

United Nations Expert Mechanism on the Rights of Indigenous Peoples

Country Engagement Mission Australia

April 2024

ADVISORY NOTE

I. Context and purpose of the mission

1. Under its revised mandate, EMRIP assists Member States and Indigenous Peoples in achieving the ends of the UN Declaration on the Rights of Indigenous Peoples (the Declaration). It provides for technical assistance upon the request of States, Indigenous Peoples and other stakeholders, including the private sector, pursuant to paragraph 2 of Human Rights Council resolution 33/25. Under this mandate, EMRIP can provide technical advice regarding “the development of domestic legislation and policies relating to the rights of Indigenous Peoples. The EMRIP provides this advice in response to a request from the Noongar Family Safety and Wellbeing Council with respect to the contemporary removal of Aboriginal children. The request is based on the understanding that certain legislative frameworks and policies do not align with the key articles of the Declaration, including the right to self-determination (Articles 3, 4) non-discrimination (article 2, 22), the prohibition against forced assimilation (Article 8) and removal of people from traditional lands and territories (Articles 7, 10).

2. The terms of reference for this country engagement were prepared in consultation with the requesters and the Member State (see annex). The mission took place from 1 to 10 October, and the members of the Expert Mechanism that participated in the mission were Ms. Sheryl Lightfoot, Chair of EMRIP and Head of Mission, and Ms. Valmaine Toki, EMRIP member of the Pacific, as well as staff of the United Nations Office of the High Commissioner for Human Rights Secretariat, which provides substantive and administrative support to the work of the EMRIP.

3. During the mission, EMRIP travelled to Perth, Albany and Geraldton in Western Australia, where it met with the requesters, Aboriginal and Torres Strait Islander peoples from different communities, Aboriginal and Torres Strait Islander organisations, NGOs, state, judicial, legal officials, academia and others. The delegation also visited out-of-home care facilities.

4. The purpose of the EMRIP country engagement with Australia, as agreed upon by both parties in the terms of reference, was to:

- a. Provide advice and guidance to the Aboriginal and Torres Strait Islander community and the Member State on the implementation of the Declaration in relation to the “contemporary removal of Aboriginal children,” as agreed upon by both parties. The advice

will include guidance on implementing the right to self-determination, transferring jurisdiction over child protection to Aboriginal bodies, strengthening Indigenous representation in government, confronting discrimination and systemic bias in the child protection system and ensuring a culturally appropriate institutional environment, addressing the root causes of child protection involvement, such as domestic violence, providing “culturally appropriate early intervention and prevention programs and models,” increasing access to “services for Aboriginal children in out of home care with disability and psychosocial needs,”¹² and aligning the Children and Community Services Amendment Act 2021 (Western Australia) with the Declaration.

b. Provide assistance and advice on implementing recommendations made previously to Australia by the Human Rights and Equal Opportunity Commission, in its 1997 *Bringing Them Home*¹⁴ report, and UN bodies, including the Special Rapporteur on Violence Against Women, its Causes and Consequences, in 2018 (A/HRC/38/47/Add.1), the Special Rapporteur on the Rights of Indigenous Peoples, in 2017 (A/HRC/36/46/Add.2), the Committee on the Elimination of Racial Discrimination, in 2017 (CERD/C/AUS/CO/18-20), and the Committee on the Rights of the Child, in 2019 (CRC/C/AUS/CO/5-6).

II. Framework

5. The EMRIP provides this advice based on information received orally and in writing from the parties and others with whom EMRIP engaged during the Mission as well as background information on the specific context of the Western Australia legal system, and recommendations of the UN human rights treaty monitoring bodies and other human rights experts.

6. This advice is grounded in the rights protected under the Declaration, which was endorsed by the State in 2009, and other international standards pertaining to Indigenous Peoples, including provisions of the international human rights treaties. In this regard, EMRIP considers relevant recommendations of the UN human rights treaty bodies and the Special Rapporteur on the Rights of Indigenous Peoples, among others.

