SNAICC
National Voice for our Children

FAMILY MATTERS WA
Strong communities. Strong culture. Stronger children.

WAACPC
Western Australian Aboriginal Child Protection Council

Review of the *Children and Community Services Act 2004* (WA)

Submission to the Department for Child Protecton and Family Support, Western Australia

April 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.

Family Matters, Western Australia is the Aboriginal-led jurisdictional working group for the national *Family Matters – Strong community, strong culture, stronger children* campaign. Family Matters is Australia's national campaign to ensure Aboriginal and Torres Strait Islander children and young people grow up safe and cared for in family, community and culture. Family Matters aims to eliminate the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care within a generation (by 2040). The campaign is supported by a Strategic Alliance of over 150 Aboriginal and Torres Strait Islander, and non-Indigenous organisations. It is driven by strong Aboriginal leadership across diverse sectors relevant to outcomes for child well-being. The Family Matters Roadmap is provided as Annexure A and describes the campaigns goal, targets and evidence based building blocks for change.

The **Western Australian Aboriginal Child Protection Council** is made up of Aboriginal leaders in the child protection sector in Western Australia. Its primary purpose is to monitor, contribute to and influence child protection and out of home care policy, legislation and programs that impact on Aboriginal children and families in the south west of Western Australia.

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Introduction

SNAICC – National Voice for our Children (SNAICC), **Family Matters, Western Australia,** and the **Western Australian Aboriginal Child Protection Council** (WAACPC) welcome the opportunity to make a submission to the periodic review of the *Children and Community Services Act 2004* (WA) (the Act).

Western Australia has by far the highest over-representation of Aboriginal and Torres Strait Islander children in its child protection system of any Australian state or territory. We submit that the continuing high number and over-representation of Aboriginal and Torres Strait Islander children is appalling and unacceptable, requiring a focused and urgent response. With a child protection system that serves a majority of Aboriginal and Torres Strait Islander children, Western Australia's child protection legislation review should be centrally focused on improving outcomes for our children.

As at 30 June 2016 in Western Australia, Aboriginal and Torres Strait Islander children were 17.5 times more likely to be placed in out-of-home care than non-Indigenous children.[1] This rate is almost double the already alarming national statistic that indicates that across Australia, Aboriginal and Torres Strait Islander children are 9.8 times more likely than non-Indigenous children to be placed in out-of-home care.[2] In Western Australia, Aboriginal and Torres Strait Islander children represented 54 per cent of all children in out-of-home care at 30 June 2016.[3] This over-representation continues to increase annually,[4] highlighting the need for significant and systemic change, including but not limited to legislative reform.

In its 2012 Concluding Observations on Australia, the United Nations Committee on the Rights of the Child described the "widespread discrimination faced by Aboriginal and Torres Strait Islander children" in relation to their over-representation in out-of-home care.[5] Racial discrimination in Western Australia's child protection practice is systemic and persistent, driven by failures to heal the intergenerational trauma resulting from past discriminatory policies and the experiences of the Stolen Generations. Discrimination persists because of the failure to provide adequate supports to heal and strengthen families and to empower Aboriginal and Torres Strait Islander communities to make decisions about the care and protection of their own children. We observe that discrimination has escalated to such an extent that Aboriginality is now often closely associated with the identification of risk. Through targeted approaches in areas such as family violence and 'pre-birth planning', 'at-risk' Aboriginal families are readily and disproportionately identified. Anecdotally, practice in these areas drives increased and expedited removal of Aboriginal children without adequate responses and supports to address the circumstances that underlie risk for children. When such approaches combine with a failure to include Aboriginal and Torres Strait Islander communities in decision-making, the strengths and resources within culture and family are often not identified alongside the risks and discrimination is amplified. Discrimination is amplified further when children are then fast-tracked towards permanent care and permanent separation from family, community and culture. We note the UN Committee on the Rights of the Child's call in 2012 for affirmative action to address the persistent discrimination against Aboriginal and Torres Strait Islander children[6] and submit that given that the Western Australian child protection system is self-evidently failing Aboriginal and Torres Strait Islander children, significant legislative reform must occur to pursue affirmative action, in line with the recommendations made in this submission.

The high-level policy statements in the Western Australian Out-of-Home Care (OOHC) Reform Strategy and the Earlier Intervention Strategy provide a strong basis from which to embark on

the process of systemic reform. We are encouraged by the OOHC Reform Strategy's stated 'specific focus' on reducing the rate of Aboriginal and Torres Strait Islander children entering out-of-home care and overall priorities in first, preventing children entering out-of-home care and second, reunifying children with parents. The Earlier Intervention Strategy is similarly encouraging when setting out its focus areas as – delivering shared outcomes through collective effort, a culturally competent service system, diverting families from the child protection system, and preventing children entering out-of-home care.

In line with the Strategies' commitments we submit 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, and have the right to drive change. We welcome the 'Aboriginal Services and Practice Framework 2016-2018' as a promising first step in this regard.

However, while there is significant promise in many aspects of the reform agenda, the scope of legislative reform outlined in the Consultation Paper is currently far from adequately aligned to empower Aboriginal and Torres Strait Islander communities and improve outcomes for our children. This submission addresses relevant concerns with the legislative change proposals and provides recommendations for a stronger legislative framework that could advance the safety and wellbeing of Western Australia's Aboriginal and Torres Strait Islander children.

We encourage reference in the design of legislation to the 'Family Matters Roadmap', developed by SNAICC in partnership with leading child and family service and representative organisations across the country (Annexure A). The Roadmap 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. Notably, the 2016 'Family Matters Report' found that Western Australia is arguably fairing the worst of all Australian states and territories in terms of progress on both improving outcomes and implementing solutions – taking account of measures of over-representation, family support provision and access, and Aboriginal and Torres Strait Islander community and family empowerment in child protection.[7] The priority responses required to address this situation 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.[8]

This submission presents recommendations for how the Act could support these goals based on the perspectives of Aboriginal leaders working to advance the safety and wellbeing of Aboriginal and Torres Strait Islander children in Western Australia, and based upon the evidence of successful and promising national and international initiatives. We call for ongoing engagement and consultation with our organisations to ensure Western Australian Aboriginal leadership in the reform process.

Recommendations

Recommendation 1: That the Act be amended to include measures that promote the safe care of children by their parents and family members, including:

a) Provision for positive obligations of the Department to provide all reasonable family preservation and reunification supports to ensure children can be safely cared for at home;

b) Recognition of a specific object to heal and strengthen Aboriginal and Torres Strait Islander families and communities to care for children; and

c) Requirements for the availability of quality, culturally safe and accessible family support services provided by Aboriginal and Torres Strait Islander organisations.

Recommendation 2: That a moratorium on long-term and permanent orders for Aboriginal and Torres Strait Islander children is put into place for a period of at least two years or until appropriate reforms are progressed to reflect improved compliance with the Aboriginal and Torres Strait Islander Child Placement Principle, provide appropriate support for family preservation and reunification, and incorporate adequate provisions for cultural maintenance for Aboriginal and Torres Strait Islander children in out-of-home care.

Recommendation 3: That in the absence of a moratorium, as called for in recommendation 2, the onus of proof be placed upon the Department to demonstrate that a long-term order is in the best interests of the child and that certain requirements are specified as needing to be demonstrated, including:

- The full implementation of the Aboriginal and Torres Strait Islander Child Placement Principle;
- The adequate provision of family preservation and reunification supports; and
- The recommendation of an Aboriginal and Torres Strait Islander organisation that a long-term order is appropriate and supports the cultural identity and long-term well-being of the child.

Recommendation 4: That no mandatory timeframes be applied to the making of permanent care orders for Aboriginal and Torres Strait Islander children. Requirements for holistic stability planning for children should be included with sufficient flexibility to determine what is in each individual child's best interests.

