EXPLANATORY MEMORANDUM

2017 marks the 20th anniversary of the "Bringing Them Home" report.

Of the 54 recommendations of the Bringing Them Home report only 3 have been acted upon (approximately 5% of the recommendations). Since the release of the Bringing Them Home report the removal of Aboriginal and Torres Strait Islander children (Indigenous children) from their families and communities and their placement in out-of-home (foster) care has significantly increased such that the rate of removal is at its highest point since colonisation and with the result that approximately 1 in 10 Indigenous children live in out of home care.

Since the 1967 referendum (this being the 50th anniversary) the Federal government has had the power to make laws with respect to Indigenous people. Any law made by the Federal government with respect to Indigenous people would allow jurisdiction to be assumed and for the Federal government to directly control Indigenous child welfare. This head of power has not previously been used save as the Constitution foundation for the NT Intervention. The use of the power for the purpose of the Intervention demonstrates a Federal willingness and ability to use the power.

The Federal government has, since 1997, (the same year as the Bringing Them Home report) had jurisdiction with respect to all private law disputes involving children as a consequence of a referral of powers by the States and Territories (save W.A) – private law disputes (jurisdiction over public law or child welfare disputes was retained by the States and Territories).

The assumption of public law disputes for Indigenous children is, thus, not a novel concept and would permit all jurisdiction for the determination of disputes with respect to Indigenous children to be dealt with by one Court and with consistency of approach and law applied.

The intention of this Act is to assume to the Commonwealth responsibility for the determination of all disputes with respect to Aboriginal children. It would not be necessary for the Commonwealth to create a separate Child Welfare Agency as existing State and Territory agencies would continue to operate and exercise their powers up to and until the time when a determination was made by such agencies that Court intervention were necessary.

At present Federal jurisdiction under the Family Law Act is excluded once a Child Welfare order is made by a State Court (s.69ZK). This has the effect that even if proceedings have been pending before a Federal Court for some time that those proceedings can be rendered nugatory by a State or Territory Child Welfare agency commencing proceedings in a State or Territory Court. Thus, attempts by Indigenous communities to address concerns regarding children in the private law system can be and have been frustrated. Further, once proceedings

are commenced in a State Court there are limitations upon who may participate in those proceedings such that extended family and community are effectively excluded and unless assessed as "appropriate" carers by State and Territory Child Welfare agencies do not have a role to play and are not considered as carers for their related children.

As outline by Justice Forrest in Gordon & Gordon [2015] FamCA 616 the "*…fundamental cornerstones of our system of administration of justice [are]…the right to know what Court Orders are sought against you, the right to be heard in response, the age old principle that justice is administered in Courts open to the public and public scrutiny, and the right to know what Court Orders have been made against you*".

At present decisions regarding the removal of Indigenous children from their parents, extended family and community, are made in by Courts at the bottom of the hierarchy of Courts, in closed Courts with few published judgements to give insight into or guidance as to proceedings and without application of the rules of evidence. This is in contradistinction to the determination of private parenting disputes determined under the Family Law Act by the Federal Circuit Court and Family Court.

The provisions of the Family Law Act, if applied to public law disputes involving Indigenous children, would allow these concerns to be address and whilst preserving a prioritisation of risk of harm above all else (s.60CC(2A)). Accordingly, the risk to an Indigenous child could be determined by reference to the holistic needs of the child and in accordance with the International Convention in the rights of the Child (an object of the Family Law Act per s.60B(4)) and the child's right to culture (s.60CC(6)).

INDIGENOUS CHILDREN'S WELFARE ACT

Purpose

1. The purpose of this Act is to require that any application by a State or Territory Child Welfare Agency regarding an Indigenous child is determined in accordance with the *Family Law Act 1975* and not otherwise.

Note: The jurisdictional basis for this Act is s.51(xvi) Australian Constitution Act 1900 (the "race power").

Note: A schedule of State and Territory laws affected by this Act is attached as Schedule 1.

