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Aboriginal Legal Service (NSW/ACT) Limited

## Understanding the Aboriginal and Torres Strait Islander child placement principles as a framework for best practice

*This presentation is addressed to Service Providers who hold case management responsibility for Aboriginal and Torres Strait Islander children in out-of-home care, and not just to non-Aboriginal and mainstream Service Providers. It discusses the centrality of cultural identity to the best interests of an Aboriginal child and argues that a proper appreciation of the full breadth of the Aboriginal and Torres Strait Islander child placement principles, and a commitment to their implementation is foundational to good casework practice. The presentation concludes with suggestions of what implementation of the principles might look like in practice and discusses examples of case studies drawn from the ALS legal practice where a lack of commitment to an Aboriginal child's cultural identity needs by a Service Provider has resulted in poor outcomes for the child and family.*

### Acknowledgement

*I acknowledge the traditional custodians of the land on which we meet, and pay my respects to their Elders, past, present and emerging. I acknowledge the Aboriginal and Torres Strait Islander people present and their communities ongoing connection to land, sea and sky.*

It is important to start by talking about cultural identity and the best interests of an Aboriginal child or young person, and the role of the Service Provider in ensuring the child's Case Plan amounts to more than just tokenistic lip service of a child's Aboriginality.

I think the starting point has to be acknowledgement of the importance of cultural identity to what we understand is the 'best interests' of a child or young person. That may sound trite or basic but it's fundamental.

In the words of eminent Aboriginal leader, and CEO of the Victorian Aboriginal Child Care Agency, Muriel Bamblett:

*Whenever Aboriginal or Torres Strait Islander children need to be removed from home to protect them from harm, we must rise to the challenge of protecting their cultural identities. If we neglect this aspect of our children's best interests we deny them the cultural and spiritual life that is their birthright. We also risk fundamentally damaging their well being, growth, education and life prospects.*

*Our children need to know their culture and for Aboriginal and Torres Strait Islander children, culture and family are inextricably linked. Culture and spirituality are part of the meaningful ways in which Aboriginal and Torres Strait Islander people interact with their families and communities and their land. There are no short cuts to keeping our children culturally and spiritually strong: maintaining connections to family and community is the only way.<sup>1</sup>*

The President of the Children's Court in one of his recent judgements, speaks to the centrality of cultural identity to the Aboriginal child's best interests and the need for this fact to be acknowledged if Care Plans for Aboriginal children are going to be properly implemented.

He says the following in respect of Aboriginal children when quoting from the Victorian jurisdiction:

*"The permanency planning [the care plan document] must address how the plan has complied with the principles of participation and self determination set out in section 13*

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<sup>1</sup> Muriel Bamblett, forward to *Achieving Stable and Culturally Strong Out of Home Care for Aboriginal and Torres Strait Islander Children*, SNAICC Policy Paper, 2005.

of the Care Act: s78A (3). It should also address the principle set out in section 9(2)(d) which requires that the child's identity, language and cultural ties be as far as possible, preserved. **Proper implementation requires an acknowledgement that the cultural identity of an Aboriginal child is 'intrinsic' to any assessment of what is in the child's best interests...**"<sup>2</sup>

If we – as a sector – are going to do justice to the proper implementation of an Aboriginal child's Care Plan (in essence the role of the Service Provider with case management responsibility), we need to be alive to the fact that their cultural identity matters, it's not a peripheral consideration, it's not something that exists in conflict with "best interests" – it is intrinsic to what is in their best interests.

### The Aboriginal and Torres Strait Islander Child Placement Principles (ATSICPP)

The principles are found in Section 13 of the *Children and Young Persons (Care and Protection) Act*, and provide for a hierarchy of placement for Aboriginal and Torres Strait Islander children. You would all likely be familiar with section 13(1) and the placement hierarchy. You would all be aware of the reference to practicality and a child's "best interests" in that hierarchy, hence the introduction above.