Recommendation 5: That the full definition of the Aboriginal and Torres Strait Islander Child Placement Principle, including its five constituent elements – prevention, partnership, participation, placement, and connection – be incorporated into legislation alongside enabling provisions for each element.

Recommendation 6: That the right of self-determination of Aboriginal and Torres Strait Islander peoples be more strongly recognised as a principle within the Act and reflected in substantive provisions that require the participation of Aboriginal and Torres Strait Islander families and organisations in child protection decision-making. We recommend that the right to self-determination be expressed in clear and unequivocal language, such as:

Section 13: Fundamental principle of self-determination

Aboriginal peoples' rights to self-determination is a fundamental and guiding principle to be adopted at all times in the administration of this Act. Aboriginal people and communities have the right to make decisions about the care and protection of Aboriginal children consistent with the right to self-determination as recognised in the UN Declaration on the Rights of Indigenous Peoples.

Recommendation 7: That a model of Aboriginal and Torres Strait Islander Family-Led Decision Making facilitated by Aboriginal and Torres Strait Islander organisations is provided for in legislation and is mandated to be offered to families as early as possible in their contact with child protection services, and at a range of significant decision-making points.

Recommendation 8: That legislation be amended to mandate independent representative participation of Aboriginal and Torres Strait Islander community controlled organisations in all significant decisions for Aboriginal and Torres Strait Islander children in contact with child protection services. These provisions should be linked to a requirement for Aboriginal and Torres Strait Islander Family-led Decision Making through which Aboriginal and Torres Strait Islander organisations can ensure their advice is based on their role to facilitate family participation in the process (see recommendation 7). Mandatory provisions should be qualified to begin immediately in locations with existing capacity and phased in across the state over a 5 year period in line with capacity development of community controlled organisations.

Recommendation 9: That the Act recognise the role of an Aboriginal and Torres Strait Islander peak body to participate in the design and monitoring of policy and programs related to the implementation of the Act for Aboriginal and Torres Strait Islander children. The inclusion of such a provision would need parallel support by the Western Australian government for the establishment of such a peak body by Aboriginal leaders in the child and family service sectors in Western Australia.

Recommendation 10: That section 12 of the Act be amended to require that "all reasonable efforts" be taken to follow the placement hierarchy in order of priority, exhausting options at each level of the hierarchy before moving to the next.

Recommendation 11: That section 12 of the Act be amended to require that any placement away from extended Aboriginal or Torres Strait Islander family must be within close geographical proximity to the child's family.

Recommendation 12: That a new provision require the Department, in its report to the court, to demonstrate how it has and will comply with the intent and full five elements of the Aboriginal and Torres Strait Islander Child Placement Principle. This should include reporting on making all reasonable efforts to provide support services to enable a child to remain in the care of parents (see recommendation 1) and full assessment of out-of-home care placements in order of the priority of the placement hierarchy (see recommendations 10 and 11). This should also include reporting on periodic reviews of placement to determine whether there are any higher level placements available and in the best interests of the child.

Recommendation 13: That the completion, implementation and periodic review of cultural support plans be mandated for all Aboriginal and Torres Strait Islander children in out-of-home care and that the role and provision of resources for Aboriginal and Torres Strait Islander organisations to complete and support implementation of cultural planning be specified in legislation.

Recommendation 14: That a provision be added to the Act, equivalent to section 18 of the *Children, Youth and Families Act 2005* (Vic), providing for the future delegation of the Chief Executive Officer of the Department's functions and powers under the Act to the Chief Executive Officer (or Principal Officer) of an Aboriginal and/or Torres Strait Islander organisation. Further enabling provisions should also be introduced to support the practical operation of delegated functions and powers. Aboriginal and Torres Strait Islander organisations should be supported and fully resourced to build capacity to take on delegated functions and powers.

Recommendation 15: That consideration be given to how legislative provisions could direct and allow for the development of alternative court processes that are better attuned to Aboriginal and Torres Strait Islander cultural perspectives and aligned with the right to self-determination. Alongside appropriate legislative reform we call for the development of alternative court processes that empower Aboriginal and Torres Strait Islander peoples drawing on promising practices in Australia and internationally.

Recommendation 16: That legislation specify the requirement of representation of an Aboriginal and Torres Strait Islander organisation on any cross-sector carer assessment panel with the power to specify carers it deems unsuitable to support the cultural needs of Aboriginal and Torres Strait Islander children.

Recommendation 17: That the role of Aboriginal and Torres Strait Islander community controlled organisations to undertake culturally safe and adapted processes of kinship carer identification, assessment, recruitment and support be recognised in the Act.

Recommendation 18: That appropriate systems of financial and non-financial support for informal relative carers be established whether through the Act or another appropriate mechanism.

Prevention and Early Intervention

Evidence clearly shows 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.[9] In 2012 the UN Committee on the Rights of the Child recommended that Australia prioritise early intervention and reunification supports, including through the provision of intensive support to families.[10] Although the priority for prevention is not addressed in detail in the Consultation Paper, we submit that reflecting these priorities and recommendations, legislation in Western Australia should provide a stronger basis for increased and sustained prevention and early intervention efforts.

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.[11] 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.[12] 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.[13]

Recent research in Western Australia has identified the wide reaching implications of Fetal Alcohol Spectrum Disorders (FASD) for Aboriginal children in contact with Western Australia's child protection system. One study in a remote area in Western Australia diagnosed 12 per cent of Aboriginal children with fetal alcohol syndrome or partial fetal alcohol syndrome, the visible forms of FASD.[14] Prevalence rates will be significantly higher in these communities when the full FASD spectrum is included.[15] Research has highlighted the limited availability and development of effective FASD interventions, especially for infants and young children, alongside the potential of supports that take a broader ecological approach recognising the impact of FASD across multiple domains of functioning.[16] The lack of identification, diagnosis, and provision of family support specific to FASD is being increasingly recognised as a major driver of child protection intervention and placement breakdown due to parents and carers not being equipped with the knowledge and strategies to cope with and manage children's behaviours.[17] We submit that within the broad range of prevention and early intervention responses that are required, a specific focus on culturally appropriate supports and training for the identification of and response to FASD will be critical to improving outcomes for Aboriginal children. The emergence of FASD as both a significant consequence of the impacts of inter-generational trauma and a contributing factor in perpetuating family breakdown highlights the critical and complex nature of the family and community supports that are required to address the rising over-representation of Aboriginal children in out-of-home care.

The current Act already goes some way in acknowledging the value of prevention and early intervention, recognising the primary role of parents, families and communities in safeguarding

and promoting the well-being of children, and that the preferred way of achieving this is to support parents, families and communities.[18] The Act sets out that one of the Department's functions and duties is to consider and initiate, or assist in the provision of, social services, such as preventative and support services, to children, families and communities.[19] The Act in its section 53 goes on to require that the Department must provide all services that it considers appropriate to a child and a child's parents where a protection order (supervision) – an order where the child remains in the care of his/her parent/s, to be supervised by the Department – is in place. We submit that it is inconsistent and concerning, particularly given the stated commitment to safe reunification as the first priority,[20] that there is no equivalent requirement for the provision of services where a protection order (time-limited) – an order that gives the Department parental responsibility for a child for a period of not more than two years – is in place. Support services are crucial at this time to effect safe and timely reunification and so we hold that a new provision should be introduced to create a positive obligation for the Department to provide reunification supports where a child is subject to a protection order (time-limited).

Further, to more strongly create accountability for the provision of preventive supports, we recommend a new provision – similar to that found in Victorian legislation[21] – that requires that *before* any protection order is made that removes a child and takes parental responsibility away from parents, that a court must be satisfied that all reasonable attempts have been made by the Department to provide the services that are necessary to enable the child to remain in the care of his or her parent/s.

