
# Review of the *Child Protection Act 1999* (Qld)

Submission to the Queensland Government Department of Communities, Child Safety and Disability Services

January 2017

**SNAICC – National Voice for our Children** (Aboriginal and Torres Strait Islander Corporation) is the national non-governmental peak body for Aboriginal and Torres Strait Islander children.

SNAICC works for the fulfilment of the rights of our children, in particular to ensure their safety, development and well-being.

The SNAICC vision is an Australian society in which the rights of Aboriginal and Torres Strait Islander children, young people and families are protected; our communities are empowered to determine their own futures; and our cultural identity is valued.

SNAICC was formally established in 1981 and today represents a core membership of Aboriginal and Torres Strait Islander community-controlled organisations providing child and family welfare and early childhood education and care services.

SNAICC advocates for the rights and needs of Aboriginal and Torres Strait Islander children and families, and provides resources and training to support the capacity of communities and organisations working with our families.

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National Voice for our Children

## Introduction

**SNAICC – National Voice for Our Children** (SNAICC) welcomes the opportunity to make a submission to inform the review of the *Child Protection Act 1999* (Qld) (the Act). The review of the Act takes place in the context of an alarming and increasing over-representation of Aboriginal and Torres Strait Islander children in out-of-home care in Queensland. At 30 June 2016, Aboriginal and Torres Strait Islander children were 42 per cent of all children living away from home in Queensland[1] despite representing only 7.8 per cent of the Queensland child population in 2015.[2]

The Queensland Government has recognised that the representation of Aboriginal and Torres Strait Islander children in out-of-home care will escalate to over 50 per cent in the next 5 years if urgent action is not progressed.[3] Progressing an agenda to address over-representation should be a leading priority in the reform of the Act, reflecting the state government's commitment "to acknowledge the deep and enduring historical trauma for Aboriginal and Torres Strait Islander families dealing with the child protection system and respond in ways that enable people, families and communities to heal."[4]

SNAICC believes that what is needed to reverse current trends for Aboriginal and Torres Strait Islander children is a holistic and rights-based approach that targets early intervention, prevention, healing, and family and community strengthening initiatives. Such an approach can only be effectively progressed with recognition and respect of the cultural authority of Aboriginal and Torres Strait Islander peoples who hold the knowledge and expertise to drive change. We encourage reference in the design of legislation to the Family Matters Roadmap, which outlines four evidence-based responses that can address over-representation, drawing on a broad evidence base including the leadership of Aboriginal and Torres Strait Islander organisations and the non-government sector nationally. These four priorities for change are:

- All families enjoy access to quality, culturally safe universal and targeted services necessary for Aboriginal and Torres Strait Islander children to thrive;
- Aboriginal and Torres Strait Islander people and organisations participate in and have control over decisions that affect their children;
- Law, policy and practice in child and family welfare are culturally safe and responsive; and
- Governments and services are accountable to Aboriginal and Torres Strait Islander people.[5]

SNAICC is encouraged to observe that many of these elements are already significantly represented in the legislation Options Paper and we provide guidance throughout this submission on their further integration into the legislative reform process.

As a national peak body we present a number of options for reform in this submission based on successful and promising initiatives found nationally and internationally, as well as reflecting learnings from our ongoing work to support the safety and well-being of Queensland's Aboriginal and Torres Strait Islander children. SNAICC works in partnership with the state peak body, the Queensland Aboriginal and Torres Strait Islander Child

Protection Peak (QATSICPP), and supports and endorses the QATSICPP submission to the present review.

## A broader purpose and strengthened principles

### (a) Legislating a focus on child well-being and supporting families to care (Options 1A-1D and 6A-6D)

Evidence is clear that the primary approach needed to address the over-representation of Aboriginal and Torres Strait Islander children in the child protection system and in out-of-home care is the greater application of prevention and early intervention to heal and strengthen families to deal with the challenges they face and provide safe care for children. This has been recognised as the central tenet of Australia's National Framework for Protecting Australia's Children 2009-2020 that aims to reorient service systems towards a public health model for protecting children.[6]

Australian and international evidence has demonstrated the enormous potential downstream social and economic cost benefits of early intervention supports that, especially when applied early in the life cycle, are effective to improve education outcomes and reduce poor health, welfare dependency, substance misuse, child protection and criminal justice intervention.[7] Family functioning issues and risk factors for child neglect and abuse in Aboriginal and Torres Strait Islander communities are strongly linked to the intergenerational trauma resulting from colonisation, racism, discrimination and forced child removals. Addressing the impacts of trauma for families has been recognised to require significant investment in intensive and targeted family support casework models that provide holistic and culturally safe supports for families to address multiple and complex issues.[8] Prevention has also been identified as the first element of the Aboriginal and Torres Strait Islander Child Placement Principle, recognising that protecting the rights of children to be brought up in their families requires that they have access to a full range of culturally safe and quality universal and targeted support services.[9]

SNAICC recognises that while support service provision must be expanded to achieve better outcomes for Queensland's Aboriginal and Torres Strait Islander children, participation in family support programs should remain primarily voluntary in nature and outside the scope of statutory intervention, so as to avoid unnecessary and excessive intervention in family life, and ensure a focus to empower families to lead their own sustainable changes. However, SNAICC supports legislated minimum standards for the availability of quality, accessible and culturally safe services that promote family preservation and reunification prior to and during statutory child protection intervention as proposed by Option 6D.

SNAICC encourages reference to relevant provisions of the *Children, Youth and Families Act 2005* (Vic) which makes clear the need to protect, strengthen, preserve and promote each child's relationships with parents and family members (ss10(3)(a) and (b)), and requires all reasonable steps be taken to provide the services necessary for the child to remain in the care of the child's parent (s276(2)(b)).

We further recommend that equivalent provisions in the future Queensland Act create accountability for the availability of culturally safe and accessible services for Aboriginal and

Torres Strait Islander families delivered by Aboriginal and Torres Strait Islander agencies. Such a move would contribute to the response to key findings of the Queensland Child Protection Commission of Inquiry (Carmody Inquiry) which stated that "all else being equal, child protection services are more likely to be effective if they are delivered through Aboriginal and Torres Strait Islander-controlled agencies because these agencies are familiar with local circumstances and have the requisite cultural competence."[10] Key Carmody Inquiry findings that indicate the importance of providing a minimum standard for the provision of Aboriginal and Torres Strait Islander controlled family services include that:

- Aboriginal and Torres Strait Islander people are less likely to access mainstream services;[11]
- access to Aboriginal and Torres Strait Islander family support services should be extended[12] and regional coverage of Aboriginal and Torres Strait Islander child and family services be established;[13] and
- Aboriginal and Torres Strait Islander agencies should be strengthened to provide integrated and holistic services with capacity building support provided by the state peak body.[14]

SNAICC supports the proposition in Option 1C to provide further legislative guidance on the application of the *best interests* principle for Aboriginal and Torres Strait Islander children. Research has identified that amongst the major barriers to implementation of the Aboriginal and Torres Strait Islander Child Placement Principle are poor practitioner understanding of the cultural connection and support needs of children and failures to enable Aboriginal and Torres Strait Islander participation to determine a child's best interests.[15] We encourage significant reference to the United Nations Committee on the Rights of the Child's two General Comments addressing the best interests of Indigenous children (General Comments 11 and 14) that provide further guidance on determining the best interests of an Aboriginal or Torres Strait Islander child. In particular, we refer to the following comments of the Committee:

