Submission to the Western Australian Standing Committee on Legislation's Inquiry into the *Children and Community Services Amendment Bill 2019* (WA)

July 2020

About SNAICC – National Voice for our Children

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

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

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

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

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

About the Noongar Family Safety and Wellbeing Council

The **Noongar Family Safety and Wellbeing Council** (NFSWC) is a peak body 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 across Noongar Country in Western Australia.

The NFSWC strives to work across the child protection, family violence, youth justice, housing, education and health sectors in partnership with peak bodies and Aboriginal community controlled organisations on reforms to develop transformative, culturally-grounded services to change the lives of the most disadvantaged people in our community.

NFSWC aims to ensure the rights of all Aboriginal families on Noongar Country are protected, and that Aboriginal family centred approaches are embedded in legislation, policy and practice to ensure the central connectivity of Aboriginal families, community, culture and country.

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1. Introduction

SNAICC- National Voice for Our Children (SNAICC) and the **Noongar Family Safety and Wellbeing Council (NFSWC)** welcome the opportunity to submit to the Western Australia Legislative Council Standing Committee on Legislation's Inquiry into the *Children and Community Services Amendment Bill 2019 (WA)* (hereafter "the Bill").

SNAICC and NFSWC have high concerns that the Bill, in its current form, falls well short of what is needed to protect the rights of, and improve outcomes for, Aboriginal and Torres Strait Islander children in contact with the Western Australian child protection system. Amendments to the *Children and Community Services Act 2004 (WA)* are vital to ensure that the legislative framework fully enables our families and communities to exercise their rights to self-determination and participation in decisions about the care and protection of our children. SNAICC and NFSWC have provided consistent input to this effect since our first submission to the legislative review process over 3 years ago. However, vital aspects of this input are yet to be heard or responded to in the Bill.

We are encouraged that the proposed Bill contains several important positive amendments that will improve practice for Aboriginal and Torres Strait Islander children and families. These include requirements for cultural support plans to be completed and for approved Aboriginal and Torres Strait Islander organisations to participate in their development (sections 89 and 89a), and minor limitations and conditions on making permanent care orders (*special guardianship*) for Aboriginal and Torres Strait Islander children (sections 61 and 63).

While many Aboriginal and Torres Strait Islander children in Western Australia grow up safe in loving homes, connected to culture, Western Australia also has the highest rate of over-representation in the child protection system in the country. Our children are approximately 17 times more likely to be in out-of-home care than non-Indigenous children.[1] As a result, child protection legislation has an enormously disproportionate impact on our families and communities, and as such, our perspectives must be central in the design of effective legislation. This submission makes key recommendations to strengthen the Bill in alignment with the evidence and our knowledge of best practice to advance the rights, safety and wellbeing of Aboriginal and Torres Strait Islander children in Western Australia.

2. List of recommendations

1. Strengthen Section 14 participation requirements to specify that an opportunity and assistance must be given to each of a child's family group, a community of which the child is a member ***and*** an approved Aboriginal and Torres Strait Islander representative organisation, to participate in decision-making processes under the Act. Remove the words "where appropriate" from the provision.

2. Remove the part of the amendment to Section 14 that directs that the requirements for family and community participation do not apply to decisions about placement and cultural support plans
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3. Amend the proposed section 81 to require consultation with a child's family group prior to placement rather than only with one family member.

4. Amend the proposed sections 89 and 89A to require participation of a child's family group in the development of care plans, including cultural support plans.

5. Include additional provisions that require families to be given support to participate in child protection decisions by means of an independently facilitated Aboriginal family-led decision making process.

[1]Australian Institute of Health and Welfare, *Child Protection Australia 2018–19*, p. 53, retrieved from: https://www.aihw.gov.au/getmedia/3a25c195-e30a-4f10-a052-adbfd56d6d45/aihw-cws-74.pdf.aspx?inline=true

6. Include additional principles in the Act to align with each of the five elements of the Aboriginal and Torres Strait Islander Child Placement Principle.

7. Include an additional provision requiring that "active efforts" are undertaken to provide the supports necessary to preserve and reunify a family prior to removal or placing a child on long-term orders. Provide a definition of "active efforts" in the Act.

