QATSICPP submission on the "Supporting families and protecting children in Queensland: a new legislative framework", Discussion Paper

The Queensland Aboriginal and Torres Strait Islander Child Protection Peak (QATSICPP) welcomes the opportunity to contribute to the development of a new legislative framework to support families and protect children in Queensland. As the peak body representing the interests of Aboriginal and Torres Strait Islander children and their families, we are acutely aware that legislative reform is needed. With our Aboriginal and Torres Strait Islander children now representing 41% of children subject to child protection intervention despite making up only 8% of the child population, Queensland desperately needs a new legislative framework that will support our families and communities to safely care for their children at home.

QATSICPP's response to the Discussion Paper is framed by the five elements of a reconceptualised Aboriginal and Torres Strait Islander Child Placement Principle. These five elements have been identified in the research to reflect the original intent of the Principle to support and maintain ongoing safe care and connection of Aboriginal and Torres Strait Islander children with their families, communities and cultures. These elements are very different to how the Principle is represented in the current Act. As described by Tilbury (2013) and Arney et al (2015) these elements are:

- Prevention – Early intervention and prevention to strengthen Aboriginal and Torres Strait Islander families and communities, keeping them together
- Partnership – Independent representative participation of Aboriginal and Torres Strait Islander peoples in all decisions for the safety and wellbeing of

their children to enable genuine partnership between our communities and government services

- Placement – Children who need to be in statutory care are placed in accordance with the agreed hierarchy of out-of-home care placement options, informed by community and family participation
- Participation – Children, families and communities participate in the decisions that affect the safety and wellbeing of their children
- Connection – Every effort is made to support and maintain family, cultural and community connection for Aboriginal and Torres Strait Islander children in out-of-home care

The Queensland Government has committed to implement this reconceptualised Principle through the third action plan under the National Framework for Protecting Australia's children which states,

> "States and Territories commit to continuing to fully implement the Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP). Action: All parties agree to ensure the five domains of the ATSICPP (prevention, partnership, placement, participation and connection) are applied to the implementation of strategies and actions identified in the Third Action Plan."

To action this commitment QATSICPP believes that the Principle and its five individual elements must be included within the new Act both as an explicit over-arching principle of the Act and integrated throughout its provisions.

The elements of this Principle are strongly aligned with the human rights of Aboriginal and Torres Strait Islander children. We believe rights-based legislation is critical to advance the holistic wellbeing of our children and redress their over-representation in Queensland's child protection system. Throughout this submission

we align our recommendations with internationally recognised rights of children and Indigenous peoples.

We have provided responses below to questions within the discussion paper that we believe are most critical to advancing the rights, safety and wellbeing of Aboriginal and Torres Strait Islander children.

Question 2 – What should be the purpose of Queensland's child and family legislation?

QATSICPP agrees with the proposition in the Discussion Paper that the purpose of the legislation should be significantly broadened to include the role of government and the sector to provide voluntary support to families and children to promote child safety and wellbeing and prevent child protection intervention. Such a move would be in keeping with the vast weight of evidence that early intervention provides the best and most cost effective approach to secure the long-term wellbeing of children. It would align with Queensland's commitments under the National Framework for Protecting Australia's children to re-orient the service system towards early intervention and presents as the only viable, evidence-based strategy to redress the rising number of children entering out-of-home care. The alarming and continuing increases in the representation of Aboriginal and Torres Strait Islander children in our child protection system can only be reversed through investing in our families. A long-standing Queensland Government commitment to support families has not resulted in adequate service provision to prevent escalating entry of children to out-of-home care. As a result, we believe a legislatively entrenched commitment to support families is urgently required.

Question 3 - To what extent, if at all, should Queensland's child and family legislation set out the role of government in supporting families to care for their children?

