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RE: THE DISCUSSION PAPER RETHINKING RIGHTS AND REGULATION: TOWARDS A STRONGER FRAMEWORK FOR PROTECTING CHILDREN AND SUPPORTING FAMILIES

We welcome and appreciate the opportunity to make a submission in relation to the consultation round of child protection legislation reform. We recognise the considerable level of reform already carried out in the area of Child Safety by the Queensland Government and welcome the ongoing efforts to conduct further reform, especially with respect to options to:

- Reinforce human rights in the legislative framework;
- Strengthen children and young people's voices in decision making; and
- Reshape the regulation of care.

We support changes to the child safety system that would enhance its ability to protect children and support families and to provide better outcomes for children who are currently subject to child safety orders. The focus of this submission is on strengthening the child's right to maintain connection to kin, culture and country.

We are seeking amendments that reduce obstacles to the timely accreditation of kinship carers to allow greater resort to kinship care and to shift the emphasis away from reliance on foster carers and residential care facilities for the intake of Aboriginal and Torres Strait Islander children.

We are also seeking legislative changes that provide a stronger voice for the children in the child safety system and support greater input from both children and their kin and communities to protect the child's right to maintain connection to kin, culture and country. These rights have recently been recognised in the passage of the *Human Rights Act* 2009.

All of the above changes are interrelated and depend on each other for effective implementation.

We have had the opportunity to read the submission from QATSICPP, the Queensland Aboriginal and Torres Strait Islander Community Controlled Child Protection peak body in Queensland, and are fully supportive of their submissions. We would also like to add the following comments from our perspective.

Preliminary Consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander people across Queensland. The founding organisation was established in 1973. We now have 26 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander people.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout the entirety of Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by four and a half decades of legal practise at the coalface of the justice arena and we therefore believe we are well placed to provide meaningful comment. Not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

Summary of Recommendations

Broadening the purpose of the Act beyond 'the protection of children' to encompass children and young people's wellbeing and the goal of ensuring that they remain cared for and protected by their families and to recognise and promote self-determination as an overarching principle;

Broadening current legislative language concerning the Protection Principle, drawing upon ss 10(3)(a), 10(3)(b) and 276 of the *Children Youth and Families Act* 2005 (Vic);.

Broadening current legislative language concerning the Partnership Principle, giving the Independent Entity/Independent Person under the *Child Safety Act* a similar role to the role of the Tribes to intervene and make recommendations as exists under the US *Indian Child Welfare Act* (2016);

Incorporation of "Active Efforts" into the legislation as modelled on the "Active Efforts" in the US *Indian Child Welfare Act* (2016);

Make changes to the accreditation process for Kinship Carers

Create an independent oversight mechanism for overseeing the accreditation and monitoring of care service providers;

Implement changes to address the significant numbers of siblings who are separated and to allow siblings to be kept together;

Children to have access to direct legal representation and to seek reviews of decisions especially in regard to placement decisions.

Create a dedicated Aboriginal and Torres Strait Islander Child Guardian within the Office of Public Guardian to advocate for Aboriginal and Torres Strait Islander Children and Young People.

A Note On Terminology– Family and Kin

A perpetual problem is the unconscious assumptions made when talking about families. The default notion of "family" is that of a nuclear family with two parents and one or more children. The Aboriginal and Torres Strait Islander peoples have the oldest continuing culture in the world and there is a great variety of family structures among Aboriginal and Torres Strait Islander Communities. Aboriginal and Torres Strait Islander families and communities are responsible for 'growing up' children, ensuring they are safe and well, and defining how they are connected to their kin and community.

Households can contain nuclear families, but it is quite normal for multigenerational members to be residing together. Uncles and Aunts have a much bigger role in the raising of children. The term mother could encompass not just the biological mother, but also her sisters as well, whilst the term father may include the brothers of the biological father. A grandmother may be regarded as a mother, as can the grandfather be regarded as a father. A child being cared for will be raised with brothers and sisters, cousin-brothers and cousin-sisters and cared for by multiple adults. Young adults may continue to reside at home. For this reason, we will use the term "kin" which carries the broader definition of family and family carers.

