



September 29, 2023

The National Indian Child Welfare Association (NICWA), the National Congress of American Indians, and Association on American Indian Affairs appreciate the opportunity to provide comments on the proposal to create a uniform model state Indian Child Welfare Act (ICWA) law through the Uniform Law Commission (ULC). NICWA and our partner organizations have decades of experience working with tribal nations and states to promote compliance with ICWA, including development of state ICWA laws. Our experience has taught us how crucial tribal leadership is in the effective development of, advocacy for, and implementation of state ICWA laws. Tribal involvement supports tribal self-determination and respects the government-to-government relationship that tribal nations have with federal and state governments. It also ensures that tribal nations, whose children and families are the focus of ICWA, and this proposed model state legislation, inform local legislation as to what works best for tribes and American Indian/Alaska Native citizens and how to reflect the spirit of ICWA more generally. Prior to filing these comments, NICWA discussed the ULC's proposal with a group of tribal leaders from the Northwest to complement our own experiences and perspectives. Below are our responses to the questions provided in the ULC letter dated August 21, 2023, soliciting comments on the ULC state ICWA law proposal.

Question 1: Is the development of a uniform Indian Child Welfare Act law desirable?

While state ICWA laws support improved ICWA compliance and opportunities for tribal nations to enhance their roles in ICWA's implementation, a uniform state ICWA law's impact may be different than a law that is developed by tribal nations, moved through a state legislature with tribally directed advocacy strategies, and then implemented through state program and policy development with tribal involvement. Each of the states that currently have state ICWA laws used a locally driven process that was led by tribal nations and tribal advocates within state legislatures and then later with state agencies. This allowed tribal nations to shape the legislation to respond to their local concerns about ICWA compliance and address any unfriendly proposed provisions that might undermine tribal sovereignty or shift focus to the priorities of other advocacy groups.

As we understand the current process, tribal leaders have not been members of the ULC Study Committee developing this proposal. In addition, the Study Committee members will make the decision on whether to move forward to draft a model state ICWA law and recommend any model state ICWA law that is drafted for approval by the full ULC Commission. We understand the ULC Commissioners, who are primarily state judges, are supportive of ICWA, and there have been subject matter experts from Indian Country that have observed the process and have been asked for their perspectives at times. While helpful, this model is not the same as a tribal leader led process, which raises questions about why more substantive tribal leader engagement did not occur earlier. While we appreciated the ULC sponsored tribal consultation on September 6, 2023, it was publicly announced just 15 days prior to the consultation session and had only a few tribal leaders in attendance. In our meeting this month with tribal leaders from the Northwest, only one tribal leader had heard about the ULC initiative, and they were only aware because NICWA had informed them about it. While there could be benefits from a model state ICWA law, the current process has not followed common consultation protocols outlined by tribal nations for development of policy that substantially impacts them.

Another question is about the level of control there would be with shepherding a model state ICWA law if unfriendly amendments are proposed in a state legislative process, especially when tribal nation involvement is limited or has not occurred. In 2023, several new state ICWA laws were enacted, each using tribally developed or approved legislation and tribally driven advocacy strategy. In at least three of these states, there were attempts to subvert tribal legislative priorities by non-Native advocacy group



priorities. In Nevada, private adoption advocates tried to amend the proposed state ICWA legislation to carve out exceptions to ICWA's requirements regarding application of ICWA protections in voluntary adoptions. In Wyoming and Montana, there were attempts to add amendments to tribally developed state ICWA legislation that would undermine the scope of ICWA's protections as compared to what is included in the federal law. In each of these cases, tribal involvement was crucial to not only protecting the tribally developed legislation but to negotiating and limiting the impacts of any compromises that needed to be made. Under a ULC process, a ULC Commissioner is required to promote the legislation within the state legislature they are assigned. While the two ULC Study Committee members on the tribal consultation call said they would want to work with tribal partners, they were unable to describe how this might work in a state where there are no federally recognized tribes or just a few tribes that had limited capacity to participate in a state legislative process. All states have American Indian/Alaska Native children within their state child welfare system, and in some states that have no federally recognized tribes, the Native population in the state child welfare system is sizeable and represents a diverse population of American Indian/Alaska Native children and families from numerous tribal nations outside the state. While a state ICWA law could potentially provide benefits in such a state, there are also significant risks associated with pursuing and implementing a state ICWA law without tribal involvement that could impact ICWA cases involving tribal nations outside of that state.

Another concern is how a model state ICWA law might impact existing state ICWA laws. During the tribal consultation this question was asked, but the response provided limited information on how this might play out or how the ULC might mitigate these concerns. Driving this concern is the potential for state legislators to prefer model state ICWA law provisions over what has been previously put forward by tribal nations or is being proposed currently. In a state where there is a tribal desire to update the current state ICWA law, there could be competition between a tribally preferred set of amendments and provisions in a model state ICWA law. Hopefully, this could be addressed to the satisfaction of tribal nations in that state, but it could require additional time and resources to “fend” off alternatives, especially if they come from an influential national organization like ULC that works with state legislators regularly.