- "The Committee notes that the best interests of the child is conceived both as a collective and individual right, and that the application of this right to indigenous children as a group requires consideration of how the right relates to collective cultural rights."[16]
- "When State authorities including legislative bodies seek to assess the best interests of an indigenous child, they should consider the cultural rights of the indigenous child and his or her need to exercise such rights collectively with members of their group. As regards legislation, policies and programmes that affect indigenous children in general, the indigenous community should be consulted and given an opportunity to participate in the process on how the best interests of indigenous children in general can be decided in a culturally sensitive way."[17]
- "The principle of the best interests of the child requires States to undertake active measures throughout their legislative, administrative and judicial systems that would systematically apply the principle by considering the implication of their decisions and actions on children's rights and interests. In order to effectively guarantee the rights of indigenous children such measures would include training and awareness-raising among relevant professional categories of the importance of considering collective cultural rights in conjunction with the determination of the best interests of the child."[18]

## Addressing the disproportionate representation of Aboriginal and Torres Strait Islander children

### (a) The Aboriginal and Torres Strait Islander Child Placement Principle (Option 2C)

SNAICC strongly supports the proposal to explicitly legislate each of the five elements of the Aboriginal and Torres Strait Islander Child Placement Principle (the Principle). This would be a critical step to build awareness and understanding of the broader intent of the Principle and create accountability for the actions required to fully implement it. It would also serve to align Queensland legislation with the broader definition of the Principle that has been agreed and adopted nationally within the Third Action Plan for the National Framework for Protecting Australia's Children 2009-2020.[19]

The narrow conceptualisation of the Principle as relating only to a placement hierarchy applied at one point of child protection intervention has been a major and persistent barrier to its effective implementation nationally.[20] In legislating the five elements of the Principle, it is essential that its detailed elements are integrated throughout relevant provisions of the legislation, not only as a statement of principle. The specific provisions that would achieve this are discussed throughout this submission.

### (b) Explicit recognition of the right to self-determination and cultural authority (Option 2D)

SNAICC supports the inclusion of principles that explicitly recognise the right to self-determination of Aboriginal and Torres Strait Islander Peoples. However, we note with extreme caution that self-determination is recognised in legislation in New South Wales, Western Australia, and the Northern Territory, without the inclusion of sufficient additional enabling provisions. In those jurisdictions there is no state-wide program for representative Aboriginal and Torres Strait Islander participation in child protection decisions either through family decision making processes or community-controlled organisational participation, and there is no mandated requirement in legislation for such participation. As a result, the legislated principles concerning self-determination remain largely inoperative in those jurisdictions.

Including the right to self-determination as a principle in the Act would assist to promote awareness of its significance as a critical right of Indigenous Peoples recognised in the United Nations Declaration on the Rights of Indigenous Peoples, as endorsed by Australia. However, from the experience of other jurisdictions it is clear that genuine self-determination will not be achieved unless additional provisions mandate participation of Aboriginal and Torres Strait Islander peoples in decision making under the Act.

### (c) Principles relating to the participation of Aboriginal and Torres Strait Islander children, families and communities in decision making (Options 2A and 2B)

SNAICC supports the proposal to include stronger requirements for a child's family and kin to participate in decision making as far as possible, but is highly concerned by the proposal that this *replace* the role of the recognised entity. The Carmody Inquiry called for significant reform of the recognised entity role, but instead identified the need for (emphasis added) "giving recognised entities *a more meaningful role* to ensure the system is responsive to the needs and concerns of Aboriginal and Torres Strait Islander children."[21] The Inquiry report stated that recognised entities "should retain their role in providing an independent view of children's best interests, particularly at the court phase" and that reform of recognised entities should see Aboriginal and Torres Strait Islander agencies "taking a growing responsibility for statutory practice over time."[22]

While SNAICC agrees that the suite of core functions for recognised entities identified by the Carmody Inquiry are appropriate – family conferencing, carer identification and assessment, cultural support planning, and transition from care planning – these functions can only be properly enabled if they are accompanied by legislative authority to participate in the decisions that they relate to. In this regard legislation should recognise:

- The requirement for Aboriginal and Torres Strait Islander organisations to participate in all significant decisions for Aboriginal and Torres Strait Islander children, drawing on knowledge from their engagement with families and their role to enable the voice of families, kin and community in decision making;
- That Aboriginal and Torres Strait Islander Family-led Decision Making can only be provided by Aboriginal and Torres Strait Islander agencies, and that it should occur early and at a range of stages of child protection intervention and inform the input of recognised entities to decision making; and
- That no placement of an Aboriginal or Torres Strait Islander child in out-of-home care should be made without the recommendation of an Aboriginal and Torres Strait Islander agency, drawing on their engagement with families to inform placements that maintain family and cultural connections.

In line with changes to the role and powers of the recognised entities in legislation, SNAICC recommends changing the title of the function, in consultation with Aboriginal and Torres Strait Islander communities, to promote understanding of the changed role and avoid association with elements of the recognised entity function that have not been implemented effectively in the past.

### (d) Delegation of powers (Option 2E)

SNAICC supports Option 2E – to include a new power in the legislation to enable the functions and powers of the Chief Executive in relation to a child subject to a child protection order be delegated to an Aboriginal and Torres Strait Islander agency. The delegation and exercise of such functions and powers by an Aboriginal and Torres Strait Islander agency would contribute to practically enable principles suggested in Option 2D recognising Aboriginal and Torres Strait Islander self-determination and cultural authority. Such a provision could also give significant practical effect to the partnership element of the Aboriginal and Torres Strait Islander Child Placement Principle by transferring authority for the care and protection of Aboriginal and Torres Strait Islander children in out-of-home care to community-controlled agencies. Importantly, it would align with Australian and

international evidence that Indigenous self-determination exercised through the control of the design and delivery of services for their own families and communities is key to achieving better outcomes.[23] In short, SNAICC believes strongly that better decisions will be made and better outcomes will be achieved for Aboriginal and Torres Strait Islander children in out-of-home care where the agencies and people who know and understand their culture, community, family and historical context have control over the decisions made about their care.

In Victoria, the delegation of guardianship to Aboriginal agencies is currently being delivered through two Aboriginal agencies as enabled by section 18 of the *Children, Youth and Families Act 2005* (Vic). In Victoria, the Victorian Aboriginal Child Care Agency (VACCA) has clearly described the importance and potential benefits of delegation, stating that:

> "Aboriginal guardianship provides an opportunity to change the whole nature of the relationship between Aboriginal communities and child protection; it is the means to ensure that identity and belonging is central to any response to an Aboriginal child who needs the protection of guardianship. For an Aboriginal child, their guardian will be an Aboriginal person who is proud of their Aboriginal culture and shares the aspirations for Aboriginal children that exist across Aboriginal communities. An Aboriginal guardian will engage with children and families in a way that is familiar. The opportunity for a child to be proud of their culture and strongly connected to their Aboriginal community will build their resilience to manage the challenges they will certainly face in their adult life."[24]

In its consideration of the exercise of Aboriginal guardianship in the Canadian context, VACCA observed that the transfer of guardianship to Aboriginal agencies resulted in increased connection to families, culture, and community for Aboriginal children.[25]

While section 18 was first included in legislation in Victoria in 2005, it was not until November 2015 that enabling provisions were introduced that allow for the practical and effective exercise of Aboriginal guardianship.[26] Provisions relating to the provision, exchange, and use of information, powers and functions of an acting Principal Officer (of an Aboriginal agency), and delegation of functions and powers by a Principal Officer to an employee of the Aboriginal agency are now in place, making Aboriginal guardianship an operable reality. We urge the current review to consider and ensure that such essential enabling provisions are included at the outset with a power enabling the delegation of functions and powers to an Aboriginal and Torres Strait Islander agency.