8. Amend the proposed section 61(2B) to specify that the Court cannot make a special guardianship order unless it has received a report from an approved Aboriginal or Torres Strait Islander organisation that recommends the making of the order.

3. Comments on the Bill

3.1 Requiring Aboriginal and Torres Strait Islander participation in child protection decision-making

Participation of Aboriginal and Torres Strait Islander peoples in decisions that affect them is a core human right and is recognised as critical to decision-making that supports the best interests of children.[2] For Aboriginal and Torres Strait Islander children, their extended families and communities hold the knowledge of how to bring them up safe and well, strong in their identity and culture. The *Bringing them Home Report* recognised that the exclusion of Aboriginal and Torres Strait Islander families and communities from decision-making about the care and protection of children resulted in deep and lasting harm to generations of Aboriginal and Torres Strait Islander people and must never be repeated.[3]

While the Bill provides some strengthened requirements for the participation of representative Aboriginal and Torres Strait Islander organisations, it contains minimal requirements for the participation of families in decision-making. SNAICC and NFSWC take note of the proposed provisions in the Bill that are intended to strengthen and promote the participation of families and communities in child protection decision-making. These include section 14 which seeks to improve participation in all decision-making processes under the Act and sections 81 and 89A which relate to placement decision-making and cultural support planning respectively. Table 1 provides an overview of the limited effect of these three provisions on their intended purpose to increase participation requirements.

Table 1 – Aboriginal and Torres Strait Islander participation requirements proposed by the Bill

Proposed or amended section	**Subject of decisions**	**Family participation required?**	**Representative organisation participation required?**
s14	All decision-making processes under the Act	**No** – one of three options, and only "where appropriate"	**No** – one of three options, and only "where appropriate"
s81	Placement in out-of-home care	**No –** only one family member required	**Yes**
s89A	Cultural support plans	**No**	**Yes**

Proposed section 14(1) stipulates that "a kinship group, community or Aboriginal or Torres Strait Islander representative organisation **must** be given, where appropriate, an opportunity and assistance to participate in decision-making processes under this Act". The word "must" will replace the word "should" in the current provision. However, this proposed amendment provides little improvement.

[2] Committee on the Rights of the Child, General Comment No. 11: Indigenous Children and their Rights under the Convention, 2009, CRC/C/GC/11, 12 February 2009, para. 31.
[3] Human Rights and Equal Opportunity Commission (1997) *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, Sydney: Author.

Appropriate recognition of the right to self-determination in child protection matters would require all three parties – a child's family group, community and a representative organisation – to participate. The use of the word "or" in section 14 allows for significant decisions to be made under the Act without the participation of a child's family, which is out of step with human rights, recognised best practice standards and comparative provisions in other Australian jurisdictions. Also, the proviso, 'where appropriate', is retained, providing a high level of discretion as to whether this provision is acted upon. Given that the purpose of this section is to enable Aboriginal and Torres Strait Islander participation in decisions, in cases where a non-Indigenous decision maker determines that it is "not appropriate" to provide the opportunity and assistance for participation, the purpose of the provision will be wholly defeated.

Recommendation 1: Strengthen Section 14 participation requirements to specify that an opportunity and assistance must be given to each of a child's family group, a community of which the child is a member ***and*** an approved Aboriginal and Torres Strait Islander representative organisation, to participate in decision-making processes under the Act. Remove the words "where appropriate" from the provision.

We also do not agree with the proposed amendment to section 14 and the proposed sections 81 and 89A to the extent that they will limit family and community participation in decisions about placement and cultural support plans. Section 14 stipulates that its requirements for participation in child protection decision-making do not extend to decisions about placement and cultural support plans, while specific participation requirements related to these matters are provided by sections 81 and 89A. Section 81 of the Bill, if passed, will only require that consultation is undertaken with **one** family member prior to placement of a child in out-of-home care, rather than recognising the important role of extended family and kin in a child's life. Consultation with one family member is entirely at odds with Aboriginal and Torres Strait Islander cultural definitions of family and protocols regarding family relationships, responsibilities and decision-making. Sections 89 and 89A are positive amendments in that they introduce the requirement for a cultural support plan to be developed (s89(3A)), and the requirement that an approved Aboriginal or Torres Strait Islander representative organisation participates in the preparation of the plan (s89A(2)). However, again these provisions do not include any requirement for family participation.

