



Aboriginal & Torres Strait Islander Women's Legal Services NQ Inc

A.B.N. 42 109 450 961

Address: PO Box 1062, Townsville Qld 4810 Phone: (07)4721 6007 Freecall: 1800 082 600 Fax: (07)4724 5112
Email: admin@atsiwltnq.org.au

18 January 2021

Legal Affairs and Community Safety Committee
Secretariat
By email: lasc@parliament.qld.gov.au

Dear Sir/Madam

RE: **Child Protection and Other Legislation Amendment Bill 2020**

We note that the *Child Protection and Other Legislation Amendment Bill 2020* ("the Bill") was tabled before the previous Queensland Parliament on 14 July 2020. The Bill lapsed with the dissolution of the 56th Parliament and the Bill has not been changed. We note that the Legal Affairs and Community Safety Committee completed its inquiry and tabled a report on 28 August 2020.

The Aboriginal and Torres Strait Islander Women's Legal Services NQ Inc. ("ATSIWLSNQ") provided a submission in response to the Bill in August 2020 (ATSIWLSNQ's previous submission). We welcome the opportunity to supplement our previous submission with the benefit of further information including the *Family Matters Report 2020*.

Aboriginal and Torres Strait Islander Women's Legal Services NQ

ATSIWLSNQ practices predominantly in areas involving Aboriginal and Torres Strait Islander families and children in North Queensland. A significant portion of our work involves child protection matters, including litigation. As the only community legal service in Queensland designated as an Aboriginal and Torres Strait Islander legal service for women, we have a particular interest in Child Protection matters which have impacted on the lives of First Nations women and their children disproportionately for generations.

Documents

Documents relating to the Amendment Bill and relied on in formulating this submission were:

1. *Child Protection and Other Legislation Amendment Bill 2020* ("the Bill")
2. Recommendations made by the Deputy State Coroner in the Inquest into the Death of Mason Jet Lee
3. Statement of Compatibility for the *Child Protection and Other Legislation Amendment Bill 2020*
4. Explanatory Notes *Child Protection and Other Legislation Amendment Bill 2020*

In ATSIWLSNQ's previous submission, we also noted our support for submissions made by the Queensland Aboriginal and Torres Strait Islander Child Protection Peak ("QATSICPP") and the Queensland Law Society ("QLS"). We affirm our support for these submissions.

Amendment of Child Protection Act 1999 Clause 8 - further considerations

ATSIWLSNQ remains opposed to adoption being an option for Aboriginal and Torres Strait Islander children under the *Child Protection Act 1999*. We provided reasons for our opposition in our previous submission.

In addition to the comments made in our first submission, we submit that the following further considerations relevant to the proposed amendment of section 5BA of the *Child Protection Act 1999* with respect to First Nations children.

Rights of Children

The UN *Convention on the Rights of the Child* recognises the special importance of children and the family's role in the care of children.

Recalling that, in the universal declaration of human rights, the United Nations has proclaimed that childhood is entitled to special care and assistance¹

Article 5 of the *Convention on the Rights of the Child* ("UNCRC") provides that States are to "respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by a local custom, legal guardians or other persons legally responsible for the child..".²

The UNCRC recognizes the family as the fundamental group of society, in particular it acknowledges the importance of protecting children, as also echoed in the *Human Rights Act 2019* (Qld) ("HRA")³. A consistent theme of the UNCRC is the importance of the child's identity and family relationships and the importance of the child maintaining personal relationships, including "contact with both parents on a regular basis, except if it is contrary to the child's best interests"⁴.

Further, UNCRC acknowledges the right of a child belonging to an indigenous group to "enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language".⁵ This is reinforced by the *UN Declaration on the Rights of Indigenous Peoples* ("UNDRIP") which recognizes the right to self-determination⁶, the right of indigenous peoples not to be subjected to forced assimilation or destruction of their culture⁷ and, the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation".⁸

In its General Comment No. 11, the Committee on the Rights of the Child ("the Committee") has commented that the specific references to indigenous children in the UNCRC indicates a recognition that they require special measures to fully enjoy their rights.⁹

The *Human Rights Act 2019* (Qld) acknowledges that Aboriginal peoples and Torres Strait Islander peoples hold "distinct cultural rights", including but not exclusively the right to develop their identity and