We further recommend that provisions be included in the Act to 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 organisations. Aboriginal and Torres Strait Islander organisations are best placed to provide culturally competent services that are attuned to the needs of their communities.[22] Evidence also confirms that community controlled services are more likely to be used[23] and offer Indigenous families a safe, comfortable, culturally appropriate environment that is easier to access and engage with.[24] Despite this, recent Departmental advice has confirmed that only 7 per cent of family support service funding in Western Australia is provided to Aboriginal organisations which is grossly inadequate when Aboriginal and Torres Strait Islander children are 54 per cent of the out-of-home care population.[25]

Research has highlighted the success of Aboriginal and Torres Strait Islander intensive and targeted family support services to engage and support families in other states and territories that have invested to support their capacity. SNAICC has undertaken research supported by the Australian Government Department of Social Services under the National Research Agenda for Protecting Australia's Children with Aboriginal and Torres Strait Islander service providers delivering intensive and targeted family support programs. This research has shown the elements of support programs that are being adapted to meet the needs of Aboriginal and Torres Strait Islander children and families.[26] The 2-year research project across four jurisdictions, conducted in collaboration with Griffith University found that the Aboriginal and Torres Strait Islander services were effectively engaging Aboriginal and Torres Strait Islander families and operating at a high level of quality with "skilled and experienced staff supported by good supervision and management, with strong team functioning."[27] Services in the study were engaging families in helpful and constructive ways to develop clear goals that addressed the underlying causes of child protection intervention.[28] Importantly, the research found that adaptation of evidence-based family support approaches for Aboriginal and Torres Strait

Islander communities was showing success and that Indigenous leadership was integral to that success – concluding that:

> The research demonstrates the capacity of services to adapt the core elements of best practice for Aboriginal and Torres Strait Islander families. Providing services in culturally competent and respectful ways was intrinsic to the services. Their standing as Aboriginal and Torres Strait Islander community services was important to engagement and take-up… The value lies in the services being delivered by Aboriginal community-controlled agencies as these entities are framed by the philosophy that community owns the service, that 'it is our service, for our community'.[29]

While current community-controlled sector capacity is inadequate to enable full-coverage of supports across Western Australia, a legislative provision could make allowance for such support to increase with capacity over time, aligned with implementation of the Aboriginal Services and Practice Framework 2016-2018.

Recommendation 1: That the Act be amended to include measures that promote the safe care of children by their parents and family members, including:

a) **Provision for positive obligations of the Department to provide all reasonable family preservation and reunification supports to ensure children can be safely cared for at home;**
b) **Recognition of a specific object to heal and strengthen Aboriginal and Torres Strait Islander families and communities to care for children; and**
c) **Requirements for the availability of quality, culturally safe and accessible family support services provided by Aboriginal and Torres Strait Islander organisations.**

Stability and Permanency

Our submission 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. However, we do not support the currently proposed amendments designed to increase and expedite the use of permanent care orders. These proposals have been developed without the leadership of Western Australia's Aboriginal communities and are unaligned to the holistic aspects of stability for children, particularly Aboriginal and Torres Strait Islander children. We call for a halt to the progress of these amendments and a moratorium on the use of permanent care orders for Aboriginal and Torres Strait Islander children until our broad ranging concerns can be addressed.

We refer to the "already-approved [permanency] amendments" noted only briefly in the Consultation Paper, set out in the earlier April 2016 OOHC Reform Strategy, and announced by the Minister for Child Protection in May 2016. We understand that the proposed permanency amendments seek to limit the amount of time a child will be in out-of-home care in provisional protection and care (on an interim order) or subject to a protection order (time-limited) to two years before the Department must make an application for a long-term protection order that allocates parental responsibility away from the parents until a child is 18 years of age (protection order (until 18) or protection order (special guardianship)). We understand that the expedited deadline by which a long-term 'permanent' order must be made may only be extended by the court from two years to three years if special circumstances can

be established. These proposed amendments would significantly shift the current legislative framework that does not prescribe expedited legal permanency and should be considered in detail in the present review.

We submit that by prescribing a timeframe for the pursuit of legal permanency, the proposed permanency amendments go against two clearly stated commitments in the Consultation Paper: 1. The principle that 'Child protection legislation should be sufficiently flexible to enable decisions to be made in the best interests of individual children; and 2. The commitment to "safe reunification [as] the first priority wherever possible".[30] Further, for Aboriginal and Torres Strait Islander children, we hold that the basis for the amendments – the idea that "the longer a child is waiting in temporary care for a permanent decision to be made, the worse their life outcomes are likely to be"[31] – is flawed, misguided and ultimately harmful to Aboriginal and Torres Strait Islander children and families.

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".[32] Recent state and territory reforms across Australia have tended to focus on the latter two. We submit 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, including the proposed Western Australian permanency amendments, 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.[33] Aboriginal and Torres Strait Islander people commonly question this narrow construction of attachment theory that centres stability on the singular emotional connection between a child and a carer. This narrow construction has been described as "inconsistent with Aboriginal and Torres Strait Islander values of relatedness and child-rearing practices."[34] 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,[35] and their place in relation to family, mob, community, land and culture.

Regardless of the positive intention of permanency reform, the long-term and 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 long-term protection orders or 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 and expedited legal measures to achieve long-term protection orders that remove parental responsibility from parents will serve to sever these important 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.

Accordingly, we strongly oppose the proposed permanency amendments and are particularly concerned about the lack of proper safeguards protecting the holistic needs of Aboriginal and Torres Strait Islander children for stability. We note that there is no proposed legislative safeguard to ensure that long-term protection orders are only made where reunification attempts have been pursued, resourced and exhausted. In this regard we recommend consideration of provisions within the Victorian legislation that require that before a protection

order removing a child from a parent's care is made, the court must be satisfied that all reasonable attempts have been taken by the Department to provide the services necessary to enable the child to remain in the care of his or her parent.[36] We also recommend legislative safeguards that require compliance and review of compliance with the full intent of the Aboriginal and Torres Strait Islander Child Placement Principle – to a broader extent than current subsection 61(4) that applies only to protection orders (special guardianship) and in relation to suitability of the guardian – and review by an Aboriginal and Torres Strait Islander organisation to ensure long-term orders are appropriate and maintain cultural connections for Aboriginal and Torres Strait Islander children.

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; and
- Insufficient provision of supports to preserve and reunify families.

These concerns are described fully in SNAICC's policy position paper 'Achieving Stability for Aboriginal and Torres Strait Islander Children', available on the SNAICC website and provided with this submission (Annexure B). We believe that remedy of these concerns will be more effective than the broader and hastened implementation of long-term orders to promote stability for Aboriginal and Torres Strait Islander children.

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 for Aboriginal and Torres Strait Islander children in Australia. We call for the careful consideration and reflection 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.**

Recommendation 2: That a moratorium on long-term and permanent orders for Aboriginal and Torres Strait Islander children is put into place for a period of at least two years or until appropriate reforms are progressed to reflect improved compliance with the Aboriginal and Torres Strait Islander Child Placement Principle, provide appropriate support for family preservation and reunification, and incorporate adequate provisions for cultural maintenance for Aboriginal and Torres Strait Islander children in out-of-home care.

Recommendation 3: That in the absence of a moratorium, as called for in recommendation 2, the onus of proof be placed upon the Department to demonstrate that a long-term order is in the best interests of the child and that certain requirements are specified as needing to be demonstrated, including:

- **The full implementation of the Aboriginal and Torres Strait Islander Child Placement Principle;**
- **The adequate provision of family preservation and reunification supports; and**
- **The recommendation of an Aboriginal and Torres Strait Islander organisation that a long-term order is appropriate and supports the cultural identity and long-term well-being of the child.**

Recommendation 4: That no mandatory timeframes be applied to the making of permanent care orders for Aboriginal and Torres Strait Islander children. Requirements for holistic stability planning for children should be included with sufficient flexibility to determine what is in each individual child's best interests.

