

Family is Culture Legislative Recommendations

Discussion Paper



To:	Transforming Aboriginal Outcomes Division, Department of Community and Justice
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From:	Barnardos Australia
Contact:	Dr Robert Urquhart - Head of Knowledge, Outcomes and Research
Subject	<i>FIC</i> Legislative Review submission
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Thank you for providing Barnardos Australia (Barnardos) with the opportunity to comment on the *Family is Culture (FIC)* Legislative Recommendations Discussion Paper.

Barnardos is a not for profit children's social care organisation providing direct support to 15,000+ children and their families in the Australian Capital Territory (ACT) and New South Wales (NSW) each year, in addition to foster care and open adoption (the latter for non-Aboriginal children) for approximately 1500 children and young people. In our family support work we aim to reach vulnerable children at risk of separation from their families. We work in areas with significant Aboriginal populations such as Central West NSW, the South Coast, Western Sydney and Inner Sydney. For close to 100 years, we have been working together with children, young people and families to break the cycle of disadvantage, and create safe, nurturing and stable homes, connected to family and community.

Overall comments

Barnardos strongly supports the legislative recommendations of the FIC independent review chaired by Professor Megan Davis to safeguard Aboriginal children, young people, and families in contact with the child protection system. We welcome the desire of the NSW Government to act quickly on the recommendations, which represent long-overdue reforms to address the over-representation of Aboriginal children and young people in out-of-home care (OOHC).

We note that *FIC* involved extensive consultation with Aboriginal organisations and stakeholders and that this present consultation has not been intended to replicate that process. Further, we extended the invitation to Barnardos Australia Aboriginal practitioners to participate in targeted consultation workshops designed and led by Aboriginal Department of Communities and Justice (DCJ) staff to seek feedback on the *FIC* legislative recommendations.

However, we believe that in hindsight, one significant learning from the present targeted consultation exercise is the need to work in partnership at every stage of the implementation process. Such an approach gains trust and support for future engagement. For example, it would have been invaluable to develop the Discussion Paper in collaboration with Aboriginal community leaders, peak bodies, and non-government stakeholders and fully co-design the proposed phasing, changes, and priorities for implementation. A partnership approach would also help identify areas where existing policy settings may be sufficient but remain underutilised or are not being robustly implemented on the ground.

Our responses to the proposed legislative changes to implement the *FIC* recommendations in the Discussion Paper, which we would like to comment on, are summarised below. For the recommendations on which we have made comments, we have focussed on responding to the high-level questions, notably "*Are they the right ones?*"; "*What do we need to consider to effectively implement them?*" as requested in the Invitation to Comment (p.8). In addition, we have also addressed "*Are there any other recommendations that could be actioned in the short-term?*" where relevant.

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

Recommendation 19: Parliamentary Committee oversight

Barnardos supports the NSW Government amending the Advocate for Children and Young People Act 2014 or otherwise legislating to ensure that a parliamentary committee monitors and oversees the out-of-home care functions of the Office of the Children's Guardian (OCG). We note that

- As outlined in our response to the OCG Review of Accreditation and Monitoring functions, Barnardos strongly supports measures such as recommendation 19, which strengthen the transparency and effectiveness of the OCG's regulatory activities related to the OOHC sector.
- In our view, the proposed broadening of the oversight of the Joint Parliamentary Committee on Children and Young People to include the OCG's accreditation of OOHC agencies is a significant step forward to achieving increased openness and transparency in accreditation activities.

Recommendation 48: Evidence of prior removals

Barnardos agrees the NSW Government should amend s106A (1)(a) of the Children and Young Persons (Care and Protection) Act 1998 to reduce the rate of removal of Aboriginal children. We note that:

- All assessments should focus on the individual care and protection needs of the child for which proceedings are before the Court. Each child is an individual and needs individual assessment.
- There should not be a general admission of evidence of prior removals, because this negates the propensity of families for positive change and it groups together historical information that may not be relevant or pertinent in the care proceedings for that individual child. Barnardos note the removal of this section does not prevent the Court from hearing evidence about the prior removals of siblings that have not been restored to their parents' care.
- People mature and grow over time particularly when they receive adequate, responsive, tailored support; however, it is challenging for families to provide documentary evidence of change.