Question 2: What provisions of the ICWA or ICWA regulations need clarification or improvement?

There are a number of areas under ICWA where improvements could be helpful. These improvements could provide more clarity, enhance protections for Indian children and families, and create greater accountability through data collection, reviews, or tribal-state collaboration. We recommend that the ULC continue consultation with tribal nations and subject matter experts to identify provisions for consideration if the decision to draft a model state ICWA law is made. We recognize the complexity in developing a model state ICWA law that can be suitable for diverse state jurisdictions, so we have questions about how decisions will be made as to which provisions would be prioritized for inclusion in a final product. This is another situation where well-planned tribal nation education and consultation would be necessary. Examples of ICWA provisions we would suggest for a model state ICWA law include:

- Greater clarity regarding the qualifications for Qualified Expert Witnesses (QEW) and preferences for the use of different types of QEWs in court proceedings.
- Mandatory notice to tribal nations in voluntary adoption proceedings (private adoptions).
- Additions to foster care and adoptive placement preferences that offer additional placement preference options to promote placement with other Indian families that the child has a connection to.
- Recognition of tribal customary adoptive placements by state courts.
- Greater clarity regarding the process a prospective relative or American Indian/Alaska Native family must go through to have their interest in becoming a placement for an Indian child acknowledged (formal notice vs. informal notice of intent).



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- Further clarity on the application of ICWA in third party placements (e.g., grandparent petitioning for guardianship placement where parental rights have not been terminated and state child protection agency has not been involved).
- Further clarification on the application of ICWA in stepparent adoptions.
- Funding tribal legal counsel participation in state ICWA proceedings (state or federal funding support/reimbursement).
- Additional clarity on what constitutes fraud or duress related to consent in state adoption proceedings involving an Indian child.
- Further clarification on the application of active efforts under ICWA in voluntary placements and in-home services situations (court supervised or agency supervised) where the risk of removal is present.
- Further clarification on what information should be provided to adult adoptees that petition a state court for information to establish their tribal affiliation.
- Further clarification of state authority and/or obligation to accept tribally licensed homes as equivalent to state licensed homes (narrow the reasons for not accepting a tribally licensed home for placement).
- Establishment of a state data collection system that contains measures of ICWA compliance developed in consultation with tribal nations where data is regularly shared with tribal nations that have children within the state child welfare system.

Question 3: What issues arise in an ICWA case that are not currently covered by the law or regulations that would be beneficial to add?

Increasingly, American Indian/Alaska Native children and their families are caught between child welfare and juvenile justice systems with contradictory views on ICWA's application. There is variation in how Indian children enter child welfare and juvenile justice systems, but often Indian children and their families are denied ICWA's protections, especially in status offense cases that can start in either system. When juvenile justice systems utilize foster care homes, residential care, or other alternatives to incarceration to protect the safety of youth, ICWA is often not applied even though status offenses are covered under the federal law. The basis for not applying ICWA is often a view that ICWA generally doesn't apply to juvenile delinquency proceedings without close examination of the purpose for the out of home placement (protecting the safety of a minor related to status offenses vs. punishment for adult criminal violations). More clarification beyond the federal statutory language and federal guidance is needed to guide state courts as they consider the application of ICWA in juvenile delinquency proceedings.

Question 4: Are there specific provisions in existing state ICWA statutes that would be beneficial to include in a uniform law, should the ULC move to drafting?

A number of the examples we provided under Question 2 are found in different state ICWA laws. A few state ICWA laws that we believe effectively address local issues within their state include California, Michigan, Minnesota, North Dakota, Oregon, Washington, and Wisconsin. We have not had time to do an exhaustive examination of individual provisions in each enacted state ICWA law, so we recommend that the ULC do extensive consultation with tribal nations and subject matter experts to better understand how different states have addressed different provisions and the outcomes associated with those provisions (e.g., Did the specific provision achieve its intended purpose?).

Question 5: If the ULC moves forward with drafting, what is the best mechanism to ensure that there is adequate tribal involvement and that the final product is broadly acceptable to those most directly affected – Indian children, families and tribes?



Given the lack of tribal leadership involvement to this point, we believe a better option is to develop a sample state law or guidance that outlines examples of provisions that such laws may contain rather than a uniform model law. Broader guidance or a sample could provide states with an example to draw upon while reducing the need to seek uniformity between states that could diminish flexibility and interfere with local tribal priorities and preferences. Even in this type of process, we believe that regular, well-planned, and informative education and consultation should occur.

Tribal nations should define how this process will work to ensure that maximum attention is given to developing strong support for and maximize policy impact of any final product. We understand that this would require the ULC to implement a process that is different from what they typically use with other model law development and has additional fiscal implications. This is an opportunity for ULC to deepen their understanding of and relationship with Indian Country, which would also be beneficial in future work. Our suggested process of regular education and consultation will help ensure that future state ICWA laws based upon a ULC sample or model law have the full support and investment from tribal nations that is necessary to protect tribal sovereignty and some of their most vulnerable children and families in state child welfare systems.