Reflecting our response to the previous question, we believe a strong raft of provisions should be introduced to legislate the role of government and the sector to support families to care for their children. We do, however, maintain reservations that extending the reach of statutory intervention to family support could lead to excessive and unnecessary government intervention in the lives of families. In this respect, we believe that legislation must address the role of non-government organisations and particularly the community-controlled sector to lead this approach from a genuine support, rather than protective intervention, perspective.

This approach would work towards implementing key provisions of the Convention on the Rights of the Child 1989 not adequately reflected in the current Act. These include the article 18(2) requirement to render appropriate assistance to parents in the performance of their child rearing responsibilities and the article 3(2) requirement to take legislative and administrative measures 'to ensure the child such protection and care as is necessary for his or her well-being'.

A range of provisions could serve to enact these rights, including:

- Legislating that adequate family support services be made available to families at the earliest opportunity when child protection concerns are identified;
- Requiring judicial review of the adequacy of family support provided to promote family preservation and reunification; and
- Requiring family reunification support to be provided wherever children are removed to out-of-home care, unless reunification is deemed not achievable after adequate investigation and assessment, including legislated timeframes for the provision of prompt reunification supports

Question 4 - If the legislation sets out the role of government in supporting families, should specific provisions be included to address the unique needs of Aboriginal and Torres Strait Islander families and children?

The legislation should include clear provisions on the role of Aboriginal and Torres Strait Islander community-controlled organisation to support Aboriginal and Torres Strait Islander families, and the role of government to enable their operation. Extensive international evidence is clear that more successful family engagement and better outcomes are achieved where Indigenous communities control and deliver their own services.[1] In Australia numerous reports and inquiries consistently confirm a lack of robust community governance and meaningful Aboriginal and Torres Strait Islander community participation as major contributors to past failures of Government child and family welfare policy.[2] They highlight the need to build capacity for Aboriginal and Torres Strait Islander community-controlled children and family services.[3] On this issue, the Queensland Child Protection Commission of Inquiry Final Report (Carmody Report) stated:

> Agencies controlled by Aboriginal and Torres Strait Islander people have a central role to play in improving the quality of statutory services for Aboriginal and Torres Strait Islander children and families, and reducing their over-representation in the system. All else being equal, child protection services are more likely to be effective if they are delivered through Aboriginal and Torres Strait Islander–controlled agencies because these agencies are familiar with local circumstances and have the requisite cultural competence.[4]

The Carmody Report called for the development of integrated and holistic Aboriginal and Torres Strait Islander community-led family services,[5] and legislative reform should be aligned to enable and support their operation. Also, as a critical component of self-determination, localised Aboriginal and Torres Strait Islander

leadership should be enabled in the design, not only implementation, of integrated family support services.

Enabling the role of community-controlled organisations in family support through legislation would work towards implementing key human rights provisions not adequately reflected in the current Act, including rights to self-determination and participation recognised in the United Nations Declaration on the Rights of Indigenous peoples.

Provisions to support the enactment of these rights could include:

- Requirements for Aboriginal and Torres Strait Islander family support services to be resourced commensurate with the level of over-representation of Aboriginal and Torres Strait Islander children in the child protection system, and also recognising the resource impacts on our agencies of responding to more complex family needs in our communities; and
- A legislated role for Aboriginal and Torres Strait Islander organisations to provide Aboriginal and Torres Strait Islander Family-Led Decision Making to families as early as possible when concerns are identified, and ongoing at key stages of statutory intervention, to empower families to find solutions to the challenges they face.

Questions 6-9 regarding the best interests of the child

QATSICPP firmly believes in legislatively defining the best interests of the child as the paramount principle in all decisions affecting the child, in line with the Australia's obligations under the Convention on the Rights of the Child 1989. We share similar concerns to those recognised in the Discussion Paper, that the subjective determination of a child's best interests is in practice failing to give proper effect to the best interests principle. This is particularly the case for Aboriginal and Torres Strait Islander children, where decisions about their safety and wellbeing are commonly made by non-Indigenous professionals defining a child's best interests through a non-Indigenous lens.

