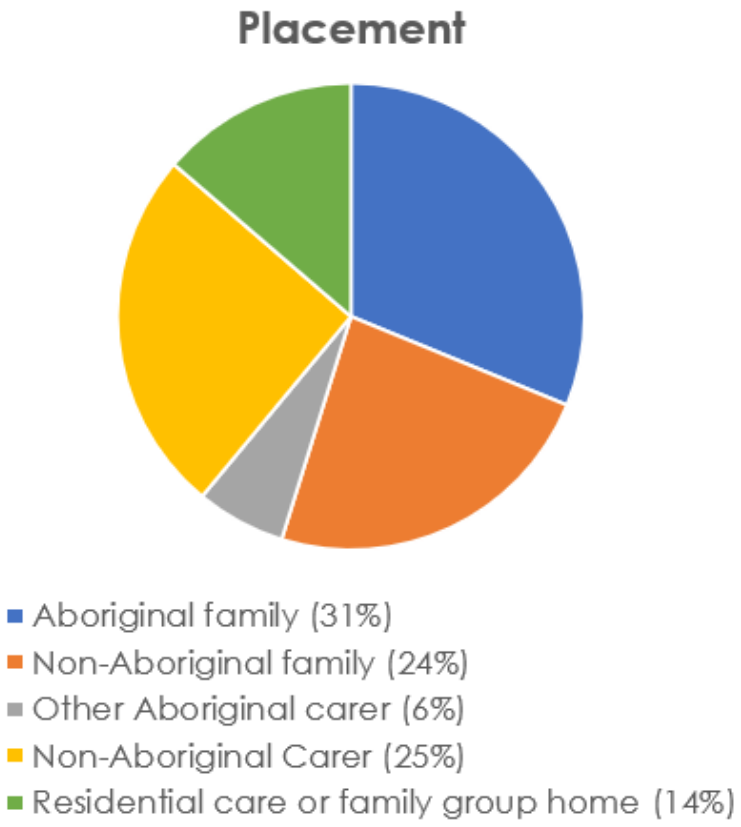
Placement

In South Australia 55% of the 1,705 Aboriginal children and young people in care at 30 June 2022 were placed with relatives or kin; 31.7% with an Aboriginal relative or kin, 23.3% with a non-Aboriginal relative or kin, and 6.2% with another Aboriginal carer.[65]

National reporting on compliance with the ATSICPP identifies compliance as including the placement of an Aboriginal child or young person in a relative/kin placement (regardless of the Aboriginality of the kinship carer) or with an Aboriginal carer.[66] Overall, the literature suggests that a significant proportion of Aboriginal children and young people are placed with non-Aboriginal placements, which represents a "system failure that contributes to dislocation in Aboriginal families and communities",[67] and indicates a failure to adhere to the placement hierarchy.[68] Reviews and audits across Australia have repeatedly identified poor and partial implementation of the ATSICPP, and of the placement hierarchy in particular.[69] Reporting on compliance with the principle also does not identify the extent to which Active Efforts have been undertaken in line with the best practice implementation of the ATSICPP, or the extent to which children remain connected with their families, culture and community.[70]

In South Australia the proportions of Aboriginal children and young people reported as being placed in compliance with the ATSICPP placement hierarchy (i.e., in a relative or kin placement or with an Aboriginal foster carer) has decreased slightly over time (from 66.8% on June 30 2013 to 61.2% on June 30 2022).[71] Nationally, a similar decrease has been observed, from 67.2% on June 30 2013 to 63.1% on June 30 2022.

This decrease appears largely reflective of the decreasing proportion of Aboriginal children and young people placed with Aboriginal relatives/kin in South Australia over the past decade (from 36.3% at June 30 2013 to 31.7% at June 30 2022). This is also reflected in national trends, with the proportion of Aboriginal children and young people placed with Aboriginal relatives/kin nationally decreasing from 37.6% at June 30 2013 to 31.8% at June 30 2022.[72]



Currently section 12 CYPS Act contains the only statutory obligation for the CE to comply with the ATSICPP. It only applies to placement decisions. Its objects are to maintain connection of Aboriginal children with their family and community, to enable Aboriginal people to participate in the care and protection of their children, and to achieve these objects by encouraging Aboriginal people, their children and young people and state authorities to act in partnership when making decisions about the placement of children under the Act.