During the period that section 18 was practically inoperable, a pilot program was implemented whereby an Aboriginal agency, VACCA, acted *as if* it had formally been delegated the Secretary's guardianship rights and responsibilities for Aboriginal children. The trial from 2013 to 2015 saw almost half of all children safely reunified with family – parents or another family member – despite indications that they were on a pathway to long-term out-of-home care. The 13 children included in the program had been in out-of-home care for some time, with 10 children in out-of-home care for more than eight years and four children having been in out-of-home care within six months of their birth.[27]

VACCA CEO Professor Muriel Bamblett AO praised the trial, noting, "the most significant learning of the pilot was that through the development of strong and positive relationships

with a competent, professional Aboriginal organisation, Aboriginal families who have previously been *written off* were supported to enable their children to safely return to their care and their communities. Aboriginal community-controlled agencies have the intrinsic cultural knowledge to deliver holistic, targeted services."[28]

An independent evaluation of the trial found "potential benefits for Aboriginal children, young people and their families from a distinctive section 18 approach by an Aboriginal Community Controlled Organisation."[29] The evaluation reflected that even though the trial's cohort was broadly representative of Aboriginal children on relevant protection orders in out-of-home care, given the very small size of the sample and the absence of a control group to compare outcomes, "it would be unwise and premature to draw any firm conclusions from the outcomes achieved for these particular children."[30] The evaluation did, however, conclude that the outcomes "are cautiously encouraging and if replicated and sustained on a larger scale could have a positive impact upon slowing and eventually reducing the number of Aboriginal children subject to protection orders and placed in out-of-home care."[31]

VACCA's own review of the trial set out many project learnings, some tied to the nature of the *as if* trial and others relevant to the full implementation of section 18. A significant learning was the need for adequate funding, support, and infrastructure to perform guardianship related activities, at least at the level currently provided to the child protection service, including in relation to access to legal advice and representation, training, brokerage, and expert advice for highly complex case decisions.[32]

Following the promising *as if* pilot of Aboriginal guardianship and with the introduction of the enabling provisions that allow for the practical operation of section 18, in 2016 the Victorian Government committed funding for VACCA to continue the delivery of section 18 services.[33] The Victorian Government has expressed clear commitment to the successful implementation of section 18, taking a staged and planned approach and building the capacity of Aboriginal organisations to assume and exercise functions and powers in relation to Aboriginal children.[34] As part of this approach, in July 2016, the Bendigo and District Aboriginal Co-operative joined a 12-month trial as part of the section 18 rural pilot program.[35]

SNAICC is strongly encouraged by the initial progress of Aboriginal guardianship in Victoria and its significant potential to increase self-determination in child protection matters for Victoria's Aboriginal peoples. We strongly recommend that legislation make provision for similar promising approaches to be pursued in Queensland. SNAICC supports acknowledgement in the Options Paper that implementation will need to include investment to build the capacity and capability of agencies to take on the trial. We note that equitable resourcing to that which supports the performance of the same functions by the Queensland Government would be essential. We also note that we are aware that a number of Aboriginal and Torres Strait Islander agencies in Queensland have significant existing capacity and readiness to begin the process of taking on delegated functions.

Importantly, review of the Canadian experience of delegating statutory authority to Aboriginal agencies has revealed limitations to achieving outcomes from delegation where Indigenous community agencies are provided only with responsibility for statutory child protections functions and are not resourced to provide the holistic preventive supports that are needed to heal and strengthen communities and stop the flow of children coming into out-of-home

care.[36] These learnings highlight that the delegation of guardianship, while a vital component to achieving self-determination, is not the panacea for Aboriginal and Torres Strait Islander child protection issues, but must be part of a broader process to empower Aboriginal and Torres Strait Islander communities and their organisations to respond to the underlying causes of child protection intervention.

## A shared responsibility for child protection and well-being

### (a) Shared responsibility (Options 3A-3D)

We note the promising recent work of the Queensland Government to progress the co-design of a whole of government strategy, together with non-government partners through Queensland Family Matters, with the aim to ensure Aboriginal and Torres Strait Islander children grow up safe and cared for in family, community and culture. This initiative brings the voices of Aboriginal and Torres Strait Islander organisations, peaks and leaders to the fore in developing long-term strategies to ensure the safety and well-being of Aboriginal and Torres Strait Islander children.

Reflecting on the early development and progress of this initiative we believe that governance structures for the continued development, implementation and oversight of such a strategy, including the participation of Aboriginal and Torres Strait Islander peak bodies and leadership to co-design and monitor, should be recognised in legislation. Such provisions would give clear guidance and practical effect to a critical component of the right to self-determination for Aboriginal and Torres Strait Islander people through representative participation in system and service design and monitoring. Such provisions would also contribute to enact the *partnership* element of the Aboriginal and Torres Strait Islander Child Placement Principle which envisages a genuine collaboration between government and Aboriginal and Torres Strait Islander community-controlled services and peaks to progress reform and supports that assist to ensure Aboriginal and Torres Strait Islander children are safely cared for in their families and communities.

## Meaningful participation of families in decision making

### (a) Legislating Aboriginal and Torres Strait Islander Family-led Decision Making (Option 10C)

Ensuring the participation of Aboriginal and Torres Strait Islander families in decisions about the care and protection of their children is recognised as a core element of the Aboriginal and Torres Strait Islander Child Placement Principle[37] is central to enabling self-determination in child protection matters for Aboriginal and Torres Strait Islander peoples. SNAICC strongly supports Option 10C to legislate for the provision of Aboriginal and Torres Strait Islander Family-led Decision Making as a means to enable such participation. The model of Aboriginal and Torres Strait Islander Family-led Decision Making currently being trialed in Queensland originates from the New Zealand model of family group conferencing which was designed partly as a means to better attune child protection services to cultural practices in working with Maori communities by involving Indigenous family and community members in decision making for their children.[38]

Importantly, studies of family group conferencing have shown that plans generated tended to keep children at home or with their relatives, and that the approach reinforced children's connections to their family and community,[39] thus demonstrating the alignment of the model with the central purpose of the Aboriginal and Torres Strait Islander Child Placement Principle. In Australia and internationally, the promise of culturally adapted models of family-led decision making to engage and empower Indigenous families and communities in child protection processes has been recognised,[40] though Australian implementation remains very limited to date. In Victoria, where a state-wide model of Aboriginal Family-led Decision Making (AFLDM) has been operating since 2005, the recent report of an inquiry conducted by the Victorian Commission for Children and Young People found minimal compliance with implementation requirements, noting that only 11 per cent of intended meetings occurred in 2014-15, and citing particular deficiencies in departmental referral practice, challenges of a co-convenor model, and various additional practice challenges.[41] Despite these issues, the report strongly recommended improvement and continuation of the model, finding that:

> There was unanimous agreement that the AFLDM program is extremely valuable in making important decisions to keep a child safe, and maintain the child's culture and identity through connection to their community. The AFLDM program presents one of the most significant opportunities to meaningfully involve families in decision-making and ensure that the process undertaken is led by Aboriginal people.[42]

Research has clearly identified that family decision-making models provide opportunities to bring alternate Indigenous cultural perspectives and worldviews to the fore in decision making, ensuring respect for Indigenous values, history and unique child rearing strengths.[43] At the same time, research has recognised the danger that these processes will be ineffective to empower families and communities where they remain wholly controlled and operated by non-Indigenous professionals and services.[44] While strong partnerships with government child protection services are essential to any model of family-led decision making, SNAICC holds strongly that an effective and culturally strong model of Aboriginal and Torres Strait Islander Family-led Decision Making must be operated by Aboriginal and Torres Strait Islander community-controlled agencies and that this requirement should be specified in legislation.