We believe that to more clearly and accurately define the best interests of the child, specific reference should be had to s7(1)(b) of the Adoption Act 2009 (Qld), which specifies that:

> It is in the best interests of an Aboriginal or Torres Strait Islander child—
> (i) to be cared for within an Aboriginal or Torres Strait Islander community; and
>
> (ii) to maintain contact with the child's community or language group; and
>
> (iii) to develop and maintain a connection with the child's Aboriginal tradition or Island custom; and
>
> (iv) for the child's sense of Aboriginal or Torres Strait Islander identity to be preserved and enhanced.

The United Nations Committee on the Rights of the Child highlights that respecting Indigenous children's rights and making decisions in the best interests of Indigenous

children requires Indigenous participation in decision-making.[6] This is recognised as important to ensure a culturally informed understanding of what a child's best interests are, as well as the impact of decision-making on a child's enjoyment of cultural rights in community with members of her/his cultural group.[7]

We note that current provisions to ensure Aboriginal and Torres Strait Islander participation in best interests decision making have been largely ineffective (see the response to question 18 below). As a result, we believe further definition is required to prevent cultural bias in best interests decision-making. Provisions to achieve this goal could include:

- specifying that a child's Aboriginal and/or Torres Strait Islander cultural heritage and connections are a critical consideration in best interests decision-making noting the equivalent provisions of the Adoptions Act 2009 (Qld);
- reinforcing that the participation of Aboriginal and Torres Strait Islander people is critical to determining the best interests of Aboriginal and Torres Strait Islander children, with reference to supporting provisions, including those relating to the role of the Recognised Entity, Aboriginal and Torres Strait Islander Family-Led Decision Making, and delegated authority of Community-Controlled Organisations.

Question 18 - How can Queensland's child and family legislation support collaborative community and family-led approaches to child and family support that meet the unique needs of Aboriginal and Torres Strait Islander children, families and communities?

QATSICPP is encouraged by the Queensland Government commitment expressed in the Discussion Paper to advancing self-determination for Aboriginal and Torres Strait Islander peoples. At the heart of self-determination is the right of Aboriginal and Torres Strait Islander peoples to participate in the decisions that affect us. The United Nations Expert Mechanism on the Rights of Indigenous Peoples (2010) has

concluded that, 'Indigenous participation in decision-making on the full spectrum of matters that affect their lives forms the fundamental basis for the enjoyment of the full range of human rights.' The key to promoting collaborative practice with our communities will be to ensure our families, our communities and our community-controlled organisations are able to genuinely participate in and lead the decisions that affect their children.

As noted in our introduction above, we believe that a reconceptualised Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) should be the guiding framework for provisions in the new legislation directed to secure the safety and wellbeing of Aboriginal and Torres Strait Islander children. The table below summarises our perspective on how legislation should seek to reflect a more holistic ATSICPP.

Table 1 – Legislating an holistic Aboriginal and Torres Strait Islander Child Placement Principle

Element	**Key legislative reform**
Prevention	▪ Requirements for the provision of family preservation and reunification supports, including the role of Aboriginal and Torres Strait Islander community controlled organisation in delivering these
Partnership	▪ Re-scoping and strengthening the role of the Recognised Entity, including through an increased role to work with families to include their voices in decision-making ▪ Making provision for the delegation of statutory child protection function to Aboriginal and Torres Strait Islander community controlled organisations

Placement	▪ Maintaining and strengthening the hierarchy of placement options for Aboriginal and Torres Strait Islander children ▪ Requiring regular placement review, ***by Aboriginal and Torres Strait Islander Community Controlled Organisations,*** for Aboriginal and Torres Strait Islander children in non-Indigenous care with the objective to ensure they are cared for by their extended Aboriginal and Torres Strait Islander family or community
Participation	▪ Requiring that Aboriginal and Torres Strait Islander Family-led Decision Making led by Recognised Entities is made available at the earliest possible opportunity and ongoing at key points of statutory intervention
Connection	▪ Strengthening requirements for the development and implementation of cultural support plans for Aboriginal and Torres Strait Islander children in out-of-home care. This process would optimally achieved through delegation of such functions to Aboriginal and Torres Strait Islander organisations/ individuals. ▪ Identifying minimum standards and requirements for non-Indigenous carers to maintain cultural connections for Aboriginal and Torres Strait Islander children in their care

The sections below provide further detail on key legislative reforms proposed in the table above.