The Child Safety System in Queensland and Past Present and Future Causes of Overrepresentation

Nationally, at 30 June 2017, 17,664 children in out of home care were identified as Aboriginal or Torres Strait Islander, at a rate of 58.7 Aboriginal and Torres Strait Islander children in every 1,000 children.[1] The national rate is 10 times the rate of non-Indigenous children, at 5.8 per 1,000. In Queensland, the

[1] AIFS, *Child Protection and Aboriginal and Torres Strait Islander Children: CFCA Fact Sheet* (2019) Table 2 'State and territory data comparing rates of Aboriginal and Torres Strait Islander children in out-of-home care compared to non-Indigenous children at 30 June 2017' available at https://aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-children

figures are 41.7 Aboriginal and Torres Strait Islander children in every 1,000 children compared to 4.8 non-indigenous children in 1,000. In Queensland these figures mean that an Aboriginal or Torres Strait Islander child is 8.7 times more likely to be in out of home care.

The over-representation of Aboriginal and Torres Strait Islander children has increased by 140% in the past decade, as compared with rates of non-Indigenous children, which have increased by 50%. Across Australian jurisdictions, between 6% and 28% of Indigenous children have been the subject of a notification to child protection services in one 12-month period.[2]

Current predictions are that the rate of over-representation of Aboriginal and Torres Strait Islander children in the child safety system, will continue, especially in tertiary intervention. This makes consideration of these changes especially important.

Various factors have contributed to the over-representation of Aboriginal and Torres Strait Islander Children in care including social and economic disadvantage, assimilation policies, intergenerational trauma and discrimination, and forced child removal as well as cultural differences in child-rearing practices and family structure.[3] There have been also links between decision making processes and sudden rises in children intakes.

The Stolen Generations refer to the practice of forcibly removing Aboriginal and Torres Strait Islander children from their families by Australian federal and state government agencies and missions. The practice of forced removal policies went on for 150 years up to the early 1970s. The devastating effects of the forcible removal and experiences of abuse and trauma were documented in the Human Rights and Equal Opportunity Commission Report *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).[4] Many Aboriginal and Torres Strait Islander people living today are part of or directly affected by the Stolen Generations. As noted in the HREOC report, the impacts of removal, abuse and trauma, and broken connections to kin culture and country impacted the ability of those affected to provide nurturing consistent care to children.[5]

There are clear imperatives to redress the wrongs of the past by acknowledging the impact of past policies and, to provide healing for those who have suffered as a result of these policies. These imperatives are recognised through human rights mechanisms including the United Nations

[2] AIFS, *Enhancing the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Policy and Practice Considerations* (2015) available at https://aifs.gov.au/cfca/publications/enhancing-implementation-aboriginal-and-torres-strait-islander-child/barriers-impeding

[3] AIFS, *ibid*, citing Human Rights and Equal Opportunity Commission(1997); SNAICC (2016a), Titterton, (2017).

[4] HREOC, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) available at https://www.humanrights.gov.au/our-work/bringing-them-home-report-1997

[5] HREOC, *Ibid*, p 347

Declaration on the Rights of Indigenous Peoples and the United Nations *Convention on the Rights of the Child.*

The Aboriginal & Torres Strait Islander Child Placement Principle

The Aboriginal and Torres Strait Islander Child Placement Principle was developed in response to the legacy of the forced removals and has been adopted by all Australian jurisdictions to ensure that children remain connected to their family, community, culture and country.[6] The Principle upholds the rights of the child's family and community to have some control and influence over decisions about their children. It also prioritises options that should be explored when an Aboriginal or Torres Strait Islander child is placed in care so that familial, cultural and community ties can remain strong.

In broad terms, the aims of the principles are to recognise and protect the rights of Aboriginal and Torres Strait Islander children, family members and communities in child welfare matters, increase the level of self-determination for Aboriginal and Torres Strait Islander people in child welfare matters and reduce the disproportionate representation of Aboriginal and Torres Strait Islander children in the child protection system.

