

Submission regarding the Day of General Discussion: Children's Rights and Alternative Care

Jumbunna Institute of Indigenous Education and Research,
Research Unit

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To the UN Committee on the Rights of the
Child

Re: Children's Rights and Alternative Care

The Jumbunna Institute's submission is enclosed.

We appreciate the opportunity to contribute to this study, exploring Children's Rights and Alternative Care.

First Nations children in Australia, and other nations, are disproportionately targeted by state child protection systems and removed into alternative care. Often, that alternative care is outside their family, kin and culture. Outcomes for First Nations children in child protection systems in Australia are particularly poor, relative to their non-Indigenous peers.

Despite sustained advocacy over generations, there has not been adequate efforts from government to reform systems for child protection and alternative care to uphold the rights of First Nations children. States such as Australia have tended to position the impost of racist policies as historic. However numerous reviews, including through various UN processes as well as domestic inquiries, have found that the rights of First Nations children are routinely denied. In particular, the distinct rights of our children continue to be misunderstood, or ignored.

We commend the Committee for the focus on *Children's Rights and Alternative Care* and urge the Committee to particularly consider the rights of Indigenous children, and the necessary legislative, policy and practice settings required to uphold their rights as Indigenous children. In particular, issues of Indigenous self-determination, autonomy and self-governance of child and family systems and services, and public accountability of governments and services to Indigenous peoples represent the foundations of rights-based systems for Indigenous children. The removal of First Nations children from their families, communities and cultures by settler-colonial state child protection systems has been shown over generations to be harmful. It is time to relegate such approaches that create and entrench racial inequity to the past, and make space for First Nations to reimagine these systems, grounded in culture and our aspirations for the future.

The Research Unit at the Jumbunna Institute at the University of Technology Sydney is an interdisciplinary team of scholars and practitioners, working according toward a common principle that our work is driven by Aboriginal and Torres Strait Islander people, and contribute to their strength, self-determination, sustainability and wellbeing. Our work includes a longstanding focus on systems that continue to disproportionately remove Aboriginal and Torres Strait Islander children from their families. This includes direct advocacy alongside Aboriginal families seeking justice in the face of systems, policies and practices that demonstrably harm our children, our families and our communities.

We are happy to provide further information regarding the matters raised within this submission.

Regards,



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Paul Gray



Distinguished Professor
Larissa Behrendt



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Submission – Children’s Rights and Alternative Care

We appreciate the opportunity to provide a brief comment on children’s rights and alternative care. Our focus in particular is related to ‘measures to address the historical and continuing discrepancy of responses and interventions within the alternative care system towards indigenous children, families and communities, and ensuring culturally sensitive approaches to care.’

First Nations children and young people, their families and communities continue to be disproportionately targeted by settler-colonial child protection systems. The over-representation of First Nations children in statutory child protection systems has been described as “one of the most pressing human rights challenges facing Australia today”.¹ The devastation inflicted by these ongoing processes of colonisation, and particularly child protection interventions, continues to adversely impact generations of Indigenous children and young people, their families, and communities. States have a responsibility to make reparations for past harms and address ongoing systems and practices and their disproportionate impact on Indigenous children. These issues significantly undermine the full enjoyment of the rights of Indigenous children.

General Comment No. 11 (2009) Indigenous children and their rights under the Convention encourages states to implement special measures, through legislation and policy, developed with Indigenous peoples, to safeguard and promote the distinct rights of Indigenous children. This includes consideration for the principle of best interests for Indigenous children, including their collective cultural rights, and the important role of the child’s Indigenous community in determining how the best interests of Indigenous children can be understood and applied in policy and practice. This includes enjoyment of their cultural rights, individually and collectively, which requires enduring connections to their family, community, and Country.

In a previous submission to the Expert Mechanism on the Rights of Indigenous Peoples regarding the rights of the Indigenous child, we noted the ongoing failures of Australian government to adequately appreciate, safeguard and promote the rights of First Nations children, despite continuing to exercise control over systems and services that affect them. These systems and frameworks entrench disparities affecting First Nations children. Further, there is a lack of accountability of governments with respect to their impact on First Nations children, particularly those systems that disproportionately intervene in

¹ Mick Gooda, *Social Justice and Native Title Report 2015*, Australian Human Rights Commission. (2015)

their lives, such as child protection and youth justice. While there are existing processes for accountability of these systems, recent reviews have demonstrated that such processes are inadequate in promoting the rights and interests of children, including First Nations children.²

