



North Australian Aboriginal Justice Agency

**Submission to the Economic Policy Scrutiny
Committee**

**CARE AND PROTECTION OF CHILDREN
AMENDMENT BILL 2019**

12 April 2019

1. Introduction

Thankyou for the opportunity for the North Australian Aboriginal Justice Agency Ltd ('NAAJA') to comment on the Care and Protection of Children Amendment Bill 2019 ('the Bill').

2. About NAAJA

NAAJA provides high quality, culturally appropriate legal aid services to Aboriginal and Torres Strait Islander people throughout the Northern Territory. NAAJA and its earlier bodies have been advocating for the rights of Aboriginal people in the Northern Territory since 1974.

NAAJA is an Aboriginal organisation governed by a Board that is representative of the Northern Territory Aboriginal and Torres Strait Islander community including a strong focus and representation from regional and remote areas.

NAAJA serves a positive role contributing to Aboriginal people's legal rights and access to justice. NAAJA travels to remote communities across the Northern Territory to provide legal representation for adults and children, deliver community legal education and work with local elder groups.

3. NAAJA's services for families, kin and youths in out of home care.

NAAJA has well-recognised expertise in the legal representation of Aboriginal families, children and young people in the Northern Territory. NAAJA played a major role in the advocacy, evidence and support and submissions to the Royal Commission into Child Protection and Detention Systems of the Northern Territory ('Royal Commission') that underpins the reforms of the Bill.

NAAJA has a multi-disciplinary team that provides legal and support services for Aboriginal families by lawyers, client service officers and social workers. NAAJA provides intensive casework support for Aboriginal families during the court processes, and provides ongoing post court support for families as they make decisions about kinship care and strengthen their lives. NAAJA provides casework support for young people who are in the care of the Northern Territory, particularly at times when they may intersect with the Youth Justice System and as they navigate systems and structures which intersect with their time in Out of Home Care.

When the 'Bringing Them Home' report into the Stolen Generations was released in 1997, Aboriginal and Torres Strait Islander children represented 20 per cent of children living in out-of-home care in Australia. As at 2016, they are over 35 per cent¹. The rate of Aboriginal and Torres Strait Islander children in out-of-home care is now almost ten times that of other children in Australia, despite "numerous legal and policy frameworks designed to advance safety, and family and cultural connections for children".² Aboriginal children make up the majority of children in out-of-home care in the Northern Territory. In the year ending 30 June

¹ *The Family Matters Roadmap*. The Family Matters Roadmap is a collaborative effort of the Family Matters campaign's national steering committee, the Family Matters Champions Group. Roadmap development was led by SNAICC – National Voice for our Children, in close consultation with members of the Family Matters Policy & Advocacy Working Group, a sub committee of the Champions Group. At <http://www.familymatters.org.au/>

² *Ibid The Family Matters Roadmap*

2018 there were 1,061 children in Out of Home Care, a 1% increase from 2016-17. 89% are Aboriginal children, of which only 34% were placed with Aboriginal carers.³

Our legal service has listened to the voices of Aboriginal families as they have raised issues and complaints about their children being removed from country and community, and their worries that their children will not grow to learn their culture. We have listened to kinship groups explain the extraordinary length of time it takes for Aboriginal families to be assessed appropriate to care for Aboriginal children. And we have listened to the worries of young people about how their experiences in out of home care has not given them stable starting blocks, and how they move from out of home care to youth detention.

NAAJA has consulted internally as much with legal practitioners and Aboriginal staff working directly with Aboriginal youth and from perspectives across the Northern Territory that has led to this submission.

4. Care and Protection of Children Amendment Bill 2019

The Care and Protection of Children Amendment Bill 2019 is an opportunity for the Legislative Assembly to consider important and significant legislative reforms for the future of children and families in the Northern Territory. It is a Bill of importance to all Territorians but also nationally as a statement of the Northern Territory's progress since the handing down of the Final Report of the Royal Commission on 17 November 2017. NAAJA supports the inclusion of the proposed amendments as part of the initial tranche of legislative reform.