Definitions

2. For the purpose of this Act the following definitions shall apply.
    a. Abuse shall have the meaning given by s.4 Family Law Act
    b. Community shall mean means any band, nation, or other organized group or community of Indigenous people of which the Indigenous child is accepted as a member or eligible for membership or, in the case of an Indigenous child who is a member of or eligible for membership of more than one such group the group of which the Indigenous child has the more significant contacts and/or the community within which the Indigenous child is habitually living and by whom the child is accepted.
    c. Extended Family shall shall be as defined by the law or custom of the Indigenous child's language group or community or, in the absence of such law or custom, shall be the Indigenous child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.
    d. Family Violence shall have the meaning given by s.4AB Family Law Act
    e. Federal Court shall mean a Court exercising jurisdiction under and as permitted by the Family Law Act 1975
    f. Indigenous person shall mean a person who by self-identification considers themselves and holds themselves out to be an Aboriginal or Torres Strait Islander person or who is accepted by their community and other Indigenous persons as an Indigenous person.
    g. Indigenous Child means a person who has not yet attained the age of 18 years and who by self-identification considers themselves and holds themselves out

to be an Aboriginal or Torres Strait Islander person or who is the biological or adopted child (by either an Adoption order under a State or Territory law or in accordance with Aboriginal or Torres Strait Islander customary law or practice) of an Indigenous person and irrespective of whether both of the child's parents are Indigenous persons.

h. Neglect shall mean a serious and persistent failure by the care given of an Indigenous child to provide for the child's physical or educational needs such that there is an unacceptable risk of permanent physical, educational or emotional harm to the child provided however that a lack of financial resources or homelessness of a parent or caregiver shall not be the basis for an allegation of neglect or application for the removal of an Indigenous child unless it can be demonstrated that significant financial and practical assistance has been provided to the parent or caregiver over a period of not less than 6 months without amelioration of the circumstances giving rise to a concern of neglect

i. Services and programs shall include but is not limited to the service and programs provided by Part II Family Law Act and, in addition, shall include but not be limited both therapeutic and forensic service including but not limited to:
    i. Medical services and treatment;
    ii. Psychological services and treatment;
    iii. Pathology collection and testing services;
    iv. In-home care services;
    v. Day Care, Pre-School, Child Minding or respite care service;
    vi. Drug and Alcohol Counselling Services;
    vii. Parenting education and support services.

Objects and Principles

3. The objects and principles to be applied in any determination made under this Act with respect to an Indigenous child are the objects and principles of the Family Law Act together with the following:
    a. Objects:
        i. That the removal of an Indigenous child from the care of one or both of their parents or from a member of the child's extended family or community should only occur if the child is in immediate and serious risk of physical harm;
        ii. That if it is necessary to remove a child from the care of a parent or family member that all practical steps should be taken as expeditiously

as possible to provide assistance and support to the parent or family member from whose care the Indigenous child was removed and to the child so that the circumstance necessitating removal is addressed and the child might be returned to the care of the person from whom the Indigenous child was removed;

iii. That if a child's best interests require that the be removed from the care of a parent that the child must, unless contrary to the child's best interests, be place with the other parent or an immediate member of the child's extended family;

iv. That in assessing the suitability of an extended family member to care for an Indigenous child that regard must be had to any kinship or cultural considerations relating to the care of children as relevant to the community or communities with which the Indigenous child is identified;

v. That in assessing the suitability of an extended family member to care for an Indigenous child the Court should invite each identified extended family who wishes to be considered to provide care for the Indigenous child should be notified of the proceedings and afforded the opportunity to be joined to the proceedings and/or to give evidence should they wish;

vi. That extended family members should not be considered unsuitable to give care to an Indigenous child to whom they are related (or considered as placements for any Indigenous child) by reason that:

    1. They have a criminal record (unless that record involves convictions for offences of violence or illicit drug use that are within 3 years of the application to be considered as a carer;
    2. They are related to and may associate with persons with such offences;
    3. They are not in paid employment or do not have fixed accommodation or accommodation of any particular standard.

