SNAICC Submission to the Northern Territory Legislative Assembly's Economic Policy Scrutiny Committee on the *Care and Protection of Children Amendment Bill 2019* (NT)

April 2019

About SNAICC

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.

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1. Introduction

SNAICC- National Voice for Our Children (SNAICC) welcomes this opportunity to make a submission to the Northern Territory Legislative Assembly's Economic Policy Scrutiny Committee on the *Care and Protection of Children Amendment Bill 2019* (NT) (hereafter "Bill"). SNAICC has been encouraged by the commitment of the Northern Territory Government to amend the *Care and Protection of Children Act 2007* (NT) (hereafter "Act") to reflect the recommendations of the Royal Commission into the Detention and Protection of Children in the Northern Territory and calls for reform made by Aboriginal and Torres Strait Islander people. However, to fulfill this commitment, some proposed measures in the current Bill require further review and strengthening.

While many Aboriginal and Torres Strait Islander children grow up safe in loving homes, connected to culture, they are approximately 12 times more likely to be in out-of-home care than non-Indigenous children in the Northern Territory.[1] Thus, it is clear that appropriate amendments to the Act are critical to ensure that the legislative framework supports Aboriginal and Torres Strait Islander families to access quality, culturally safe prevention and early intervention services to prevent their children from entering out-home care; that children and families can meaningfully participate in decisions affecting their lives; and that our children in out-of-home care remain connected to their family, culture, community and country. The Bill is promising in many respects. However, there are some aspects of the Bill that SNAICC believes currently fall short of what is necessary to ensure the: prevention of children entering care; meaningful participation of children and families in child protection decision-making; reunification of children in care with their families; and the full implementation of all five elements of the Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP). This submission highlights positive aspects of the proposed amendments and makes recommendations to strengthen the Bill.

2. Comments on the Bill

2.1 Promoting prevention and early intervention

Provision of prevention and early intervention supports to families is critical to improving outcomes for vulnerable children and families, and is the central focus of the *National Framework for Protecting Australia's Children 2009-2020*. Further, international and Australian evidence strongly supports the importance of Indigenous participation and self-determination in early intervention service design and delivery to achieving positive outcomes for Indigenous children and families.[2] Enabling the role and capacity of Aboriginal and Torres Strait Islander organisations is not only important for effective service delivery, but an important policy objective in its own right, in so far as it promotes local governance, leadership and economic participation, building social capital for Aboriginal and Torres Strait Islander peoples.[3]

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[1]Australian Institute of Health and Welfare, *Child Protection Australia 2017–18*, p 53 , retrieved 15 April 2019 from: https://www.aihw.gov.au/getmedia/e551a2bc-9149-4625-83c0-7bf1523c3793/aihw-cws-65.pdf.aspx?inline=true.

[2]Cornell, S., & Taylor, J. (2000) Soveriegnty, Devolution, and the Future of Tribal-State Relations. Cambridge: Harvard University; Denato, R., & Segal, L. (2013). Does Australia have the appropriate health reform agenda to close the gap in Indigenous health?, Australian Health Review, 37(2), May, 232-238; and Chandler, M., & Lalonde, C. (1998). Cultural Continuity as a Hedge Against Suicide in Canada's First Nations, retrieved 15 April 2019 from: http://web.uvic.ca/~lalonde/manuscripts/1998TransCultural.pdf.

[3]Australian National Audit Office (ANAO). (2012). *Capacity Development for Indigenous Service Delivery, Audit Report No. 26, 2011-2012.* Canberra: Commonwealth of Australia.

SNAICC finds promising the Bill's focus on preventative and support services, and its focus on supporting Aboriginal communities to drive the solutions. In this regard, SNAICC supports the addition of section 42(1)(cb) which stipulates that the Chief Executive Officer of the Department administering the Act (CEO) *may* "provide or facilitate the provision of assistance to Aboriginal communities to establish programs for preventing or reducing incidents of harm to children in Aboriginal communities…". However, the provision creates a discretionary power of the CEO rather than a positive obligation to resource and support the capacity of Aboriginal communities to take an active role in harm prevention in line with the evidence that community-driven solutions are critical to improving outcomes and in line with the principle of self-determination as stipulated in s12 of the Act. As such SNAICC recommends that the provision be strengthened.

Recommendation 1: Amend section 42(1)(cb) to require that the CEO "must take reasonable steps to provide or facilitate the provision of assistance to Aboriginal communities to establish programs for preventing or reducing incidents of harm to children in Aboriginal communities."