NAAJA welcomes the Bills intention to imbed in legislation a strengthening of focus on; the best interests of children; priority for cultural preservation; early intervention ; kinship care; accountability and Aboriginal decision making.

NAAJA notes the work that Territory Families are undertaking to introduce the Signs of Safety Framework, improve kinship care and support Aboriginal decision making. Legislative reform is an essential component in the success of policy reform and provides accountability and guidance for all Territorians concerned with the best interests of children. NAAJA notes that for many of the proposed reforms to be given meaningful effect, operational change and additional resourcing will be required.

4.1 Best Interests of the Child

The Bill makes several amendments which strengthen the principle that when a decision is made involving a child, that the best interests of the child are the paramount concern. NAAJA notes the following amendments which give strengths to the best interests of the child;

- Section 8 - A child may be removed from the child's family only if there is an unacceptable risk of harm to the child. This strengthens the test to bring the

³ Office of the Children's Commissioner Northern Territory, *Annual Report 2017-2018*, Northern Territory Government, Darwin, 2016, p. 64.

decision making in line with other jurisdictions and makes the test child focuses. The High Court introduced the Unacceptable Risk test in the case of *M v M* in 1988⁴. The test concentrates on the welfare of the child, rather than determining whether the alleged abuser is in fact guilty of past abuse.

- Section 10 - Ensures a sharper focus on the importance of family and culture, consistent with the Aboriginal Child Placement Principle, acknowledging the right of the child to enjoy their culture, kinship groups and persons of significance with an emphasis that, where possible, the child will return home.
- Section 12(2) – embeds the right of Aboriginal children to nominate the Aboriginal people who should participate in decision making about them.
- Section 42 – that the CEO may provide or facilitate services of support for children and families and provide or facilitate the provision of assistance to Aboriginal communities for prevention of reduction of incidents of harm supporting principles of early, non-statutory, intervention being in the best interests of children
- Section 106 – That the CEO must explain the duration and effect of the order to the child in a manner the child understands gives effect to Article 13 of the Convention on the Rights of the child for children to receive information.
- Section 130 (ca) – The court considering steps taken by the Territory to provide services necessary to address any likely risks of harm to the child strengthens accountability around early interventions and gives effect to Article 18 of the Convention on the Rights of the Child that Governments should help parents look after the best interests of their children by providing services to support them.
- S70(3)- That the CEO must start planning for a young person’s exit from care, from the age of 15 years enables time for the young person to be supported and appropriate plans, measures and supports to be built into the young person’s life.

Whilst NAAJA supports section 85A, that the CEO should provide ongoing assistance to young people who turn 18 in care to continue with their education and training by providing ongoing living arrangements and financial assistance, it is NAAJA’s position the governments obligation to support young people transition from care should not be tied to educational enrolment. NAAJA recommends that the CEO provide ongoing assistance to young people until the age of 25 years in consultation and collaboration with the wishes of the young person.

4.2 Care Plans (Royal Commission Recommendations 33.4 and 33.2)

Many children in out-of-home care have not had timely care plans prepared. Care plans, in many cases, have not been tailored to meet the specific needs and status of each child in out of home care. There has been a systemic failure to identify and use kinship carers for Aboriginal children. Article 25 of the Convention on the Rights of the Child states that children who are looked after by their local authority rather than their parents should have their situation reviewed regularly.

⁴ *M v M* (1988) 82 ALR 577

NAAJA welcomes the amendments to section 70 including that care plans include cultural care planning and identify the cultural needs of the child, must be in clear and plain English and outline actions taken to address the needs of the child.

NAAJA supports the accountability of the amendment to section 130, that the court must not make an order unless a care plan has been provided to the court. It is imperative that when a decision is made for a child that the court, the child and the child's parents can clearly identify the plans made for that child. The court cannot consider if an order is in the best interests of the child without being fully apprised of the plan for that child.

