



17 April 2019

**By email: EPSC@nt.gov.au**

Economic Policy Scrutiny Committee  
Legislative Assembly of the Northern Territory

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Dear Sir/Madam

## CAAFLUAC SUBMISSIONS

### CARE AND PROTECTION OF CHILDREN AMENDMENT BILL 2019

Central Australian Aboriginal Family Legal Unit Aboriginal Corporation (CAAFLUAC) is a Family Violence Prevention Legal Service funded by the Department of Prime Minister and Cabinet and established in 2000. We provide legal advice and case management support to victims of family violence, domestic violence and/or sexual assault. We service clients in Alice Springs, Tennant Creek, Elliott, Ali Curung, Hermansburg, Yeundemu and Papunya.

We support the proposed amendments to the *Care and Protection of Children Amendment Bill 2019*. We are pleased with the following areas of reform in the proposed legislation:

1. **Amended sections 8, 10A and 129** A higher threshold test being used to determine circumstances in which child removal can occur, namely the 'unacceptable risk of harm' test based on the principle that the least intrusive form of intervention is consistent with the best interests of the child.
2. **Amended section 10** Inclusion of connection to family and culture in factors used to determine 'best interests' of the child so as not to be overridden by the need for permanency.
3. **Amended section 12** Express inclusion of views of an Aboriginal child, family or nominated kinship group or representative organisation to be involved in decisions about child.
4. **Amended sections 42 and 130** Placing an obligation on the CEO to provide or facilitate the provision of preventative and support services that are accessible to and engaging of vulnerable families.
5. **Amendments concerning Care Plans (Sections 70, 72A, 73, 74, 76, 85, 85A, 122, 130(3))** We strongly support amendments to ensure care plans are written in clear and plain language and include the cultural needs of a child, clear reunification plans where



applicable, plans to transition to independence with ongoing support, encouraging and facilitating participation of relevant people in preparing and modifying plans with due weight given to the wishes of these participants. We also applaud the requirement that a CEO must provide a care plan to a parent/carer (unless inappropriate in circumstances) and that they must take reasonable steps to assist a person to understand the plan. We also support the making of interim care plans as soon as the child is taken into care, considering their immediate cultural needs. We also think it imperative that a care plan is provided to the Court in accordance with amended sections 122 and 130(3) before the Court can make an informed decision to determine the best interests of the child.

6. **Amendments to notice provisions (Sections 104A, 106 and 124).** We support the proposed amendments to place an obligation on the CEO to inform the parent or carer of a child of an application as soon as practicable after applying for a temporary protection order, and explain that a decision may be made in their absence, that the CEO must explain to the child in language they understand the effect of the order, that notice must be personal unless impracticable and that if personally served, and that the CEO must explain the nature of the order in language they understand.
7. **Kinship care placements Section 130 (2)** For the determination of long-term Protection Orders, we support this amendment to ensure persons with family or kinship ties are not held to the same criteria as people without, recognising the importance of family and cultural connection as an essential component of the best interests of the child.

However, we believe that the proposed legislation should also incorporate the following amendments:

1. **Amendment to section 106.** We believe this section should also include a further sub section in accordance with the Royal Commission's recommendation 34.15 so that the CEO has an obligation to explain that the person served has a right of appeal and how to appeal. We would also like this to include a proactive approach to referrals to legal services so that the CEO has an obligation to offer a referral to a relevant legal service as part of the information they are required to provide.
2. **Definition of 'unacceptable risk of harm'** Without providing a working definition of 'unacceptable risk of harm', there is a danger that this may be interpreted in an inconsistent manner. Specifically, we would support a definition of 'unacceptable risk of harm' that includes a definition and guidelines for what constitutes 'cumulative harm', in accordance with the Commission's Recommendation 32.6. From our experience, Territory Families have been historically inconsistent in determining when to intervene in matters of 'cumulative harm'. Considering that these types of matters, usually including factors such as poverty and neglect, are most cases, we think it is important that a consistent standard be applied. It is unclear from the proposed legislation whether this is to be an objective test of the 'reasonable person' or a subjective test from the perspective of the case manager involved.