DCP policy prompts engagement with children and young people and their families through family-led decision making when scoping for family placement options, but this is not a requirement and does not require a FGC.[73] Consultation with the RATSIO is required, but only after a placement has been identified.[74] This precludes the RATSIO from having any meaningful input into family scoping. This aligns with the Commissioner's preliminary observation that consultation with the only RATSIO is a weak tick box exercise done after placement decisions have been made and often after placements have commenced.

The placement of Aboriginal children in non-Aboriginal placements was one of the key themes during Aboriginal community engagement. Community was deeply concerned about the inadequate scoping of family and community placement options, leading to Aboriginal children and young people being placed with non-Aboriginal carers. Community members indicated that once a child had been placed in a care arrangement, little effort was made to scope for other placement options, with the child's perceived attachment to their carer cited as a key factor.

> *DCP are not doing much to see who the children's mob is. DCP saying can't find out where they are from, but it can be clear to me as Aboriginal community member.*
> *[Western Metro Community Forum]*

Thirteen submissions also highlighted the inadequacy of family scoping[75] and the lack of timeliness of this occurring, noting a preference that this occur as early as possible and parallel to the investigation and assessment process.[76] Several submissions drew attention to the non-compliance or inconsistency in the application of the placement hierarchy and the child's right to a voice and participation in decision making.

Mandatory partnership with the Aboriginal community through local level RATSIOs and mandatory FGCs are needed to ensure Active Efforts are applied when placing Aboriginal children and young people in out-of-home care.

Preliminary recommendation 12

The legislated functions of RATSIOs be expanded within the *Children and Young People (Safety) Act 2017*, in line with recommendation 4, to include family scoping for identification of family and community placement options for Aboriginal children, and that mandatory FGCs be held early, in line with recommendation 6, to enable Active Efforts to be made to place Aboriginal children in accordance with the placement hierarchy.

Connection

Connection to family, community and culture

Article 8 (1) of the UNCRC states that:

> *'States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.'*

Article 9 (3) states that:

> *'States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.'*

Article 20 states that:

> *1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.*
>
> *2. States Parties shall in accordance with their national laws ensure alternative care for such a child.*
>
> *3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.*

Additionally, Article 30 states that:

> *'In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in 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.'*

In setting out the other needs of children and young people Section 8(3) CYPS Act provides that:

> *"Without derogating from any other provision of this Act, it is desirable that the connection of children and young people with their biological family be maintained."*

For Aboriginal children, Section 12(3)(b) CYPS Act provides *"the child or young person should be given the opportunity for continuing contact with their family, community or communities and culture",* but this only applies when a child or young person is unable to be placed in accordance with the placement hierarchy set out in Section 12(3)(a) CYPS Act.

The community forums conducted during this Inquiry identified concern within the community regarding lack of connection to family and culture for Aboriginal children and young people in care. It was identified that children were being deprived of their right to cultural connection due to insufficient opportunities to connect with family, with contact arrangements reported to be inconsistent and often limited. It was further noted that sibling contact arrangements were not prioritised, and where contact with parents was not taking place, efforts to maintain sibling connections also lapsed.

A key theme identified in the submissions to this inquiry was that Aboriginal children in care were not receiving sufficient support to maintain their connection to culture.[77] The Office of the Guardian for Children and Young People's submission noted the importance of contact with family members and significant people to children and young people in care, with this featuring among the top presenting issues with requests for advocacy by the office.[78]

There is no legislative provision for the Court to make any orders with respect to family contact for children placed under guardianship orders. Those decisions are administrative decisions made by the CE. In line with the international human rights of the child it is recommended that the legislation be amended to empower the Court to make rights-based decisions relating to family contact.

Currently the only method to review a contact decision made by the CE is the Contact Arrangements Review Panel (CARP). Whilst it is arguable the CARP should consider the ATSICPP in making a decision about maintaining connection to family, community and culture in accordance with section 12(3)(b) CYPS Act, it may be limited to considerations in Part 4 CYPS Act. There is no transparency in its operations and no policy that requires CARP to take the ATSICPP into consideration.