4.3 Aboriginality

NAAJA notes the concerns of its clients that when children enter out of home care, that they lose essential connection to their cultural history. NAAJA also notes the stories of young people leaving out of home care that they are unable to grow into strong Aboriginal men and women because of the loss of their culture and language. We note the high number of children who move from the out of home care system to the youth justice systems. With 89% of all children in out of home care in the Northern Territory Aboriginal, NAAJA welcomes the first steps taken in this legislative reform to embed the Aboriginal Child Placement Principle throughout the whole ethos of the legislation and not just the principles of section 12. We particularly welcome;

- Section 10 – embedding a child's right to enjoy their Aboriginal cultures and traditions including the need to maintain ongoing contact with family, connection to country and language as a core principle in the best interests of the child.
- Section 42(4) That the CEO must take reasonable steps to engage meaningfully with families in a language they understand, is culturally responsive and empowers families to make decisions for their families.
- Section 70(5) – that care plan must include reasonable actions to maintain and develop the child's Aboriginal identity and encourage the child's connections to kin
- Section 72A - the recognition of Aboriginal decision making by allowing for families to nominate kinship groups of aboriginal representative organisations to participate in the care plan
- 124(5)(a)- That the CEO must explain duration and effect in the preferred language of the person or if not reasonably practicable in a language and manner the person understands
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4.4 Court Orders

The term 'best means' in sections 121 and 129 of the *Care and Protection Act* does not offer enough guidance and has led to inconsistency in application. The court must consider the least intrusive order possible, consistent with the best interests of the child. This is consistent with other jurisdictions such as New South Wales and Queensland where the legislation requires that any protection order made be the least intrusive order

possible, consistent with the best interests of the child. NAAJA welcomes the proposed amendments to section 121 and 129.

4.5 Accountability

The Royal Commission and Board of Inquiry heard many stories of young people's experience in out of home care which highlighted significant systemic by the Territory including failure to "adequately communicate decisions and processes" with children and families, failure to "adequately attempt to find... kinship carers", failure to "adequately support connections to family and culture for some Aboriginal children in care" etc⁵. NAAJA welcomes legislative amendment that creates mechanisms for accountability of the Territory by the Courts; including directions on the actions of the CEO both in orders and on adjournment, Judicial consideration of the appropriateness of service, Judicial consideration on the steps taken by the Territory and Judicial oversight on future decision making for children before Orders are made. NAAJA welcomes;

- Section 123 - Directions in a protection order extended to actions the CEO must do or refrain from doing in relation to the care of a child
- 139(5) – May require the CEO to supervise contact on adjournment if the court has heard submissions from the parties in relation to the requirement.
- Section 124 - parties must be served with copies of any application for a care order unless the court is satisfied that it is impractical having regard to the attempts made and why they were unsuccessful
- Section 130(ca) – The court is to consider steps taken by the Territory to provide services necessary to address any likely risks of harm to the child.

5. Recommendation

The Assembly should pass this Bill as the first Tranche of reforms to the Care and Protection of Children in the Northern Territory.

NAAJA notes that further reforms remain outstanding such as Royal Commission recommendation 33.7. The Royal Commission was of the view that there should be a mechanism in place to ensure foster and kinship carers, and those seeking or applying to be foster or kinship carers, have a legal right to seek an independent review of any adverse decision. The Commission recommended that NTCAT be given review powers in relation to a range of decisions with respect to foster and kinship carers, including assessment and approval decisions. NTCAT's powers would include setting aside the decision and making a new one, or remitting the decision back to the decision-maker for reconsideration.

NAAJA calls for amendment to Section 85A so that supports to maintain a young persons living arrangements are not just conditional on educational enrolment but are also available to young people in consultation with the young person and regard to their wishes.

⁵ Chapter 29, Volume 3A Report of the Royal Commission and Board of Enquiry into the Protection and Detention of Children in the Northern Territory