The five interrelated elements of the Principle, prevention, partnership, placement, participation and connection are all reflected in the *Child Protection Act* 1999 (Qld). We support the following ways to strengthen the implementation of the Child Placement Principle.

Preamble and Section 5C changes

Preamble

We support developing a broader purpose for the Act than 'the protection of children' as currently contained in section 4 to one that encompasses children and young people's wellbeing, and the goal of ensuring they remain cared for and protected by their families.

In the Victorian Legislation the purposes[7] include:

> 1 Purposes The main purposes of this Act are—
>
> (a) to provide for community services to support children and families; and
>
> (b) to provide for the protection of children; …

The New South Wales Legislation provides: [8]

> *The objects of this Act are to provide:*

[6] The principle has been adopted by all jurisdictions in legislation and policy. A useful overview is contained in AIFS *Child Protection and Aboriginal and Torres Strait Islander Children: CFCA Fact Sheet* (2019), *ibid*.
[7] *Children Youth and Families Act* 2005 (Vic), s 1
[8] *Children and Young Persons (Care and Protection) Act* 1998 (NSW), s8

(a) that children and young persons receive such care and protection as is necessary for their safety, welfare and well-being, having regard to the capacity of their parents or other persons responsible for them, and…

(c) that appropriate assistance is rendered to parents and other persons responsible for children and young persons in the performance of their child-rearing responsibilities in order to promote a safe and nurturing environment.

As noted by SNAICC, any legislation that relates to the care and protection of Aboriginal and Torres Strait Islander children should also recognise and promote self-determination as an overarching principle.[9]

Broadening of the Prevention Principle

Section 5C (2) of the *Child Protection Act* 1999 (Qld) presently provides:

*(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;*

The definition of the prevention principle should go beyond being preferable. The Prevention Principle addresses the underlying causes of child protection intervention. The Principle should be amended to clearly articulate the intent of protecting children's rights to grow up in family, community, and culture by enabling equitable access to quality supports and services to redress causes of child protection intervention.

In the United States under equivalent legislation, regulations made under the *Indian Child Welfare Act* 1978 contains specific reference to family preservation as the preferable choice unless there is a "risk of imminent physical, damager or harm", it also imposes a duty on the State to make active efforts promote family preservation through the delivery of remedial and rehabilitative services, and further requires the State to demonstrate to the Court that active efforts had been provided but were unsuccessful prior to seeking an order for removal.[10]

Those ideas have been translated into the Victorian legal system in the *Children Youth and Families Act* 2005 (Vic). Section 10 of that Act addresses the Best Interests Principles. Sections 10(3)(a) and 10(3)(b) relevantly provide (for any child):

(3) In addition to subsections (1) and (2), in determining what decision to make or action to take in the best interests of the child, consideration must be given to the following, where they are relevant to the decision or action—

[9] SNAICC,*The Aboriginal and Torres Strait Islander Child Placement Principle: A Guide to Support Implementation* (2019), available at https://www.snaicc.org.au/wp-content/uploads/2019/06/928_SNAICC-ATSICPP-resource-June2019.pdf

[10] *Indian Child Welfare Act*, 25 U.S.C. ch 21§1901 et seq.. See also the discussion in SNAICC,*ibid,* p22

(a) the need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention into that relationship is limited to that necessary to secure the safety and wellbeing of the child;

(b) the need to strengthen, preserve and promote positive relationships between the child and the child's parent, family members and persons significant to the child;

Additionally, section 276 (2)(b) also provides:

276 Restrictions on the making of protection orders

(2) The Court must not make a protection order that has the effect of removing a child from the care of the child's parent unless—

(b) the Court is satisfied by a statement contained in a disposition report in accordance with section 558(c) that ***all reasonable steps have been taken by the Secretary to provide the services necessary to enable the child to remain in the care of the child's parent***;(emphasis added) *and*

(c) the Court considers that the making of the order is in the best interests of the child.

(3) The fact that the child does not have adequate accommodation is not by itself a sufficient reason for the making of an order referred to in subsection (2).