While we strongly oppose the proposed permanency amendments, we do acknowledge the positive approach that Western Australia has adopted in relation to family contact provisions for long-term orders. We understand that the OOHC Reform Strategy concluded that a child's

contact with family does not necessarily need to reflect permanency objectives and instead contact and family relationships will be promoted in line with a child's best interests. We support this position as consistent with a child rights-based approach,[37] and as a sound acknowledgement of the importance of a child's family connections. As further support for this position we refer to a recent review and analysis of attachment theory that found that "it is possible for children to maintain contact with birth parents or other caregivers without compromising the development of an attachment bond with a child's foster parent".[38] We also support the proposal that the Department be required to outline arrangements for promoting a child's relationships with family, where appropriate, in the reports it provides to the court.

Alignment with the Intent of the Aboriginal and Torres Strait Islander Child Placement Principle

Consultation Questions 3, 4 and 5

The Aboriginal and Torres Strait Islander Child Placement Principle (the Principle) provides the benchmark in Australian law and policy to ensure that the actions that caused the deep harm and tragedy of the Stolen Generations are never repeated. The Principle aims to recognise and protect the rights of Aboriginal and Torres Strait Islander children, families, and communities, increase the level of self-determination for Aboriginal and Torres Strait Islander people in child protection matters, and reduce the disproportionate representation of Aboriginal and Torres Strait Islander children in child protection systems.[39] Tilbury (2013) details the five necessary elements of the Principle to be prevention, partnership, placement, participation, and connection.[40] This definition of the Principle has been agreed and adopted nationally, including by Western Australia through its commitment as a partner in the implementation of the Third Action Plan for the National Framework for Protecting Australia's Children 2009-2020.[41]

We commend the acknowledgment in the Consultation Paper of the full scope and five elements of the Principle, that to date there has been a narrow focus on merely the placement element, and that there have been various implementation challenges. We further commend the commitment to "a concerted effort … in Western Australia towards a more holistic implementation of the five elements of the child placement principle".[42] However, we continue to hold several key concerns with aspects of the current and proposed Western Australian legislation that do not align with the Principle.

The Aboriginal and Torres Strait Islander Child Placement Principle in current section 12 is limited in its application to children "subject to placement arrangements". The Principle is narrowly conceptualised in the current Act and we understand that despite the comments in the Consultation Paper, set out above, recognising its five elements and holistic nature, there are no proposals to amend this. The narrow conceptualisation needs to be changed as it fails to recognise that decisions made right throughout a child's contact with child protection services impact upon the child's connections to family, community and culture and require consideration of the Principle. We also have significant concerns regarding the specification of the placement hierarchy in section 12, which are addressed in the section on 'Placement and Cultural Connection' below.

Our submission is in agreeance with the spirit of proposals to amend section 13 regarding self-determination, however amendments will need to be significant to align with international human rights standards. We agree with the removal of the paternalistic language that currently

"allows"" Aboriginal and Torres Strait Islander people to exercise self-determination. However, this change alone is not enough. We call for stronger enabling language that promotes and encourages self-determination instead of passively "observing" the principle of self-determination. Representatives of Family Matters, Western Australia have workshopped and progressed a proposed alternative provision that would align with international human rights standards, as follows:

> **Section 13: Fundamental principle of self-determination**
>
> Aboriginal people's rights to self-determination is a fundamental and guiding principle to be adopted at all times in the administration of this Act. Aboriginal people and communities have the right to make decisions about the care and protection of Aboriginal children consistent with the right to self-determination as recognised in the UN Declaration on the Rights of Indigenous Peoples.

Such a strong provision for self-determination is important to promote awareness of its significance as a critical right of Aboriginal and Torres Strait Islander peoples, as recognised in the United Nations Declaration on the Rights of Indigenous Peoples. However, the limited actualisation of self-determination provisions in jurisdictions across Australia clearly indicates that genuine self-determination cannot be achieved unless additional enabling provisions mandate decision making by Aboriginal and Torres Strait Islander peoples. Libesman (2008) identifies that the common lack of definition of 'self-determination' and other participatory principles undermines legislative objectives by leaving the means and extent of participation enabled to the interpretation of government departments.[43]

Thus, we support amendment for a stronger self-determination principle and at the same time we recommend that enabling mechanisms are recognised throughout the Act including: delegation of statutory functions and powers to Aboriginal agencies; the establishment of an Aboriginal peak body for child and family welfare; Aboriginal and Torres Strait Islander Family-led Decision-Making; and mandated participation of Aboriginal community-controlled organisations in decision-making. Each of these measures to promote self-determination are discussed in detail in other sections of this submission.

<u>Recommendation 5</u>: That the full definition of the Aboriginal and Torres Strait Islander Child Placement Principle, including its five constituent elements – prevention, partnership, participation, placement, and connection – be incorporated into legislation alongside enabling provisions for each element.

<u>Recommendation 6</u>: That the right of self-determination of Aboriginal and Torres Strait Islander peoples be more strongly recognised as a principle within the Act and reflected in substantive provisions that require the participation of Aboriginal and Torres Strait Islander families and organisations in child protection decision-making. We recommend that the right to self-determination be expressed in clear and unequivocal language, such as:

> ***Section 13: Fundamental principle of self-determination***
>
> ***Aboriginal peoples' rights to self-determination is a fundamental and guiding principle to be adopted at all times in the administration of this Act. Aboriginal people and communities have the right to make decisions about the care and protection of Aboriginal children consistent with the right to self-determination as recognised in the UN Declaration on the Rights of Indigenous Peoples.***

Participation of Aboriginal and Torres Strait Islander Families and Community-Controlled Organisations

Consultation Questions 3, 4 and 5

Participation of Aboriginal and Torres Strait Islander peoples in decisions that affect them is a core human right,[44] and recognised as critical to decision-making that is based on the best interests of children, incorporating an understanding of their cultural needs and rights.[45] To be genuine and effective, participation must extend beyond consultation to genuine inclusion of Aboriginal and Torres Strait Islander children, families and community representatives in the decisions that are made about their children at all stages of the child protection process.[46] In 2012 the United Nations Committee on the Rights of the Child called on Australia to:

> Ensure the effective and meaningful participation of Aboriginal and Torres Strait Islander persons in the policy formulation, decision-making and implementation processes of programmes affecting them.[47]

Currently, the Act fails to provide any *mandatory* requirements for the participation of Aboriginal and Torres Strait Islander peoples in decision-making about their children. As a result, it fails to create any clear and positive obligations for the Western Australian government to support, enable and resource Aboriginal and Torres Strait Islander people and their organisations to participate. We submit that this aspect of the Act has a discriminatory effect by enabling government services and decision makers to rely on the excuse of a lack of capacity to participate, rather than to proactively support and enable that capacity for Aboriginal and Torres Strait Islander people and organisations.

Legislated participation requirements in Western Australia require significant reform in order to align with a human rights framework and support the right of Aboriginal and Torres Strait Islander peoples to self-determination. The core elements of a human rights based approach to enabling participation include:[48]

- **Representative participation:** Aboriginal and Torres Strait Islander peoples select their own representatives in decision-making and participate through their own institutions;
- **Consultation in good faith:** Good faith negotiations take place with Aboriginal and Torres Strait Islander peoples from the beginning and throughout decision making;
- **Free, prior and informed consent:** Aboriginal and Torres Strait Islander peoples have adequate financial and technical resources, time and information to reach decisions without external coercion or manipulation and their perspectives are reflected in the outcomes of decision making;
- **Prioritising, promoting and safeguarding culture:** Aboriginal and Torres Strait Islander people provide input on the nature and importance of culture in decisions and contribute to processes that promote and maintain connections for children to family, community and culture;
- **Children's participation:** Aboriginal and Torres Strait Islander children have the opportunity to participate in decisions that affect them in line with their capacity, age and maturity and receive culturally appropriate support to do so.

