Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

30 May 2022

Dear Officer,

RE: Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia

The Australian National University Law Reform and Social Justice Research Hub ('ANU LRSJ Research Hub') welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Committee, responding to terms of reference (f) and (i) of the inquiry.

The ANU LRSJ Research Hub falls within the ANU College of Law's Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are students of the ANU College of Law, who are engaged with a range of projects with the aim of exploring the law's complex role in society, and the part that lawyers play in using and improving law to promote both social justice and social stability.

Summary of Recommendations:

1. The Commonwealth should implement the national framework legislation as set out in recommendations 43a, 43b and 43c of the *Bringing Them Home Report* to ensure First Nations have the right to self-determination in matters relating to the care of their children and young people. This will facilitate the Commonwealth government's adherence to article 7(2) of the UNDRIP.
2. Child protection legislation and operation protocols should be amended to ensure that removals substantiated on the grounds of poverty-related neglect are minimised. Instead, child welfare interventions in cases of neglect must involve a compulsory gradual intervention process that addresses the structural risk factors that limit the capacities of First Nations families.
3. Stronger accountability mechanisms should be imposed upon child welfare practitioners, particularly social workers, in order to ensure that removal and out of home care options are exercised only as a final solution.

If further information is required, please contact us at

On behalf of the ANU LRSJ Research Hub,
Authors: Nabeela Maricar and Kimberley Slapp
Editor: Isabella Keith

Introduction

This submission addresses Australia's progress in implementing article 7(2) of the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP'), responding to terms of reference (f) and (i) respectively. Article 7(2) of the UNDRIP states that 'Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group'.[1]

1. Term of reference (f): The Australian federal government's adherence to the principles of the UNDRIP

Australia has a well-known and unfortunate history of forcibly removing Indigenous children from their families and Country. 25 years ago, the *Bringing Them Home Report* ('the Report') investigated Australia's historical policies and ongoing impacts of the forced removal of Aboriginal and Torres Strait children, finding that 'between one in three and one in 10 Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970'.[2] However, this is not merely a historical issue.

As of 2020, the Secretariat of National Aboriginal and Islander Child Care (SNAICC) found that more than 21,000 Indigenous children were in out-of-home care, representing one in every 15.6 Indigenous children in Australia.[3] Indigenous children are significantly over-represented in the numbers of children in out-of-home care, making up 39 percent of all children in out-of-home care.[4] Most alarmingly, if the *National Framework for Protecting Australia's Children 2021-2031* is not implemented, the number of all Aboriginal and Torres Strait Islander children in out-of-home care is projected to increase by 54% in the next 10 years.

While the contemporary issue of Aboriginal and Torres Strait Islander children living in out-of-home care differs in principle from Australia's policy of forced removals between 1910 and 1970, the enduring power imbalances within the child protection systems have perpetuated the significant over-representation of Indigenous children being removed from their families and communities.[5] The UNDRIP recognises 'in particular, the right of Indigenous families and communities to retain the responsibility for upbringing, training,

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[1] United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/61/296 (2 October 2007, adopted 13 September 2007) ('UNDRIP') art 7(2).
[2] Patricia Anderson and Edward Tilton, 'Bringing Them Home 20 Years On: An Action Place for Healing', (Online, May 2017) <https://healingfoundation.org.au/app/uploads/2017/05/Bringing-Them-Home-20-years-on-FINAL-SCREEN-1.pdf> 7.
[3] Family Matters, 'The Family Matters Report 2021', (Online, December 2021) <https://www.familymatters.org.au/wp-content/uploads/2021/12/FamilyMattersReport2021.pdf> ('Family Matters Report') 12.
[4] Ibid 117.
[5] Ibid 95.

education and well-being of their children'.[6] For the Commonwealth to implement article 7(2) of the UNDRIP in the spirit of the document, action must be taken to address the over-representation of Indigenous children in the out-of-home care system. If the Australian federal government fails to implement meaningful policy to address this, it will fail to adhere to the principles of UNDRIP – particularly article 7(2).

The Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) was established to guide best practice in child protection decision making. It sets out to recognise the importance of safe care within family and culture, and to ensure that the Stolen Generations are not repeated.[7] Premised on the principle of self-determination, it emphasises the following 5 core elements:

1. Prevention: Protecting children's rights to grow up in family, community and culture by redressing causes of child protection intervention;
2. Partnership: Ensuring the participation of community representatives in service design, delivery and individual case decisions;
3. Placement: Placing children in accordance with the ATSICPP placement hierarchy;
4. Participation: Ensuring the participation of children, parents and family members in decisions; and
5. Connection: Maintaining and supporting connections to family, community, culture and Country for children in out-of-home care.[8]

The ATSCIPP also establishes a placement hierarchy, which decision makers should follow when placing children in out-of-home care. Children should be placed:

1. With Aboriginal and Torres Strait Islander relatives or extended family members, or other relatives and family members; or
2. With Aboriginal and Torres Strait Island members of the child's community; or
3. With Aboriginal and Torres Strait Islander family-based carers. Only if these options are not available, as a last resort the child can be placed with:
4. A non-Indigenous carer or in a residential setting.

The role of the Commonwealth is to develop a national priority to implement this framework in state and territory legislation.[9] More broadly, reflecting Recommendation 43 of the Report, the Commonwealth should implement the principle of self-determination in legislation to reduce the need for forced removals of Indigenous children. The Report recommends that 'national legislation establishing a framework for negotiations at community and regional levels for the implementation of self-determination in relation to the well-being of Indigenous children and young people' be implemented.[10] Enacting legislation which binds the

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[6] 'UNDRIP' (n 1) preamble.
[7] Family Matters, 'What is the Aboriginal and Torres Strait Islander Child Placement Principle?' (Web Page, 2 November 2016) <https://www.familymatters.org.au/aboriginal-torres-strait-islander-child-placement-principle/> ('Family Matters Report').
[8] Ibid.
[9] Secretariat of National Aboriginal and Torres Strait Islander Child Care, 'The Aboriginal and Torres Strait Islander Child Placement Principle: A Guide to Support Implementation' (Web Document, June 2019) <https://www.snaicc.org.au/wp-content/uploads/2019/06/928_SNAICC-ATSICPP-resource-June2019.pdf>.
[10] Human Rights and Equal Opportunity Commission, Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (Report, April 1997).

Commonwealth and each State and Territory government to guarantee the right of Indigenous communities to formulate and negotiate measures best suited to their individual needs concerning children, young people and families would also aid in the explicit implementation of the right to self-determination established in the UNDRIP.

Every state and territory government has endorsed the Commonwealth's *Safe and Supported National Framework for Protecting Australia's Children 2021-2031*. This framework commits to closing the gap for Aboriginal and Torres Strait Islander children by reducing the rate of over-representation of Aboriginal and Torres Strait Islander children in out-of-home care by 45% by 2031.[11] The framework also centres the principle of self-determination, aiming to facilitate Indigenous communities to take control of the design and administration of their child protection systems.[12] It fully embeds the ATSICPP and supports the empowerment of Indigenous community-controlled child protection organisations. However, this policy framework is not reflected in legislation and therefore is not legally binding. To meaningfully implement article 7(2) of the UNDRIP, these principles should be legislated.

Recommendation 1: The Commonwealth should implement the national framework legislation as set out in recommendations 43a, 43b and 43c of the *Bringing Them Home Report* to ensure First Nations have the right to self-determination in matters relating to the care of their children and young people. This will facilitate the Commonwealth government's adherence to article 7(2) of the UNDRIP.

2. Term of Reference (i): The current and historical systemic and other aspects to take into consideration regarding the rights of First Nations people in Australia

Historical systemic issues with child welfare practice

Child welfare systems in Australia were formulated with the purpose of eradicating First Nations people. By removing children and placing them in white and European environments, the colonial state aimed to dilute Indigeneity such that the challenge posed by First Peoples to settler society was eliminated. The various Protection Acts across the colonies targeted Indigeneity, rather than the maltreatment of children – conflating Indigeneity as being contradictory to the moral and physical welfare of the child.[13] Welfare boards were empowered to remove children without substantiation, solely on the grounds that it was in the interest of the moral and physical welfare of the child to be raised away from their Aboriginal parents.[14]

[11] Department of Social Services, *Safe and Supported: the National Framework for Protecting Australia's Children 2021–2031* (Report, 2021) <https://www.dss.gov.au/sites/default/files/documents/12_2021/dess5016-national-framework-protecting-childrenaccessible.pdf> 10.
[12] Ibid 28.
[13] See eg, *Aborigines Protection Amending Act* 1915 s 3(2).
[14] Kelly Godfrey, 'The Lost Kooris', (Online, May 2017).