1. Re-scoping and strengthening the role of the Recognised Entity

The current Act requires the participation of a Recognised Entity in all significant decisions for an Aboriginal and/or Torres Strait Islander child. However, QATSICPP has observed that this provision has been grossly inadequate to ensure Indigenous community and cultural perspectives in decision making, owing to a narrowing and under-resourcing of the Recognised Entity role. The role has been largely pigeonholed as to provide a limited scope of 'cultural advice' rather than to enable

genuine participation from a community and cultural perspective, as was the clear intention of the current Act.

QATSICPP believes that key to reform of the Recognised Entity role is:

(a) expanding the role of the Recognised Entity to work with families and communities to represent their perspectives in decision-making, so that they are a conduit for family and community participation rather than an isolated voice;

(b) increasing the authority of the Recognised Entity in decision-making based on their engagement with Aboriginal and Torres Strait Islander families and communities.

We also believe that the name of the Recognised Entity should be changed so that a new role can begin that is untainted by past failures to enable the Recognised Entity role.

The re-scope of the role should increase the role and authority of the Recognised Entity in key areas identified in the Carmody Report, including: leading Aboriginal and Torres Strait Islander Family-Led Decision Making; identifying and assessing potential carers; developing and implementing cultural support plans; and preparing transition from care plans.

However, learning from past limitations of the role, the re-scope of the Recognised Entity will only be successful if the role is provided sufficient delegated authority to perform these functions without Departmental intervention and control. For example, where a Recognised Entity conducts a Family-led Decision Making process, the trust of family and community would be undermined if the Department were then to intervene and declare the outcomes invalid from a non-Indigenous perspective. Family and community participation requires statutory authority that is aligned with the cultural authority and right to self-determination of our families and communities.

2. Delegating authority for child protection services

QATSICPP believes that the delegation of a number of statutory functions to Aboriginal and Torres Strait Islander community controlled organisations will support better outcomes for our children and families. We have addressed earlier in this submission the evidence that Aboriginal and Torres Strait Islander leadership will enable better outcomes. We have also noted the commitment of the Queensland Government to enabling self-determination, and we assert that the relocation of decision-making authority is critical to achieving this goal.

We refer the Queensland Government particularly to s18 of the Children, Youth and Families Act 2005 (Vic) that enables the Secretary to authorise the principal officer of an Aboriginal agency to perform specified functions under the Act. We believe that a similar provision should be included within Queensland's legislation to provide opportunity for the progressive delegation of functions, including those specified as critical to the successful re-scoping of the Recognised Entity role above.

Additionally, a 'section 18' equivalent provision in Queensland could be utilised for the purpose of delegating guardianship of Aboriginal and Torres Strait Islander children in out-of-home care to community-controlled agencies, as has been recently trialled with the Victorian Aboriginal Child Care Agency. The final report of that trial found significant success to increase a focus on reunification, with 46% of children participating in the trial being safely reunified with their Aboriginal family. While the trial recognised limitations that were linked to challenges for the Department to let go of and actually delegate authority, it concluded:

> The project illustrated an Aboriginal approach to delivering the powers and functions of the Secretary that is consistent with the legislation in that it upholds the primacy of the child's safety, stability and development, and privileges the importance of cultural safety and family empowerment

(Naughton, 2015). The positive outcomes for children and families achieved through the project reinforce VACCA's view that s.18 is required sooner rather than later.

