



SNAICC
National Voice for our Children

Review of the *Adoption Act 1984 (Vic)*

Submission to the Victorian Law Reform Commission

September 2016

About SNAICC

SNAICC – National Voice for our Children (Aboriginal and Torres Strait Islander Corporation) is the national non-governmental peak body for Aboriginal and Torres Strait Islander children.

SNAICC works for the fulfilment of the rights of our children, in particular to ensure their safety, development and well-being.

The SNAICC vision is an Australian society in which the rights of Aboriginal and Torres Strait Islander children, young people and families are protected; our communities are empowered to determine their own futures; and our cultural identity is valued.

SNAICC was formally established in 1981 and today represents a core membership of Aboriginal and Torres Strait Islander community-controlled organisations providing child and family welfare and early childhood education and care services.

SNAICC advocates for the rights and needs of Aboriginal and Torres Strait Islander children and families, and provides resources and training to support the capacity of communities and organisations working with our families.

SNAICC
National Voice for our Children
Aboriginal and Torres Strait Islander Corporation
Suite 8, First Floor,
252-260 St Georges Road
North Fitzroy VIC 3068

Phone 03 9489 8099 | Fax 03 9489 8044
PO Box 1445, Fitzroy North VIC 3068
info@snaicc.org.au | www.snaicc.org.au



Introduction

SNAICC – National Voice for Our Children welcomes the opportunity to input to the review of the *Adoption Act 1984* (Vic) and the *Adoption Regulations 2008* (Vic).

Adoption is a sensitive and critical issue in consideration of the rights and wellbeing of Aboriginal and Torres Strait Islander children. Regardless of the intentions that underpin permanency measures, the permanent removal of Aboriginal and Torres Strait Islander children from their families presents harrowing echoes of the Stolen Generations for Aboriginal and Torres Strait Islander communities. As a result, any provisions of the Victorian Adoption Act that relate to or impact our children are intrinsically coupled with a responsibility and obligation on governments to ensure the leading participation of Aboriginal and Torres Strait Islander community representatives and organisations to shape reform.

We believe that any reform must be in keeping with the spirit and recommendations of the *Bringing Them Home* report, particularly recognising a commitment to improve, not worsen, outcomes for Aboriginal and Torres Strait Islander children and families. Improving outcomes for vulnerable Aboriginal and Torres Strait Islander children rests on a recognition that historical practices have inflicted deep cultural trauma on Aboriginal and Torres Strait Islander families and communities, and any practices that relate to the trauma of past events – particularly the permanent removal of children from their families and communities – will exacerbate the impact of trauma and further entrench intergenerational disadvantage.

While SNAICC seeks to provide constructive input to all relevant aspects of the review in this response, we believe ultimately that in the short term a complete moratorium on the adoption of Aboriginal and Torres Strait Islander children should be included in legislation. The moratorium should be maintained unless, and until, Victoria’s Aboriginal and Torres Strait Islander communities, through appropriate sector representatives, can reach agreement with the Victorian Government on the elements of an open adoption legislative regime with adequate provisions for the protection of the cultural rights of our children.

Outlined below are SNAICC’s responses to the key issues of relevance to Aboriginal and Torres Strait Islander children identified in the discussion paper. Our recommendations outline the necessity for a differentiated approach to adoption legislation as it relates to Aboriginal and Torres Strait Islander children.

1. Stability in culture and identity

Effective engagement between the Victorian Government and the Victorian Aboriginal and Torres Strait Islander community on issues of adoption begins with recognition of the cultural differences that exist around the concept of adoption – particularly differences in understanding of what it means for an Aboriginal and/or Torres Strait Islander child to have stability of care and relational permanence in their lives.

SNAICC understands that adoption holds as one of its most significant goals, the achievement of safe and stable care for children. While stability is important for all children, stability for Aboriginal and Torres Strait Islander children is grounded in the permanence of their identity in connection with family, kin, culture, and country. As such, any legislative measures relating to adoption must be developed with due regard to how these connections will be respected, promoted and protected. Such an approach would align with the wellbeing needs of our children and their internationally recognised rights to cultural enjoyment and connection.

SNAICC notes particularly the terms of reference for the present review that require consideration of the rights of the child as protected by the *United Nations Convention on the Rights of the Child* (UNCRC). SNAICC recommends that the Commission have particular regard to and reference in its finding the following rights:

- The rights of Indigenous children to practice and retain their culture as articulated in Article 30 of the UNCRC:
 - *In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her 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.*
- The rights of Indigenous peoples to actively participate in decisions about the care decisions of children in out of home care as articulated in the United Nations Committee on the Rights of the Child's General Comments on Indigenous Children (No.11) and the Best Interests Principle (No.14).