Broadening of the Partnership and Participation Principles

Partnership is understood by most, to mean ensuring the involvement of Aboriginal and Torres Strait Islander people, community representatives and organisations, external to the statutory agency, in policy and program development, service design, delivery and individual child-protection case decision-making.

The Queensland Government through the Department has demonstrated a commitment to partnerships with Aboriginal people, representatives and organisations well beyond statutory decision making, including policy and program development, service design and delivery and, to some extent, the appointment of the First Children and Families Board to have an oversight function in relation to implementation of the Our Way Strategy.[11]

However, at the individual level, with respect to case decisions at intake, assessment, intervention, placement and care, those principles are narrowly interpreted and often confined to the discretionary engagement of the departmentally funded Family Participation Program at a limited number of decision-making points.

[11] See also in this regard, the identification of the Queensland Our Way Strategy as a promising practice of the partnership principle. SNAICC,*ibid*, pp34-35

It is a concern that a narrow definition leads to poor outcomes. A broadening of the current language of the Partnership principle is needed.

Partnerships that support self-determination need to extend beyond mere consultation. Best practice legislation to support partnership would : [12]

- Recognise and promote self-determination as an overarching principle of any Act that relates to the care and protection of Aboriginal and Torres Strait Islander children;
- Require participation of independent representative ACCOs in all significant decisions about children;
- Provide for delegation of case management, custody and guardianship functions and powers to ACCOs; and
- Require ACCOs to approve permanent care decisions, including whether a permanent care order (or similar) is pursued through court proceedings.

In the United States, a broader role is recognised under the *Indian Child Welfare Act* (2016). It provides that the tribes have a right to intervene at any time in a child custody proceeding and can make recommendations regarding the placement of a child. The Independent Entity/Independent Person under the *Child Safety Act* could fulfil a similar role. Thus a proper voice could be given to the child's kin and to Aboriginal and the Torres Strait Islander Community Controlled organisation working with them.

Reinforcement of the Five Principles with Active Efforts

A recommendation contained in the SNAICC report supports the implementation of active efforts in jurisdictions to ensure compliance with all five elements of the Aboriginal and Torres Strait Islander Child Placement Principle".[13] The active efforts concept is drawn from a United States Federal Act, the *Indian Child Welfare Act* (ICWA).

> "Active efforts mean affirmative, active, thorough and timely efforts intended primarily to maintain or re-unite an Indian child with his or her family"

In our view, enshrining "active efforts" in the legislation would place the onus on government and agencies to ensure full and proper implementation of the five child placement principles.

The sorts of active efforts that could usefully be included in the legislation include:

[12]SNAICC, *The Aboriginal and Torres Strait Islander Child Placement Principle: A Guide to Support Implementation* (2019) page 33. Available at https://www.snaicc.org.au/wp-content/uploads/2019/06/928_SNAICC-ATSICPP-resource-June2019.pdf

[13]SNAICC,*ibid,* page 4, referring to Ministers for the Department of Social Services, Community Services Ministers' Meeting Communiqué (2018) < https:// formerministers.dss.gov.au/17211/ community-services-ministers-meetingcommunique/>

1. Conducting a comprehensive assessment of the circumstances of the Aboriginal or Torres Strait Islander child's family, with a focus on safe reunification as the most desirable goal;
2. Identifying appropriate services and helping parents to overcome barriers, including actively assisting the parents in obtaining such services;
3. Identifying, notifying, and enabling Independent Aboriginal and Torres Strait Islander Entities for the child to participate in the provision of support to enhance the families participation in decision making processes.
4. Utilising processes such as Aboriginal and Torres Strait Islander Family Led Decision Making models to empower and promote optimal participation of families in decisions made regarding the safety and wellbeing of their children.
5. Conducting or causing to be conducted a diligent mapping of the child's Aboriginal kinship system, to identify and meaningful engage extended family and people of cultural significance to the child in the provision of support for the child and their family and to promote preservation or restoration of connection to kin, culture and country;
6. Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's community and local service system;
7. Taking steps to keep siblings together whenever possible;
8. Supporting regular visits with parents or kin in the most natural setting possible as well as trial home visits of the child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
9. Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Aboriginal or Torres Strait Islander child's parents or, when appropriate, the child's family, in utilising and accessing those resources;
10. Monitoring progress and participation in services;
11. Considering alternative ways to address the needs of the Aboriginal or Torres Strait Islander child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;
12. Providing post-reunification services and monitoring.[14]