3. Legislating Aboriginal and Torres Strait Islander Family-Led Decision-Making

QATSICPP views Aboriginal and Torres Strait Islander Family-Led Decision Making (ATSIFLDM) as a critical innovation to improve child protection decision-making through the empowerment of our families to find solutions to the challenges they face. Better solutions for our families that are owned and supported by extended families and communities could be achieved through legislating ATSIFLDM.

A legislated ATSFILDM process should include:

- leadership and delegated authority for Recognised Entities to work with families to conduct the process and confirm whether family plans meet statutory safety requirements; and
- that ATSIFLDM is made available to families at the earliest possible opportunity when concerns are identified and then again at subsequent key points of intervention to ensure family participation across all phases of child protection involvement.

We also believe that ATSIFLDM should only be one component of the Recognised Entities' broader role to work constructively with extended families and communities and to ensure their active participation in child protection decision-making. Recognised Entities should have an independent role to engage with family and community and contribute their perspective to all stages of child protection decision-making, and to facilitate decision-making meetings at critical points.

4. Strengthening the placement hierarchy for the Aboriginal and Torres Strait Islander Child Placement Principle

While QATSICPP acknowledges that the hierarchy of placement options for Aboriginal and Torres Strait Islander children specified in s83(4) of the current Act is appropriate, in practice it has been insufficient to ensure options at each level of the hierarchy are fully explored before moving to the next. The 2012-13 audit of implementation of the Principle by the Commission for Children and Young People revealed extensive non-compliance, with only 13% of cases demonstrating consideration of the hierarchy in order.

We are also aware of consistent failures to revisit the hierarchy of placement options when cases are reviewed and circumstances change, or even simply following an urgent or rapid placement where full investigation of placement options hasn't been completed.

To address the shocking rate of compliance with implementing the placement hierarchy, we believe stronger legislative provisions are required, including:

- An explicit requirement to fully investigate and exhaust all possible placement options at each level of the hierarchy in consultation with the Recognised Entity before moving to the next level down;
- To explicitly define the first two options in the hierarchy (s83(4)(a) and s83(4)(b)) as higher order placement options, and where a child is not placed in a higher order placement, to require regular review of placement options with the objective to ensure the child transitions to a higher order placement.

5. Enhancing cultural support planning requirements

Ongoing connection to Aboriginal and Torres Strait Islander family, community and culture is critical to the wellbeing of our children in out-of-home care. The Carmody Report described significant shortfalls in the completion, quality and implementation of cultural support plans for Aboriginal and Torres Strait Islander children.[8] To assist

in ensuring family and cultural connections are prioritised, QATSICPP recommends legislative provision that:

- require a cultural support plan to be in place for every Aboriginal and Torres Strait Islander child in out-of-home care;
- require regular review of the quality and implementation of cultural support plans as a distinct component of case plan reviews; and
- delegate authority to Recognised Entities to lead the cultural support planning process.

Question 19 – How can Queensland's child and family legislation promote the importance of permanence and provide a range of option for providing children with relational, physical and legal permanence

QATSICPP agrees with the principle in the current legislation that stability of relationships and environment are important to support wellbeing for children. However, we believe that mainstream notions of permanency are not appropriate to ensure the long-term wellbeing of Aboriginal and Torres Strait Islander children. The logic underpinning permanency planning espouses that early, quick decision making about whether restoring children to the care of their parents is a viable option helps to avoid multiple restoration attempts and uncertainty for children. Theories that promote permanency planning assert that the sooner attachment with carers, and therefore stability occurs, the less drift in care there is, which is best for children's wellbeing.[9]

Aboriginal and Torres Strait Islander peoples have commonly questioned the tenets of Western attachment theory that firmly locates stability as centred around the emotional connection between a child and primary carer. Such theories have been described as "inconsistent with Aboriginal and Torres Strait Islander values of relatedness and child-rearing practices."[10] In contrast, permanence for Aboriginal and Torres Strait Islander children is identified as supported by a broader communal

sense of belonging; a stable sense of who they are, where they are from[11] and their place in relation to family, mob, community and culture.