vii. That in any case when a Court determines that it is in the best interests of an Indigenous child that the Indigenous child be removed from the care of a parent then orders should be made that with most like allow the child's restoration to the care of a parent;

viii. That in every case where it is alleged that an Indigenous child is at risk of unacceptable harm in the care of a parent such as may warrant the removal of an Indigenous child from a parent then the Court shall ensure evidence is provided and obtained as to the impact upon the

Indigenous child and the Indigenous child's best interests of separation from their parent/s as well as removal from extended family, community and access to and practice of culture.

ix. That in every case the history of the Indigenous child's parents and extended family and community are considered especially in light of the Bringing Them Home Report and the recommendations contained therein.

x. The *International Convention on the Rights of Indigenous Peoples* shall be incorporated into this Act as additional objects and principles.

Exclusive jurisdiction over Indigenous Children

4. A State and Territory Child Welfare Agency has standing to initiate proceedings before a Court exercising jurisdiction under the Family Law Act with respect to an Indigenous child.
5. Section 69ZK shall not apply to any application for orders or proceedings relating to or involving Indigenous children.
6. A State or Territory Child Welfare Agency shall not commence proceedings with respect to an Indigenous child other than in a Court exercising jurisdiction under the Family Law Act 1975.
7. Any application with respect to an Indigenous child by any person or by a State or Territory Child Welfare Agency shall be determined in accordance with the Family Law Act.
8. In any proceedings to which a Child Welfare Agency is a party the Court may, by order, direct that Child Welfare Agency or any person employed by the Agency to provide support, assistance, housing or any other services or programs or make any other provision and including by directing that Agency or person how to do anything that is within their power or control.

Note: If a child welfare agency has control over services such as housing or financial assistance payments then the Court may direct the Child Welfare agency or person employed by the Agency to provide to a parent or other person housing or financial assistance.

9. As soon as a child or young person is identified as or is alleged to be an Indigenous Child the provisions of this Act and the Family Law Act 1975 shall apply to all any determination with respect to that child or young person including but not limited to:
    a. Any determination of whether the child is, in fact, an Indigenous child (and in the event that any person should seek to allege that a child who has asserted that they are an Indigenous child or with respect to who it is asserted by a

parent, family member or other member of the child's identified community that they are an Indigenous child then the person who seeks to challenge that the child is an Indigenous child shall bear the burden of proof on the civil standard);

b. Whether the child or young person is a child in need of care and protection or is exposed or likely to be exposed to an unacceptable risk of harm
c. What is in the best interests of the Indigenous child;
d. Who is an appropriate carer for the carer;
e. Who has standing to and who should participate in the proceedings whether as a party or in any other capacity;
f. Which person or persons should have parental responsibility for the Indigenous child;
g. Which persons would spend time and communicate with the Indigenous child and on what basis, by what means and with what frequency;
h. What parenting orders (as set out in s.64B Family Law Act 1975) should be made, if any, with respect the Indigenous Child.

10. Any person employed by a State or Territory Child Welfare Agency shall, at the time of receiving any information or report with respect any child shall, at the time of receiving that information or report, enquire of the person providing that information or report whether that person is aware that the child the subject of the information or report is or may be an Indigenous child or young person or has any basis to be believe or suspect that the child the subject of the report or information is an Indigenous child or young person and, if so, the person receiving the report or information shall ensure that this knowledge, belief or suspicion is recorded within any record created of the receipt of the information or report.
11. Any person employed by a State or Territory Child Welfare Agency shall, at the time of making contact with any parent, carer, guardian or other whom they may contact in the course of investigating any report or information that may have been received by a State or Territory Child Welfare Agency shall, as soon as practicable enquire of that person whether that person is aware that the child the subject of the information or report is or may be an Indigenous child or young person or whether that person has any basis to be believe or suspect that the child the subject of the report or information is an Indigenous child or young person and, if so, the person receiving the report or information shall ensure that this knowledge, belief or suspicion is recorded within any record created of the receipt of the information or report.
12. Should any person employed by a State Child Welfare Agency become aware of any information that identifies a child the subject of any information or report as an Indigenous child or young person or which cause a reasonable person to suspect or

believe that a child is or may be an Indigenous child or young person then that person shall thereafter proceed on the basis that the is or may be an Indigenous Child or Young Person.