¹ Paragraph 4 Preamble *Convention on the Rights of the Child*

² Article 5 *Convention on the Rights of the Child*

³ Section 26 HRA and Preamble UNCRC

⁴ Article 9, UNCRC and also articles 7 and 8

⁵ Articles 30, UNCRC

⁶ Article 3 UNDRIP

⁷ Article 8 UNDRIP

⁸ Article 9 UNDRIP

⁹ Paragraph 5, General Comment No. 11 (2009), Committee on the Rights of the Child

cultural heritage, traditional beliefs, traditional cultural expressions and the right to “enjoy, maintain, control, protect and develop their kinship ties”¹⁰.

Further, the HRA recognizes equality before the law, every person’s right to enjoy their human rights and acknowledges that special measures to assist or advance a group disadvantaged because of discrimination does not constitute discrimination.¹¹

National framework and Queensland Government

The growing numbers of children in out-of-home care, more particularly Aboriginal and Torres Strait Islander children, is indicative of a system which has failed Aboriginal and Torres Strait Islander children and their families.

With 84% of child protection funding being channelled into services focused on removal of children and only 16% on support services¹², the main focus of child protection services has been, and is currently, on funding child protection departments after children enter the child protection system, rather than recognising the contributing factors and providing services to keep children safe and prevent them from entering the system.

In 2009, however, COAG, developed a strategy to change to a preventative model, more consistent with its human rights obligations to children and families, and intended to effect change in a sustainable way.

The *National Framework for Protecting Australia’s Children 2009-2020*¹³ (“the National Framework”), proposed a Public Health model for protecting children, in recognition of the demands on Child Protection services and the inability of those services to provide for vulnerable children and families.

The National Framework acknowledged that children’s safety and families’ support is an all of government responsibility in partnership with communities. This contrasts with the departmentally entrenched child protection system which operates in Australian States and Territories, which belatedly focuses on “risk” *after* children come to the attention of the child protection authorities.

The National Framework acknowledged the significant over-representation of Aboriginal and Torres Strait Islander children in the child protection system and proposed a preventative approach.

In its 2020 evaluation of the national framework, it acknowledged that the shift in emphasis to the public health model had failed to become fully embedded in the policy and program priorities of the State child protection systems.

We acknowledge that the Queensland government has, prior to the tabling of the Bill, taken steps towards a model of child protection that focuses on early intervention and better realises the importance of community-controlled Aboriginal and Torres Strait Islander support services to provide early intervention to protect vulnerable children and their families. We refer to the following as some of the more progressive steps taken by the Queensland government towards addressing the crisis in the child protection system in Queensland.

(a) Our Way

“Our Way: A generational strategy for Aboriginal and Torres Strait Islander children and families 2017-2037” (“the Strategy”) emphasized self-determination and the need to empower Aboriginal

¹⁰ Section 28, *HRA*

¹¹ Section 15 *HRA*

¹² The Family Matters Report 2020, Snapshot

¹³ “Protecting Children is Everyone’s Business” National Framework for Protecting Australia’s Children 2009-2020, 2009 Commonwealth of Australia, and An Initiative of the Council of Australian Governments.

and Torres Strait Islander families to “exercise opportunities to live well” in accordance with their values and beliefs and the UNCRC.

The Strategy acknowledged the significant over-representation of Aboriginal and Torres Strait Islander children in out-of-home care (with Aboriginal and Torres Strait Islander children being 9.7 times more likely to be in out of home care than non-indigenous children¹⁴) and committed to a new approach to child protection.

The Strategy overtly supported values which included children developing and maintaining their personal and cultural identity and community connections. This was an important principle consistent with the human rights framework for the rights of children and the cultural rights of Aboriginal and Torres Strait Islander children.¹⁵ The strategy committed to families at risk being able to access integrated services.

The Strategy acknowledged that, for indigenous populations, there is evidence that the “single biggest factor in improving health and social outcomes is self-determination”, thus acknowledging the importance of Aboriginal and Torres Strait Islander leadership in developing and participating in the protection of children and maintenance of culture.

The Strategy undertook to shift the balance of investment from the tertiary child protection system (the response model) to investing in universal and secondary services with an emphasis on prevention and early intervention services.