SNAICC also directs the Commission to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and in particular the rights of Indigenous peoples to free, prior and informed consent as articulated in the Article 19 of the UNDRIP:

- *States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.*

SNAICC also notes the interplay between recent amendments to the *Children, Youth and Families Act 2005* (Vic) relating to permanency of care and the review of the *Adoption Act 1984* (Vic). Given the potential for permanent care to contribute to increased use of adoption, SNAICC has grave concerns that recent permanent care amendments limit consideration of an individual child's best interests in violation of their rights under the United Nations Convention on the Rights of the Child. These concerns are further detailed in the SNAICC policy position statement:

[*Achieving stability for Aboriginal and Torres Strait Islander children in out-of-home care.*](#)

2. Understanding and applying the Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP)

As recognised in the consultation paper, the Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) emerged in the 1970s as an embodiment and expression of Aboriginal and Torres Strait Islander peoples worldviews about the safety and wellbeing of their children, particularly for those children experiencing high levels of vulnerability.

The ATSICPP is the cornerstone of Australian law and policy acknowledging the importance of family, cultural and community connections to the identity and wellbeing of Aboriginal and Torres Strait Islander children who come into contact with statutory child protection systems. SNAICC is concerned that implementation of the ATSICPP in Victoria remains grossly inadequate to promote and respect the rights of our children to family and cultural connection.

The ATSICPP recognises that Aboriginal and Torres Strait Islander people have the knowledge and experience to make the best decisions concerning their children and promotes a partnership approach between governments and Aboriginal and Torres Strait Islander communities in decision making about children's welfare.

Despite repeated recommendations over the past few decades (including in the *Bringing Them Home* report) for national standards legislation to embed a consistent approach to the ATSICPP, the ATSICPP continues to be incompletely and inconsistently applied across jurisdictions. This failure of governments to effectively apply the ATSICPP often leads to a common misunderstanding of the ATSICPP as a narrow guide to the placement of Aboriginal and Torres Strait Islander children. In reality the ATSICPP interpreted in line with its development and original purpose is best understood by examining and considering its five key elements covering prevention, partnership, placement, participation and connection. These elements of the ATSICPP are detailed in the paper [Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements](#).

2(a) Placement hierarchy

We understand the significant focus of the consultation paper on the placement element of the Principle given its relevance to adoption law, and assert that a stronger formulation of the placement hierarchy is required in Victorian legislation. SNAICC supports the formulation of the hierarchy that currently exists in the *Children, Youth and Families Act 2005* (Vic) under s13 – Aboriginal Child Placement Principle.

SNAICC supports recommendations from the Victorian Aboriginal Child Care Agency (VACCA) to ensure that all relevant legislation has consistent wording around placement hierarchies for Aboriginal and Torres Strait Islander children.

2(b) Aboriginal and Torres Strait Islander led decision-making

The consultation paper currently appears to have insufficient focus on participatory elements of the ATSI CPP that outline the essential requirements and human rights that representative Aboriginal and Torres Strait Islander organisations, families and children have to participate in decisions on the care and protection of children. In line with the *Children, Youth and Families Act 2005* (Vic) and provisions of the UNCRC described above, SNAICC believes that adoption reform must include strong requirements for representative participation. In particular, SNAICC refers to section 323 of the *Children, Youth and Families Act 2005* (Vic) which requires that no order for permanency of care be made without the recommendation of an Aboriginal and Torres Strait Islander agency, and believes that a similar provision should be included in adoption legislation.

Further, the Act should include safeguards to ensure that Aboriginal and Torres Strait Islander community and family have been involved in the process of identifying appropriate care arrangements prior to an adoption being sought. Effective and broad consultations with families and communities can lead to the identification of broader family networks for kinship carers that agencies may not be aware of.

As well as informing decisions in relation to individual children, SNAICC asserts that Aboriginal and Torres Strait Islander communities and their organisations must lead the development of legislation and policy for adoption and permanent care of their children based on an understanding of their unique kinship systems and culturally-informed theories of attachment and stability.

SNAICC also supports recommendations from VACCA for a consultation process with Torres Strait Islander communities in Victoria to ensure that their unique cultural practices and values regarding adoption are incorporated in this Review.

2(c) Retaining connections to culture

In relation to the 'connection' element of the ATSI CPP, SNAICC supports continuation of current provisions that enable Aboriginal and Torres Strait Islander parents to place special conditions on adoptions relating to the maintenance of relationships and cultural connections. SNAICC also believes that additional provisions are required to make the maintenance of connection by adoptive parents mandatory and accountable. Where Aboriginal and Torres Strait Islander children are in any long-term care arrangement away from their birth family, be it adoption or otherwise, genuine cultural support plans must be developed and maintained (including with regular review) on an ongoing basis. Ongoing support is required for children in care to access cultural supports and connect with Aboriginal and Torres Strait Islander community organisations.