7. The Expert Mechanism shares the deep concern of the United Nations Committee on the Elimination on Racial Discrimination regarding the high proportion of Indigenous children in contact with the criminal justice system, and that Indigenous children face a higher risk of being removed from their families and placed in alternative care facilities, many of which are not culturally appropriate and in which, too often, they also face abuse. The Expert Mechanism aligns itself with the recommendations issued to Australia in 2017, where the Committee recommended that the State party: a) Ensure adequate, culturally appropriate and accessible legal services for Indigenous Peoples, including by increasing funding to Aboriginal and Torres Strait Islander legal services and Aboriginal family violence prevention legal services; (b) Effectively address the overrepresentation of indigenous children in alternative care, including by developing and implementing a well-resourced national strategy in partnership with Indigenous Peoples, increase investment for Aboriginal family support services at state and

territory levels, and ensure that well-resourced Indigenous community-led organisations can provide child and family support services with a view to reducing child removal rates; (c) Potentially establish commissioners for Indigenous children in each state and territory.

8. The Expert Mechanism also agrees with the Committee's recommendation that the State party accelerate its efforts to implement the self-determination demands of Indigenous Peoples, as set out in the "Uluru Statement from the Heart" of May 2017, including by establishing meaningful mechanisms that enables their effective political participation and entering into good faith treaty negotiation with them. The Committee also requests that the State party increase support, including financial support, to Indigenous-led programmes and organisations providing services to Indigenous Peoples, which is necessary to enable them to discharge their functions effectively. The Expert Mechanism notes with regret the private members bill, first introduced by Lidia Thorpe in March 2022, that would provide measures to enact the Declaration in Australian law, was not passed.

9. Furthermore, the Expert Mechanism agrees with the view of the Special Rapporteur on the Rights of Indigenous Peoples, that the prolonged impacts of intergenerational trauma from the Stolen Generations in Australia, disempowerment and entrenched poverty continue to inform Aboriginal and Torres Strait Islanders' experiences of child protection interventions. This includes the grief and helplessness felt by parents and children owing to their separation, and the link this has to high rates of mental illness and substance abuse. In the view of the Expert Mechanism, the described situation fully applies to the State of Western Australia today.

10. The Expert Mechanism also agrees with the Special Rapporteur's recommendation regarding the need for a greater engagement with the Aboriginal and Torres Strait Islander community in decision-making processes around child protection. Community-led early intervention programmes that invest in families would prevent children from being in contact with the child protection system in the first place, as well as structural reforms to ensure Aboriginal representative bodies are supported and heard, in addition to Aboriginal children's commissioners in each state and territory. As noted by the Special Rapporteur, the Aboriginal and Torres Strait Islander Child Placement Principle was first implemented in 1983 as a framework designed to promote policy and practice that will reduce the over-representation of Aboriginal and Torres Strait Islander children in the child protection system. The purpose was to enhance and preserve Aboriginal children's sense of identity through the prevention of out-of-home care, reunifying children with their families, ensuring culturally connected placements and enabling the participation of Aboriginal and Torres Strait Islander families and communities in child protection decision making. Despite that, the incidence of Indigenous children in out-of-home care is increasing rapidly and has reached critical levels.

11. The EMRIP notes that many of the concerns and recommendations contained in the concluding observations to Australia of the UN Committee on the Rights of the Child in November 2019 are still of relevance today in the State of Western Australia, including the concerns over the continuing overrepresentation of Aboriginal and Torres Strait Islander children in alternative care, often outside their communities; the different criteria being used

across jurisdictions in making decisions on child removal and placement in care; the inconsistent application of 'risk' when determining placement issues; the lack of culturally appropriate decision making including when assessing risk; the fact that the child protection systems still do not have sufficient human, technical and financial resources and are still unable to provide adequate professional support to children. Furthermore, EMRIP finds that the recommendations regarding the need to invest in measures for children and their families aimed at avoiding the removal of children from their families; to limit removal, when it is deemed necessary, to the shortest time possible; and to ensure that children, their families and communities participate in decision-making in order to guarantee an individualised and community-sensitive approach are still applicable in the context of child removal in Western Australia.

12. The EMRIP agrees with the Special Rapporteur on violence against women that years after the apology to the "stolen generations", Indigenous women and girls continue to carry intergenerational trauma, as a result not only of the past but also remaining laws and policies that keep them in a disadvantaged socioeconomic position, including higher rates of child removals. The Special Rapporteur agreed with the National Family Violence Prevention Legal Services forum that there was an excessive and inappropriately punitive and judgmental approach towards Aboriginal victims/survivors of family violence that blames victims for exposing their children to violence, rather than supporting them to safely care for their children and live free from violence.