(b) *Changing Tracks An action plan for Aboriginal and Torres Strait Islander children and families 2020-2022*, was the Queensland Government’s first Action Plan under the Strategy. To its credit, it actively targeted the need to change and address systemic, social and policy barriers to eliminate the over-representation of Aboriginal and Torres Strait Islander children in the child protection system by 2037.

From the perspective of ATSIWLSNQ, undertaking legal casework with families experiencing child protection intervention, the change of emphasis towards self-determination, was promising.

The introduction of family-led decision making and the delegation of some statutory responsibilities for decision-making by community-controlled Aboriginal and Torres Strait Islander organisations, opened the door to better participation by parents and families including extended family members and to better decision making in addressing the needs of children and families. There was greater hope for children being reunited with their families and communities.

(c) *The Bill*

Clause 8 of the *Child Protection and Other Legislation Amendment Bill 2020*, which seeks to amend section 5BA Principles for achieving permanency for a child is contrary to the directions set both at a national level by the National Framework and also the direction of the Queensland government’s Strategy and current Action Plan. The Bill is aimed at reinforcing child removal permanently from their families effecting not only a permanent physical and relational separation but a legal severance from the child’s family, heritage and identity.

Although adoption is provided as a “last resort” in Clause 8, for Aboriginal and Torres Strait Islander children, the legacy of the Stolen Generations under previous government policies, the ongoing pain, loss and inter-generational trauma suffered by those who were removed under past government policies (including many of the parents and grandparents of children currently in the

¹⁴ Family Matters Report 2020

¹⁵ E.g. s.,28 *HRA*, Article 5 UNCRC, Articles 3, 8, 9 UNDRIP

child protection system), should have alerted legislators as to the inappropriateness of proposing adoption as an option at all for Aboriginal and Torres Strait Islander children.

The Explanatory Notes on introduction of the Bill make it clear that the intention is to achieve “relational, physical and legal permanency” as a way of ensuring the wellbeing and best interests for a child in care. Adoption is already available as an option, but the Explanatory Notes make it clear that expressing adoption as an option is intended to promote the best interests of children through “stability and continuity for children in care”.¹⁶

The Committee on the Right of the Child (“the Committee”), in its General Comment no.11 (2009) gave consideration to the meaning of “best interests” of the child for indigenous children. In relation to non-discrimination, the Committee considered that Article 2 of the UNCRC required States to actively identify children and groups of children who may need special measures to recognise and realise their rights.

Although the Explanatory Notes to the *Child Protection and Other Legislation Amendment Bill 2020* acknowledged the impact of the “historical practices” and the “ongoing need for cultural safety for Aboriginal and Torres Strait Islander children”¹⁷, there are no legislated special measures to ensure that Aboriginal and Torres Strait Islander children have ongoing cultural safety. In fact, there is no mechanism for children to maintain contact with their family and extended family either through a legally binding document or culturally safe support services.

The lack of any legislated mechanism to support Aboriginal and Torres Strait Islander children in the form of “special measures” that ensure continuation of identity, culture, family and community, the Bill fails to satisfy the standard of non-discrimination in the UNCRC.

“Best Interests” and stability for Aboriginal and Torres Strait Islander children

The Explanatory Notes to the Bill expressly acknowledge that the Bill is a response to the recommendations of the Deputy Coroner in the Mason Jet Lee case. In her recommendations, the Deputy Coroner was critical of the Queensland Government’s approach to child protection:

*The emphasis for child safety in Queensland...is maintaining family unification or reunification That is a philosophy which is oriented towards parents’ rights to family rather than a child’s unquestionable right to be safe.*¹⁸

The comments should be contextualised within the harrowing facts of the particular case being dealt with by the Deputy Coroner. In our submission, the risk of adopting the comments as a mandate to legislate adoption within a hierarchy of out of home care, is premature and inconsistent with the paramount principle that the Act should be administered under the principle that the “safety, wellbeing and best interests of a child, both through childhood and for the rest of the child’s life are paramount.”