The following sections of this submission describe how these human rights based elements of participation could be reflected in legislation in Western Australia.

Family Participation

We note with deep concern that the Consultation Paper does not address gaps to enable family participation in child protection processes and decision making in Western Australia. 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[49] and is central to enabling self-determination in child protection matters for Aboriginal and Torres Strait Islander peoples.

Currently, the Western Australian Act does not contain any strong provisions calling for or enabling family participation in decision making. Section 14 sets out a principle of community participation, including kinship participation, that is to be "observed". However, other than the section 32 provision for the Department to arrange or facilitate a meeting that may include family – this is one of several actions the Department may take to safeguard or promote a child's well-being – there are no provisions enabling or mandating family participation. There is some scope for family participation in the form of court ordered pre-hearing conferences provided for by section 136 and related regulations, however again, family participation is not mandated and further comes at the late stage of adversarial litigation, limiting the ability of family to effectively participate in all relevant and significant decisions about their children. Finally, to the extent that it can be read as a provision relating to family participation, section 81 does not mandate consultation with an Aboriginal or Torres Strait Islander family member before a decision about the placement of an Aboriginal or Torres Strait Islander child is made. We note further concerns regarding section 81 in the section relating to 'Representative Participation' below.

Accordingly, we call for new provisions that require Aboriginal and Torres Strait Islander family participation in decision making in relation to all significant decisions about a child and recommend culturally adapted models of family group conferencing as a means to enable such participation.

Studies of family group conferencing have shown that plans generated through conferencing tended to keep children at home or with their relatives, and that the approach reinforced children's connections to their family and community,[50] 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 Aboriginal and Torres Strait Islander families and communities in child protection processes has been recognised,[51] 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.[52] 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.[53]

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.[54] Research has also 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.[55] While strong partnerships with government child protection services are essential to any model of family-led decision making, we hold strongly and recommend that an effective and culturally strong model of Aboriginal and Torres Strait Islander Family-led Decision Making or family group conferencing must be operated by Aboriginal and Torres Strait Islander community-controlled organisations 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. We recommend reference to these principles and their appropriate incorporation in the design of legislation for Western Australia's family group conferencing for Aboriginal and Torres Strait Islander children and families:

- 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
- The Department 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 suggest that any model of family group conferencing or Aboriginal and Torres Strait Islander Family-Led Decision Making should be made available and utilised at any, and at an early, stage of contact with the child protection system. This approach aligns with research that has described the benefits of enabling a family decision-making process early,[56] 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.[57] 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,[58] including the review of a promising trial with Aboriginal families in Alice Springs.[59] Reflecting this research, we recommend that there should be a mandatory requirement to provide the Aboriginal and Torres Strait Islander Family-Led Decision Making process at the point at which the Department decides to pursue an investigation and also at subsequent significant decision making points, for example, case planning, case plan review, and placement change. We believe that this process would provide the basis for Aboriginal and Torres Strait Islander organisations to engage with and support the families to participate throughout all phases of child protection decision-making.

Recommendation 7: That a model of Aboriginal and Torres Strait Islander Family-Led Decision Making facilitated by Aboriginal and Torres Strait Islander organisations is provided for in legislation and is mandated to be offered to families as early as possible in their contact with child protection services, and at a range of significant decision-making points.

Representative Participation

Ensuring the participation of Aboriginal and Torres Strait Islander organisations in decision making about Aboriginal and Torres Strait Islander children is essential to contribute to genuine self-determination and to implementing the partnership element of the Aboriginal and Torres Strait Islander Child Placement Principle. It is also critical to ensure that decisions made for Aboriginal and Torres Strait Islander children protect cultural rights and connection that are core to their best interests.

Following the 2009 'Review of the Western Australian Aboriginal and Torres Strait Islander Placement Principles by the Department for Child Protection', in 2011 section 81 of the Act was amended to remove the requirement that the Department must "consult" with an Aboriginal and Torres Strait Islander agency in relation to a placement decision about an Aboriginal and/or Torres Strait Islander child. Now, the Department may choose to consult with such an agency, an Aboriginal and/or Torres Strait Islander person, or an officer of the Department who is an Aboriginal and/or Torres Strait Islander person.

SNAICC and many Aboriginal sector leaders in Western Australia were deeply concerned by the Department's response to the 2009 review. While, as noted in the Consultation Paper, the review found that the Department was using a 'tick box' approach to consultation because of the lack of available community controlled services with a connection to family and community to consult with, we believe strongly that its decision to remove the consultation requirements from legislation as a result served the needs of the Department rather than the needs of Aboriginal and Torres Strait Islander children. The decision ran counter to recognised best practice, human rights and core recommendations of the landmark 'Bringing them Home' report. Had the Department instead decided to respond by investing to build the capacity of

community-controlled organisations to participate in decision-making across Western Australia, we may today be looking at a very different landscape in Western Australian child protection where Aboriginal and Torres Strait Islander agencies and communities were empowered to support the safety and wellbeing of their children. Instead, removing their role to participate in decision making effectively placed the blame for lack of consultation on Aboriginal and Torres Strait Islander communities that were never enabled to have the organisational and representative capacity to participate in the first place.

SNAICC research has identified that an essential element of genuine Aboriginal and Torres Strait Islander participation in decision making is that it is representative in nature, allowing consultation with Aboriginal and Torres Strait Islander peoples through their own institutions and procedures.[60] The elements of representative participation identified in SNAICC's research and reflecting the United Nations Declaration on the Rights of Indigenous Peoples are:

- Aboriginal and Torres Strait Islander communities select their own representatives in consultation processes;
- Consultation respects Aboriginal and Torres Strait Islander decision-making processes; and
- Consulted people are broadly representative of the specific Aboriginal and Torres Strait Islander community affected by the decision being made.[61]

Our submission recognises the important and valuable role that is performed by Aboriginal Practice Leaders in the Department to advance the cultural capacity of the Department and the quality of its work with Aboriginal and Torres Strait Islander families and believes these roles should be maintained. However, they cannot take the place of independent and representative consultation with Aboriginal and Torres Strait Islander communities. To enable independent cultural input, those providing it need to sit outside the organisational culture of the Department in Aboriginal organisations that select their own representatives and adopt their own independent procedures.

We call for legislation that recognises the role of Aboriginal and Torres Strait Islander organisations to participate in the making of all significant decisions about Aboriginal and Torres Strait Islander children engaged with child protection services. Significant decisions include, for example, whether to investigate a notification of harm, whether to substantiate harm, whether to apply for a protection order for a child, and where and with whom to place a child in out-of-home care. These and other significant decisions considerably affect Aboriginal and Torres Strait Islander children and their communities and so should be informed by the knowledge of Aboriginal and Torres Strait Islander community-controlled organisations. Currently section 14 provides a weak and qualified opportunity for "representative organisations" to participate in significant decision making. The section sets out that a "representative organisation of Aboriginal and Torres Strait Islanders … should be, where appropriate" given the opportunity and assistance to participate in decision making that is likely to have a significant impact on a child. We submit that a stronger mandatory requirement for participation is required and note the similar, but stronger provision in section 6 of the *Child Protection Act* 1999 (Qld)[62] for consideration. Further, support and procedures to facilitate informed, timely and genuine participation should be detailed in legislation, regulations or policy.

To facilitate representative participation of Aboriginal and Torres Strait Islander organisations in decision making, we suggest that a clearer definition of "representative organisation" as referred to in section 14 and "Aboriginal or Torres Strait Islander agency" as referred to in

section 81 be set out. The definition of a "recognised entity" in the Queensland context may be useful – a "recognised entity" is an organisation that includes Aboriginal and Torres Strait Islander members, has appropriate knowledge of child protection and provides services to Aboriginal and Torres Strait Islander people.[63] An Aboriginal and Torres Strait Islander representative organisation seeking to participate in decision making about a child should be one that is recognised, accepted and respected by local families who would engage with that organisation in child protection and related matters.