In consultation with stakeholders for the current trial of Aboriginal and Torres Strait Islander Family-Led Decision Making in Queensland, SNAICC has developed a series of principles for the conduct of a model of Aboriginal and Torres Strait Islander Family-led Decision Making in Queensland, ensuring the significant alignment of principles with the Queensland Strengthening Families Protecting Children Framework for Practice, the Queensland Aboriginal and Torres Strait Islander Child Protection Standards, and the evidence base for effective practice in Aboriginal and Torres Strait Islander Family-led Decision Making. We recommend reference to these principles and their appropriate incorporation in the design of legislation for Aboriginal and Torres Strait Islander Family-led Decision Making:

- Aboriginal and Torres Strait Islander peoples have the right to participate in decisions that affect their children and families;
- Aboriginal and Torres Strait Islander children are best cared for in their family, kin and cultural networks – supporting families and communities to stay together promotes healing and the protection of future generations;

- Children have a right to participate in decisions made about their own care, in accordance with their age and maturity;
- Family is a culturally defined concept – participants in the decision making process should be defined by the Aboriginal and Torres Strait Islander families, children and communities;
- Families should be given the opportunity to make decisions without coercion, including having time to meet on their own without professionals present;
- Plans are more likely to be followed through when they are made and owned by the child's family and community;
- When a plan developed by the family group meets safety needs of the child then all professionals should give preference to the family group's plan over other identified plans and provide resources to progress it;
- Aboriginal and Torres Strait Islander community-controlled organisations have cultural and community knowledge that strongly assists the facilitation of family-led decision making. The independent leadership role of Aboriginal and Torres Strait Islander community-controlled organisations needs to be recognised, respected and acknowledged; and
- Child Safety has statutory obligations to ensure safety for children – these obligations need to include collaboration with Aboriginal and Torres Strait Islander community-controlled organisations and families to ensure safety concerns are clearly identified and addressed in decision-making.

Finally, we note our support for the proposition in Option 10C that provisions direct that Aboriginal and Torres Strait Islander Family-led Decision Making may be used at earlier points of contact with the child protection system. Such provisions would align with research that has described the benefits of enabling a family decision-making process early,[45] including the increased likelihood that conferences will focus on resolving family issues utilising services or informal family and community supports to enable children to remain in the safe care of their families.[46] A number of studies of family group conferencing or family-led decision making have highlighted the more limited scope for empowering families where meetings take place later in child protection intervention and called for their application at earlier stages,[47] including the review of a promising trial with Aboriginal families in Alice Springs.[48] Reflecting this research, we believe that there should be a mandatory requirement to provide the process at the point at which Child Safety Services determine to pursue an investigation and at subsequent significant decision making points, for example, case planning, case plan review, and placement change. As noted earlier in this submission, we believe that this process would provide the basis for Aboriginal and Torres Strait Islander organisations to engage with and support families to participate throughout all phases of child protection decision-making.

## Permanency outcomes for children

### (a) Achieving stability for Aboriginal and Torres Strait Islander children (Options 12A-12E)

SNAICC strongly recognises the importance of stability for children who are engaged with child protection services and supports measures that promote their holistic stability of relationships, identity and care. When legislating regarding permanence of care we

recommend very careful consideration of the measures introduced and the extent to which they align with the holistic aspects of stability for children.

Permanency in the care and protection sector has been defined as comprising three key aspects, "relational permanence (positive, caring, stable relationships), physical permanence (stable living arrangements), and…legal arrangements."[49] Recent state and territory reforms have tended to focus on the latter two. SNAICC believes that this has been to the detriment of key aspects of relational permanence that are central to the well-being and lifelong outcomes of Aboriginal and Torres Strait Islander children. The theory underpinning many permanency planning reforms asserts that the sooner an enduring attachment with a carer can be established, the greater stability can occur, and that this is a better outcome for a child's well-being.[50] Aboriginal and Torres Strait Islander people commonly question this narrow construct of attachment theory that centres stability on the singular emotional connection between a child and a carer. This has been described as "inconsistent with Aboriginal and Torres Strait Islander values of relatedness and child-rearing practices."[51] For Aboriginal and Torres Strait Islander children, permanence is identified by a broader communal sense of belonging; a stable sense of identity, where they are from,[52] and their place in relation to family, mob, community, land and culture.

Regardless of the positive intention of permanency reform, the permanent removal of Aboriginal and Torres Strait Islander children from their families presents harrowing echoes of the Stolen Generations for Aboriginal and Torres Strait Islander communities. Legal permanency measures have tended to reflect an underlying assumption that a child in out-of-home care experiences a void of permanent connection that needs to be filled by the application of permanent care orders. This understanding is flawed in its failure to recognise that children begin their out-of-home care journey with a permanent identity that is grounded in cultural, family and community connections. This is not changed by out-of-home care orders. Inflexible legal measures to achieve permanent care may actually serve to sever these connections for Aboriginal and Torres Strait Islander children, in breach of their human rights, and break bonds that are critical to their stability of identity while they are in care and later in their post-care adult life.

SNAICC asserts that the permanent removal of Aboriginal and Torres Strait Islander children from their families currently presents a high level of risk of causing additional harm to Aboriginal and Torres Strait Islander children due to factors including:

- The current inadequate participation of Aboriginal and Torres Strait Islander peoples in decision making to ensure decisions are informed of cultural needs and safe care options in the child's family and community;
- Limited compliance with the Aboriginal and Torres Strait Islander Child Placement Principle, reported at only 12.5 per cent of matters that fully complied with legislative requirements relating to the Principle when last reviewed by the former Queensland Commission for Children and Young People in 2012-13;[53] and
- Insufficient provision of supports to preserve and reunify families.

SNAICC describes these concerns fully in its policy position paper *Achieving Stability for Aboriginal and Torres Strait Islander Children*, available on the SNAICC website and appended to this submission. We believe that remedy of these concerns will be more effective than the broader implementation of permanent care orders to promote stability for

Aboriginal and Torres Strait Islander children. Further, we support the proposition in Option 12E to introduce appropriate safeguards for the application of permanent care orders and hold that safeguards should include requirements that each of the above measures – participation, Aboriginal and Torres Strait Islander Child Placement Principle compliance, and family support – have been adequately implemented and provided for. In particular, we believe that any decision to place an Aboriginal and/or Torres Strait Islander child in permanent care should only be made with the appropriate and timely review of the child's individual circumstances, and with informed support for the decision from an appropriate Aboriginal and Torres Strait Islander community-controlled agency.

We note our strong opposition to Option 12D insofar as it specifies that a child will exit the out-of-home care system when placed on a permanent care order. SNAICC believes that such a measure would serve to shift responsibility for addressing serious care issues to individual carers. Governments bear responsibility for a fully funded and effective alternative care system that complies with human rights and moral obligations to children. In its review of long-term guardianship orders in New South Wales, the Aboriginal Child, Family and Community Care State Secretariat (AbSec) has highlighted the lack of service supports provided to carers when permanent orders are made, despite the high therapeutic care needs of many children in out-of-home care who are impacted by trauma.[54] Similar experiences have been reported in other states. Aboriginal and Torres Strait Islander families provide a large proportion of out-of-home care in Australia, caring for over half of all Aboriginal and Torres Strait Islander children in care. Research has highlighted the additional strain on Aboriginal and Torres Strait Islander families and communities that results from providing high-levels of additional care while also experiencing higher-levels of poverty and disadvantage.[55] This strain is compounded by lower-levels of support provided to kinship carers as compared to foster carers.[56] If permanent care measures are utilised to further reduce the financial and/or practical supports available to kinship and foster carers, this will negatively impact children and the communities that are already extending their resources to care for them.