The foundations of Australia's child welfare system are therefore such that they are undetachable from the predatory, violent rhetoric with which it was fashioned. The 'Stolen Generation' acknowledged as part of Australia's history cannot be relegated to a dark past but are an indication of the future that Australia's child welfare system is heading towards.

Current systemic issues with child welfare practice

Failure to address structural risk factors

The current experience of First Nations people who encounter Australia's welfare structures must be acknowledged as one that is irrevocably violent. For Australia to be compliant with the UNDRIP, we recommend firstly that child protection agencies develop relationships with First Nations peoples such that child welfare policy is culturally informed and addresses structural risks as a priority, as opposed to removing children.

Despite the overwhelming acknowledgement of the trauma caused by colonialism, the practice of child removal continues to this day and current child welfare systems have a propensity to disproportionately impact First Nations children.[15] The likelihood of children removed from their homes for long periods of time being able to return to their families and reconnect with their cultures is minimal – deprivation of cultural ties and support systems has a negative impact on youth and adult incarceration, education outcomes, as well as substance abuse.[16] Out-of-home care therefore continues to function as an aggravating factor that dispossesses First Nations families and perpetuates colonial trauma.

Child welfare departments across Australia must protect the safety and welfare of children but must prioritise solving the structural risks that cause First Nations families to encounter welfare systems as opposed to removing children when parents lose capacity to parent their child. The correlation between structural risk factors and child welfare intervention is potent. 31.8% of Indigenous child removals are substantiated on grounds of 'neglect', a term that reflects symptoms of poverty.[17] 'Neglect' is defined in s 343 of the *Children and Young People Act 2008 (ACT)* as a 'failure to provide the child with a necessity of life if the failure has caused or is causing significant harm to the child's wellbeing or development'.[18] The loose definition of neglect, along with the leeway that child protection legislation affords social workers has resulted in removals that appear to be substantiated and in the child's best interests but in reality are the product of gross failures to distinguish structural risks from harm to children. Child protection legislation and practice directions were initially drafted to provide a crisis response in cases of severe abuse, a function that is no doubt crucial to the wellbeing of children. However, most First Nations families encounter child protection mechanisms due to a chronic need for support rather than crisis intervention. Not only are

[15] 'Family Matters Report' (n 3).
[16] 'Outcomes for children and young people in care', (Online, October 2007) <https://aifs.gov.au/cfca/publications/outcomes-children-and-young-people-care>.
[17] Jacynta Krakouer, 'First Nations children are still being removed at disproportionate rates. Cultural assumptions about parenting need to change', *The Conversation* (online, 26 November 2021) <https://theconversation.com/first-nations-children-are-still-being-removed-at-disproportionate-rates-cultural-assumptions-about-parenting-need-to-change-169090>.
[18] *Children and Young People Act 2008* (ACT) s 343.

the legislation and practice directions inadequate to address an epidemic, the propensity of welfare systems to target Indigenous children makes for a biased and ultimately failing system. Child protection legislation fails to address the structural causes of poor child welfare, creating a cycle of intervention that not only fails to increase the capacity of First Peoples but also violates the UNDRIP core principle of self-determination.

Best Interests and Failure to adhere to ATSICPP/ACPP

Child protection legislation stresses the 'best interests of the child' as paramount to welfare decision-making. These interests must govern decision-making processes not only for social workers but for courts who enforce the orders sought by welfare departments.[19] This language may appear neutral and to serve the interests of Indigenous and non-indigenous children equally. However, the reality is that Indigenous children and families are at a far greater disadvantage and more likely to encounter child protection systems.

Section 11 of the *Care and Protection Act (NSW)* acknowledges that 'it is a principle to be applied in the administration of this Act that Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young persons with as much self-determination as is possible.'[20] Similarly, section 12 of the equivalent Victorian legislation enshrines the importance of recognising self-determination in welfare decisions.[21] In both jurisdictions, this has given rise to the ATSICPP (recognised above) that is embedded within practice directions and legislation alike.[22] These guiding principles recognise the historical, systemic trauma that indigenous children and their families have endured over generations.

Additionally, failure to address the structural risk factors means that many Aboriginal carers fail to meet the criteria that would otherwise allow them to care for Aboriginal children placed in out-of-home care. These factors include high levels of unemployment, poverty, ill-health, homelessness and poor education outcomes. While there has been cursory acknowledgement that these realities are the results of intergenerational effects of assimilationist policies,dispossession and marginalisation, the child protection system fails to address these difficulties and instead punishes Indigenous families for systemic disadvantages. The system's ongoing failure to provide support to Indigenous families and instead resorting to child removal adds to the structural risks faced by Indigenous children.