For children who must be removed to ensure their safety and wellbeing, placement with kin or family, and quality, well-resourced cultural support plans, are critical for ensuring that they maintain connections to their family, community, culture, and Country. Families and community members with the requisite cultural authority for the child are best placed to inform decisions about culturally appropriate placements and cultural support planning. Sections 14, 81 and 89A do not appropriately reflect and recognise this knowledge and expertise or the rights of family and community members to participate.

Recommendation 2: Remove the part of the amendment to Section 14 that directs that the requirements for family and community participation do not apply to decisions about placement and cultural support plans.

Recommendation 3: Amend the proposed section 81 to require consultation with a child's family group prior to placement rather than only with one family member.

Recommendation 4: Amend the proposed sections 89 and 89A to require participation of a child's family group in the development of care plans, including cultural support plans.

Section 6AA of the Child Protection Act 1999 (Qld) promotes a more holistic understandings of participation of children and families in child protection decision-making and could serve as a model for strengthening the Bill's provisions:

> *s6AA (2) When making a significant decision about an Aboriginal or Torres Strait Islander child, a relevant authority must—*
>
> *(a)have regard to the child placement principles in relation to the child; and*

(b) in consultation with the child and the child's family, arrange for an independent Aboriginal or Torres Strait Islander entity for the child to facilitate the participation of the child and the child's family in the decision-making process.

s6AA (5) As far as reasonably practicable, a relevant authority must, in performing a function under this Act involving an Aboriginal or Torres Strait Islander person (whether a child or not), perform the function—

(a) in a way that allows the full participation of the person and the person's family group; and

(b) in a place that is appropriate to Aboriginal tradition or Island custom.

The participation of children and their families in child protection decision-making is enhanced when formal processes such as Aboriginal and Torres Strait Islander family-led decision-making models (ALFDM) are legislatively required as early as possible and for all significant decisions. AFLDM processes aim to empower families to make informed choices about the child's best interests and put decision-making around child protection concerns in the hands of the child's immediate and extended family.[4] Research has identified that family-led 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.[5] Studies have shown that plans generated through these processes have tended to keep children at home or with their relatives, and that the approach reinforced children's connections to their family and community.[6] In Australia, Victoria and Queensland have established AFLDM programs, with strong Aboriginal and Torres Strait Islander community-controlled organisation leadership in the process, and have undertaken evaluations and reviews that confirm the value and success of these approaches.[7] An Inquiry led by the Victorian Aboriginal Children's Commissioner reported that:[8]

> *Throughout the consultations, 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.*

As it currently stands, the Bill does not recognise the best practice process of AFLDM. There is precedent for embedding AFLDM within legislation in section 12(1)(b) of Victoria's *Children, Youth and Families Act 2005* (Vic) which requires that:

> *A decision in relation to the placement of an Aboriginal child or other significant decision in relation to an Aboriginal child, should involve a meeting convened by an Aboriginal convener who has been approved by an Aboriginal agency or by an Aboriginal organisation approved by the Secretary and, wherever possible, attended by—*
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> *(i) the child; and*
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> *(ii) the child's parent;*
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> *(iii) members of the extended family of the child; and*

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[4] SNAICC – National Voice for our Children. (2018). *The Aboriginal and Torres Strait Islander Child Placement Principle: A Guide to Support Implementation,* retrieved from https://www.snaicc.org.au/wp-content/uploads/2019/06/928_SNAICC-ATSICPP-resource-June2019.pdf

[5] Drywater-Whitekiller, V. (2014). 'Family Group Conferencing: An Indigenous Practice Approach to Compliance with the Indian Child Welfare Act', Journal of Public Child Welfare 8(3), p260- 278; Ban, P. (2005). 'Aboriginal Child Placement Principle and Family Group Conferences', Australian Social Work 58(4), p384-394;

[6] Pennell, J., Edward, M., & Burford, G. (2010). 'Expedited Family Group Engagement and Child Permanency', Children and Youth Services Review 32, p1012-1019.