In consultation with Aboriginal and Torres Strait Islander organisations and leaders nationally, SNAICC has developed a set of principles to guide the development of stability and permanency planning measures in Australia. We call for the careful consideration and reflections of these principles in legislative design:

1. **Aboriginal and Torres Strait Islander children have rights of identity that can only be enjoyed in connection with their kin, communities and cultures.** In accordance with the Aboriginal and Torres Strait Islander Child Placement Principle, their rights to stay connected with family and community must be upheld and the child, their families and communities enabled to participate in decision making regarding their care and protection. There must be consistent and comprehensive consideration of the hierarchy of placement options, culturally appropriate kinship carer identification and assessment, and regular review to give priority for placement with a child's family and community before considering permanent care;

2. **Permanent care for Aboriginal and Torres Strait Islander children should only be considered where the family has been provided with culturally appropriate and ongoing intensive and targeted family support services**, and there has been

an appropriate independent assessment that there is no future possibility of safe family reunification;

3. **Traditional adoption that severs the connection for children to their families and communities of origin is never an appropriate care option for Aboriginal and Torres Strait Islander children**, except as it relates to traditional Torres Strait Islander adoption practices;

4. **Decisions to place an Aboriginal and/or Torres Strait Islander child in permanent care should only be made with the appropriate and timely review of the child's individual circumstances, and with informed support for the decision from an appropriate Aboriginal and Torres Strait Islander community-controlled agency;**

5. **Aboriginal and Torres Strait Islander communities and organisations must be resourced and supported to establish and manage high-quality care and protection-related services**, and to make decisions regarding the care and protection of children and young people in their own communities;

6. **Permanency should never be used as a cost saving measure in lieu of providing Aboriginal and Torres Strait Islander families and communities with adequate and appropriate support.** The burden of care held by Aboriginal and Torres Strait Islander families and communities should be adequately resourced, whether placements are temporary or permanent;

7. **Aboriginal and Torres Strait Islander communities and their organisations must lead the development of legislation and policy for permanent care of their children based on an understanding of their unique kinship systems and culturally-informed theories of attachment and stability**; and

8. **Where Aboriginal and Torres Strait Islander children are on long-term/permanent orders, genuine cultural support plans must be developed and maintained (including with regular review) on an ongoing basis.**

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SNAICC

National Voice for our Children

# Achieving stability for Aboriginal and Torres Strait Islander children in out-of-home care

SNAICC POLICY POSITION STATEMENT

JULY 2016


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With direction and input from the SNAICC Policy Sub-Committee: Garry Matthews (Chair), Sharron Williams, Rachel Atkinson, Natalie Lewis, Tim Ireland, and Lisa Thorpe.

With input and submissions by SNAICC members and stakeholders. Particularly, SNAICC acknowledges Aboriginal and Torres Strait Islander community-controlled organisations across Australia that provided submissions and papers to inform this statement, including: Aboriginal Child, Family and Community Care State Secretariat (AbSec) (NSW); Aboriginal Legal Service of Western Australia (WA); Danila Dilba Health Service (NT); Wuchopperen Health Service (Qld); and Ngaanyatjarra, Pitjantjatjara and Yankunytjatjara Women's Council (NPY Women's Council) (SA, WA & NT), and the Victorian Aboriginal Child Care Agency (VACCA) (Vic). SNAICC also acknowledges other individuals who provided significant review and input to the development of the paper, including especially Julian Pocock, Teresa Libesman, and Simon Schrapel.

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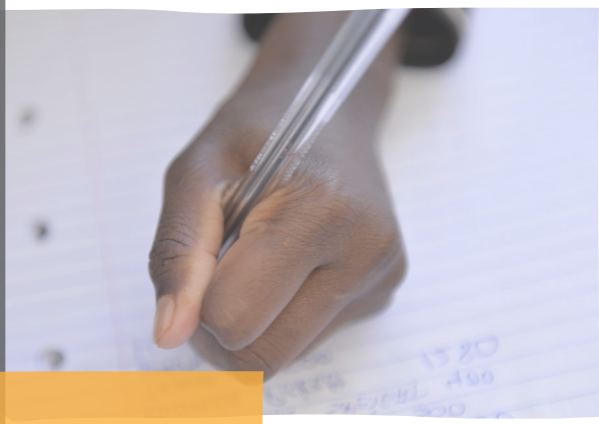

# OVERVIEW

Like all children, Aboriginal and Torres Strait Islander children have the right to live in safety, free from abuse and neglect, and in stable and supportive family and community environments. Each child's wellbeing and ongoing best interests should be the priority of those who care for them. **For Aboriginal and Torres Strait Islander children who are harmed or at risk of harm and in need of alternative care, their protection is our priority.**

For children who are placed in out-of-home care, stability of relationships and identity are vitally important to their wellbeing and must be promoted. In recent years, state and territory child protection authorities have increasingly used a range of case management measures that seek to promote stability through longer-term care arrangements for children. These vary in detail in each jurisdiction but are often broadly described as *permanency planning*. A number of jurisdictions have sought to entrench these measures in legislation. The overt rationale for reform has been to provide children in care with "safe, continuous and stable care arrangements, lifelong relationships and a sense of belonging." [1]

While SNAICC supports an agenda to improve stability for Aboriginal and Torres Strait Islander children in out-of-home care, we have significant concerns that current and proposed permanency planning measures will not achieve this. Without significant improvement to their design and further safeguards, they will likely cause more harm to children and exacerbate inter-generational harm to families and communities. We believe that current approaches are not sufficiently flexible or attuned to the reality that, **for an Aboriginal and/or Torres Strait Islander child, their stability is grounded in the permanence of their identity in connection with family, kin, culture, and country.**

## KEY RECOMMENDATIONS
### TO ADVANCE STABILITY FOR ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN INCLUDE:

1. Child protection legislation, policy and practice guidelines and decision-making are reviewed (periodically) to ensure effective and differential recognition of the unique rights of Aboriginal and Torres Strait Islander children to safe and stable connections to kin, culture, and community.
2. Mechanisms are established to enable Aboriginal and Torres Strait Islander community-controlled agencies, families and children to participate in all decisions relating to the care of Aboriginal and Torres Strait Islander children, particularly those relating to longer-term or permanent care.
3. All governments invest appropriately to provide access to early intervention, intensive family support and healing services for Aboriginal and Torres Strait Islander families to prevent abuse, neglect and removal of children to alternative care, and to promote family restoration where children have been removed.

# PERMANENCY PLANNING TRENDS

**Each state and territory has a child protection order available in legislation that transfers exclusive parental responsibility to a person, other than the child's biological parents, until the child is 18 years old.** While these orders are not new in child protection legislation, in recent years there have been strong trends in policy and legislative reform to increase the focus on, and expedite timeframes for, the use of these orders by child protection authorities and the courts. Over the last two years permanency-focused legislative reform has been undertaken in New South Wales, Victoria, and the Northern Territory, and tabled in discussion papers on legislative reform priorities in both Queensland and Western Australia.