#### **13 Aboriginal and Torres Strait Islander Child and Young Person Placement Principles**

- (1) **The general order for placement** Subject to the objects in section 8 and the principles in section 9, an Aboriginal or Torres Strait Islander child or young person who needs to be placed in statutory out-of-home care is to be placed with—
  - (a) a member of the child's or young person's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, or
  - (b) if it is not practicable for the child or young person to be placed in accordance with paragraph (a) or it would not be in the best interests of the child or young person to be so placed—a member of the Aboriginal or Torres Strait Islander community to which the child or young person belongs, or
  - (c) if it is not practicable for the child or young person to be placed in accordance with paragraph (a) or (b) or it would not be in the best interests of the child or

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<sup>2</sup> *The Secretary of the Department of Communities and Justice (DCJ) and Fiona Farmer [2019] NSWChC 5, at [116]*

young person to be so placed—a member of some other Aboriginal or Torres Strait Islander family residing in the vicinity of the child’s or young person’s usual place of residence, or

- (d) if it is not practicable for the child or young person to be placed in accordance with paragraph (a), (b) or (c) or it would be detrimental to the safety, welfare and well-being of the child or young person to be so placed—a suitable person approved by the Secretary after consultation with—
  - (i) members of the child’s or young person’s extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, and
  - (ii) such Aboriginal or Torres Strait Islander organisations as are appropriate to the child or young person.

You should also be aware that the definition of statutory out-of-home care means that the application of the Aboriginal Child Placement Principle is not just about the pointy end of Court proceedings when having to provide a long term placement proposal, but is applicable once an interim order is made or within two weeks of removal of a child from it’s parents.

If we are to understand the Aboriginal child placement principles correctly, they are about so much more than identifying a long-term placement for an Aboriginal child in accordance with a prescribed hierarchy under the Care Act.

They are about enhancing an Aboriginal child’s sense of their Aboriginal identity, and consequently, their self-identity.

To ensure that we promote and preserve a child or young person’s cultural identity, we need to look to the Aboriginal Child placement principles:

- Developing a proper appreciation of what they entail
- Adopting them as the framework from within which all casework and case planning for Aboriginal children is undertaken

### The Elements of the ATSI CPP

The Secretariat of National and Islander Child Care Agency (“SNAICC”) – which is our peak national Aboriginal body and voice for Aboriginal and Torres Strait Islander children,

defines the Aboriginal Child placement principles as comprised of five discreet yet interconnected elements:

- (1) Prevention
- (2) Partnership**
- (3) Placement
- (4) Participation**
- (5) Connection** <sup>3</sup>

This definition is likewise adopted by the NSW Aboriginal Peak body, ABSEC<sup>4</sup> (who has a number of Aboriginal Service Providers as members) and recently has been explicitly acknowledged and adopted in the Department of Communities and Justices' own Aboriginal Case Management Policy rules and practice guidance.<sup>5</sup>

For a Service Provider working in the context of a child placed in long-term OOHC – partnership, participation and connection are most relevant to your practice. The Family is Culture Review identified SNAICC's resources on the ATSICPP as best practice, which is why we want to outline three out of the five principles today.

### PARTNERSHIP

This element calls for the active participation of Aboriginal and Torres Strait Islander Community representatives at each stage of decision making on the child protection continuum, from intake and assessment through to judicial decision making processes following removal of a child from the care of their parents, **and extending to decision making for a child once placed in out of home care.**<sup>6</sup> For partnership to occur in any meaningful sense participation must extend beyond 'consultation' to genuinely include

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<sup>3</sup> *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and care Elements*, SNAICC, June 2013

<sup>4</sup> Aboriginal Child, Family and Community Care State Secretariat, Policy Brief, The Aboriginal Child Placement Principles, at: <https://www.absec.org.au/images/downloads/Policy-Brief-Aboriginal-Child-Placement-Principle.pdf>

<sup>5</sup> Department of Communities and Justice NSW, Aboriginal Case Management Policy rules and practice guidance, March 2019, see glossary, page 58. *The NSW Department of Communities and Justice Aboriginal Case Management Policy rules and practice guidance define the Aboriginal Child placement principles by reference to these five interconnected and interdependent elements*

<sup>6</sup> *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and care Elements*, SNAICC, June 2013

Aboriginal and Torres Strait Islander community representatives in the decisions that are made about Aboriginal children.<sup>7</sup>

### PARTICIPATION

Closely aligned to the concept of partnership, this element refers to the right of Aboriginal children, parents and family members to participate in decision making for Aboriginal children.<sup>8</sup> The elements of partnership and participation are acknowledged and enumerated at sections 11 and 12 of the *Children and Young Persons (Care and Protection) Act*.