13. The EMRIP notes the 2020 "Family Matters" report by the national non-governmental peak body Secretariat of National Aboriginal and Islander Children in Care (SNAICC), which demonstrates that there were a staggering 20,077 Aboriginal and Torres Strait Islander children in out-of-home care at 30 June 2019, representing one in every 16.6 Aboriginal and Torres Strait Islander children in Australia. Aboriginal and Torres Strait Islander children were 9.7 times more likely than non-Indigenous children to be in out-of-home care, an over-representation that has increased consistently over the last 10 years. According to SNAICC, at 30 June 2021 there were 22,297 Aboriginal and Torres Strait Islander children in out-of-home care, including on third-party parental responsibility orders – projected to increase by 54% by 2030. 79% of these children are permanently living away from their birth parents. Aboriginal children were more than 10 times more likely to be in out-of-home care than non-Indigenous children, with rates particularly high in Western Australia where Aboriginal children are 17.5 times more likely to be removed from their families.

14. It has been brought to the attention of the Expert Mechanism that SNAICC has been working with the Noongar Family Safety Wellbeing Council and Aboriginal community members, leaders, Aboriginal Community controlled organisations (ACCOs) and other stakeholders in Western Australia to facilitate community voices to inform the development of a 10-Year Roadmap to reduce the overrepresentation of Aboriginal children in out-of-home care. To help shape the Roadmap, SNAICC held regional community forums in Western Australia from October 2022 – February 2023, and held a central design forum in March 2023. The main issues and concerns coming out of the consultations were, inter alia: Aboriginal communities continue

to suffer from the long-term effects of colonisation and the intergenerational trauma of the Stolen Generations. This trauma is compounded by continued high rates of removal of children from their families. As a result, the community feels that this is creating further Stolen Generations. Furthermore, there are widespread experiences of institutional racial discrimination in government and NGO staff at all levels. Finally, Aboriginal families feel they are being treated differently than non-Aboriginal families in child protection decision-making.

15. The EMRIP notes positive recent initiatives at the national level, such as the new National Agreement on Closing the Gap, signed in 2020 which includes a target to, “by 2031, reduce the rate of over-representation of Aboriginal and Torres Strait Islander children in out-of-home care by 45 per cent.” This target provides a high level of ambition to reduce statutory intervention in the lives of Aboriginal and Torres Strait Islander families that is closely aligned with the goal of the Family Matters campaign to end over-representation in out-of-home care by 2040.

16. The EMRIP notes the launching in December 2021 of a National Indigenous Early Childhood Strategy coordinated by the National Indigenous Australians Agency (NIAA), aiming at supporting Aboriginal and Torres Strait Islander children aged 0-5 years old and their families with a view to provide a more coordinated policy and investment approach across the Commonwealth and with the states and territories.

17. The EMRIP also notes the positive step announced in August 2020 by the Western Australia Minister for Child Protection about funding of \$715,000 for two years to pilot Aboriginal family-led decision-making. The trial will empower Aboriginal families to make decisions about their children in a culturally safe way. The pilot will be led and co-designed by Aboriginal people and will complement changes to the Children and Community Services Act 2004.

18. The EMRIP further notes the 2021 amendments to the Western Australia Children and Community Services Act 2004 that are intended to better protect children from harm as a result of abuse; and to build stronger connections to family, culture and Country for Aboriginal children, in care of the Chief Executive Officer of the Department of Communities, through working more closely with Aboriginal peoples and Aboriginal community controlled organisations to achieve better outcomes for Aboriginal children, families and communities.

19. The EMRIP welcomes the positive initiative of a pilot therapeutic court, Dandjoo-Bidi-ak (together on a path), a specialized court located at Perth’s Children’s Court that provides an opportunity for all participants to ‘have their say’ when determining the best and safest outcome for the child. The friendly and welcoming Court environment is more conducive to achieving a positive outcome for all. The recent decision to extend this pilot is a positive development.

20. Finally, EMRIP welcomes the existence of the Southwest Native Title Settlement (the Settlement) as the largest native title settlement in Australian history, viewed by some as ‘Australia’s first treaty’, negotiated between the Noongar peoples and the Western Australian government. Although not all Noongar peoples voted for the settlement, it will affect an

estimated 30,000 Noongar People and encompass approximately 200,000 square kilometres in the Southwest of Australia.