We particularly endorse the importance of proposed Active Effort 5, concerning the need for diligent mapping of the child's Aboriginal kinship system, to identify and meaningful engage extended family and people of cultural significance to the child in the provision of support for the child and their family

[14] List provided by QATSICCP

and to promote preservation or restoration of connection to kin, culture and country; and for Active Effort 7, Taking steps to keep siblings together whenever possible.

The Need for Kinship Carers

Kinship care enables children to live in a familiar environment and there is a growing recognition of the importance of children in care maintaining contact with their families, community and culture Kinship care is increasingly becoming the most common form of placement for Indigenous children across Australia.

The numbers of Aboriginal and Torres Strait Islander children in out of home care who are placed with Aboriginal and Torres Strait Islander carers has improved over the years but there is still much further to go. Figures obtained by the Australian Institute of Family Studies indicate that nationally, as at 30 June 2017, the Aboriginal and Torres Strait Islander children in out of home care placed with indigenous and non-indigenous care givers were as follows:[15]

Carer Relationship (%)	**Qld**	**NSW**	**National**
Indigenous relative/kin	23.8	40.6	35.5
Other Indigenous Caregiver	13.9	24.2	15.3
Other relative/kin	19.3	16.1	17.0
Total placed with relatives/kin, other Indigenous caregivers or in Indigenous residential care	**57.0**	**80.9**	**67.8**
Total not placed with relatives/kin, other Indigenous caregivers or in Indigenous residential care	43.0	19.1	32.4
Total	100	100	100

Removing Barriers to Kinship Care

[15] AIFS, *Child Protection and Aboriginal and Torres Strait Islander Children*, Table 3: 'Aboriginal and Torres Strait Islander children in out-of-home care, by Indigenous status and relationship of carer, states and territories, at 30 June 2017, by percentage'. Available at https://aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-children. Percentages do not add exactly to 100% due to rounding. NSW data exclude children and young people on 'Guardianship Orders' (finalised third-party parental responsibility orders: non-out-of-home care funded).

The primary barriers to kinship care, are the length of time to do identity checks, limitations to the Blue Card system as it applies to kinship carers and adult members of the household, including the length of time to obtain and renew Blue Cards, and the appropriateness of the assessments.

There are often tight time frames for decision-making around the identification and accreditation of family members as kinship carers. Unlike foster carers, kinship carers are unable to be recruited in advance, and the immediate needs for placement of children may mean that children are placed with non-Indigenous carers while family members are sought.

If appropriate kinship carers can not be identified or accredited in time and if no other suitable placement with Aboriginal and Torres Strait Islander carers can be found, then children are placed with non-Indigenous carers as a last resort, provided they are able to maintain the child's connections to their family, community and cultural identity. However, the weakness of this approach is when, due to work pressures the Child Safety officers are unable to make all efforts to locate suitable kin carers or when foster parents are unwilling or unable to maintain the child's connections to kin, culture and country, it is presently practically impossible remedy that situation. That loss of connection then becomes entrenched by long term guardianship orders.

Checks and Accreditation Barriers

We note and support the QFCC recommendations that there be an alternative process for identity checks for prospective kin carers to overcome difficulties currently faced and that the Department considers changes to the relevant legislation to allow the Department of Child Safety, Youth and Women to nominate foster and kinship care services as alternative parties to verify the identification for blue card applications for all foster and kinship carer applicants (including adult household members).[16]

Changes to the Accreditation Process for Kinship Carers.