#### **11 Aboriginal and Torres Strait Islander self-determination**

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

#### **12 Aboriginal and Torres Strait Islander participation in decision-making**

Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Minister, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under this Act that concern their children and young persons.

It should be noted that the Family is Culture Review found that the right to self-determination – meaning the right of Indigenous peoples to freely determine their political, economic, social and cultural status – is not currently applied in the Aboriginal child protection system in NSW.<sup>9</sup> It further found that the frequent use of the language of self-determination without appropriate structural recognition creates unrealistic expectations and sets an extremely low bar in which power is retained by the state.<sup>10</sup> It went on to make the following relevant findings:

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<sup>7</sup> SNAICC, Understanding an Applying the ATSICPP, a resource for legislation, policy and program development, page 4

<sup>8</sup> Ibid.

<sup>9</sup> Family is Culture Final Report, p81.

<sup>10</sup> Ibid, pgs78, 85.

- Formal Aboriginal consultation with external Aboriginal representatives is rarely occurring for Aboriginal children before they enter care or at key practice and casework points after entry into OOHC. In cases where consultation did occur, recommendations were not clearly recorded or were not progressed or ignored.<sup>11</sup>
- Caseworkers routinely fail to consult with Aboriginal children, parents and family members during casework or consult in an inappropriate or ineffective manner.<sup>12</sup>
- The majority of cases reviewed identified issues in respect of the participation component of the ACPP (78.5%), these issues included not contacting or involving family in decision making, presenting family with ready-made decisions, cancelling family group conferences and never rescheduling and disregarding the views of Aboriginal family members.<sup>13</sup>

### CONNECTION

This element refers to Aboriginal and Torres Strait Islander children in out-of-home care being properly supported to maintain connections to their family, community, culture and country, especially children placed with non-Indigenous carers.<sup>14</sup> The **object of connection** is:

*“To ensure that Aboriginal and Torres Strait Islander children in out-of-home care do not endure the same sense of loss of identity and dislocation from family and community as the Stolen Generations.”<sup>15</sup>*

The recent Family is Culture Review conducted by Professor Megan Davis noted the following in relation to connection in their final report:

*Every Aboriginal child in out-of-home care (OOHC) has the right to maintain connections with his or her family and culture, although these two concepts are intrinsically related. To*

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<sup>11</sup> Ibid, pgs272-273.

<sup>12</sup> Ibid, pgs313, 316.

<sup>13</sup> Family is Culture Final Report, p314.

<sup>14</sup> SNAICC, Understanding an Applying the ATSI CPP, a resource for legislation, policy and program development, page 5

<sup>15</sup> Ibid.

this end, the element of connection encompasses three main practical issues in respect of children in OOHC, namely:

- (i) arrangements to ensure that Aboriginal children have contact with their family including extended family;
- (ii) (ii) the placement of Aboriginal children with their siblings; and
- (iii) (iii) the maintenance of cultural connections.<sup>16</sup>

Connection is acknowledged in the Care Act as well. The Act is to be administered under the principle:

*Section 9 (2) (d) If a child or young person is temporarily or permanently deprived of his or her family environment, or cannot be allowed to remain in that environment in his or her own best interests, the child or young person is entitled to **special protection and assistance from the State, and his or her name, identity, language, cultural and religious ties should, as far as possible, be preserved.***

These words are a reflection of the human rights found in the UN Convention on the Rights of the Child.

Section 13 speaks to the importance of an enduring connection for an Aboriginal child with their Aboriginal or Torres Strait Islander family, community and culture.