The Commissioner's preliminary observation of DCP policy is that contact with family is dealt with separately in case plans and not scoped within the child's cultural maintenance plan. In this way decisions about contact are disconnected from policies that attempt to ensure connection to family, community and culture.

While in care, the maintenance of Aboriginal children and young people's cultural identity and connections with their communities, families, and country is critical to their wellbeing, identity and the preservation of their cultural heritage.[79]

However, cultural care planning for Aboriginal children and young people in care is often described as limited in scope, incomplete, inconsistent, disconnected, haphazard and under-resourced.[80] Libesman identified that "cultural identity is formed out of ongoing experiences" however, cultural care plans are often seen as static rather than living documents, and there is often insufficient support for non-Aboriginal carers and workers to provide appropriate cultural care.[81]

A cultural care plan is necessary to maintain an Aboriginal child or young person's cultural connection while in care and should be developed, resourced, implemented, monitored, and reviewed regularly for every child subject to ongoing intervention, including comprehensive and practical specifications of the activities that will support the child's cultural connection, when they will happen, who will be responsible for ensuring they happen, and how they will be resourced.[82] As Aboriginal cultures are both heterogeneous and dynamic, cultural care planning needs to be individually tailored for each child and ongoing over time; a cultural care plan should be a living document and must be trauma-informed from an Aboriginal perspective.[83] As family is central to cultural identity, establishing and maintaining connection with children and young people's Aboriginal family is at the heart of cultural care planning.[84]

Section 28 CYPS Act specifies that the CE must cause a case plan to be prepared and maintained for each child or young person who is under guardianship, care or custody pursuant to the Act. The case plan is to include a part setting out a cultural maintenance plan. Although there is practice guidance in place for cultural planning, including use of the Aboriginal Cultural Identity Support Tool (ACIST), this guidance is reportedly failing to translate to Active Efforts to support connection to family, culture, community which are key to the effective implementation of the ATSICPP.

Regulation 8(3) *Children and Young People (Safety) Regulations 2017* also provides that the CE must in preparing the part of a case plan setting out a cultural maintenance plan take reasonable

steps to consult with an Aboriginal or Torres Strait Islander organisation that is appropriate to the child or young person or member of the Aboriginal or Torres Strait Islander community to which the child belongs.[85]

The Commissioner has observed that the Manual of Practice chapter regarding developing a cultural maintenance plan refers to Regulation 8(3) but provides no guidance to the case worker about how to find a community member or ACCO connected to the child's community.[86] The ACIST section of the case plan template prompts the case worker to record details such as family, kin, mentors or elders who have been consulted or whether a Principal Aboriginal Consultant (PAC) has been consulted, but in the observation of case files, there is infrequent engagement with community members in development of the cultural maintenance plans.

The CE DCP is required to report on the extent to which this provision is being complied with but has consistently failed to do so.[87] The CE has also failed to report on the extent to which agreements made in case planning are supporting the cultural needs of Aboriginal children and the extent to which Aboriginal children have access to a case worker, community, relative or some other person from the child's community.

The Office of the Guardian for Children and Young People's submission noted that DCP reported high rates of completion of cultural maintenance plans, however the absence of reporting data under sections 156(1)(a)(ii) and 156(1)(a)(iii) of the CYPS Act it is not possible to assess the quality and implementation of those plans. The Office's annual review audits identified concerns regarding the extent to which key indicators of cultural support were actually incorporated into the lives of Aboriginal children in care.[88]

Aboriginal community members have also expressed concerns about the absence of appropriate and effective cultural planning for Aboriginal children in care, noting that the child protection system can take a generic approach to connection to culture, focusing on annual cultural events, such as NAIDOC week, and the creation of generic life story books. Aboriginal community reinforced that cultural identity is developed and maintained through authentic connection with Aboriginal family and community.