The Committee on the Rights of the Child in considering the “best interests of the child” in relation to indigenous children were of the view that it requires special attention. In noting that the “best interests of the child” is a concept relating both to the rights of individual children and also to a collective right, the Committee considered how the right relates to collective cultural rights.¹⁹ The following comments are relevant to the issue of “best interests” as it relates to the rights of Aboriginal and Torres Strait Islander children:

When State authorities, including legislative bodies, seek to assess the best interests of an indigenous child, they should consider the cultural rights of the indigenous child and his or her

¹⁶ Explanatory Notes pp2-3

¹⁷ Explanatory Notes p3

¹⁸ Paragraph 940, Coroner’s Court of Queensland Findings of Inquest into the death of Mason Jet Lee, 2 June 2020

¹⁹ Paragraph 30, General Comment no.11 (2009), Committee on the Rights of the Child

need to exercise such rights collectively with members of their group. As regards legislation, policies and programmes that affect indigenous children in general, the indigenous community should be consulted and given an opportunity to participate in the process on how the best interests of indigenous children in general can be decided in a culturally sensitive way.²⁰

SNAICC, in its Policy Position Statement for “Achieving stability for Aboriginal and Torres Strait Islander children in out of home care”, while noting the vital importance of stability for children placed in out of home care and supportive of an agenda to improve stability for Aboriginal and Torres Strait Islander children in out of home care, considered the need to improve permanency planning to safeguard children and avoid exacerbating inter-generational harm to families and communities:

..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.²¹

A key recommendation was that governments invest “to provide access to early intervention, intensive family support and healing services for Aboriginal and Torres Strait Islander families to prevent abuse”.²²

In considering permanency planning, SNAICC noted that recent governmental reforms have focused on physical and legal permanence, *rather than relational, consisting of positive, caring, stable relationships.*²³

SNAICC particularly noted that underpinning the concept of permanence, the theory that stability depends on the child emotionally attaching to an individual carer is inconsistent with Aboriginal and Torres Strait Islander values of relatedness and child rearing practices.²⁴ SNAICC relied on research of Aboriginal and Torres Strait Islander communities to assert that:

...stability for Aboriginal and Torres Strait Islander children does not rely exclusively on developing particular bonds with a single set of parents or carers or on living in one house. There are differences in family life across Nations, groups and families, but many long-practiced Aboriginal and Torres Strait Islander models of child-rearing hold that ..'children are part of a system of care...(with) different kinship relationships with various members of extended families and often move between..or outside it'²⁵

Notwithstanding the potential negative impacts of the amendments to the *Child Protection Act 1999* in 2018, the Queensland Government’s introduction of its “Our Way” Strategy, provided some hope for better outcomes. Yet it should be noted that the overwhelming majority of child protection funding nationally (84%) is still focused on child removal.²⁶ This is not surprising for the early stages of a change in child protection strategy, but it is also indicative of the inherent risk of moving to focus on the permanent severance of children from their families and communities, without the new Strategy having had time to be tested and without legislating any appropriate support mechanisms.

Loss of identity and connection

SNAICC in stressing the importance of connection to culture as part of the foundations of children’s identity cited a Canadian study that found a direct link between lack of personal identity for First Nations young people and increased rates of youth suicide.²⁷ It found that when there was cultural connection and practice and self-governance, youth suicides reduced to zero. The direct link between loss of identity

²⁰ Paragraph 31, General Comment no.11 (2009), Committee on the Rights of the Child

²¹ P.5 July 2016, “Achieving stability for Aboriginal and Torres Strait Islander children in out of home care”

²² Ibid.

²³ July 2016, “Achieving stability for Aboriginal and Torres Strait Islander children in out of home care”, p7

²⁴ Ibid.

²⁵ Ibid.

²⁶ The Family Matters Report 2020, Snapshot

²⁷ Ibid.

and youth suicides is particularly concerning in light of the finding that 32.8% of First Nations people report high or very high rates of psychological distress (compared with 13% of other Australians). We note, further that between 2014 and 2018 suicide deaths for first nations people was almost double that of other Australians (23.7 per 100,000 population compared with 12.3 per 100,000 population).²⁸ SNAICC concluded that:

...permanence for Aboriginal and Torres Strait Islander children is identified by a broader communal sense of belonging; a stable sense of identity, where they are from and their place in relation to family, mob, community, land and culture.²⁹

Among its concerns, SNAICC listed the insufficient support to preserve and reunify families. It is noted that the amendments to the *Child Protection Act 1999* (Qld) legislated shorter time frames for families to achieve reunification and introduced Permanent Care Orders.