Further, section 42(3)(a) compels the CEO to "take reasonable steps to ensure that services provided under the Act include, where appropriate…preventative and support services to strengthen and support families to reduce the incidents of harm to children…" The requirement to take "reasonable steps" is not fully aligned with best practice provisions nationally and internationally that have sought to ensure that every effort is made to provide preventative and support services to families so that they can address identified concerns to prevent harm before a child is removed from their care. For example, Victoria's *Children, Youth and Families Act 2005* (Vic) compels the relevant Department's Secretary to take "all reasonable steps" to "provide the services necessary in the best interests of the child", and "to provide the services necessary to enable the child to remain in the care of the child's parent" before the Court can make a protection order.[4] Moreover, the United States of Americas' *Indian Child Welfare Act 1978* (US) recognises that "active efforts" must be taken 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.[5] 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. Thus, they have committed to "implement active efforts in jurisdictions to ensure compliance with all five elements of the Aboriginal and Torres Strait Islander Child Placement Principle".[6] Active efforts are purposeful, thorough and timely efforts that are supported by legislation and policy and enable the safety and wellbeing of Aboriginal and Torres Strait Islander children. Active efforts should be made not only in relation to preventing children from entering out-of-home care, but also in relation to reunifying children with their families if they are removed.

SNAICC calls on the Northern Territory Government to legislatively enshrine the accepted standard of "active efforts", giving effect to the commitments made by all Community Services Ministers in 2018 and leading the way in its approach to supporting Aboriginal and Torres Strait Islander children to remain with their families.

Recommendation 2: Amend section 42(3)(a) to provide that *active efforts* must be taken to ensure a child can remain safely in the care of the child's parents including through the provision of necessary support services. Include a definition of "active efforts" within the Act.

2.2 Promoting participation in child protection decision-making

[4] See *Children, Youth and Families Act 2005* (Vic), s276(1)(b) and s276(2)(b).
[5] See *Indian Child Welfare Act 1978* (US), s1912(d).
[6] Ministers for the Department of Social Services, Community Services Ministers' Meeting Communiqué (June 2018).

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 is about the best interests of children from a cultural perspective.[7]

SNAICC takes note of the provisions in the Bill that seek to facilitate participation of children and families in decision-making. For example, section 42(4)(a) stipulates that the "CEO must take reasonable steps to ensure that services provided to families under this Act, where appropriate…involve meaningful engagement with families in a language and manner they understand…". Moreover, section 42(4)(d) compels the CEO to promote decision-making processes that actively involve children, as well as parents, family members and members of the relevant kinship group.

Further, when care plans are being prepared or modified, section 72(a) stipulates that the CEO must facilitate the participation of the child; each parent of the child; an appropriate member of the child's family; and a person from the child's kinship group or a person nominated by the child or the child's family who represents the cultural group to which the child belongs, as the CEO considers appropriate.

However, the Bill does not stipulate that consultation or participation of an external Aboriginal and Torres Strait Islander agency must be expressly required for all significant decisions, including placement and judicial decisions. This is an important measure to ensure that Aboriginal and Torres Strait Islander communities are represented in decision-making and to ensure that families and children receive the culturally safe and independent support of an Aboriginal and Torres Strait Islander agency required for them to meaningfully participate in all child protection decision-making processes. Queensland's *Child Protection Act 1999* (Qld) contains a valuable provision in this regard, mandating the chief executive, litigation director and authorised officers to, in consultation with the child and their family, arrange for an independent Aboriginal or Torres Strait Islander entity to facilitate the participation of the child and their family in all decision-making processes.[8] SNAICC believes a similar provision should be included in the *Protection of Children Amendment Bill 2019* (NT).

Recommendation 3: Insert a section in the Bill that stipulates that when making a significant decision about an Aboriginal or Torres Strait Islander child, a relevant authority must, 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.

Furthermore, while the Act states that mediation conferences *may* be initiated by the Department (if the parents agree) to address concerns about a child's wellbeing, or by court order (sections 49 and 127 of the Act), there is no mandatory requirement to enable family and child participation through mediation or other family group conferencing means, and no requirement for such a process to be supported by ACCOs, such as through an Aboriginal and Torres Strait Islander family-led decision-making (AFLDM) process. The Bill does not redress this deficiency.

SNAICC supports legislatively enshrining AFLDM as a means to enable the meaningful participation of children and their families. AFLDM processes implemented in other Australian jurisdictions are largely based on a family group conferencing model with adaptations to enable unique Aboriginal and Torres Strait Islander decision-making processes supported by independent Aboriginal and Torres Strait Islander facilitators and agencies. Studies of family group conferencing models have shown that plans generated during these meetings tended to keep children at home or with their relatives, and

[7] 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.
[8] See *Child Protection Act 1999* (Qld), s6AA(2)(b).

that the approach reinforced children's connections to their family and community.[9]. In Australia and internationally, the promise of culturally adapted models of family-led decision-making to engage and empower Indigenous families and communities in child protection processes has been recognised.[10] In addition, 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.[11] At the same time, research has recognised the danger that these processes will be ineffective to empower families and communities where they remain wholly controlled and operated by non-Indigenous professionals and services.[12] While strong partnerships with government child protection services are essential to any model of family-led decision making, an effective and culturally strong model of AFLDM must be led by ACCOs and thus, this requirement should be specified in legislation.