III. Advice

21. The EMRIP sets out its advice below under four main themes: Self-Determination; Forced assimilation; Discrimination (and the 2021 Amendment); and Removal of children and six related themes of Culture and Assessment of risk; Trauma; Children deprived of a family environment, Out-of-home care facilities, Dandjoo-Bidi-ak Pilot Court, and Aboriginal and Women Legal Services - Indigenous Women.

22. A great variety of other issues raised but not dealt with in detail here include the existence of disproportionate poverty rates between Aboriginal and non-Aboriginal people, the unacceptable disproportionate incarceration rates for Indigenous youth, or gender-based violence among Aboriginal and Torres Strait islander peoples. This advice is not intended to give exhaustive guidance on a child protection framework but to focus on a few broad areas of particular relevance raised by the parties during the Mission.

1. Self Determination

23. The fundamental right of the Declaration is the right to self-determination recognized in article 3: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.” The right to self-determination is manifested in articles 4, 5, 18, 19, 20 and 33 of the Declaration, which expounds on its implementation at the domestic level. Without article 3, none of the other rights can be wholly fulfilled.

24. The pivotal and fundamental right of self-determination should influence, direct and underscore any plan, policy or organisation particularly when considering the wellbeing of Indigenous children. The right to self-determination is the most important right in relation to Indigenous children as “culture is reproduced through children and this magnifies the connection between principles of self-determination and Indigenous children’s cultural care, their wellbeing and their communities’ wellbeing.” Thus, realisation of the right to self-determination is critical for Indigenous Peoples when addressing child welfare. Equally important is the requirement for government departments, such as the Department of Communities responsible for out-of-home care, to support and meaningfully facilitate this right of self-determination for Indigenous Peoples.

25. It is acknowledged that the coalition of Peak Bodies, an alliance of over eighty Indigenous peak bodies formed following discussions of fourteen Aboriginal Community Controlled Organisations (ACCOs), demonstrates important elements of self-determination, especially in terms of their focus on community-level decision-making. EMRIP views community-level decision-making as a positive step that will likely dramatically improve outcomes for Indigenous children and families. However, EMRIP also notes that Peak Bodies and ACCOs are organised as NGOs, not Indigenous Peoples’ representative (i.e. self-government) institutions, and this

structure calls into question how Indigenous issues are represented and advocated more generally. In addition, the reliance on discretionary government funding raises questions of independence and places Peak Bodies at the whim of the Commonwealth government and their inclination towards mainstream rather than Indigenous programs.

26. It is, however, acknowledged that additional support for Peak Bodies will not require legislative change and as a member of Council tasked with overseeing the National Policy on Closing the Gap, the Peak Bodies will have a seat at the table. These are both positive and welcome developments. However, EMRIP is of the view that a seat at the table is only one voice that cannot be considered as meaningful participation in decision making in matters that would affect their rights, as affirmed in article 18 of UNDRIP.

27. This is even more urgent when the Family Matters Report notes that the over-representation in out-of-home care has increased in every state and territory over the last 10 years, with the highest over-representation in 2019 in Western Australia. In addition, the Report notes that nationally, 4,289 Aboriginal and Torres Strait Islander children were admitted to out-of-home care in 2018-19 at a rate of 13 per 1,000 children, which is nearly nine times the rate of entry for non-Indigenous children. This situation of increasing out-of-home care statistics, under the status quo, for Indigenous children, is alarming.

28. Considering the above, although the ACCOs and Peak Bodies demonstrate important community-led components of self-determination, given that this issue is one that impacts directly on children and more widely on the family structure, the central component of communities, EMRIP advises that consideration toward self-governing, Indigenous centred bodies and representative institutions, that provide a broader reach, be considered and supported over time. This is consistent with UNDRIP recognition of the right of Indigenous peoples to their own representative institutions.

29. EMRIP welcomes the Southwest Native Title Settlement framework as a commitment between the WA Government and the Noongar people to a set of principles and priorities aimed at improving the Noongar community development opportunities and potentially, self-government. Consistent with the right of self-determination, EMRIP supports the Southwest Native Title Settlement framework as a positive starting point that, with improved capacity, could potentially lead to enhanced self-determination for the Noongar peoples, over time. As examples from other countries show, Indigenous representative and self-governing institutions provide the strongest basis for self-determination in decision-making and for delivering economic, social and cultural benefits directly to Indigenous Peoples, leading to improved outcomes for children, families and communities.