Section 13 (6) provides that where an Aboriginal child is placed with a non-Aboriginal caregiver, the following principles should determine the choice of caregiver:

*(a) Subject to the best interests of the child or young person, a fundamental objective is to be the reunion of the child or young person with his or her family or Aboriginal or Torres Strait Islander community.*

*(b) Continuing contact must be ensured between the child or young person and his or her Aboriginal or Torres Strait Islander family, community and culture.*

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<sup>16</sup> Family Is Culture Final Report, p321.



What might the principles of Partnership, Participation and Connection look like in practice?

Let's consider these by reference to the Service Providers responsibilities regarding cultural planning.

Partnership, Participation and Connection in practice – Service Provider's responsibilities regarding cultural plans

Firstly, every Aboriginal and Torres Strait Islander child requires a Cultural Plan.

In any matter that has been finalised by the Children's Court concerning an Aboriginal child, the child should have a Cultural Plan; this is now embedded in the child's Care Plan – although can be in a more detailed and annexed document.

If you have a child under your case management who has been in OOHC since before the time it was standard practice to include cultural plans within their final Care Plans, those children still require a comprehensive and current Cultural Plan.

The Cultural Plan found within the Care Plan is not where cultural planning ends – it is the responsibility of the Service Provider to continue with cultural planning through the development of a Cultural Support Plan – which builds upon the initial Plan filed with the Court. It is also important to understand that as cultural information is updated and more information is received by the carers, child or family- that Cultural Support Plan requires updating. It is good practice to update the Cultural Plan as part of a yearly case plan review.

ABSEC define cultural support plans in the following terms:

*“A Cultural Support Plan is a **living document** which describes the actions that will be undertaken to support an Aboriginal child or young person to maintain and develop their cultural connections and relationships, identity and sense of belonging while in out-of-home care. The Cultural Support Plan should be monitored regularly and reviewed at a minimum of 12 months or at key decision-making points such as case management transfers.”<sup>17</sup> (emphasis added)*

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<sup>17</sup> ABSEC Policy brief on cultural planning

<https://www.absec.org.au/images/downloads/Cultural-Planning-Policy-Brief-Draft-Final-2019.pdf>

DCJ define cultural support plans in similar terms:

*The Cultural Support Plan builds on the Cultural Care Plan, providing evidence and actions for how a child's cultural connections and relationships will be maintained and strengthened in an active, ongoing way. It includes specific, age appropriate strategies for developing and maintaining a positive sense of identity and belonging<sup>18</sup>*

The principles of partnership and participation dictate that Cultural Support Plans are developed, implemented and reviewed with meaningful involvement of Aboriginal family, community members and organisations. We would argue that this is more than merely consultation – particularly the kind of ‘consultation’ that simply provides proposals to the family to endorse.

According to DCJ policy, cultural support plans should be developed through Aboriginal family led decision making processes.<sup>19</sup> A core element of family led decision making is that it is led by an Aboriginal community facilitator, with family at the centre of decision making.

It is helpful to recite some of the information tools (the most relevant) that are provided to DCJ caseworkers when they are drafting Cultural Plans for the Court:

- *There is no legal requirement for Aboriginal children and young people to have a Confirmation of Aboriginality form. **It is important to note that only Aboriginal people can determine who is Aboriginal.***
- *It is important to identify ALL the Country/Nations, language groups, kinship groups, communities of belonging and totem of the child or young person;*
- *It is important for a child to be connected to ALL Country/Nations and communities of both parents*
- *A comprehensive genogram should be developed with the family and attached to their Cultural Plan, and this genogram should include both sides of a child's family*

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<sup>18</sup> Department of Communities and Justice NSW, Aboriginal Case Management Policy rules and practice guidance, March 2019, see glossary, page 58.