2(d) Mainstream approaches are not appropriate

SNAICC believes that the perspectives shared in the consultation paper that a mainstream

approach would achieve better outcomes for Aboriginal and Torres Strait Islander children overwhelmingly fails to recognise the unique circumstances facing our children. As outlined in this submission, our children have unique rights to remain connected to their culture, which must be understood as a key contributor to their stability and wellbeing – not the antithesis of it.

SNAICC believes the view that differentiated approaches to adoption are not required for Aboriginal and Torres Strait Islander children is highly objectionable and that the mainstreaming of child care and protection policy and practice would reflect an abject failure to acknowledge the realities of injustice experienced by Aboriginal and Torres Strait Islander peoples throughout Australian history. We do not believe that these views hold any validity in a contemporary debate about adoption practice in Victoria and are in direct contravention to the provisions of international human rights law, along with the findings of seminal inquiries such as *Bringing Them Home*.

3. Adoption that severs cultural and community connections is never an appropriate care option for Aboriginal and Torres Strait Islander children

Aboriginal and Torres Strait Islander children have rights of identity that can only be enjoyed in connection with their kin, communities and cultures. Closed adoption that severs the connection for children to their families and communities of origin is never an appropriate care option for Aboriginal and Torres Strait Islander children, except as it relates to traditional Torres Strait Islander adoption practices.

While SNAICC seeks to provide constructive input to all relevant aspects of the review in this response, we believe ultimately that in the short term a complete moratorium on the adoption of Aboriginal and Torres Strait Islander children should be included in legislation.

The moratorium should be maintained unless, and until, Victoria's Aboriginal and Torres Strait Islander communities, through appropriate sector representatives, can reach agreement with the Victorian Government on the elements of an open adoption legislative regime with adequate provisions for the protection of the cultural rights of our children.

4. Prioritising support for families and reunification above adoption or permanent care arrangements

While SNAICC recognises that policy, practice and resourcing for family support goes beyond the terms of reference for this review, we believe consideration of these issues remains relevant to how adoption legislation is shaped. A lack of investment to heal and rebuild families and communities should never be used as justification for the use of permanency planning measures that can further devastate them. Given the lack of support available to vulnerable families, both before and after children are removed to alternative care, there is a significant risk that a focus on permanent care planning could consolidate inter-generational family and community breakdown.

Reforms that may contribute to increased use of adoption and permanent care options may lead to perverse outcomes where families do not receive adequate supports and opportunities to respond to the issues that cause children to be removed to out of home care. The UNCRC recognises the rights of children to have adequate supports provided to their families in Article 19:

- *Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.*

SNAICC believes that promoting and supporting the preservation and restoration of Aboriginal and Torres Strait Islander families to provide safe care for their children must be given priority over permanency planning approaches.

Permanent care for Aboriginal and Torres Strait Islander children should only be considered where the family has been provided with culturally appropriate and ongoing intensive and targeted family support services, and there has been an appropriate independent assessment that there is no future possibility of safe family reunification.

5. Adequately resourcing carers

Adoption or other permanent placement options should never be used as a cost saving measure in lieu of providing Aboriginal and Torres Strait Islander families and communities with adequate and appropriate support. The burden of care held by Aboriginal and Torres Strait Islander families and communities should be adequately resourced, whether placements are temporary or permanent.

Aboriginal and Torres Strait Islander families provide a large proportion of out-of-home care, and this places strain on families and communities due to both the need to provide high-levels of additional care while also experiencing higher-levels of poverty and disadvantage. This strain is compounded by lower-levels of support provided to kinship carers as compared to foster carers. If permanent care measures are utilised to further reduce the financial and/or practical supports available to kinship and foster carers, this will negatively impact children and the communities that are already extending their resources to care for them.

In this respect, we recommend that the Commission have regard to the potential implications of severing service and/or payment support through a process of adoption and consider safeguards against potential further strain on caring resources and capacity in Aboriginal and Torres Strait Islander communities.

Reviewing the Adoption Act 1984 (Vic)

Reform of the *Adoption Act 1984* (Vic) is a significant opportunity for the Victorian Government to align their approach to child safety and wellbeing with the self-determination aspirations of Aboriginal and Torres Strait Islander people in Victoria, and the rights of Aboriginal and Torres Strait Islander children.

It is SNAICC's recommendation that a differentiated suite of provisions that protect the unique rights of Aboriginal and Torres Strait Islander children and promote the participation of them, their families, and their communities in relevant decisions is needed.

SNAICC welcomes the opportunity to further detail and discuss any of the recommendations made in this response.