Legislated timeframes for permanency planning have been recently introduced in Victoria and New South Wales, and are provided for in Tasmania. These provisions seek to limit the time during which reunification (also known as *restoration*) of children with their biological parents is pursued. Victorian legislation requires the application of a permanent care objective where a child has been in out-of-home care for a cumulative period of 12 months or 24 months in exceptional circumstances.[2] In New South Wales, the Children's Court is required to make a determination as to whether a plan that pursues restoration is appropriate within 6 months of an interim out-of-home care order for a child under 2 years of age, and 12 months for a child over 2 years of age.[3] In Tasmania, the Magistrates' Court must consider a long-term guardianship order where a child has been in out-of-home care for a continuous period of 2 years.[4] Only in Victoria are permanent care orders coupled with restrictions on the child's contact with their birth parents, which is limited to 4 times per year.[5]

A range of safeguards are legislated to varying degrees to protect the best interests of Aboriginal and Torres Strait Islander children in respect of permanency planning. All jurisdictions have general provisions regarding the maintenance of cultural identity and connection, including a form of the *Aboriginal and Torres Strait Islander Child Placement Principle*, but there are variations on the extent of requirements and how they are implemented. For example, in Victoria a court must not make a permanent care order unless an Aboriginal agency recommends the making of the order,[6] whereas Queensland and South Australia have more general provisions requiring that an Aboriginal agency be given the opportunity to participate in the decision. Other jurisdictions have less prescriptive requirements to consult with or receive submissions from Aboriginal and Torres Strait Islander people, rather than an independent agency. In all states and territories parents have either the right to appeal the making of a permanent care order, or to apply for a revocation or variation of the order, or all of these – except the Northern Territory, where parents cannot apply for a revocation or variation of the order.[7]

The Northern Territory introduced permanent care orders in 2015 and is the only jurisdiction not to place any restrictions on the making of such an order beyond general pre-requisites and principles in the relevant Act. The Northern Territory Act lacks safeguards commonly present in other jurisdictions, such as provision for parental contact, parental rights to apply for revocation of an order, and restrictions on permanent placements for Aboriginal children in non-Indigenous care.

*Note: A comparative table of relevant legislative provisions prepared by King & Wood Mallesons is available accompanying this position statement on the SNAICC website.*

# ABORIGINAL AND TORRES STRAIT ISLANDER CONCEPTS OF PERMANENCE

**Permanency in the care and protection sector has been defined as comprising three key aspects, "relational permanence (positive, caring, stable relationships), physical permanence (stable living arrangements), and…legal arrangements."**[8] Recent state and territory reforms have tended to focus on the latter two. SNAICC believes that this has been to the detriment of key aspects of relational permanence that are central to the wellbeing and lifelong outcomes of Aboriginal and Torres Strait Islander children.

The theory underpinning many permanency planning reforms asserts that the sooner an enduring attachment with a carer can be established, the greater stability can occur, and that this is a better outcome for a child's wellbeing.[9] Aboriginal and Torres Strait Islander people commonly question this narrow construct of attachment theory that centres stability on the singular emotional connection between a child and a carer. This has been described as "inconsistent with Aboriginal and Torres Strait Islander values of relatedness and child-rearing practices."[10]

Modern applications of attachment theory allow for attachment to both parents and also with grandparents and other relatives and care-givers.[11] This less fixed, more dynamic understanding is also reflected in the *best interests principle* in international child rights law that calls for consideration of the particular circumstances of each individual child.

Reflecting research and the knowledge of Aboriginal and Torres Strait Islander communities, SNAICC asserts that stability for Aboriginal and Torres Strait Islander children does not rely exclusively on developing particular bonds with a single set of parents or carers, or on living in one house. There are differences in family life across Nations, groups and families, but many long-practiced Aboriginal and Torres Strait Islander models of child rearing hold that "…children are part of a system of care…described as *intermittent flowing care* (Wharf 1989), (with) different kinship relationships with various members of extended families and often move between…or indeed outside it."[12] Stability for children within these systems stems from being *grown up* and cared for within extended family and kin networks that form "the foundations of their identity, culture and spirituality."[13]

Canadian research has directly linked a lack of continuity of personal identity for First Nations young people to increased rates of youth suicide.[14] The research has connected the individual wellbeing of young people to the cultural continuity of their communities, finding that where a set of cultural connection, practice, and self-governance factors are present, suicides for First Nations young people reduce to zero.[15] In the Australian context, Pat Anderson AO, has described the connections that underpin stability of identity for Aboriginal and Torres Strait Islander people:

> "OUR IDENTITY AS HUMAN BEINGS REMAINS TIED TO OUR LAND, TO OUR CULTURAL PRACTICES, OUR SYSTEMS OF AUTHORITY AND SOCIAL CONTROL, OUR INTELLECTUAL TRADITIONS, OUR CONCEPTS OF SPIRITUALITY, AND TO OUR SYSTEMS OF RESOURCE OWNERSHIP AND EXCHANGE. DESTROY THIS RELATIONSHIP AND YOU DAMAGE – SOMETIMES IRREVOCABLY – INDIVIDUAL HUMAN BEINGS AND THEIR HEALTH."[16]

Thus, **permanence for Aboriginal and Torres Strait Islander children is identified by a broader communal sense of belonging; a stable sense of identity, where they are from,**[17] **and their place in relation to family, mob, community, land and culture.**

"EARLY INTERVENTION SUPPORTS ARE REQUIRED TO PREVENT CHILDREN ENTERING CARE"

# OUR CONCERNS

**SNAICC BELIEVES THAT CURRENT POLICY AND REFORMS THAT SEEK TO EXPEDITE PERMANENT CARE ARE NOT APPROPRIATE TO ACHIEVE STABILITY FOR ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN IN OUT-OF-HOME CARE, AND WILL CAUSE MORE HARM.**

Further, SNAICC believes that mainstream notions of stability implicit within permanency measures have not adequately examined what stability is from the perspective of an Aboriginal or Torres Strait Islander child, nor the most appropriate ways to support that stability for children.

Regardless of the intentions that underpin permanency measures, **the permanent removal of Aboriginal and Torres Strait Islander children from their families presents harrowing echoes of the Stolen Generations** for Aboriginal and Torres Strait Islander communities. Permanency measures tend to reflect an underlying assumption that a child in out-of-home care experiences a void of permanent connection that needs to be filled by the application of permanent care orders. This understanding is flawed in its failure to recognise that children begin their out-of-home care journey with a permanent identity that is grounded in cultural, family and community connections. This is not changed by out-of-home care orders. Inflexible legal measures to achieve permanent care may actually serve to sever these connections for Aboriginal and Torres Strait Islander children, in breach of their human rights, and break bonds that are critical to their stability of identity while they are in care and later in their post-care adult life.

This section details a number of our specific concerns regarding the design and application of permanency measures.

## (A) LIMITED COMPLIANCE WITH THE ABORIGINAL AND TORRES STRAIT ISLANDER CHILD PLACEMENT PRINCIPLE

The Aboriginal and Torres Strait Islander Child Placement Principle has been developed to support and maintain the safe care and connection of Aboriginal and Torres Strait Islander children with their families, communities and cultures. Research has confirmed that the history and intent of the Principle is about far more than a decision about where and with whom a child is placed.[18] Its purpose and key elements require early intervention supports to prevent children entering care; supports for children to maintain and re-establish cultural connections in out-of-home care; efforts for reunification; and ensuring that Aboriginal and Torres Strait Islander families, communities and organisations are involved in decision making, service design and service delivery.[19]

**There remains inconsistent and ineffective implementation, and in some settings misunderstanding, of the Principle across jurisdictions,[20] which has significant implications for permanency planning.** Practical concerns include failures to identify Aboriginal and Torres Strait Islander children and inadequate efforts to consistently look for placement options in consultation with family and community at each stage of the management of a child's care arrangements. Lack of culturally appropriate kinship carer identification and assessment processes have also been identified as significant concerns.