In the absence of meaningful action, grounded in self-determination, and bolstered by increased public accountability of governments to First Nations, the disproportionate intervention in the lives of First Nations children through these systems continues to grow. In 2020, First Nations children and young people were 10 times more likely to be forcibly removed from their families and placed into alternative care, with parental responsibility placed with the Minister or on third-party orders.³ Further, analysis of a cohort of children in NSW found that almost half of all First Nations children were screened-in to child protection systems as being at significant risk of harm by age 5, and 1 in 3 experienced some further form of child protection response.⁴ Concerns regarding ongoing connections to family, community, and culture have been raised through numerous reviews,⁵ including the annual Family Matters Report produced by the national First Nations children's peak organisation, SNAICC – National Voice for our Children.⁶ Worryingly, unless there is significant structural change to contemporary child protection systems and practice, the number of First Nations children in alternative care is expected to double by 2029.⁷

That these systems disproportionately affect First Nations children and young people is generally considered to be arising from the ongoing social and economic marginalisation of First Nations communities, the failure of governments to invest in effective, culturally-embedded and community-based supports and diversionary programs, and the imposition of external decision making and systems that routinely undervalues family and community strengths, and the child's identity and cultural rights, grounded in ongoing connections to family, community, and Country. Addressing systemic racism remains a key focus for reform.⁸

² Megan Davis, *Family is Culture Review Report – Independent Review of Aboriginal Children and Young People in OOH, Family Is Culture*, (2019)

³ Australian Institute of Health Wellbeing, *Child Protection Australia Report 2019/20*, (2021)

⁴ Davis above n.2

⁵ Davis above n.2; Sue-Anne Hunter, John Burton, George Blacklaws, Adelajda Soltysik, Andria Mastroianni, Janelle Young, May Jones, Nadeshda Jayakody, Alex Bhathal, Jacyntha Krakouer, Wei Wu Tan, Arno Parolini, Clare Tilbury, and Aron Shlonsky. *The Family Matters report 2020: Measuring trends to turn the tide on the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care in Australia*, Melbourne: SNAICC. (2020); Commission for Children and Young People, *In the child's best interests: Inquiry into compliance with the Aboriginal Child Placement Principle in Victoria*, (2016); Commission for Children and Young People, 'Always was, always will be Koori Children': *Systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria*, Melbourne, (2016)

⁶ Hunter et al above n.5

⁷ Hunter et al above n.5

⁸ SNAICC – National Voice for Our Children, *The Family Matters Roadmap*, (2016)

First Nations advocates have also raised significant concerns about the increased use of third party permanent care orders to artificially 'exit' children and young people from out-of-home care. Such orders lack sufficient mechanisms to ensure that the rights and interests of First Nations children are protected and promoted, particularly as decisions continue to be made through non-Indigenous processes. Further, as only approximately half of the First Nations children removed to alternative care by child protection systems are placed within their First Nations families,⁹ there is a significant risk that such orders represent the permanent dismemberment of First Nations families, and deprive First Nations children of the full enjoyment of their rights. As noted above, there remain significant concern about how contemporary out-of-home care systems ensure that First Nations children benefit from the full enjoyment of their rights, including their cultural rights, which are often marginalised. It is unlikely this situation will be improved by the use of third-party orders that remove even those inadequate safeguards and supports that currently exist.

Further, it is noted that many governments are now emphasising the use of 'evidence-based programs', which, while important, has the effect of further entrenching the marginalisation of First Nations approaches. The long-standing neglect and under-resourcing of First Nations approaches by governments have resulted in a limited evidence base for First Nations approaches. The insistence on models with an existing evidence base, despite often not being relevant to the social or cultural context of First Nations families and communities, further compounds these historical exclusions and biases. Commissioning frameworks should insist on First Nations-led approaches, complemented by a rigorous evaluation framework aligned to First Nations outcomes, in order to build and continuously improve systems and practice for First Nations communities.

Addressing the existing inequities created by contemporary child protection systems requires a complete reimaging of child protection systems, policies and approaches. However, government reforms have been more limited in scope, imposing arbitrary timeframes and prioritising artificial 'exits' that absolve governments of their ongoing responsibilities to children. The gap between First Nations aspirations to reimagine child welfare systems, and government appetite for genuine structural change, remains a critical issue that further entrenches inequities for First Nations children, families and communities. Without urgent structural change to dismantle the baseless and racist foundations of settler-colonial child welfare interventions in First Nations

⁹ Hunter et al above n.5

families, the troubling projections for growing disparities are unlikely to be avoided. It requires a specifically anti-racist approach to reimagining systems, dismantling current systems that entrench inequities and replacing them with new approaches focused on equity and eliminating harm.¹⁰

First Nations communities and advocates have continued to develop and promote new approaches to uphold the rights of and achieve better outcomes for their children. Recommendations from *Bringing Them Home* included a focus on addressing the social and economic drivers of contemporary removals, and a legislative framework to enable Aboriginal and Torres Strait Islander peoples to exercise self-determination in the welfare of their children, including investing in family and community supports designed and delivered by communities themselves, and transferring legal jurisdiction for child welfare to Aboriginal and Torres Strait Islander peoples. One recent review, *Family is Culture*, identified two critical structural reforms necessary to addressing the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care; respect for self-determination, and greater public accountability and transparency of child protection systems. Further recommendations urged a refocus of child protection systems on prevention, early intervention, and family preservation, including through the full implementation of the Aboriginal and Torres Strait Islander Child Placement Principle. This principle aims to [aim], and includes five interrelated elements; *prevention, partnership, placement, participation and connection*.