Recommendation 54: Alternatives to removal

Barnardos supports the NSW Government amending the Children and Young Persons (Care and Protection) Act 1998 to mandate the consideration by the Department of Communities and Justice of specific alternatives prior to removal. Such specific alternatives could include Parent Responsibility Contracts, Parent Capacity Orders, and Temporary Care Arrangements. In our view:

- Every attempt should always be made to offer interventions prior to removal, notwithstanding the safety of the child is always paramount.

- There is a compelling need for investment in culturally safe and appropriate intervention programs in the safety and prevention arena, for example parenting programs, playgroups and intensive family preservation services so that families have access to programs they see as relevant to their needs and want to participate in.
- There is a need to review and substantiate that current processes and safeguarding measures have been followed correctly prior to removal. What evidence can be provided for each attempt that has been made and failed? For example, has the Family Action Plan been implemented? Have evidence of protective factors in the home been adequately sought and identified?
- Care needs to be taken with introducing alternatives to removal, to avoid the risk of replacing one set of delays with different set of gaps and delays.
- Barnardos would like it noted that timely decision making is paramount, and consideration needs to be given to the age of the child at the centre of the care proceedings as children need decisions made according to their developmental timeframes.

Recommendation 65: Children at criminal proceedings

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

- Every child in care at criminal proceedings should have a support person who knows the child in addition to the person who holds parental responsibility for the child.
- Every child should have the opportunity to nominate a support person and have the reasons clearly explained if their nomination is not supported.
- In the absence of either the support or the person who holds parental responsibility for the child, the criminal proceedings should not proceed.

Recommendation 71: Aboriginal Child Placement Principles

Barnardos strongly supports the New South Wales Government amending the Children and Young Persons (Care and Protection) Act 1998 to ensure that its provisions adequately reflect the Aboriginal Child Placement Principles (ACPP), namely: prevention, partnership, participation, placement, and connection. We believe that:

- The implementation of recommendation 71 is an urgent and immediate legislative priority as a catalyst for reshaping practice.
- Barnardos believes objective evidence should also be required of how each ACPP has been adhered to throughout each point of the establishment process and before long terms orders are considered.
- Evidentiary support of adherence should be sought from the local Aboriginal community.
- Education needs to be undertaken to assist Aboriginal families in understanding the five elements of the SNAICC ATSI CPP and what they can expect in terms of compliance by caseworkers.

Recommendation 76: Identifying Aboriginality

Barnardos agrees that in partnership with relevant Aboriginal community groups and members, that New South Wales Government should develop regulations about identifying children in contact with the child protection system as Aboriginal for inclusion in the Children and Young Persons (Care and Protection) Regulation 2012. However, we note that:

- Careful consideration must be given to establishing robust and transparent processes and procedures that align with the legal requirement and the legal construct of defining Aboriginality, including the *Aboriginal Lands Rights Act 1983* (NSW). Failure to do this and relying solely on self-identification can have the unintended consequence of a young person believing they are Aboriginal and yet being denied acceptance by 'their' community upon exit from care.

Section 2: Changes that require further time and consideration

Recommendation 9: A new Child Protection Commission

Barnardos agrees that the establishment of a new, independent Child Protection Commission should be the subject of further consideration and consultation. We note:

- Barnardos welcomes the focus on addressing the fragmentation of current oversight mechanisms, and the need for these functions to operate more openly and transparently.
- In particular, complaints acceptance and handling have been poor even when valid concerns have been raised about caseworker practices. For example, Aboriginal families are often told to contact their local DCJ Community Service Centre and when they do, they often do not receive acknowledgment nor a response to their concerns. Further, conflicts of interest throughout the process can be difficult to surmount given current complaints mechanisms.
- The operation of the Official Community Visitor Scheme on the ground should be strengthened to achieve its intended aim of ensuring the standard of the care received by children and young people living in residential OOHC.
- Barnardos would welcome the independent conduct of the new qualitative case file review program.
- However, given the magnitude of the proposed changes, we believe further consideration is required before proceeding with recommendation 9. For example, could the existing complexity and fragmentation of oversight mechanisms be better addressed by changing the alignment of some current areas of responsibility rather than creating an entirely new bureaucratic structure? This is integral to ensuring that the scope and remit of such an entity is inclusive of government and non-government performance.
- In addition, Barnardos believes that persistent tensions and gaps in the system, including poor complaints handling, are symptomatic of a chronic lack of working in partnership with Aboriginal communities, Aboriginal community-controlled organisations, and non-government service providers. Therefore, sustained attention needs to be given to establishing more effective consultation and collaborative casework practices and meaningful engagement with Aboriginal families and communities by DCJ. An essential

first step towards a more collaborative approach would be early and ongoing consultation when developing new systems, procedures, and protocols as mechanisms for oversight.