AFLDM should take place at various stages of the child protection continuum, from the early intervention stage where there is no requirement for ongoing departmental contact or intervention, to the stage where relevant parties are working towards identifying potential carers for a child who has been placed on a protection order, or developing and pursuing reunification plans. Between 2016 and 2017, SNAICC in partnership with key stakeholders conducted trials of AFLDM in Queensland. An independent evaluation of the trials found that the utilisation of AFLDM processes at early stages of the child protection decision-making continuum had a greater impact on keeping children safe sooner because there was more time to work with families.[13] Taking account of this research, SNAICC believes that there should be a mandatory requirement within legislation to provide AFLDM at the point at which child safety services decide to pursue an investigation and at subsequent significant decision making points, for example, case planning, case plan review, and placement change. We believe that this process would also provide the basis for Aboriginal and Torres Strait Islander organisations to engage with and support families and children to participate throughout all phases of child protection decision-making.

Recommendation 4: Include a requirement in the Bill to make AFLDM, facilitated by independent Aboriginal and Torres Strait Islander agencies, available to families at key decision-making points across the child-protection continuum.

2.3 Promoting connection to family and culture

For Aboriginal and Torres Strait Islander children removed and placed in out-of-home care outside of their families and communities, efforts to maintain and develop connections to family, community, culture and country are especially vital to their ongoing safety and wellbeing. SNAICC welcomes provisions in the Bill that recognise this importance, in particular sections 10(2)(ca) and 10(2)(ha)

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

[10]Ban, P. (2005). 'Aboriginal Child Placement Principle and Family Group Conferences', Australian Social Work, 58(4), p384-394; 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; Marcynyszyn, L.A., Bear, P.S., Geary, E., Conti, R., Pecora, P.J., Day, P.A., and Wilson, S.T. (2012). 'Family Group Decision Making (FGDM) with Lakota Families in Two Tribal Communities: Tools to Facilitate FGDM Implementation and Evaluation', Child Welfare 91(3), p113-134.

[11]Ban, P. (2005). 'Aboriginal Child Placement Principle and Family Group Conferences', Australian Social Work 58(4), p384-394; 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.

[12]Ban, P. (2005). 'Aboriginal Child Placement Principle and Family Group Conferences', Australian Social Work 8(4), p384-394, 392

[13]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.

which acknowledge that the best interests of the child also encompass the child's right to remain connected to his or her parents, family members, kinship group, other persons who are significant in the child's life, and the culture and tradition of the child's family and community, as well as their country and language. Further, it is promising that section 70(5) of the Bill provides that care plans for Aboriginal children must include reasonable actions to "maintain and develop the child's Aboriginal identity" and "encourage the child's connection to their Aboriginal culture, tradition, language and country…"

Furthermore, the primary way to ensure that children placed in out-of-home care are connected to family, culture and community is through their safe reunification with family. In this regard, SNAICC takes note of section 10(2)(cb) which acknowledges that consideration should be given to all possibilities related to reunifying a child who has been removed with their parents when determining what is in their best interest. Further, section 70(2)(d) stipulates that a child's care plan is one that "sets out what is required to reunify the child with the child's parents, unless the CEO determines that reunification is not in the best interests of the child." However, SNAICC notes with concern that the amendments do not include language that signifies that reunification should be the first priority when a child has been removed. In addition, the Bill does not explicitly mandate that families should receive supports to enable safe reunification.

Legislatively enshrining reunification as the highest priority for children who have been removed from their families, and the obligation to provide supports to families so that their children can be returned to them is vital. For Aboriginal and Torres Strait Islander children placed in out-of-home care, safe reunification is the best way to protect a child's right to be brought up within their family and connected to community, culture and country. For Aboriginal and Torres Strait Islander children reunification with family can also include being returned to the care of their Aboriginal kin and community where safe reunification with birth parents is not possible. In this regard, the current definition of family in section 19 of the Act is overly broad in that it includes "anyone who is closely associated with the child or another family member of the child." This leaves open the possibility of children being reunified with carers who they do not have a genuine family or cultural relationship with. A child's genuine Aboriginal kinship connections must be determined by the child's Aboriginal family and community.

Recommendation 5: Amend section 8 of the Act so that it explicitly indicates that if a child is removed from their family, their timely and safe return to family must be facilitated as a matter of first priority wherever possible. Remove section 19(c) of the Act so as to define "family" more appropriately as limited to relatives and extended family in accordance with customary law or tradition and include an additional subsection in section 19 that specifies that for Aboriginal children their Aboriginal kinship connections must be determined by their Aboriginal family and community.