<sup>19</sup> Ibid at page 25 and 59

- *'Community of belonging' is a community in which the child or young person and family have a cultural connection, and a child may have more than one. It is important that a child maintains connection with ALL communities of belonging*
- *Caseworkers are asked to complete a minimum of four (4) consultations with Aboriginal family, kin and community people in order to develop the cultural plan. This is important to ensure that the information is both detailed and accurate. Consultation should continue even after the Care Plan is submitted to the Court.*
- *Consultation must occur with family, extended family, communities **and** relevant organisations and services.*
- *Aboriginal consultation is an exchange or two-way flow of information.*
- *Engagement with and access to Aboriginal services for medical, development and educational requirements help maintain a child's connection to the community and are often sources of information about cultural activities and connections in the community.*

When it comes to the review of cultural support plans – partnership and participation again require that *“Aboriginal families, kin and community are actively engaged and lead the process, reviewing the implementation and impact of current strategies and identifying new strategies to meet the child's cultural and developmental needs.”*<sup>20</sup>

Connection dictates that the practical outworking of the cultural support plan is such that the child is having contact with their Aboriginal family, has opportunities to learn about and practice their culture *with* family (including extended family) and community members, and has the opportunity to spend time on country. Of course, in order to do all of this, it is important to properly identify family and country (rather than simply community of belonging) as early as possible for a child or young person.

If the cultural plan has been done correctly whilst the matter is before the Court, then you should be able to identify family members and community organisations/individuals who should be brought together to develop the child's cultural support plan.

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<sup>20</sup> ABSEC Policy brief on cultural planning

<https://www.absec.org.au/images/downloads/Cultural-Planning-Policy-Brief-Draft-Final-2019.pdf>

If DCJ policy is to be followed, ideally an Aboriginal community member leads and directs the discussion for the family and community members to develop the child's Cultural Support Plan. Once developed, the Cultural Support Plan needs to be reviewed a minimum of annually.

The Cultural Support Plan should be specific – and should be practical - who is the child having contact with? What opportunities will exist for the child to learn about and experience their culture with members of their Aboriginal family and/or community? What is occurring in their local community that is relevant and age appropriate for a child or their family? Will contact with their parents also meet the requirements to connect them to their culture? Are there other family members that hold cultural information or knowledge that are important to a child? In what way can a child connect to their mob and their country, including sites of significance – even if that involves significant travel?

#### When Service Provider's are NOT meeting their responsibilities to an Aboriginal child

Here are some examples from what we have seen in our matters to give you a grasp of what is not adequate in meeting an Aboriginal child's cultural needs:

- Asking an Aboriginal caseworker with your organisation to draft a cultural support plan and then asking a parent to sign it after it has been drafted
- Completing a genogram that consists of only one side of the family, or only goes back as far as their immediate grandparents
- Developing the cultural support plan by way of consultation with the child's carers, but not the child's birth or extended family or kinship group.
- The child's attendance at NAIDOC week activities with the carers in conjunction with learning about Aboriginal culture at their school, but no further cultural support from community organisations or family
- Suggesting that watching NITV children's programs satisfy early childhood stage connection to culture, in lieu of spending time with significant members of a child's family or community
- Printing off information about the child's mob from the internet and annexing this to a document purporting to be a cultural support plan
- Having a cultural support plan which identifies a family member as a key person to provide cultural knowledge and support but not having any arrangements in place for the child to exercise contact with that person

- Having a cultural support plan which documents that family members have provided input that the child should attend family funerals but being unwilling to entertain the possibility of facilitating the child's attendance at sorry Business when a family member dies,
- Consulting with parents for the development of a cultural support plan, documenting that the parents say they do not know much about their culture and then making no further attempts to identify or speak to family or community members who may be placed to provide cultural support to the child.
- Asking family members to provide cultural information for the carer to provide to the child, without recognising the importance of that information being held by and passed on by family and community Elders.

#### What does it look like when a Service Provider is meeting their responsibilities

Here are some examples:

- Provision of financial and practical support to facilitate the child/children returning to country and spending time with members of their family on country even where that involves travel and accommodation interstate,
- Contact arrangements not being limited to a child's biological parents and siblings.
- Casework undertaken to ascertain and assess suitable family members who can provide supervision of contact so the child is able to experience time with their parents and family members without the need for an external contact supervisor,
- Provision given for young people to have additional support from Aboriginal mentors/youth workers, particularly ones that have experienced OOHC
- Plans that identify significant places/sites for children and ensure that they are able to spend time on country and important times of the year and which also identify gender-specific activities and seasonal activities in determining the times that family contact should occur
- Care Plans that ensure that there are points of contact within the community of family of an Aboriginal child where upcoming community gatherings and events are communicated to the appropriate caseworker or carer.