The legal framework for the regulation of child protection services including the assessment and approval of carers is contained in the *Child Protection Act* 1999 and the *Child Protection Regulation* 2011. Queensland's foster care system includes foster carers, kinship carers and provisionally approved care. It is administered by Child Safety Services within the Department of Child Safety, Youth and Women with support from the non-government sector. Carers must be approved by the Department. In 2015-2016 there were 2,114 new carer applications (to be either a foster carer or kinship carer) and 2,001 renewal applications.[17]

To be eligible to be a kin carer a person is required to have a positive notice, also known as a "Blue Card," under the *Working with Children (Risk Management and Screening) Act* 2000 (Qld) ('WWC Act'). That notice must be renewed every two years. Applications for renewal are assessed by the

[16] QFCC, *Keeping Queensland's Children more than Safe: Review of the Foster Care System* (2017), available at https://www.qfcc.qld.gov.au/sites/default/files/final_report_FC_review.pdf. *See* Recommendation 12.
[17] QFCC, *Ibid*, at p 31

Department of Child Safety, Youth and Women. These checks include not only the carer but also the adult household members who reside in the carers home or interact with the children on a daily basis must also be checked. More checks and therefore more delays are involved for extended family structures and multigenerational households than for nuclear family households.

While the object of the WWC Act is to promote and protect the rights, interests and wellbeing of children in Queensland by screening persons who work or wish to work with children, the one size fits all approach, currently contained in the WWC, means that thus the same rules apply to those who work with children, those who volunteer with children, those who are carers for children and adult members of carer households. A person being assessed for a blue card for the purposes of being a kinship carer is held to the same standard as if they wanted a blue card for working with children.

A further difficulty arises for young adults who are being raised in the same household. A 20 year old who has been charged with an offence may then cause an invidious choice for the carer as to which person gets ejected from the household, the child in care or the young adult. As noted in *PML v Director-General, Department of Justice and Attorney-General* [2019] QCAT 88, apart from the inherent impossibility of predicting future risk with certainty, the Act is premised on past behaviour being an indicator of future behaviour and allows for precautionary action even if it is not demonstrated that a person's criminal offending is not directly child related.[18]

In the case of the carer, as noted in a QCAT appeal in *PML v Director-General, Department of Justice and Attorney-General*

> *[the expert witness] noted that PML only requires the Blue Card to care for her grandchildren and she has no intention of offering her services to the general community. However, if she were to use her Blue Card more broadly, she would need to be committed that she had the capacity to not be a risk to children and that would be a question to be considered at the relevant time.*[19]

The QCAT member dealt with the issue this way:

> *While I must accept that a Blue Card is transferrable, it is a fact in this case that PML must have a Blue Card to be able to care for her grandchildren and that is the primary reason that she wishes to have it reinstated. PML will always be supervised by Child Safety as a carer and if there were to be future issues, I am satisfied that this supervision would instead be a protective mechanism.*[20]

While that decision could have been worded better, it highlights how her grandchildren who had been doing well, who were being raised well and who were safe with their grandmother could so easily have lost the best care available to them because of broader concerns irrelevant to their care.

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[18] *PML v Director-General, Department of Justice and Attorney-General* [2019] QCAT 88 para 60. It should be noted this case is presently under appeal.

[19] *PML v Director-General, Department of Justice and Attorney-General* [2019] QCAT 88 Para 43.

[20] *PML ibid*, at para [68].

Comment on the Ongoing Practice of Using Residential Care as an Alternative to Kinship or Foster Carers

In our view residential care should not be an alternative to kin or foster care.

Although the Department's stated policy has been that residential care placements are for young people aged 12 – 17 with the proviso that under 12's **may only** be considered for such placement if certain conditions are met, we currently see higher numbers of children being placed in residential care facilities as a matter of course.

In ATSILS' view children under the age of 12 should not be placed in residential care facilities at all. Based on information available to us, neither the facilities nor the qualifications of the staff at such facilities makes them appropriate for care of such young children. Further, as far as children older than 12 are concerned, residential care facilities should be an absolute last resort. They should not be sent to those facilities as a standard referral. These facilities are a relatively new phenomena, having been established in 2010. We are starting to see children coming out of them as young adults and are concerned see children who are suffering significant, life-long trauma as a result of being placed in such facilities.