3. **Ensuring compliance with Aboriginal Placement Principle** We propose that Territory Families should be required to file a comprehensive report of all efforts made to comply with the Aboriginal Placement Principle when making applications to the Court including detailed affidavit material of all attempts to made to place a child with kinship carers and that a long-term Protection Order should not be made unless the Court is satisfied that Territory Families have exhausted all other options (Recommendations 49 and 69 of NAAJA's submissions to the Royal Commission on Care and Protection).
4. **Administrative Review mechanism** We believe that, the legislation should be amended to create an administrative review mechanism such as NTCAT to review decisions on child placements, contact between a child and their family, kin, community and significant others, and decisions which impact on an Aboriginal child's continued cultural connection. (Recommendation 13 in NAAJA's Submissions to the Royal Commission on Care and Protection).
5. **Independent child lawyers** There are two points we wish to raise:
  - a. We believe that, the Care and Protection system should be brought into line with the Family Law Court system to the extent that factors to consider for such an ICL appointment be embedded in the legislation. Historically it was an automatic appointment for a child. This legislative appointment was repealed and replaced with an appointment subject to application. The factors to consider with such an appointment such as the ones set out by the Full Court of the Family Court in the case of **Re K**<sup>1</sup> (1994) FLC 92-461 have not been outlined in the Act. This is a gap that needs to be addressed.
  - b. The legislation should also accommodate an automatic appointment of a child advocate whose role would be likened to a community visitor position as recommended by NAAJA at points 73-75 in their Submissions to the Royal Commission on Care and Protection.
6. **Family Group Conferencing** We believe that the Commission's Recommendations 34.7 – 34.10 should be implemented to ensure that family group conferencing is provided to families on request at any time, facilitated by a person or body external to Territory Families (who are trauma informed and culturally appropriate), and that no Protection Orders should be made by the Court unless a family group conference has taken place in the six months prior. However, we understand that this last requirement may be unrealistic and so would support an amendment that no Protection Orders should be made unless a family group conference has taken place in the last six months or an opportunity to hold a family group conference has been offered to the family, but they have declined to participate.



We support the provision of family group conferences that are non-adversarial and do not include lawyers, only relevant family members, independent facilitators and/or any other relevant people that the family thinks are important in the child's life and wishes to be present.

We note that there is extensive research that supports the success of family group conferencing in the care and protection context in New Zealand and other states in Australia, acknowledging that the family who know the child often have greater insight about what would be best for the child and the family.

As Nathan Harris surmised in his paper, 'Family Group Conferencing in Australia 15 years on':


*Findings suggest that conferences lead to greater feelings of empowerment by families, are usually able to produce a plan that is acceptable, mobilise greater informal and formal support for families, and would seem to increase the safety of children and other family members where violence is a concern (Kiely, 2001; Marsh & Crow, 1998; Merkel-Holguin, Nixon & Burford, 2003; Pennell & Burford, 2000; Sundell & Vinnerljung, 2004).<sup>ii</sup>*

According to Harris' 2008 paper, the Northern Territory is the only jurisdiction in Australia that has never used family conferencing in the care and protection context.

In the New Zealand context, if an agreement is reached at a family group conference, which occurs in most cases, this agreement is legally binding unless impractical or inconsistent with the legislation, thus saving the Court time and resources. In Australian jurisdictions, a decision reached at a family group conference generally has less weight but is still significant.

Family Group Conferencing may be a useful way to implement the **Amended section 12** of the proposed legislation, so that relevant participants can present a unified agreement or plan to Territory Families.

Yours faithfully,



**Kim Raine**  
**Principal Legal Officer**  
**CAAFLUAC**

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<sup>i</sup> **Re K** (1994) FLC 92-461

<sup>ii</sup> Nathan Harris, Family Group Conferencing in Australia 15 Years On, NCPC Issues No 27, February 2008, <https://aifs.gov.au/cfca/publications/family-group-conferencing-australia-15-years>, accessed 2/4/19.