Recommendation 12: Publishing final judgments

Barnardos has no objection to the proposed change that the Children's Court of NSW should be appropriately resourced to enable it to publish all its final judgments online in a de-identified and searchable form. We note that:

- Publishing all judgements online will not only promote access to justice for unrepresented litigants, but also enhances transparency of the legal process.
- Further it enables access to information about how proceedings are determined in the Children's Court as well as important insights into the decision making of Children's Magistrates.

Recommendation 117: Period for restoration

Barnardos supports the NSW Government amending section 79(10) of the Children and Young Persons (Care and Protection) Act 1998 to ensure that it is linked to service provision that would support Aboriginal parents to have their children restored to their care. We note that:

- The barriers to restoration are not just about length of time. There is a critical need to provide for culturally appropriate interventions and relevant services, as well as the robust implementation of Aboriginal case management policy.

Recommendation 122: New agency to run litigation

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

- Establishing a new agency to conduct care and protection litigation would exacerbate the existing problem that lawyers are directing Children's Court matters instead of trained and experienced practitioners.
- While we agree that further work is required to enhance concurrent permanency assessment and planning before the Children's Court, we believe the proposed model is fundamentally flawed and therefore highly unlikely to achieve the identified objectives.

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

Recommendation 11: For-profit OOHC providers

Barnardos supports implementation of recommendation 11. We have already provided feedback on the issue of prohibiting for-profit providers from the Office of the Children's Guardian (OCG) as part of its review accreditation and monitoring functions. We note:

- We support *FIC*'s view that for-profit providers should not be allowed to be accredited as OOHC providers, consistent with the principle that is currently applied to the adoption service stream.
- We agree with the thrust of recommendation 11, that prohibition of for-profit OOHC providers is the safest and simplest means of avoiding the risk of unethical practices and a lack of effective scrutiny. For-profit providers currently operate outside the contract-based OOHC system and are significantly more costly whilst having less regulatory reporting requirements.
- There is a dearth of objective evidence that non-profit providers will not step into any service gaps following implementation of recommendation 11.

Recommendation 20: Accrediting OOHC agencies

Barnardos supports implementation of recommendation 20. We believe that the NSW Government should proceed with amending the Children and Young Persons (Care and Protection) Regulation 2012 to ensure that the OCG does not have the power to accredit agencies that have not demonstrated compliance with the accreditation criteria. In our view:

- The implementation of recommendation 11 would first need be preceded by implementation of a resourced strategy designed to increase the capability and scope of Aboriginal Community Controlled Organisations.
- Following effective implementation of the above, recommendation 11 should then be implemented.

Recommendation 121: Adoption

Barnardos agrees that NSW Government should not amend the Children and Young Persons (Care and Protection) Act 1998 and the Adoption Act 2000 to ensure that adoption is not an option for Aboriginal children in OOHC as in our view the existing policy settings offer substantive and effective safeguards. We note:

- As *FIC* has powerfully highlighted, the Aboriginal community has strong and deeply-held opposition to the adoption of Aboriginal children due to continuing trauma experienced by the Stolen Generations and the profound impact of child removals on Aboriginal communities, culture, and identity.
- Recognising this long-held opposition, we believe existing policy settings are sufficient as the Care Act and the Adoption Act contain significant and effective safeguards prior to making an adoption plan.
- A blanket ban would have the unintended consequence of preventing Aboriginal families from adopting Aboriginal children and older Aboriginal children from consenting to their own adoption.

Please do not hesitate to contact Dr Robert Urquhart, Head of Knowledge, Outcomes & Research on rurquhart@barnardos.org.au, tel (02) 9218 2392 or mobile 0431 404 199 if you require further information on our feedback.