Better and more stringent training for residential care workers may perhaps improve the situation.

It is our submission that children who are placed in residential care facilities should have standing to challenge their placements in those facilities. The importance of giving children a voice is reflected in the QFCC report on Young Peoples Perspectives on Residential Care[21]We would advocate legislative changes to support a more robust kinship, foster care model to plug the care gap leaving Resicare facilities as an option of last resort only with strictly capped numbers.

There should be more flexible funding for alternatives when kinship or foster care not available.

Reshape the Regulation of Care

We support the creation of an independent oversight mechanism for overseeing the accreditation and monitoring of care service providers. We are of the view that this would complement existing measures undertaken within the department and would strengthen the safety and wellbeing of children in care.[22]

The establishment of an Aboriginal and Torres Strait Islander Children's Guardian or the creation of a dedicated position within the Office of Public Guardian may be the best way to implement the

[21] QFCC, *Young People's Perspectives of Residential Care, Including Police Call-Outs*, available at https://www.qfcc.qld.gov.au/sites/default/files/Young%20people%20s%20perspectives%20on%20residential%20care%2C%20including%20police%20call-outs.pdf

[22] Similar mechanisms are to be found in the *Workplace Health and Safety Act* 2011, the *Medicines, Poisons and Therapeutic Goods Bill* (2019) or the police misconduct provisions in the *Crime and Corruption Act* 2011.

independent oversight mechanism. We are aware that effective oversight would require broad powers to undertake a range of monitoring activities such as making unannounced visits to undertake spot audits and assessment of services in residential care facilities. Presently the Public Guardian lacks the dedicated resource to undertake this role effectively.

Reinforce Human Rights in the Legislative Framework

We would support explicit reference to human rights in the preamble of the act and would further commend explicit recognition of the five elements of the placement principle as mandatory processes for enacting those human rights.

A Greater Compass for the Best Interests of the Child

As noted in the General Comments of the United Nations Committee on the Rights of the Child in 2009,

> *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 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. Such consultations should, to the extent possible, include meaningful participation of indigenous children.*[23]

Strengthening the Paramount Principle and the Best Interests of the Child

The Paramount Principle should be expanded to include "throughout the lives of children and young people". To do so would recognise the lifelong impacts of the removal of a child from their family and recognises that the best interests of the child encompasses their best interests in the future as well as in a single point of time. This would encourage current practices to reflect a long term view of the best interests of the child.

Strengthening the Right to a Cultural Identity as part of the Best Interests of the Child

A Child's fundamental need and recognised right to maintain their cultural identity should not be treated as a secondary consideration but a primary consideration of the best interests of the child. Connection to culture is integral to the safety and well-being of children. Connection to culture should be embedded in all decision making that impacts upon the child. Decision making that fails to take into account a child's connection to culture, kin or country, or even worse, erodes that connection, is not in the best interests of the child.

[23] UN Committee on the Rights of the Child, *General comment No. 11 (2009): Indigenous children and their rights under the Convention [on the Rights of the Child]*, UN Doc CRC/C/GC/11, [31] (12 February 2009)

Recognising Collective as well as Individual Rights – Keeping Siblings Together

A significant number of siblings in out of home care continue to be separated with no or insignificant levels of contact between them.

As noted in the General Comments of the United Nations Committee on the Rights of the Child in 2009,[24]

> *However, the term "children" implies that the right to have their best interests duly considered applies to children not only as individuals, but also in general or as a group. Accordingly, States have the obligation to assess and take as a primary consideration the best interests of children as a group or in general in all actions concerning them. This is particularly evident for all implementation measures. The Committee4 underlines that the child's best interests is conceived both as a collective and individual right, and that the application of this right to indigenous children as a group requires consideration of how the right relates to collective cultural rights.*

A Greater Say for Children and Young People and Communities and Kin

Among the major barriers to implementation of the Aboriginal and Torres Strait Islander Child Placement Principles are poor practitioner understanding of the cultural connection and support needs of children and failures to enable Aboriginal and Torres Strait Islander participation to determine a child's best interests[25]