Aboriginal and Torres Strait Islander models of child rearing hold that "…children are part of a system of care… described as 'intermittent flowing care' (Wharf 1989), (with) different kinship relationships with various members of extended families and often move between… or indeed outside it."[12] Stability for children within these systems stems from being 'grown up' and cared for within extended family and kin networks that form "the foundations of their identity, culture and spirituality."[13]

QATSICPP is also concerned that given current failures to genuine include our families and communities in child protection decision-making, there is a significant risk that expedited permanency planning could turn poor child protection decisions into permanent decisions that harm our children be disconnecting them from family, community and culture. We also assert, that for the same reasons and related to the experiences of the Stolen Generations, adoption should never be an option for an Aboriginal and/or Torres Strait Islander child.

To ensure adequate safeguards for the holistic wellbeing of Aboriginal and Torres Strait Islander children in permanency planning we recommend the following legislative provisions:

- Any long-term orders for an Aboriginal and Torres Strait Islander child should have the approval and support of an Aboriginal and Torres Strait Islander community controlled organisation;
- Permanent care should not to be a consideration for an Aboriginal and/or Torres Strait Islander child unless and until they are in a higher order placement of the ATSICPP, being cared for by someone from their family or community;
- Adoption should never be an option for Aboriginal and Torres Strait Islander children;

- Where Aboriginal and Torres Strait Islander children are on long-term orders, requirements are maintained for carers to implement genuine cultural support plans on an ongoing basis.

[1] Cornell, S., and Taylor J. (2000). *Sovereignty, Devolution, and the Future of Tribal-State Relations*. Cambridge: Harvard University, pp6-7; Lavoie, J. et al (2010). Have investments in on-reserve health services and initiatives promoting community control improved First Nations' health in Manitoba?, *Social Science and Medicine*, 71(4), August, 717; Chandler, M., and Lalonde, C. (1998). *Cultural Continuity as a Hedge Against Suicide in Canada's First Nations*.

[2] See for example: NSW Ombudsman. (2011). *Addressing Indigenous Disadvantage: the need to do things differently*, Sydney: NSW Ombudsman, p4; Wild, R., and Anderson, P. (2007). *Little Children are Sacred*, Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Darwin: Northern Territory Government, pp142-143; Australian National Audit Office (ANAO). (2012). *Capacity Development for Indigenous Service Delivery*, Audit Report No. 26, 2011-2012, Canberra: Commonwealth of Australia; Cunneen, C. and Libesman, T. (2002) Removed and Discarded: The Contemporary Legacy of the Stolen Generations. *Australian Indigenous Law Reporter*, Vol 7, No 4, pp1-20.

[3] Ibid.

[4] *QCPCI Final Report, p369*

[5] *QCPCI Final Report, p373*

[6] Committee on the Rights of the Child, General Comment No. 11: *Indigenous Children and their Rights under the Convention*, 2009, CRC/C/GC/11, 12 February 2009, para. 31.

[7] Ibid, para. 30.

[8] *QCPCI Final Report, p231-232*

[9] NSW Department of Community Services (2007). *Permanency Planning Policy*, p4.

[10] Osborn, A., and Bromfield, L., (2007) '*Getting the big picture': A synopsis and critique of Australian out-of-home care research*. NCPC Issues No. 27 – October 2007

[11] Yeo, SS. (2003) Bonding *and Attachment of Australian Aboriginal Children*. Child Abuse Review Vol 12: 293.

[12] D'Souza, N. (1993) Aboriginal Child Welfare: Framework for a National Policy, Family Matters, no.35, p43.

[13] SNAICC (Secretariat of Aboriginal & Islander Child Care) 2005, Stable and Culturally Strong Out of Home Care for Aboriginal and Torres Strait Islander Children, SNAICC, Melbourne., 2006, p18.