As was recognised in the Department's 2009 review, legislation mandating participation in decision making of Aboriginal and Torres Strait Islander organisations will be ineffective unless such organisations are provided with the resources and have the capacity to participate. To this end SNAICC believes the Department's commitment to support capacity development of Aboriginal and Torres Strait Islander community-controlled organisations across Western Australia through the Aboriginal Services and Practice Framework 2016-2018, OOHC Reform Strategy, and Earlier Intervention Strategy would support the implementation of legislative requirements. We recommend that legislation specify mandatory requirements for participation to be phased in starting immediately in locations with Aboriginal and Torres Strait Islander organisational capacity and expanding across the state over the forward 5-year period.

Recommendation 8: That legislation be amended to mandate independent representative participation of Aboriginal and Torres Strait Islander community controlled organisations in all significant decisions for Aboriginal and Torres Strait Islander children in contact with child protection services. These provisions should be linked to a requirement for Aboriginal and Torres Strait Islander Family-led Decision Making through which Aboriginal and Torres Strait Islander organisations can ensure their advice is based on their role to facilitate family participation in the process (see recommendation 7). Mandatory provisions should be qualified to begin immediately in locations with existing capacity and phased in across the state over a 5 year period in line with capacity development of community controlled organisations.

Beyond participation in individual case decisions, the participation of Aboriginal and Torres Strait Islander peoples in service design and development is a critical element to enabling genuine participation and supporting self-determination. In 2012 the United Nations Committee on the Rights of the Child called for Australia to ensure participation of Aboriginal and Torres Strait Islander people in policy formulation and decision-making for children.[64] The Western Australian Aboriginal Services and Practices Framework includes a principle of "self-determination and autonomy" that recognises the rights of Aboriginal peoples "to determine and develop policies and services."[65] To facilitate Aboriginal leadership in policy development it is critical that the Western Australian government support the development and ongoing role of a peak body for Aboriginal child and family welfare.

Policies and practice in Western Australia's child protection system are commonly informed and shaped by non-Indigenous perspectives, frameworks and worldviews that are failing our children and families. We submit that it is essential that a peak body in Western Australia be equipped with strong research and policy development arms that allow for the application of Aboriginal research methodologies to determine the most appropriate and effective policy and practice responses for Aboriginal children. This would assist to ensure that research and policy design take full account of Western Australia's unique Aboriginal cultures, incorporate Aboriginal worldviews and are driven by Aboriginal cultural authority. The establishment of these functions would be the beginning of a more genuine engagement between the Western

Australian Government and Aboriginal and Torres Strait Islander peoples to establish a culturally informed and responsive child and family service system.

The development of a state peak body could draw on the leading example of states such as New South Wales, Queensland and Victoria that have invested to support representative, policy and sector development functions of Aboriginal and Torres Strait Islander organisations. We note, for example, that the Queensland state government has recently supported increased capacity of the Queensland Aboriginal and Torres Strait Islander Child Protection Peak (QATSICPP) to both engage in co-design of relevant policy initiatives and provide capacity development support to the community controlled child and family services sector. In that state, the state government has been working with QATSICPP and Aboriginal and Torres Strait Islander leaders through Family Matters, Queensland, on the development of a soon to be completed whole of government strategy targeted to ensure Aboriginal and Torres Strait Islander children grow up safe and cared for in family, community and culture.

We submit that governance structures for the development, implementation and oversight of such a strategy, including the participation of an Aboriginal peak body and Aboriginal sector leaders to design and monitor relevant policies, should be recognised in legislation in Western Australia.

Recommendation 9: That the Act recognise the role of an Aboriginal and Torres Strait Islander peak body to participate in the design and monitoring of policy and programs related to the implementation of the Act for Aboriginal and Torres Strait Islander children. The inclusion of such a provision would need to parallel support by the Western Australian government for the establishment of such a peak body by Aboriginal leaders in the child and family service sectors in Western Australia.

Placement and Cultural Connection

Consultation Questions 3, 4 and 5

There is a strong evidence base that describes the critical importance of continuity of cultural identity to child wellbeing[66] and the cultural strengths of unique Aboriginal and Torres Strait Islander child rearing practices to support the well-being and safety of children.[67] The inclusion of requirements for the maintenance of cultural connections for children removed from their families in legislation around the country was a critical call of the 1997 'Bringing them Home' report to ensure that the actions that caused the tragedy and continuing traumatic consequences of the Stolen Generations are never repeated.

Recognising the importance of cultural connections, we call for the current legislative review to strengthen provisions relating to placements connected to culture and to mandate cultural support planning and implementation for children in out-of-home care led by Aboriginal and Torres Strait Islander agencies.

Anecdotally, Aboriginal sector leaders in Western Australia observe a significant lack of cultural competence of many Department staff and describe the inadequacy of current online training approaches for cultural competence development. We call for stronger processes of cultural competency training and development within the Department, but also note that gaps in cultural competence highlight the critical importance of legislative provisions that require and empower Aboriginal people and organisations to make decisions about cultural care and connection for Aboriginal children.

Placement Hierarchy

Currently, section 12 of the Act sets out the hierarchy for placement of Aboriginal and Torres Strait Islander children in out-of-home care. The section contains equivocal requirements for placement in order of priority only if it is "otherwise practicable". We submit that this permits a broad scope for placement decisions to be made without dedication of the efforts and resources required to identify culturally appropriate family placements or even other prioritised placements.

Anecdotally, Aboriginal sector leaders in Western Australia have observed that Department staff are frequently undermining the spirit of the Principle by failing to identify or directly bypassing safe family and community based care options. Australian research has highlighted circumstances where government child protection staff preference non-Indigenous care based on discriminatory attitudes that assume risk in Indigenous communities and fear the loss of control of the child protection service over kinship placements.[68]

We recommend the use of language to the effect that "all reasonable efforts" should be undertaken to exhaust options at one level of the hierarchy, in consultation with Aboriginal and Torres Strait Islander organisations, before moving to the next. One example of stronger and clearer phrasing is the term "wherever possible" that is used in relation to the application of the hierarchy in Victoria.[69]

We are also concerned that section 12 does not require placement to be close to the child's family. The placement element of the Aboriginal and Torres Strait Islander Child Placement Principle requires that if a child is not placed with his or her Aboriginal or Torres Strait Islander family, the placement must be within close geographical proximity to the child's family.[70] The omission of this requirement in section 12 allows a practical barrier – geographical distance – to easily thwart Aboriginal and Torres Strait Islander children's connections to family, community, and culture. It poses a particular threat in terms of the potential relocation of children from Western Australia's remote communities to urban centres, which anecdotally our members describe as occurring commonly in practice.

We note the "already-approved amendment" that will require the Department to demonstrate how it has or how it will apply the Aboriginal and Torres Strait Islander Child Placement Principle in its report to the court.[71] It is unclear, but it appears that this is referring to the application of the placement element or hierarchy of the Principle. Again, this is a narrow conceptualisation of the Principle, limiting its focus on the placement element. However, there is value in requiring the Department to provide information to the court and to parents who are parties to court proceedings, as to the assessment of out-of-home carers according to the placement hierarchy. This could be a useful accountability mechanism to ensure that the Department is thoroughly investigating and assessing carers in the order of the hierarchy of placement. We submit that there should be a further requirement to periodically review and

report on whether any higher prioritised placements are now available to promote efforts to reconnect children with their family, community and culture where they have been separated.

Recommendation 10: That section 12 of the Act be amended to require that "all reasonable efforts" be taken to follow the placement hierarchy in order of priority, exhausting options at each level of the hierarchy before moving to the next.

Recommendation 11: That section 12 of the Act be amended to require that any placement away from extended Aboriginal or Torres Strait Islander family must be within close geographical proximity to the child's family.