[7] Winangali and Ipsos, 'Evaluation: Aboriginal and Torres Strait Islander Family-Led Decision-Making' accessible at: https://www.snaicc.org.au/wp-content/uploads/2018/05/Evaluation_Report_ATSIFLDM-2018.pdf;

[8] Victorian Commission for Children and Young People (2016). *In the Child's Best Interests: Inquiry into compliance with the intent of the Aboriginal Child Placement Principle in Victoria*, p126, retrieved from: https://ccyp.vic.gov.au/assets/Publications-inquiries/In-the-childs-best-interests-inquiry-report.pdf

(iv) other appropriate members of the Aboriginal community as determined by the child's parent.

Recommendation 5: Include additional provisions that require families to be given support to participate in child protection decisions by means of an independently facilitated Aboriginal family-led decision making process.

3.2 Requiring implementation of the Aboriginal and Torres Strait Islander Child Placement Principle

NFSWC and SNAICC have consistently called for stronger recognition of the five elements of the Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) in child protection legislation. The ATSICPP is the primary policy framework that recognises the importance of connection to family, community, culture and Country in child and family welfare legislation and policy across Australia. The Principle asserts that self-determining communities are central to supporting and maintaining those connections. The ATSICPP recognises that culture is a key protective factor for children and underpins their safety and wellbeing. Under successive action plans for the National Framework for Protecting Australia's Children, Western Australia, and all other Australian government have committed to full implementation of the ATSICPP.

The Bill lacks a requirement to comply with each of the five elements of the ATSICPP: prevention, partnership, placement, participation, and connection. Embedding all five elements in legislation, as underlying principles of the Act, would be a significant step towards ensuring accountability for their full implementation The Queensland Government has embedded all five elements of the ATSICPP in section 5C(2) of the *Child Protection Act 1999* (QLD), as follows:

> *s5C(2) The following principles (the child placement principles) also apply in relation to Aboriginal or Torres Strait Islander children—*
>
> *(a) the principle (the prevention principle) that a child has the right to be brought up within the child's own family and community;*
>
> *(b) the principle (the partnership principle) that Aboriginal or Torres Strait Islander persons have the right to participate in significant decisions under this Act about Aboriginal or Torres Strait Islander children;*
>
> *(c) the principle (the placement principle) that, if a child is to be placed in care, the child has a right to be placed with a member of the child's family group;*
> *Note—See section 83 for provisions for placing Aboriginal and Torres Strait Islander children in care.*
>
> *(d) the principle (the participation principle) that a child and the child's parents and family members have a right to participate, and be enabled to participate, in an administrative or judicial process for making a significant decision about the child;*
>
> *(e) the principle (the connection principle) that a child has a right to be supported to develop and maintain a connection with the child's family, community, culture, traditions and language, particularly when the child is in the care of a person who is not an Aboriginal or Torres Strait Islander person.*

The current Act and the amendments provided for in the Bill contain some valuable enabling provisions for the ATSICPP, including cultural support planning requirements, a hierarchy of priority out-of-home care placement options, and with the changes recommended by this submission, could also provide strong provisions for family participation and partnership with communities and community-controlled organisations. A notable gap, however, is the lack of enabling provisions for the prevention element. There are currently no requirements for the provision of support services to families to prevent child removal or reunify children who have been removed from their families.

The *Indian Child Welfare Act 1978* (US) provides a leading example of legislation internationally that is well designed for this purpose. That Act requires that evidence must be provided to the court that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful" before a foster care placement or the termination of parental rights can come into effect.[9] Community Services Ministers from all Australian jurisdictions have now recognised the important role that "active efforts" play in enabling the safety and wellbeing of Aboriginal and Torres Strait Islander children and committed to "implement active efforts in jurisdictions to ensure compliance with all five elements of the Aboriginal and Torres Strait Islander Child Placement Principle".[10] "Active efforts" are purposeful, thorough and timely efforts that are supported by legislation and policy and that enable the safety and wellbeing of Aboriginal and Torres Strait Islander children. There is an opportunity for the current Bill to address the omission of this critical requirement and improve the alignment of legislation with the overwhelming evidence that prevention and early intervention are key to addressing the extremely high over-representation of Aboriginal and Torres Strait Islander children in Western Australia's child protection system.