13. As soon as any information or report identifies a child or young person as an Indigenous child or young person or as soon as any enquiry pursuant to sections 4 or 5 above cause any knowledge, belief or suspicion to arise that the child the subject of any information or report is or may be an Indigenous child or young person then a rebuttable presumption shall apply that the child is an Indigenous child or young person the rebuttal of which presumption shall be determined by a Judge of the Federal Circuit Court of Australia on the civil standard of proof.
14. If in any proceedings before a State or Territory Court it is alleged or agreed that a child or young person is or could be identified as an Indigenous child or young person then the Registrar, Magistrate or other judicial officer before whom the proceedings are listed shall forthwith upon becoming aware of that circumstance cause the proceedings to be transferred to the Federal Circuit Court of Australia.

Transitional provisions

15. Any order made by a State or Territory Court under State or Territory Child Welfare legislation (being any Act listed in Schedule 1 of this Act) before the commencement of this Act and being an order made with respect to an Indigenous Child shall be treated as an order made under this Act and shall, for the purpose of any application made under this Act with respect to an Indigenous child with respect to whom such a State or Territory Court order has been made, be treated as an order made under the Family Law Act 1975 and such that the following shall apply:
    a. Any order allocating parental responsibility to a State or Territory Child Welfare Agency shall be treated as an order under the Family Law Act vesting Parental Responsibility in that State or Territory Child Welfare Agency and providing for the Indigenous child to live with such person as may be determined by that State or Territory Child Welfare Agency;
    b. Any order allocating parental responsibility or guardianship to an individual or group of individuals shall be treated as an order under the Family Law Act vesting Parental Responsibility in that person or persons and providing for the Indigenous child to live with such person or persons;
    c. Any order requiring that a person receive or accept supervision from a State or Territory Child Welfare Agency shall be treated as an injunction requiring that the person subject to such supervision order accept the supervision of the State or Territory Child Welfare Agency.

16. In any application for variation of an order made under a State or Territory Child Welfare law prior to the commencement of this Act the following shall be parties as of right:
    a. Each biological parent of the Indigenous child;
    b. The person with care of the Indigenous child (whether pursuant to an order or on a de facto basis);
    c. Any State or Territory Child Welfare Agency who was a party to the prior proceedings;

    And provided that any person referred to by section 65C Family Law Act 1975 shall apply as regards any other person who may seek to be a party to proceedings.

Child Removal

17. An Indigenous child shall not be removed from the care of a parent or extended family member by a State or Territory Child Welfare Agency save pursuant to an order of a Court exercising jurisdiction under this Act.

Note: The Federal Circuit Court of Australia and Family Court of Australia each operate an after-hours emergency roster such that an order can be sought in the event of suggested emergency.

Proof of Indigeneity

18. Indigeneity shall be determined by an Indigenous person or child asserting that they identify as an Indigenous person or Indigenous child and in the event that any party should seek to challenge that assertion as a matter of fact then:
    a. Notice of that challenge shall be given as soon as practicable and no later than the first Court event; and,
    b. The party seeking to challenge the Indigeneity of any person shall bear the burden of proof on the balance of probabilities.

Orders as to the living arrangement for an Indigenous Child

19. Any State or Territory Child Welfare Agency seeking an order that an Indigenous child live with a non-parent or that Parental Responsibility for an Indigenous child be allocated in whole or in part to a non-parent must satisfy the Court that:
    a. Active efforts have been made to provide services and programs designed to prevent the breakup of the Indigenous family and that these efforts have proved unsuccessful;

b. The Indigenous child continuing to live with the Indigenous child's parents or a parent is likely to result in serious emotional or physical damage to the child;

c. The Indigenous child continuing to live with the Indigenous child's parents or a parent will result in serious emotional or physical harm to the child;

d. The Indigenous child living with a member of the Indigenous child's extended family or immediate community will result in serious emotional or physical harm to the child.