Ultimately, this manifests in a failure to adhere to the ATSICPP and a continuation of the trauma made familiar to Australians through 'Stolen Generation' investigations. A review of the 'best interests' principle and adherence to the ATSICPP by child protection agencies could not find a single case that complied with all the requirements to meet the intent of the

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[19] *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9(a); *Children, Youth and Families Act 2005* (Vic) s 10(1); *Child Protection Act 1999* (Qld) s 5(1); *Children and Community Services Act 2004 (WA)* s 7; *Children's Protection Act 1993* (SA) s 4(1)–3; *Children, Young Persons and Their Families Act 1997* (Tas) s 8(2)(a); *Children and Young People Act 2008* (ACT) s 11; *Care and Protection of Children Act 2007* (NT) s 9.
[20] *Children and Young Persons (Care and Protection) Act 1998* (NSW).
[21] *Children, Youth and Families Act 2005* (Vic).
[22] 'Family Matters Report' (n 7).

principle.[23] Despite acknowledgement that 'best interests' differ between Indigenous and non-Indigenous children, there appears to be a refusal amongst child protection practitioners to alter their approaches to accommodate the unique cultural needs of Indigenous children. Indigeneity alone, aside from other structural risk factors that impair family wellbeing, continues to feature as a factor that both increases the likelihood that a child is 'un-parentable' and diminishes a parent's ability to be responsible for a child.

Despite the consensus that Indigenous practitioner-led practices will result in the best outcomes, and are in the 'best interests' of the child leading to better education and health outcomes,[24] Australian child welfare policy continues to sideline First Nations perspectives. This is despite government departments demonstrating a continued preference for culturally uninformed approaches that fail to adhere to the fundamental principle of self-determination upon which the UNDRIP is founded.

Additionally, social workers' personal bias factors into discussions about child welfare. In combination with the lack of accountability imposed upon social workers, these biases result in far from desirable practical outcomes. At present, Australian social workers in the child protection space have immense control over Indigenous children. First Nations children are more likely to be 'known' to the state throughout their childhoods and are therefore more likely to encounter child protection mechanisms.[25] Social workers are also more likely to exercise their discretion to take emergency action in relation to Indigenous children even when those children and their families have been under long-term observation by those very social workers.[26] In light of the continuing systemic oppression that First Nations families encounter when facing the child welfare system, it is evident that an urgent and profound overhaul is needed.

Recommendation 2: Child protection legislation and operation protocols should be amended to ensure that removals substantiated on the grounds of poverty-related neglect are minimised. Instead, child welfare interventions in cases of neglect must involve a compulsory gradual intervention process that addresses the structural risk factors that limit the capacities of First Nations families.

Recommendation 3: Stronger accountability mechanisms must be imposed upon child welfare practitioners, particularly social workers, in order to ensure that removal and out of home care options are exercised only as a final solution.

[23] Secretariat of National Aboriginal and Islander Child Care, Reviewing Implementation of The Aboriginal and Torres Strait Islander Child Placement Principle Victoria (Report, January 2020).
[24] Robert Leckey, Raphael Schmieder-Gropen and Chukwubuikem Nnebe, 'Indigenous parents and child welfare: Mistrust, epistemic injustice, and training' (2021) 1(21) *Social and Legal Studies* 1, 2.
[25] Australian Institute of Health and Welfare, Child Protection Australia 2018-2019, (Report, March 2020).
[26] Ibid.

Conclusion

To meaningfully enact article 7(2) of the UNDRIP, the Commonwealth, state and territory governments must commit to reducing the over-representation of Indigenous children in culturally inappropriate out-of-home care. Action in this area will also drive change for Indigenous communities by improving outcomes for education, employment and health – as connection to community and culture is crucial for the wellbeing of Aboriginal and Torres Strait Islander children. This also has positive implications for the implementation of the UNDRIP more widely, in guaranteeing the right to culture and right to self-determination.

Australia's governments have a chance to reflect on the devastating history of forced child removals from Indigenous communities - and to move on by doing better. 25 years on from the *Bringing Them Home Report*, there is an opportunity for reform at all levels of government.