Recommendation 6: Include additional principles in the Act to align with each of the five elements of the Aboriginal and Torres Strait Islander Child Placement Principle.

Recommendation 7: Include an additional provision requiring that "active efforts" are undertaken to provide the supports necessary to preserve and reunify a family prior to removal or placing a child on long-term orders. Provide a definition of "active efforts" in the Act.

3.3 Achieving stability and permanency for Aboriginal and Torres Strait Islander children

For children in out-of-home care, stability of relationships and identity are vitally important to their wellbeing and must be promoted. For an Aboriginal and/or Torres Strait Islander child, their stability is grounded in the permanence of their identity in connection with family, kin, culture, and Country.[11] The pursuit of long-term legal child protection orders is not suited to achieving this stability for our children, and in fact presents an unacceptable risk of severing those vital connections and causing them harm. The full implementation of the Aboriginal and Torres Strait Islander Child Placement Principle is a far more effective and evidence-based approach to achieving stability and permanence for Aboriginal and Torres Strait Islander children.

Reflecting this, SNAICC and NFSWC have consistently raised concerns in relation to the use of permanent care orders (*special guardianship)* for Aboriginal and Torres Strait Islander children in out-of-home care and recommended that these orders not be used for our children. At 30 June 2019, Aboriginal and Torres Strait Islander children in Western Australia were 8 times more likely to be placed on a permanent care order than their non-Indigenous peers.[12]

The Bill proposes a condition on making permanent care orders which will require that the Court receives a written report prepared "by a person who meets criteria prescribed by the regulations" if the special guardian is not an Aboriginal or Torres Strait Islander person (section 61(2B). According to the explanatory memorandum to the Bill, "the intention is that suitable qualified Aboriginal organisations or individuals prepare these written reports."[13] This proposed measure that excludes children with Aboriginal and Torres Strait Islander carers and only requires provision of a report is grossly inadequate to safeguard children's ongoing connections to their family, community, culture, and Country. We propose that if special guardianship orders are to be used for Aboriginal children, that Aboriginal organisations should have the authority to assess and determine whether those orders are

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[9] See *Indian Child Welfare Act 1978* (US), s1912(d).
[10] Ministers for the Department of Social Services, Community Services Ministers' Meeting Communiqué (June 2018).
[11] SNAICC (2016). *Achieving stability for Aboriginal and Torres Strait Islander children in out-of-home care*, retrieved from: https://www.snaicc.org.au/wp-content/uploads/2016/07/SNAICC-Achieving_stability.pdf
[12] Australian Institute of Health and Welfare, *Child Protection Australia 2018–19*, retrieved from: https://www.aihw.gov.au/getmedia/3a25c195-e30a-4f10-a052-adbfd56d6d45/aihw-cws-74.pdf.aspx?inline=true
[13] Parliament of Western Australian. (2019). *Children and Community Services Amendment Bill 2019: Explanatory memorandum,* p. 9, retrieved from: https://www.parliament.wa.gov.au/Parliament/Bills.nsf/B283F888C69DAC85482584C0001481AA/$File/EM%2B157-%2B2.pdf

in the best interests of the child, as is required under section 323 of the Victorian *Children, Youth and Families Act 2005 (Vic)*:

> *(2) The Court must not make a permanent care order in respect of an Aboriginal child unless—*
>
> *(a) the Court has received a report from an Aboriginal agency that recommends the making of the order; and*
>
> *(b) a cultural plan has been prepared for the child.*

Positively, the proposed section 63(1) enables the Court to place conditions on a special guardianship order requiring compliance with matters that could be included in a cultural support plan. This increased accountability of special guardians is needed and should be retained.

Recommendation 8: Amend the proposed section 61(2B) to specify that the Court cannot make a special guardianship order unless it has received a report from an approved Aboriginal or Torres Strait Islander organisation that recommends the making of the order.

Greg McIntyre SC has prepared a memorandum of advice providing further justifications for changes to the Bill and draft amendments in line with several of the recommendations included in this submission. His advice is included as Annexure A.