The SNAICC-led Family Matters campaign outlines a clear roadmap for reform. These include the need for approaches focused on First Nations children, supporting healing for families and upholding the right of First Nations children to live in culture, as well as challenging systemic racism and inequity. The Family Matters Building Blocks promote access to culturally-safe universal and targeted supports, First Nations have control over decisions affecting First Nations children, law, policy and practice that is culturally safe and responsive to the needs of First Nations families, and governments and services that are accountable to First Nations communities.¹¹ It is noteworthy that these principles are similar to those asserted by other Indigenous-led frameworks, such as the Touchstones of Hope, which are grounded in principles of self-

¹⁰ Alan Dettlaff, Kristen Weber, Maya Pendleton, Reiko Boyd, Bill Bettencourt and Leonard Burton, 'It is not a broken system, it is a system that needs to be broken: the upEND movement to abolish the child welfare system', *Journal of Public Child Welfare*, (2020),

¹¹ SNAICC – National Voice for Our Children above n.8

determination, culture and language, holistic child and family supports, structural interventions, and equality.¹²

Some Australian jurisdictions have taken steps in this direction, exploring delegated authority provisions that enable First Nations organisations to exercise authority normally vested in state authorities, or seeking to enshrine key safeguards, such as the Aboriginal and Torres Strait Islander Placement Principle and culturally-grounded considerations of ‘best interest’, in legislation. While positive, these actions are comparatively minor in the context of broader government-led reforms that may further entrench disparities for First Nations children, families and communities.

Safeguarding the rights of Indigenous children requires that states recognise the right of Indigenous peoples to self-determination, and enshrine this right in child and family legislation, policy and practice, including systems of alternative care. Systems, policies and practices must be explicitly oriented towards addressing entrenched and enduring inequities. Such actions must also be adequately resourced to achieve equity, investing in Indigenous-led solutions to meet the needs of their children and families, taking into account the significant harms inflicted over generations and the need for healing. Failure to take this step perpetuates those same systems of colonial violence that have undermined the rights and wellbeing of First Nations children over generations, and further entrenches inequities. We urge the Committee to consider the following elements as critical to addressing the continuing inequities resulting from child protection and alternative care systems, and their ongoing impact on First Nations children, families and communities, and ensuring culturally sensitive, rights-based approaches to care:

1. Respect for the self-determination of Indigenous peoples, to ‘freely determine their political status and freely pursue their economic, social and cultural development.’¹³
2. Freedom from discrimination through the under-resourcing of First Nations communities to meet the needs of, and achieve equitable outcomes for, First Nations children and young people, as well as the imposition of non-Indigenous approaches
3. Efforts to address the structural drivers of contact with child protection systems and entry to alternative care, including the enduring impact of

¹² First Nations Child and Family Caring Society. *Touchstones of Hope for Indigenous Children, Youth and Families: Reconciliation in Child Welfare*. (2019) < https://fncaringsociety.com/sites/default/files/how-to_guide_-_reconciliation_in_child_welfare_2019_0.pdf>.

¹³ Article 3, United Nations Declaration on the Rights of Indigenous Peoples

social and economic marginalisation affecting First Nations families and communities

4. Ending the harm of alternative placements imposed through non-Indigenous systems and processes. Such approaches, including imposition of permanent third party orders and short timeframes for families to address issues of risk, increase the likelihood that First Nations children and young people will be severed from critical connections to their family, communities, culture and Country, significantly depriving First Nations children of the fully enjoyment of their rights as Indigenous children.
5. Ensuring adequate, independent, First Nations oversight of government systems and practices that affect Indigenous children and young people, including in particular child protection, justice, and education systems, to promote transparency and accountability for the outcomes and experiences of First Nations children and young people

We further encourage the Committee to consider the significant body of work developed by Indigenous Peoples Organisations regarding the rights of Indigenous children in alternative care, the harms suffered through the ongoing imposition of settler-colonial systems, and the discriminatory under-resourcing of First Nations communities to provide necessary, healing-focused services to children and young people and their families. In Australia, this includes the annual Family Matters Report, the recent Family is Culture report, and other reviews and reports led by First Nations Commissioners and organisations.