> *It's not a want it's a need, it's our culture!*
> *[Youth engagement forum with Create SA]*

Partnership with the Aboriginal community through local level RATSIOs would satisfy the requirements of Regulation 8 CYPS Regulations. This must be mandated in the Act to ensure Active Efforts are applied to maintaining connection to family, community and culture when Aboriginal children and young people are placed in out-of-home care.

Preliminary recommendation 13

The *Children and Young People (Safety) Act 2017* be amended to:

a. remove the power conferred to the CE DCP in section 93 and give powers to the Court to make orders in relation to contact with family, and
b. abolish the Contact Arrangements Review Panel.

Preliminary recommendation 14

The *Children and Young People (Safety) Act 2017* and Children and Young People (Safety) Regulations be amended to expand the functions of RATSIOs to include the development of cultural maintenance plans for Aboriginal children, in line with recommendation 4.

Reunification

Reunification of children with the person or persons from whom they were removed must be considered before a applying for a guardianship or custody order from the Court (section 50(4) CYPS Act). There is no statutory limit set on the timeframe for reunification. Whilst the Court has power to make guardianship orders, and the practice is that a 12-month order is made for this purpose, the Court does not have specific powers with respect to reunification.

Currently the Court requires the attendance of parents, DCP case managers and the child representatives (with or without the child) at Reunification Court where the judicial officer of the Court assists with keeping the parties on track with actions towards reunification, however the Court has no powers to make any orders to keep the parties on track.

Reunification should take into account the connection and placement elements of the ATSICPP. Active Efforts for connection and placement require active participation of family and community and partnership with ACCOs (including RATSIOs) as has been recommended previously. Placements with family and kin and contact with parents in the reunification context maintains active connection with family, community and culture. Importantly, cultural attachment in line with Aboriginal parenting practices is maintained whilst reunification is being attempted, and this also enables reunification to be considered with participation of family and community at all annual reviews of an Aboriginal child.

Rates of reunification of Aboriginal children with their parents have decreased significantly over the past decade. The rates of reunification within 24 months of removal to out-of-home care were 51.4% for children removed for the first time in the 2011-12 financial year. However, that rate was reported at just 28.9% for children removed for the first time in the 2018-19 financial year, demonstrating a decrease of almost 22% in reunification rates over a seven-year period.[89]

Not only have the rates of removal of Aboriginal children within the child protection system increased in recent years, but the number of children being placed under long-term orders and not being reunified with their families has also increased dramatically when compared to non-Aboriginal children. One of the most confronting findings from the BetterStart data analysis is the increasing proportion of Aboriginal children being placed onto Guardianship orders until age 18. The greatest increases have occurred at young ages. For infants born in 2019, one in 14 Aboriginal children were placed on GOM-18 orders by the time they were aged one. This has increased dramatically from a decade ago, when it was one in 40 Aboriginal children placed on a GOM-18 by age one.[90] (see graph on page 11).

One major reason for this increase is the current emphasis on early decision-making in the legislation. Section 10(1)(a) of the CYPS Act states that:

> *"Decisions and actions (if any) under this Act should be taken in a timely manner (and, in particular, should be made as early as possible in the case of young children in order to promote permanence and stability)"*

This provision has translated into policy within DCP that:

> "Decisions about the viability of reunification must be made **within six months for children under the age of two years** (due to their critical need to develop a secure attachment relationship with a carer) and **within twelve months for children over the age of two years".**[91]

These legislative provisions and policies have seen decisions being made to place children under long-term guardianship orders much sooner than under previous versions of the Act, which impacts significantly on Aboriginal parents who are required to demonstrate insight, change in behaviour and learning to parent effectively in a short period of time to satisfy the Department.

This issue was raised by several of the submissions to this Inquiry, where it was noted that the timeframes for reunification were inadequate and that a longer period was required for families to receive the support they needed.[92]

Lawyers practicing in the child protection jurisdiction of the Court have observed that as there is now no time limit on guardianship orders for the purposes of investigation and assessment.[93] This means that initial placements can be drawn out to six months or longer which automatically counts out reunification for children under two according to DCP policy and sees the early severance of connection where the placement is with a non-Aboriginal carer.