30. In view of the disappointing results, and a missed opportunity, from the recent referendum on an Indigenous Voice to parliament, together with the discontinuance of the United Nations Declaration on the Rights of Indigenous Peoples Bill in the Senate, it is paramount that the fundamental rights of the Indigenous Peoples are still meaningfully recognised and respected.

31. State government-led child-welfare measures by their nature are inherently colonial. The best long-term avenue to addressing the overrepresentation of Indigenous children in care is to support an approach that is not only community-centric but also grounded in the right of self-determination.

32. EMRIP notes the recent law reforms in WA include recognition of Aboriginal Representative Organisations (ARO) and the future role of designated bodies in Aboriginal child protection decision-making, although it is limited to engagement after the decision to remove an Indigenous child is actually made. In this regard, EMRIP can also refer to good practices in other countries. For instance, in Aotearoa, New Zealand this has been achieved with the introduction of Te Ara Matua. A tribal entity, Ngāti Kahungunu Iwi Incorporated launched Te Ara Mātua, a bespoke iwi-led partnership between a government organisation, Oranga Tamariki and iwi, which assists iwi and local organisations to be more involved in decision-making from the outset when families require intervention and support. In the United States, national legislation, in the form of the Indian Child Welfare Act (1978), provides tribal governments with jurisdiction over child custody matters and encourages transfer of court proceedings to Tribal Courts. In Canada, the federal *Act respecting First Nations, Inuit and Métis children, youth and families*, became law in 2019. The purpose of the Act is threefold, to: “affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services; to set out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children; and contribute to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples.” In February 2024, the Supreme Court of Canada explicitly cited the Declaration and upheld the constitutionality of this Act (2024 SCC 5), which provides a framework for Indigenous governments to assume direct control over child and family services, including passing their own child welfare laws.

2. Forced assimilation

33. The Declaration includes numerous provisions on protection against discriminatory and adverse treatment of Indigenous Peoples on cultural grounds as well as positive measures to support Indigenous Peoples’ cultures. The Declaration unequivocally provides for Indigenous Peoples, including children, and individuals the right not to be subjected to forced assimilation or destruction of their culture (art 8). In addition, that Indigenous peoples have the right to practise and revitalise their cultural traditions and customs and the right to maintain, control, protect and develop their culture (art 31). The corresponding obligation on the State is to take effective measures to recognize and protect the exercise of these rights.

A. Culture, culturally appropriate prevention and intervention and assessment of risk

34. EMRIP recognises the collective element of Indigenous Peoples’ right to culture, noting that “the strong communal dimension of Indigenous Peoples’ cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”

35. EMRIP recognises that 'culture' is at the heart of the West Australian Aboriginal Empowerment Strategy and that 'cultural' appropriate training is now required for Department of Communities staff. In this regard, EMRIP advises that attention should be paid not only to the accountability and review of how this initiative is implemented but how Indigenous languages, a key component of understanding Indigenous culture, is incorporated into the staff training. Similarly, and importantly, consideration should be given whether and how cultural indicators are applied and included into the risk assessment framework. EMRIP considers it would be of concern when a non-Indigenous concept of risk is exclusively applied to a cultural situation that involves Indigenous children.

36. EMRIP understands that the five elements of the Aboriginal child placement principle are prevention; partnership; placement; participation; and connections. However, there are instances when issues of conflict arise, in determining issues of home care placements. EMRIP advises that the application should be applied through a cultural lens rather than through a non-Indigenous lens. The right of the family to look after their own should not be dismissed on the grounds of conflict. From an Indigenous perspective, family and community are central. The Family Matters Report noted that Indigenous children need to grow up safe and cared for in family, community and culture, and connected to their languages and Country, and therefore, dismissing a family member from consideration as a possible placement for a child, due to conflict, is inconsistent with achieving and supporting connection to Country.

B. Trauma

37. As EMRIP noted in its 2016 Study on Right to Health and Indigenous Peoples, with a focus on children and youth, Indigenous Peoples continue to experience intergenerational trauma owing to the removal of children from families and residential schooling. The health impacts of such practices are profound and include mental illness, physical and sexual abuse, self-harm and suicide, and drug or alcohol addiction. It recommended that steps should be taken to preserve the integrity of Indigenous families in accordance with the rights of the child.