Recommendation 12: That a new provision require the Department, in its report to the court, to demonstrate how it has and will comply with the intent and full five elements of the Aboriginal and Torres Strait Islander Child Placement Principle. This should include reporting on making all reasonable efforts to provide support services to enable a child to remain in the care of parents (see recommendation 1) and full assessment of out-of-home care placements in order of the priority of the placement hierarchy (see recommendations 10 and 11). This should also include reporting on periodic reviews of placement to determine whether there are any higher level placements available and in the best interests of the child.

Cultural Support Plans

Another "already-approved amendment" is the requirement for the Department to provide a plan for maintaining a child's culture and identity – a cultural support plan – to the court at the same time that the Department provides its report to the court.[72] For Aboriginal and Torres Strait Islander children who are placed in out-of-home care outside of their families and communities, efforts to support and maintain connections are especially vital to their ongoing well-being and safety. Important aspects of cultural care include both the mapping of cultural connections through accurate genealogies, and the practical supports and resourcing for Aboriginal and Torres Strait Islander children in out-of-home care to connect with and participate in the cultural life of their families and communities.[73] Requirements commonly exist for cultural care planning and support in Australia's chid protection systems, but limited completion of plans, and limited resourcing and practical supports for implementation are endemic to these systems.[74]

We welcome the consideration of a legislative requirement to produce a cultural support plan where there is no current requirement. However, we submit that the proposed provision should be amended to include a clear and mandatory requirement that a cultural support plan must be developed for every Aboriginal and Torres Strait Islander child as soon as that child is identified as being in need of protection – not merely when a plan needs to accompany a court report – and that the plan is periodically reviewed, and updated if necessary.

We submit that legislation should further specify that cultural support planning be completed by an appropriate Aboriginal agency to ensure that is based on the knowledge of Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander family participation through the Family-Led Decision Making process should also be utilised to inform the development of appropriate cultural support plans. The importance of participation and cultural knowledge is recognised in New South Wales' new cultural planning processes that specify that there must be a minimum of four consultations with family, community or Aboriginal and Torres Strait Islander organisations in the development of a cultural support plan.[75]

Briefly we note that although not an aspect of legislative design, proper resourcing for the implementation of cultural support plans needs to be considered and provided alongside legislative requirements – for example, in Victoria a cultural plan brokerage initiative exists to provide funding to implement cultural support plans.[76]

Recommendation 13: That the completion, implementation and periodic review of cultural support plans be mandated for all Aboriginal and Torres Strait Islander children in out-of-home care and that the role and provision of resources for Aboriginal and Torres Strait Islander organisations to complete and support implementation of cultural planning be specified in legislation.

Aboriginal and Torres Strait Islander Case Management and Guardianship

'Aboriginal and Torres Strait Islander guardianship' refers to the delegation of, in Western Australia's case, the Chief Executive Officer of the Department's functions and powers under the Act, to an Aboriginal and Torres Strait Islander organisation. While such a system has not been envisaged by the Consultation Paper or otherwise in this current legislative review, in the current context of significant child protection reform, it is timely for Western Australia to consider more genuine moves towards self-determination that have been progressed in other states and internationally. In addition to going some way to realising genuine partnership with Aboriginal and Torres Strait Islander peoples and self-determination, the exercise of guardianship rights and responsibilities by an Aboriginal and Torres Strait Islander organisation aligns 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.[77] We submit 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.

Delegation of functions to Aboriginal and Torres Strait Islander agencies would provide a mechanism to implement Western Australia's Aboriginal Services and Practice Framework 2016-2018, which calls for support for Aboriginal community control and engagement to "take back care, control and responsibility for the safety and well-being of their children". The OOHC Reform Strategy has concluded that following a pilot project involving the transfer of case management to the community services sector, delegated case management will not be pursued at this time – however, we believe that this conclusion needs to be reached differently for Aboriginal and Torres Strait Islander organisations where transfer of case management responsibility is aligned with policy goals to promote self-determination.

We recognise that the planned process of community-controlled sector capacity development will need to take place to enable the delegation of case management and exercise of Departmental functions and powers, which would need to be phased in over time. What is important initially is that legislation allows for delegation to occur in line with capacity development. With increased Aboriginal and Torres Strait Islander organisational capacity, case management and exercise of Departmental functions and powers by Aboriginal and Torres Strait Islander organisations offer a strong self-managed approach that will value and protect Aboriginal and Torres Strait Islander children's connections to family, community and

culture. We note equivalent initiatives and reforms currently underway across Australia including the New South Wales Government's commitment and staged process to develop the capacity of Aboriginal and Torres Strait Islander community-controlled organisations (ACCOs) and transfer case management of all Aboriginal and Torres Strait Islander children in out-of-home care to ACCOs over a 10 year period, [78] and the Victorian Government's commitment to transferring placement and case management of all Aboriginal and Torres Strait Islander children to ACCOs.[79] A system of Aboriginal and Torres Strait Islander guardianship is currently operating in Victoria, and in its current review of its child protection legislation, Queensland is considering implementing an equivalent system to recognise Aboriginal and Torres Strait Islander self-determination and cultural authority.

In Victoria, the delegation of guardianship responsibilities to Aboriginal agencies has been trialled in the Melbourne metropolitan area and is currently being trialled in the rural Dja Dja Wurrong regions. The Victorian Aboriginal Child Care Agency (VACCA) conducted the metropolitan pilot program. VACCA undertook extensive research about Aboriginal guardianship, clearly describing the importance and potential benefits of delegation as follows:

> 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.[80]

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.[81] Translated to the Australian context this would go to enhanced compliance with the connection element of the Aboriginal and Torres Strait Islander Child Placement Principle.

Although section 18 of the *Children, Youth and Families Act* (Vic), as the provision that enables delegation, was first included in legislation in Victoria in 2005, it was not until November 2015 that further enabling provisions were introduced that allow for the practical and effective exercise of Aboriginal guardianship.[82] Legislative sections 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 in Victoria. Reflecting on this experience, we urge Western Australia to consider and ensure that 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 Victoria's section 18 was practically inoperable, a pilot program was implemented whereby an Aboriginal agency, VACCA, acted *as if* it had formally been delegated guardianship rights and responsibilities for Aboriginal children. The trial from 2013 to 2015 saw almost half of all children involved safely reunified with family – parents or another

family member – despite indications that the children were on a pathway to long-term out-of-home care. The 13 children included in the pilot 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.[83]

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."[84]

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."[85] 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."[86] 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."[87]

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.[88] VACCA is now working with specific government funding, announced in June 2016, to continue to progress section 18 implementation.[89] This involves working on addressing outstanding policy and practice considerations including separate legal representation and processes for addressing shared services.

As noted briefly above, a section 18 rural pilot program is currently running – a 12 month program delivered by the Bendigo and District Aboriginal Co-operative that began in July 2016.[90] The continued trialling of section 18 and efforts to address operational issues demonstrates the Victorian Government's clear commitment to the successful implementation of section 18 based on a staged and planned approach to build capacity of Aboriginal organisations to assume and exercise functions and powers in relation to Aboriginal children.[91] We understand that actual delegation under section 18 is likely to occur this year in Victoria.

We are 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 recommend that the current legislative review consider a similar approach to Aboriginal and Torres Strait Islander guardianship be pursued in Western Australia. At the same time, in order to support such a system, we call for proper investment to build capacity and capability of Aboriginal and Torres Strait Islander organisations to take on a trial.

As a concluding caveat, we note that while Aboriginal and Torres Strait Islander guardianship is important for participation, self-determination, and achieving better outcomes for children, a narrow focus and reliance on delegation of guardianship as a solution to these and other

issues is limiting and misconceived. A review of the Canadian experience of delegating statutory authority to Aboriginal agencies revealed limitations to achieving outcomes where Indigenous community agencies were provided only with responsibility for statutory child protections functions and were 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.[92] 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.