## Case Studies

Here are some further examples or case studies drawn from the Aboriginal Legal Service's legal practice, demonstrating the sorts of issues we see Aboriginal children and families confront when working with a Service Provider in the context of a child being in long term OOHC.

I'd encourage you to reflect on these examples in light of what we have discussed today. Namely, what the Aboriginal child placement principles call for: - partnership, participation and maintenance of the child's connection to family, community, culture and country.

- The most frequent request for assistance we encounter from families of children who are on long term orders, is they are after help to establish, reinstate or otherwise negotiate contact arrangements.
- It is not uncommon to see cases where the Service Provider has unilaterally made the decision to decrease contact from the final and approved Care Plan recommendations without discussion or consultation with family. This is both improper (given that the Court has approved a Care Plan and made final orders based on the frequency and nature of contact provided for in those Care Plans), but it is also unconscionable that the family is not involved in the decision.
- We often encounter a real inflexibility around contact for family members who sit outside western constructs of the nuclear family.
- We see matters where parents have had a period of time being inconsistent with contact due to reasonable circumstances and thereafter they have great difficulty negotiating a resumption of contact. (E.g. a father whose five year old daughter is in care, he was to exercise monthly contact with his daughter, missed three consecutive contacts after having another baby and limited transport options to travel with the baby to contact, had been requesting that contact resume for a period of two years before he requested the assistance of the ALS to get contact happening again, contact only occurred after 6 months of repeated requests in writing from the ALS). An example of how this could have been avoided was for the Service Provider to speak with the father about his reasons for missing his first

contact and negotiate alternative contact – particularly as this was also a missed two years of his daughter having contact with a sibling, as well as her father.

- We have had several matters where contact has been suspended for a period of time on the basis that the child has said they do not want to have contact with their parent or family member. These cases are problematic when a young child is given license to dictate whether they see their family without any casework support or investigations with a view to exploring the basis for the child's views, scope for therapeutic assistance to address the issue, work with the carers around the role they can be playing to support contact – and the issue just calcifies over time as the child is repeatedly questioned about whether they want to see mum or dad each time a request is made for contact. In those circumstances, where that contact is also their connection their culture and extended family, it is appropriate to support that child therapeutically in order to ascertain whether contact can be resumed in a different way, or with different people present. We often find that the child's views have not been independently obtained, or are in fact filtered through a carer. This has obvious problems with their independence. That is of course, not to say that there may be legitimate concerns for a child's welfare in some circumstances.
- We currently have a matter where the Service Provider authorised their carers (non-Aboriginal) to move interstate and advised the mother after the decision was made. The mother lives in Sydney with two children, and additional siblings also reside in a foster care placement in Sydney. After moving interstate the Service Provider have reduced contact for mum and for the other siblings in NSW from monthly to four times per year. No consultation has occurred regarding that reduction in contact and no cultural planning has occurred since the children moved interstate. It should be noted that the move interstate removed the child from country. This is entirely inappropriate and arguably breaches a number of the principles under the Care Act.

Whilst further context in relation to each of the above examples may render these situations explicable to those holding case management, from the vantage of our legal service, we continue to encounter Aboriginal children who are not having regular contact

with their families, Aboriginal families who are not consulted or involved in the decisions made for their children and Cultural Support Plans where (if they are in existence on paper) are having little tangible impact upon the child having IRL opportunities for contact with their Aboriginal family, community and country.

If you can think of a child on your books in respect of whom this is the case, please act.

And if you receive a letter from the ALS in relation to a child you are case managing, please respond.

I want to finish this presentation where we began – acknowledgement of the importance of cultural identity to best interests. This is really an area where for good practice to be possible there needs to be some self-reflection on why cultural identity matters for Aboriginal and Torres Strait Islander children. We need to acknowledge history and we need to listen to Aboriginal voices. The Bringing the Home Report is a harrowing read but may I commend it to each one of you. The recent Family is Culture review conducted by Professor Meghan Davis is in many respects a sober reminder we still have a long way to go – may I also commend it to each one of you.