A further concern that SNAICC outlined, was the lack of ongoing support for kinship and foster carers. It expressed concern that permanency planning would shift responsibility for addressing care issues to individual carers.³⁰

In our previous submission we expressed concern about the lack of transparency and oversight in cases of adoption. It remains a concern that there are inherent risks in the adoption model that cannot be mitigated under the current *Child Protection Act 1999*. There is a lack of transparency, as it removes children from departmental scrutiny of the safety of adopted children, including their cultural safety.

Adoption severs the legal relationship between the child and the child's family and may sever the child's relationship with the child's birth family and culture altogether. The child is given a new birth certificate, assumes a new name. Legally, the child becomes a member of the adopted family and the risk of loss of connection with biological family and culture is very real.

Although children being adopted from the child protection system are required to have an "Adoption Plan", the content of the Adoption Plan depends on what is agreed with the adoptive parents. More significantly, even if the Adoption Plan provides for a child to maintain a knowledge and connection with their biological family and culture, the Adoption Plan is legally unenforceable. It relies on the good faith and good intentions of the adoptive parents. It would be naïve to assume that this can be depended on in all cases and the consequences for the child who is severed from family, culture and country are severe and the facts are already known from the legacy of the Stolen Generations.

Further, the Canadian Paediatric Society made a Statement outlining some of the risks to a child of adoption.³¹ The Statement asserts that as children grow they develop a positive sense of their identity, and develop a self-concept and self-esteem. It considered that:

Adoption may make normal childhood issues of attachment, loss and self-image even more complex. Adopted children must come to terms with and integrate both their birth and adoptive families.

Children ...are affected by the adoption throughout their lives...All adopted children grieve the loss of their biological family, their heritage and their culture to some extent.³²

It is submitted that the proposed amendment to section 5BA of the *Child Protection Act 1999* (Qld) is poorly considered, as it fails to genuinely address the myriad impacts, including negative impacts on the child's self-esteem and identity if removed from their biological family and culture.

²⁸ "Wiyi Yani U Thangani", 2020, Australian Human Rights Commission p.20

²⁹ Ibid.

³⁰ July 2016, "Achieving stability for Aboriginal and Torres Strait Islander children in out of home care", p11

³¹ "Understanding adoption: A developmental approach", *Paediatric Child Health* Vol 6, No5 May/June 2001, p281

³² Ibid.

In summary, we wish to bring to the Committee's consideration our objections to the proposed amendment to section 5BA *Child Protection Act 1999* (Qld). It is submitted that the amendment, in seeking to implement the recommendation of the Deputy Coroner, has failed to give due consideration to either the impacts on Aboriginal and Torres Strait Islander children, both in the short term and the longer term impacts of grief and inter-generational trauma or the supports and oversight needed to support permanency planning. In particular, the proposed amendment:

1. Is inconsistent with the international human rights framework including the UNCRC and UNDRIP;
2. It is inconsistent with the Queensland Government's progressive child protection strategies since 2017;
3. Fails to appreciate the necessity of actively ensuring the non-discrimination of Aboriginal and Torres Strait Islander children through the implementation of special measures;
4. Is founded on a narrow interpretation of "best interests" and fails to consider the differences between the non-indigenous model and Aboriginal and Torres Strait Islander values and child rearing practices;
5. Fails to respect or understand the child's kin relationships with family and extended family;
6. Is not linked to any ongoing proposed scrutiny or oversight of children who may be subjected to adoption orders to ensure their ongoing safety, including cultural safety;
7. Fails to provide an enforceable mechanism to ensure an ongoing relationship between an Aboriginal and/or Torres Strait Islander child and their biological family, including extended family, culture, country and traditions;
8. Does not give due consideration to the impact on individual children, including loss of identity, impacts on their developing self-esteem and future risk to their mental health.

We support the Queensland Government's implementation of its "Our Way" child protection strategy and associated action plans.

We remain opposed to the current regime of unsupported permanency planning and urge the Queensland Government not to legislate for or implement the adoption of Aboriginal and Torres Strait Islander children, with the exception of traditional Torres Strait Islander adoption.

Cathy Pereira
Principal Solicitor
ATSIWLSNQ