20. A party seeking to prove any of the matters in section 17 shall bear the burden of proof on the balance of probabilities and subject to section 140 Evidence Act 1995.
21. If a determination is made by a Court that an Indigenous child cannot live with the Indigenous child's parents or a parent or a member or members of the Indigenous child's extended family then the Indigenous child shall be placed in the least restrictive setting which most approximate a family and in which the Indigenous child's special needs, if any, may be met and the Indigenous child shall be placed within reasonable proximity to the prior home of the Indigenous child.
22. In determining what orders to make (including but not limited to the person or persons with whom an Indigenous child will live and which person or persons shall have parental responsibility for the child) a Court exercising jurisdiction under this Act shall:
    a. Subject to section 17, make the order that will most likely allow, permit and lead to the Indigenous child's restoration to the care of one or both of the Indigenous child's parents or extended family;
    b. Make the order that will best allow the Indigenous child to regularly spend time with the Indigenous child's parents and extended family on a regular basis;
    c. Take into account the views of the Indigenous child and of the parents and extended family of the Indigenous child as to the child's living arrangements;
    d. Ensure that an Indigenous child lives with an Indigenous person or, in the event that an order is made allocating parental responsibility for an Indigenous child to or providing that an Indigenous child is to live with a Child Welfare Agency that arrangements are available to ensure that responsibility for the Indigenous child's living arrangements are controlled and managed by an Indigenous controlled organisation.
23. An order pursuant to section 60G Family Law Act shall not be made save with the consent in writing of each of the living parents of an Indigenous child and after notice is given to any reasonably locatable members of the Indigenous Child's extended

family and after a reasonable opportunity to be heard has been afforded to any reasonably locatable members of the Indigenous child's extended family.

Effect of order on services

24. If an order is made by a Court exercising jurisdiction under this Act that an Indigenous child live in the care of a person other than a parent then the order shall be treated as a care order made under the law of any State or Territory for the purpose of determining any administration of the arrangements for the placement of the Indigenous child by a Child Welfare Agency and for the purpose of qualification for and payment of any allowance or provision of any service.
25. To avoid any doubt the intent and effect of section 22 is to ensure that any person other than a parent with whom an Indigenous child lives pursuant to an order made under this Act shall be treated as a "carer" within the terms of any State of Territory child welfare law and shall be entitled to receive any allowance, benefit , assistance or service which a carer under a State or Territory child welfare law is entitled to receive as though the order made by a Court exercising jurisdiction under this Act were a care order made under a State or Territory child welfare law.

Supervision of arrangements by Courts

26. In the event that an order is made by a Court exercising jurisdiction under this Act that a child live with a person other than the parents or a parent of an Indigenous child (the primary order) then the Court which made that primary order shall supervise arrangements for the Indigenous child's welfare and living arrangements until the Indigenous child's 18th birthday and such supervision shall include but not be limited to:
    a. Not less than once each 12 months the proceedings shall be listed before the Court which made the primary order for the purpose of a "status hearing" to review the health, welfare and progress of the Indigenous child;
    b. At a status hearing the Court may receive evidence in such form as the Court determines as to the Indigenous child's health, welfare and progress;
    c. Notice of any status hearing shall be given to each of:
        i. The parents of the Indigenous child;
        ii. All members of the Indigenous child's extended family who were parties to or gave evidence in the proceedings which led to the making of the order;
        iii. The person with whom the child lives;
        iv. The Independent Children's Lawyer.
    d. A status hearing one or more of the following orders may be made:

i. An order directing or requiring the provision of a service or program by a person to the Indigenous child or the person/s with whom the Indigenous child lives;
ii. An order that a party do or refrain from doing a particular thing;
iii. Any order under section 64B or 68B Family Law Act.

SCHEDULE 1

Table 1. Child protection legislation in Australian states and territories