In this context, permanent care orders risk severing cultural connections in circumstances where children are in placements that are disconnected from their families and communities. Where permanent care orders contain no requirements for the ongoing maintenance of cultural connections, the risk is even greater.

## (B) INADEQUATE PARTICIPATION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES IN DECISION MAKING

**SNAICC notes the lack of effective consultation with Aboriginal and Torres Strait Islander organisations and people independent of government agencies in child protection decision-making** that has been recognised repeatedly in state and territory child protection systems inquiries over the last 10 years.[21]

The failure to include Aboriginal and Torres Strait Islander perspectives in decision-making means that many decisions are made without adequately addressing the cultural needs of the child, and without identifying the safe care options that exist within families and communities. Roles for Aboriginal and Torres Strait Islander agencies to participate in child protection decision-making have been established state-wide in Victoria and Queensland, and to a lesser extent in South Australia. However, these services have been inadequately resourced and enabled to consistently and effectively influence decision-making.[22] Such services have not been supported in other parts of the country.[23] Aboriginal and Torres Strait Islander Family-led Decision Making facilitated by independent community agencies has also been recognised as a valuable model for engaging families to identify and establish safe care options. However, this model has only been implemented state-wide in Victoria, and trialled in limited locations in New South Wales and Queensland.

In a context where Aboriginal and Torres Strait Islander participation in decision-making is limited, expediting permanent care options will contribute to progress poor, ill-informed decisions to become irreversible decisions that can harm children.

## (C) INSUFFICIENT SUPPORT TO PRESERVE AND REUNIFY FAMILIES

**A lack of adequate focus on family support services and on reunification** across jurisdictions is another major concern in the context of permanency planning. Service system responses remain reactive rather than preventative, with only $719 million (or just 16.6 per cent of total child protection expenditure) invested in supporting families, compared to $3.62 billion in child protection and out-of-home care, in the 2014-15 financial year.[24] There must be greater efforts to ensure the provision of intensive and targeted family support services that recognise and address intergenerational trauma as family members struggle with their own health and wellbeing issues at the same time as providing care and support for their children. SNAICC members have also highlighted that a lack of service availability and delays in service provision for families, including waiting lists for housing and other critical services, limit capacity for families to reunify within mandated timeframes. These concerns are particularly evident in remote and isolated locations.

We must still acknowledge the ongoing damage caused by a history of separation from culture in the context of decision-making about long-term care of Aboriginal and Torres Strait Islander children.[25] A lack of investment to heal and rebuild families and communities should never be used as justification for the use of permanency planning measures that can further devastate them.

Given the lack of support available to vulnerable families, both before and after children are removed to alternative care, there is a significant risk that a focus on permanent care planning could consolidate inter-generational family and community breakdown. SNAICC believes that promoting and supporting the preservation and restoration of Aboriginal and Torres Strait Islander families to provide safe care for their children must be given priority over permanency planning approaches.

## (D) ONGOING SUPPORT FOR KINSHIP AND FOSTER CARERS

**SNAICC is concerned that permanency planning will be used as a measure to shift responsibility for addressing serious care issues to individual carers.** Governments bear responsibility for a fully funded and effective alternative care system that complies with human rights and moral obligations to children. In its review of long-term guardianship orders in New South Wales, the Aboriginal Child, Family and Community Care State Secretariat (AbSec) has highlighted the lack of service supports provided to carers when permanent orders are made, despite the high therapeutic care needs of many children in out-of-home care who are impacted by trauma.[26] Similar experiences have been reported in other states.

Aboriginal and Torres Strait Islander families provide a large proportion of out-of-home care in Australia, caring for over half of all Aboriginal and Torres Strait Islander children in care. Research has highlighted the additional strain on Aboriginal and Torres Strait Islander families and communities that results from providing high-levels of additional care while also experiencing higher-levels of poverty and disadvantage.[27] This strain is compounded by lower-levels of support provided to kinship carers as compared to foster carers.[28] If permanent care measures are utilised to further reduce the financial and/or practical supports available to kinship and foster carers, this will negatively impact children and the communities that are already extending their resources to care for them.

"FOR CHILDREN WHO ARE PLACED IN OUT-OF-HOME CARE, STABILITY OF RELATIONSHIPS AND IDENTITY ARE SO VERY IMPORTANT TO THEIR WELLBEING AND MUST BE PROMOTED. FOR ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN, WHAT WE NEED TO REMEMBER IS THAT STABILITY IS GROUNDED IN THE PERMANENCE OF THEIR IDENTITY IN CONNECTION WITH FAMILY, KIN, CULTURE, AND COUNTRY."

## (E) LAW AND POLICY CONTRARY TO HUMAN RIGHTS

**SNAICC believes permanency measures have also been developed without sufficient attention to the international child rights framework** with its knowledge base of policy and principles drawn from comprehensive research and best practice. This framework includes obligations under the United Nations Convention on the Rights of the Child (UNCRC); the Universal Declaration on the Rights of Indigenous Peoples (UNDRIP) and the insights of the United Nations Committee on the Rights of the Child's General Comments on Indigenous Children (No.11) and the Best Interests Principle (No.14).

Without reference to such a framework, there is a high risk that permanency planning will primarily serve the interests of governments in avoiding risk and obligations of support, and increase the likelihood of practices that will cause or continue individual, community and inter-generational harm rather than protecting children.

**SNAICC calls for permanency measures to comply with our international human rights obligations.** In particular we note that Article 3(1) of the UNCRC provides that "in all actions concerning children…the best interests of the child shall be a primary consideration." The *best interests* principle calls for consideration of the individual circumstances of each child in all relevant decisions. In the context of child protection decision-making the UNCRC requires that a child not be separated from their parents unless such separation is necessary in the best interests of the child, that parents and all interested parties participate in proceedings, and that children have the right to maintain contact with their parents (Article 9). Children's participation in the decisions that affect them is also required by Article 12. Article 25 of the UNCRC holds governments responsible to provide a child placed in care with the right to periodic review of their circumstances.

**Prescriptive permanency measures that limit ongoing consideration of the best interests of the child or periodic review of their circumstances, or that exclude the views of children and parents from consideration, or that place mandatory limits on parental contact, are contrary to these rights.**

In its General Comment 11, the United Nations Committee on the Rights of the Child has also noted that:

> "WHEN STATE AUTHORITIES…SEEK TO ASSESS THE BEST INTERESTS OF AN INDIGENOUS CHILD, THEY SHOULD CONSIDER THE CULTURAL RIGHTS OF THE INDIGENOUS CHILD AND HIS OR HER NEED TO EXERCISE SUCH RIGHTS COLLECTIVELY WITH MEMBERS OF THEIR GROUP…THE INDIGENOUS COMMUNITY SHOULD BE CONSULTED AND GIVEN AN OPPORTUNITY TO PARTICIPATE IN THE PROCESS ON HOW THE BEST INTERESTS OF INDIGENOUS CHILDREN IN GENERAL CAN BE DECIDED IN A CULTURALLY SENSITIVE WAY."