As noted in the General Comments of the United Nations Committee on the Rights of the Child in 2009,

> *With regard to the individual indigenous child, the State party has the obligation to respect the child's right to express his or her view in all matters affecting him or her, directly or through a representative, and give due weight to this opinion in accordance with the age and maturity of the child. The obligation is to be respected in any judicial or administrative proceeding. Taking into account the obstacles which prevent indigenous children from exercising this right, the State party should provide an environment that encourages the free opinion of the child. The right to be heard includes the right to representation, culturally appropriate interpretation and also the right not to express one's opinion[26].*

The views and wishes of the affected child should be taken into account where possible. One option is to make available legal assistance to children to make their views known. Children should have an

[24] UN Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, UN Doc CRC /C/GC/14, [23] (29 May 2013)

[25] Arney et al, *Enhancing the Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle* (2015) available at: https://aifs.gov.au/cfca/publications/enhancing-implementation-aboriginal-and-torres-strait-islander-child/background

[26] Ibid Para 38

ability to seek reviews of decisions before QCAT with the assistance of direct legal representation, especially in regard to placement decisions.

The case of *PML* provides an excellent example of the need to take the wishes of the children into account. In that case the affected children[27] felt safe with PML

In *PML* the Public Guardian advocated for the children:

> *The Public Guardian notes the history of the care that PML provided to the children and that they had lived with her essentially their entire lives. The Public Guardian also notes that there were no current standards of care concerns in relation to PML, and that the sole basis of the young people being removed from PML's care was the issue of the negative notice. They have reviewed the material that is now before QCAT and considered that there is a strong case for QCAT to overturn the decision to issue a negative notice. They encouraged Blue Card services to review all of the material in this matter, to assess the risk to these children as well as assess what is in their best interests. They noted[that the decision to issue the negative notice was based on old concerns that that led to the removal of the children, investigation of the concerns and return of the children 8 years earlier and that no further concerns had been raised since 2011].*

As noted by the Tribunal, the Public Guardian notes that D1 15 has self-placed back with PML as he wants to live with PML. The two girls, T1 and JG, have also expressed that they want to return to live with PML as soon as possible.[28]

QCAT quoted a passage from the letter from the Public Guardian:

> *"These children are strong achievers and have been very stable in the care of their grandmother. They have been destabilised and the schooling disrupted by the series of events that began with the issue of the negative notice. They both continue to express their emotional responses to their current situation, and it is believed that it will only be a matter of time before they choose to self-place back with their grandmother."*

In the evidence of PML the carer,

> *"She said [the removal] had taken a toll on her granddaughters and they were devastated when they were told they had to leave her house. .... She described the girls as being miserable in their placements. Though there were now contact arrangements in place, so that they could have dinner with her a couple of nights per week.'*

In addition to existing avenues of assistance from the Public Guardian, there needs to be a dedicated advocate for Aboriginal and Torres Strait Islander children in care. There could be a dedicated Aboriginal and Torres Strait Islander Child Guardian with the Office of the Public Guardian to advocate for Aboriginal and Torres Strait Islander children and young people, to support them to participate in

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[27] *PML v Director-General, Department of Justice and Attorney-General* [2019] QCAT 88 available at https://archive.sclqld.org.au/qjudgment/2019/QCAT19-088.pdf. It should be noted that this matter is still under appeal.
[28] *PML*, *Ibid*, at para 44.

decisions that impact upon them. to make complaints and to seek review of decisions when the child is aggrieved by adverse decisions or actions.

With respect to the establishment of the Queensland Human Rights Commission, we are hopeful that the Commission's broad powers of review to investigate individual complaints and report upon systemic issues to Parliament will lead to improvements in the Child Safety System. We support QATSICPP in their calls for an independent Aboriginal and Torres Strait Islander Children's Commissioner within QHRC.

We thank you for the opportunity to comment on the legislation and commend it to the committee.

Yours faithfully,

Mr. Shane Duffy
Chief Executive Officer
ATSILS (Qld) Ltd.