The limited timeframes are unrealistic in circumstances of multi-generational trauma and contact with the child protection system, poverty and disadvantage. The requirement for early placement decisions also fails to acknowledge Aboriginal attachment theory and Aboriginal child rearing practices, in which a network of kin with cultural obligations, in addition to the biological parents, have child-rearing responsibilities.

Aboriginal community members also noted that once a child is placed in out-of-home care, not enough effort is made for reunification with parents or to secure long-term family placements. Community voiced concern that the child protection system puts undue emphasis on a child's attachment to their carer at the expense of reunification and experienced a lack of will to review parenting capacity and revisit reunification throughout long-term orders.

The ATSICCP should be paramount in any decisions made about Aboriginal children, including reunification. SNAICC reported that:

> "the permanency measures tend to reflect an underlying assumption that a child in out-of-home care experiences a void of permanent connections that needs to be filled by the application of permanent care orders. This understanding fails to recognise the children begin their out-of-home care journey with permanent identity that is grounded in cultural, family and community connections...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".[94]

The need for permanency of care must not cause harm by severing the real potential for future cultural connections and reunification for Aboriginal children.

Preliminary recommendation 15

The *Children and Young People (Safety) Act 2017* be amended to require that the Court and the CE, when making decisions about reunification and long-term orders, must have regard to Aboriginal attachment theory and Aboriginal child rearing practices.

Preliminary recommendation 16

The *Children and Young People (Safety) Act 2017* be amended to provide for regular consideration of the viability of reunification at annual reviews after children have been placed under long term guardianship orders.

Preliminary recommendation 17

The *Children and Young People (Safety) Act 2017* be amended to give the Court power to make reunification orders. That such orders require two monthly reviews and to make consequential orders at reviews. The Court should have a discretion to extend orders if substantial progress has been demonstrated.

Conclusion

This Preliminary Report has outlined 17 recommendations for legislative change to enhance the application of the ATSICPP and improve outcomes for Aboriginal children and families in South Australia. These recommendations are underpinned by evidence and the lived experience of the Aboriginal community.

If the State is truly committed to achieveing the objectives of the ATSICPP in accordance with the *National Agreement on Closing the Gap*, the voices of the Aboriginal community must be heard and heeded. The preliminary recommendations made herein must be implemented at the earliest possible opportunity. The State must take swift and decisive action to ensure that the rate of removals of Aboriginal children and young people from their families, community and culture is reduced.

Following the release of this Preliminary Report, the Inquiry will commence public hearings and will conclude with a Final Report and recommendations in early 2024.

Appendix A: List of written submissions

1. Individual submission - name withheld
2. Individual submission - Robert Varley
3. Individual submission - name withheld
4. Individual submission - name withheld
5. Individual submission - Mete Olle
6. Individual submission - Regina Newchurch
7. Individual submission - name withheld
8. Individual submission - name withheld
9. The Reily Foundation
10. Individual submission - name withheld
11. Individual submission - name withheld
12. Centacare Catholic Family Services
13. Youth Court of South Australia
14. Individual submission - name withheld
15. NPY Women's Council
16. Individual submission - name withheld
17. Create Foundation
18. Individual submission - Lisa O'Malley
19. Individual submission - name withheld
20. Individual submission - name withheld
21. ac.care
22. Individual submission - name withheld
23. Individual submission - Tonya Scott
24. The Carer Project
25. Individual submission - name withheld
26. Individual submission - Winston Dance
27. Individual submission - name withheld
28. Individual submission - name withheld
29. Connecting Foster & Kinship Carers SA
30. Child Death and Serious Injury Review Committee
31. Individual submission - Rowena Hammond
32. Junction Australia
33. Child and Family Focus SA
34. South Australian Council of Social Service
35. Family Violence Legal Service Aboriginal Corp
36. Individual submission - name withheld
37. KWY Aboriginal Corporation
38. Aboriginal Legal Rights Movement
39. Emerging Minds
40. Relationships Australia SA
41. Office of the Guardian for Children and Young People
42. Department of Human Services
43. Department for Child Protection
44. South Australian Aboriginal Community Controlled Organisation Network

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