Recommendation 6: Insert a sub-section in section 42 of the Bill that requires the CEO to take active efforts to ensure that services provided under the Act include support services to families to enable the safe reunification of their children to their care.

Furthermore, the current Act does not contain any safeguards protecting against the making of permanent care orders without undertaking active efforts to support reunification. It also does not restrict the Court from making a permanent care order unless it has received a report from an Aboriginal or Torres Strait Islander agency that recommends the making of the order, as is found in the Victorian legislation.[14] The Bill does not redress these deficiencies.

Permanency orders risk severing Aboriginal and Torres Strait Islander children's connection to their family, community, culture and country (refer to SNAICC's policy position statement on "Achieving

[14]See *Children, Youth and Families Act 2005* (Vic), s323(b).

stability for Aboriginal and Torres Strait Islander children in Out-of-home Care", available from the SNAICC website, for further information). As such, it is crucial that safeguards are legislatively enshrined to ensure that timely and thorough efforts are undertaken to safely reunify children with their families wherever possible, and that an Aboriginal agency that understands the child's cultural and kinship connections, has the opportunity to assess and recommend whether long-terms orders are in the best interests of the child.

Recommendation 7: Insert a section in the Bill stipulating that permanent care orders cannot be made by the Court without the relevant Department demonstrating that active efforts were made to reunify the child with their family.

Recommendation 8: Insert a section in the Bill mandating that the Court cannot make a permanent care order unless it has received a report from an Aboriginal or Torres Strait Islander agency that recommends the making of the order.

2.4 Promoting the Aboriginal and Torres Strait Islander Child Placement Principle

While the Northern Territory Government has enshrined the placement element of the ATSICPP as a principle underlying the Act, it is important to note that the ATSICPP is not limited to that one element. Rather, the ATSICPP recognises the importance of connections to family, community, culture and country in child and family welfare legislation, policy and practice, and asserts that self-determining communities are central to supporting and maintaining those connections. The ATSICPP encompasses five interrelated elements, *prevention, partnership, placement, participation and connection*.

Embedding all five elements of the ATSICPP in legislation, as underlying principles of the Act, would be a significant step in towards requiring that all five elements must be holistically implemented to bring about improved outcomes for Aboriginal and Torres Strait Islander children in the child protection system and reduce the number of children entering the system in the first place. The Queensland Government has now embedded all five elements of the ATSICPP in section 5C(2) of the *Child Protection Act 1999* (Qld).

Recommendation 9: Insert a section in the Bill to embed all five elements of the Aboriginal and Torres Strait Islander Child Placement Principle as underlying principles of the Act.

3. List of recommendations

SNAICC recommends the following insertions and amendments to the Bill:

1. Amend section 42(1)(cb) to require that the CEO "must take reasonable steps to provide or facilitate the provision of assistance to Aboriginal communities to establish programs for preventing or reducing incidents of harm to children in Aboriginal communities."
2. Amend section 42(3)(a) to provide that active efforts must be taken to ensure a child can remain safely in the care of the child's parents including through the provision of necessary support services. Include a definition of "active efforts" within the Act.
3. Insert a section in the Bill that stipulates that when making a significant decision about an Aboriginal or Torres Strait Islander child, a relevant authority must, 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.

4. Include a requirement in the Bill to make AFLDM, facilitated by independent Aboriginal and Torres Strait Islander agencies, available to families at key decision-making points across the child-protection continuum.
5. Amend section 8 of the Act so that it explicitly indicates that if a child is removed from their family, their timely and safe return to family must be facilitated as a matter of first priority wherever possible. Remove section 19(c) of the Act so as to define "family" more appropriately as limited to relatives and extended family in accordance with customary law or tradition and include an additional subsection in section 19 that specifies that for Aboriginal children their Aboriginal kinship connections must be determined by their Aboriginal family and community.
6. Insert a sub-section in section 42 of the Bill that requires the CEO to take active efforts to ensure that services provided under the Act include support services to families to enable the safe reunification of their children to their care.
7. Insert a section in the Bill stipulating that permanent care orders cannot be made by the Court without the relevant Department demonstrating that active efforts were made to reunify the child with their family.
8. Insert a section in the Bill mandating that the Court cannot make a permanent care order unless it has received a report from an Aboriginal or Torres Strait Islander agency that recommends the making of the order.
9. Insert a section in the Bill to embed all five elements of the Aboriginal and Torres Strait Islander Child Placement Principle as underlying principles of the Act.

By incorporating these recommendations, the Northern Territory Government has the opportunity to strengthen its ongoing commitment to improving outcomes for Aboriginal and Torres Strait Islander children and be innovative in its approach. SNAICC appreciates the Government's consideration of these matters. Please contact John Burton, Manager of Social Policy and Research at john.burton@snaicc.org.au or 03 9419 1921 should you wish to discuss these matters further at any time.