Recommendation 14: That a provision be added to the Act, equivalent to section 18 of the *Children, Youth and Families Act 2005* (Vic), providing for the future delegation of the Chief Executive Officer of the Department's functions and powers under the Act to the Chief Executive Officer (or Principal Officer) of an Aboriginal and/or Torres Strait Islander organisation. Further enabling provisions should also be introduced to support the practical operation of delegated functions and powers. Aboriginal and Torres Strait Islander organisations should be supported and fully resourced to build capacity to take on delegated functions and powers.

Alternative Aboriginal and Torres Strait Islander court processes

We submit that the current poor compliance with the Aboriginal and Torres Strait Islander Child Placement Principle and legislative provisions that seek to promote children's cultural care and connection also evidence deficiencies in the judicial process. Anecdotally a range of issues impact upon appropriate judicial process for Aboriginal and Torres Strait Islander families in Western Australia, including: cultural competence of the judiciary and lawyers; lack of child protection expertise of legal representatives; and the limited scope for Aboriginal and Torres Strait Islander participation in the court process.

We call for the legislative review to consider alternatives to the current role of the Children's Court of Western Australia that are more strongly aligned with the right to self-determination. Promising approaches in Australia and internationally have sought to shift judicial authority from non-Indigenous institutions either through the establishment of Indigenous operated courts or the development of court processes that more strongly include Indigenous cultural perspectives. Two such examples are discussed below.

Currently in Victoria, a 12 month pilot of a Koori list in the Family Division of the Children's Court of Victoria – that is, the court that hears child protection matters – has been underway since 1 July 2016. The establishment of the pilot follows a recommendation made by the Protecting Victoria's Vulnerable Children Inquiry in 2012. The Inquiry called for "the creation of a supportive and collaborative legal environment for Aboriginal children and youth who might be in need of care and protection" and a process that would "better meet the needs of Aboriginal children and their families in the court system".[93] The Inquiry accepted multiple stakeholders' submissions for a specialist Koori list based on the Koori Court in the Criminal Division of the Children's Court when recommending the resourcing and establishment of a Koori list in the Family Division as a matter of priority, with a pilot to determine suitability for implementation across the state.[94] A specialist Koori list in child protection matters was seen as a strong opportunity to create a space and environment for Aboriginal children and families to be heard in a culturally appropriate manner, train magistrates to oversee the list, and

provide continuity for legal proceedings.[95] The trial provides a once weekly Koori Family Hearing Day designed to promote a culturally appropriate court process with adapted procedures including the more informal conduct of proceedings and broad participation of children, families and community controlled organisation representatives.[96]

While the Koori Family Hearing day seeks to adapt and sensitise the court process to Aboriginal cultural perspectives, internationally there have been stronger moves towards self-determination in judicial proceedings. In the United States, tribal national sovereignty – the right to self-govern – is recognised in law and treaty.[97] Tribal courts are now commonly accepted as vital to tribal sovereignty[98] and in the child welfare context the *Indian Child Welfare Act 1978* provides that in some circumstances, a tribal court may have full jurisdiction over Indian child welfare.[99] Tribal courts operate in many different forms – the most common model is a hybrid model that incorporates elements of the mainstream court system with tribal customs and traditions.[100] Some of the most common elements found in tribal codes are alternative dispute resolution provisions and emphasis on preserving or reuniting the family.[101] Another significant element in many tribal codes is the '[recognition of] the rights of extended family, grandparents and traditional custodians to continued visitation even when parental rights have been terminated, as well as their right to participate in the judicial proceedings'.[102] Overall and significantly, 'tribal courts are being recognised for their often innovative and effective operations'.[103]

Recommendation 15: That consideration be given to how legislative provisions could direct and allow for the development of alternative court processes that are better attuned to Aboriginal and Torres Strait Islander cultural perspectives and aligned with the right to self-determination. Alongside appropriate legislative reform we call for the development of alternative court processes that empower Aboriginal and Torres Strait Islander peoples drawing on promising practices in Australia and internationally.

Foster Carer Standards

Consultation Questions 1 and 2

According to the Aboriginal and Torres Strait Islander Child Placement Principle, the first preference for placement where out-of-home care is necessary is with family, including Aboriginal and Torres Strait Islander family. Kinship care is the most likely form of out-of-home care to ensure an Aboriginal and/or Torres Strait Islander child's connections to family, community and culture are maintained and developed.

We welcome the proposed amendment to include a new assessment criterion for the approval of foster and family carers – that the Department must be satisfied that the carer is able to promote the child's cultural needs and identity.[104] However, we urge caution that efforts to identify, recruit and support Aboriginal and Torres Strait Islander kinship carers are not deprioritised in the push for more culturally competent foster carers. We maintain that safe kinship care is the first preference for placement and offers the best option for strong cultural care. With only 52.6 per cent of Aboriginal and Torres Strait Islander children in Western Australia placed with kin as at 30 June 2015 – where only 41.8 per cent of placements are with Aboriginal and/or Torres Strait Islander kin – it is imperative that more is done to increase the rate of placement with kin.[105]

In relation to kinship carer identification, recruitment and support there must first be recognition that the cultural knowledge of Aboriginal and Torres Strait Islander people is critical to increase

the availability of safe and culturally strong kinship care placements. Properly resourced Aboriginal and Torres Strait Islander community-controlled organisations (ACCOs) are needed not only to identify kinship care placements, but also to address the reluctance of potential carers to engage with child protection authorities that were centrally involved in creating, and still associated with, the Stolen Generations. Australian research has found that ACCOs and their Aboriginal and Torres Strait Islander staff, rather than Departmental staff, are often most effective at recruiting Aboriginal and Torres Strait Islander kinship carers.[106] Research has also highlighted that kinship carer recruitment is further restricted by a lack of training and guidelines to support it and a lack of culturally appropriate carer assessment tools and processes.[107] The Winangay Aboriginal Kinship Assessment Tool has been identified as an example of a promising ACCO-developed strengths based kinship care assessment approach that identifies and addresses perceived risks, such as inadequate support, in a way that could increase the number of safe, culturally strong, and viable kinship carers.[108]

Continued culturally safe support for kinship carers by ACCOs is needed in a context where Aboriginal and Torres Strait Islander families are often caring for multiple children while experiencing poverty and multiple stress factors.[109] This continued support is needed to redress support gaps that exist where kinship care is viewed and treated as a cost-saving measure by governments, with little or no training for kinship carers, perfunctory assessments, and commonly absent ongoing case planning and Departmental caseworker support.[110] We further observe that a significant amount of care is provided to Aboriginal children in Western Australia by informal relative carers, most commonly grandparents, who provide care with no significant financial or service support, placing further strain on families and communities with stretched resources for caring. We call for the establishment of a system of support for informal carers and note the inefficiencies, high-cost and unnecessary intrusion that result from a system that requires formal child protection intervention to trigger support for relative carers.

In relation to proposed models for the approval of foster carers, we submit that for decisions in relation to Aboriginal and Torres Strait Islander children, an Aboriginal and Torres Strait Islander organisation must be involved in the decision making process and have final authority to determine the appropriateness of carers for Aboriginal and Torres Strait Islander children. Any cross-sector assessment panel must include Aboriginal community organisation representation.

<u>Recommendation 16</u>: That legislation specify the requirement of representation of an Aboriginal and Torres Strait Islander organisation on any cross-sector carer assessment panel with the power to specify carers it deems unsuitable to support the cultural needs of Aboriginal and Torres Strait Islander children.

<u>Recommendation 17</u>: That the role of Aboriginal and Torres Strait Islander community controlled organisations to undertake culturally safe and adapted processes of kinship carer identification, assessment, recruitment and support be recognised in the Act.

<u>Recommendation 18</u>: That appropriate systems of financial and non-financial support for informal relative carers be established whether through the Act or another appropriate mechanism.

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