The importance of participation in decision-making for Indigenous peoples is also well established in international law including the Universal Declaration on the Rights of Indigenous Peoples. Thus, **when permanent care decisions are made without representative consultation with the child's Aboriginal and/or Torres Strait Islander community, they violate the best interests principle for that child.**

Aboriginal and Torres Strait Islander children have rights under the UNCRC to practice and enjoy their cultures (Article 30), and for due regard in decisions about out-of-home care to the desirability for continuity of their cultural background (Article 20(3)). Permanent care decisions that do not make adequate provision for actively maintaining a child's cultural connections are inconsistent with the child's rights.

These international principles should underpin the approach to child protection decision-making for Aboriginal and Torres Strait Islander children. The case for care and attention to these principles must also acknowledge the circumstances of our recent history in child protection decision-making. This includes recognition of the ongoing impact of the past policies of child removal in terms of personal tragedy and damage to the cultural and collective rights of so many Aboriginal and Torres Strait Islander communities and people.

"IN ALL ACTIONS CONCERNING CHILDREN...THE BEST INTERESTS OF THE CHILD SHALL BE A PRIMARY CONSIDERATION."

# OUR SOLUTIONS

## (A) PRINCIPLES FOR STABILITY AND PERMANENCY PLANNING

**IN ORDER TO ADDRESS THE CONCERNS RAISED IN THIS PAPER, SNAICC CALLS FOR POLICY AND PRACTICE IN STABILITY AND PERMANENCY PLANNING TO RECOGNISE THE FOLLOWING HUMAN RIGHTS-BASED PRINCIPLES:**

1. **Aboriginal and Torres Strait Islander children have rights of identity that can only be enjoyed in connection with their kin, communities and cultures.** In accordance with the *Aboriginal and Torres Strait Islander Child Placement Principle*, their rights to stay connected with family and community must be upheld and the child, their families and communities enabled to participate in decision-making regarding their care and protection. There must be consistent and comprehensive consideration of the hierarchy of placement options, culturally appropriate kinship carer identification and assessment, and regular review to give priority for placement with a child's family and community before considering permanent care.

2. **Permanent care for Aboriginal and Torres Strait Islander children should only be considered where the family has been provided with culturally appropriate and ongoing intensive and targeted family support services,** and there has been an appropriate independent assessment that there is no future possibility of safe family reunification.

3. **Traditional adoption that severs the connection for children to their families and communities of origin is never an appropriate care option for Aboriginal and Torres Strait Islander children,** except as it relates to traditional Torres Strait Islander adoption practices.

4. **Decisions to place an Aboriginal and/or Torres Strait Islander child in permanent care should only be made with the appropriate and timely review of the child's individual circumstances, and with informed support for the decision from an appropriate Aboriginal and Torres Strait Islander community-controlled agency.**

5. **Aboriginal and Torres Strait Islander communities and organisations must be resourced and supported to establish and manage high-quality care and protection-related services,** and to make decisions regarding the care and protection of children and young people in their own communities.

6. **Permanency should never be used as a cost saving measure in lieu of providing Aboriginal and Torres Strait Islander families and communities with adequate and appropriate support.** The burden of care held by Aboriginal and Torres Strait Islander families and communities should be adequately resourced, whether placements are temporary or permanent.

7. **Aboriginal and Torres Strait Islander communities and their organisations must lead the development of legislation and policy for permanent care of their children based on an understanding of their unique kinship systems and culturally-informed theories of attachment and stability.**

8. **Where Aboriginal and Torres Strait Islander children are on long-term/permanent orders, genuine cultural support plans must be developed and maintained (including with regular review) on an ongoing basis.**

## **(B)** PRIORITIES FOR REFORM

SNAICC proposes the following **PRIORITIES FOR THE DEVELOPMENT OF LEGISLATION AND POLICY** across all state and territory jurisdictions that will reflect a human rights-based approach to ensuring stability for Aboriginal and Torres Strait Islander children in out-of-home care:

1. Child protection legislation, policy and practice guidelines and decision-making are reviewed (periodically) to ensure effective and differential recognition of the unique rights of Aboriginal and Torres Strait Islander children to safe and stable connections to kin, culture and community.
   This review should address:
   - the effective implementation of all elements of *the Aboriginal and Torres Strait Islander Child Placement Principle*, accompanied by an evaluation framework that is nationally agreed and monitored with regular annual review;
   - the effective application of the *best interests* principle for each child through ongoing assessment of their individual circumstances; and
   - the development, implementation and review of cultural support plans for all placements, with particular attention to longer-term and permanent orders and with reference to an evaluation framework that is nationally agreed and monitored with regular annual review.

2. Mechanisms are established to enable Aboriginal and Torres Strait Islander community-controlled agencies, families and children to participate in all decisions relating to the care of Aboriginal and Torres Strait Islander children particularly those relating to longer-term or permanent care. In particular, the delegation of guardianship to a community-controlled agency, as has been trialed in Victoria, models of representative community agency participation, and models of Aboriginal and Torres Strait Islander Family-led Decision-making, should be considered for broader implementation.

3. All governments invest appropriately to provide access to early intervention, intensive family support and healing services for Aboriginal and Torres Strait Islander families to prevent abuse, neglect and removal of children to alternative care, and to promote family restoration where children have been removed.

4. All governments resource Aboriginal and Torres Strait Islander organisations to support reunification of children with family.

In the short-term SNAICC recommends a number of specific **priorities for immediate legislative reform** to support implementation of these recommendations, including:

5. That expedited timeframes for permanency planning be amended to provide greater flexibility for the use of a variety of more holistic measures to achieve stability for children, and in particular that the more inflexible provisions of Victorian legislation be repealed, including prescriptive limitations on parental contact which violate the United Nations Convention on the Rights of the Child (Art 9(2)).

6. That governments currently undertaking relevant legislative reform processes, for example in Queensland and Western Australia, respect the principles for permanency planning outlined above, and include the participation of independent Aboriginal and Torres Strait Islander agencies in the design of reforms.

7. That all governments review safeguards to maintain and support cultural connections for Aboriginal and Torres Strait Islander children for whom permanent orders are made or considered, particularly the Northern Territory, which provides manifestly inadequate protections.

SNAICC proposes the following **PRIORITIES FOR RESEARCH:**

8. In seeking to better understand the needs of Aboriginal and Torres Strait Islander children, research the causes and factors leading to placement stability and instability and *drift* in care, as well as solutions to improve stability.
9. Consult and engage with Aboriginal and Torres Strait Islander peak bodies and lead agencies in order to co-design models for planning that promote stability as understood for Aboriginal or Torres Strait Islander children.
10. Follow and support research into models for engaging and supporting Aboriginal and Torres Strait Islander families and communities in planning and decision-making processes to identify safe and stable care options for children (including current QLD Aboriginal and Torres Strait Islander Family-led Decision-Making trials).

"WE ARE DEEPLY CONCERNED ABOUT RECENT PERMANENCY PLANNING MEASURES ACROSS MANY AUSTRALIAN JURISDICTIONS MAY IN FACT UNDERMINE STABILITY FOR AND DEEPEN HARM TO CHILDREN, AND EXACERBATE INTER-GENERATIONAL TRAUMA TO FAMILIES AND COMMUNITIES. WE NEED TO URGENTLY INVEST IN EARLY INTERVENTION SERVICES TO PREVENT ABUSE, NEGLECT AND REMOVAL OF CHILDREN IN THE FIRST PLACE, ENSURE OUR PEOPLE ARE INVOLVED IN ALL KEY DECISIONS REGARDING OUR CHILDREN AND THAT ALL CHILD PROTECTION LEGISLATION, POLICY AND PRACTICE GUIDELINES RECOGNISE THE UNIQUE RIGHTS OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN TO SAFE AND STABLE CONNECTIONS TO KIN, CULTURE AND COMMUNITY."

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