38. Indigenous Peoples often experience higher rates of mental health issues, such as depression, anxiety, and post-traumatic stress, due to historical and ongoing discrimination, violence and abuse including loss of cultural identity. These experiences can lead to intergenerational trauma which can include mental health issues across multiple generations. Individual trauma, including that associated with child separation, reverberates across communities and also across generations, as manifest in the Stolen Generations. Recent years have seen the rise of historical trauma to describe the long-term impact of colonisation, cultural suppression, and historical oppression of many Indigenous Peoples. Many mental health issues such as depression, substance abuse and suicide have been identified as connected to the historical colonisation and dispossession of Indigenous peoples, which has resulted in the fragmentation of Indigenous social, cultural, economic and political institutions. The need for systemic reform is critical.

39. EMRIP advises that State institutions, when dealing with matters of intergenerational and transgenerational trauma, particularly those relating to matters connected with child removals, be adequately trained to understand intergenerational trauma, the effect that loss of culture contributes to trauma and the importance of self-determination. EMRIP was informed how Aboriginal communities continue to suffer from the long-term effects of colonisation and the intergenerational trauma of the Stolen Generations. This trauma is compounded by continued high rates of removal of children from their families, poverty, violence against women, and failure of the state to ensure the rights of Indigenous peoples.

3. Discrimination - 2021 Amendment

40. EMRIP has heard the numerous reports on the prevalence of systemic racism against Aboriginal and Torres Strait Islander Peoples, which manifests itself in different ways, ranging from discrimination and structural racism in government agencies, including child protection agencies, to the administration of justice or discrimination in the involvement of non-Aboriginal families versus Aboriginal families in child protection decision making.

41. The 2021 amendments to the Western Australia Children and Community Services Act 2004, that are intended to better protect children and build stronger connections to family, are welcomed. In addition, it is acknowledged that these amendments are to implement the recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse and the 2017 statutory review of the 2004 Act. EMRIP specifically welcomes the recognition of the principle of self-determination within the Statutory Review and highlighting that the key driver to the Department's reforms is to reduce the over representation of Aboriginal children in care. However, EMRIP notes that there is still a need to implement the changes in a way that the best interest of the child is applied in a non-purely formalistic way.

42. The severe impacts of colonisation on child protection matters must be addressed – and require a decolonising approach that will not only assist Aboriginal Peoples to heal and recover from past genocidal practices of assimilationist child removal laws, but also emphasise the key right of self-determination to support, lead and determine, child protection practices today, consistent with their right of self-determination. In Aotearoa, New Zealand, when considering how Oranga Tamariki (the government agency responsible for child protection matters) the Waitangi Tribunal in the He Pāharakeke, he Rito Whakakīkīnga Whāruarua: Oranga Tamariki Urgent Inquiry (Wai 2915, 2021) report, found that several of Oranga Tamariki's practices breached right of self-determination (tino rangatiratanga) to Māori and that the negative outcomes for Māori children in the child protection system were a result of those breaches.

43. EMRIP is concerned that when a child is taken into care, subject to a warrant, the first hearing prior to removal is ex parte and Aboriginal and Torres Strait Islander parents are not given notice of the hearing or a right to attend. At the hearing the Magistrate is only asked to consider if the warrant should be issued or is necessary based on written information provided

to the court by the Department of Communities. There does not seem to be a check on the completeness of this information. If not, this appears to be prejudicial. EMRIP understands that there are instances where the risk to the child is so high that immediate action must be taken without notice, however EMRIP is aware of occasions when the Aboriginal and Torres Strait Islander family's lawyer should be given notice of the hearing and allowed to take part. In addition, if the ex parte decision made in relation to warrants is made on a spontaneous basis then the first hearing after the warrant has been issued should afford an opportunity to argue for the return of the child on an interim basis similar to other jurisdictions such as Victoria. Although the first hearing following removal is not ex parte, EMRIP understands that many Aboriginal and Torres Strait Islander parents have not had sufficient time or emotional space to seek legal advice before the first court date and often the court will adjourn that first hearing to allow time to obtain legal advice. This creates further delays in returning Aboriginal and Torres Strait Islander children.

44. Given that the component of cultural competency is identified as vital to reach better outcomes in this amendment, it is unclear how the Department of Communities ensures that Department of Communities' lawyers are trauma informed and culturally competent with the capacity to understand the impacts of poverty, trauma and the daily experiences of Aboriginal and Torres Strait Islander families. This is required to prevent perceptions and judgments based on bias, perceived deficits and moral failure rather than outcomes as a result of personal and intergenerational poverty, racism and disadvantage. To achieve this, EMRIP suggests a high level of training in these areas so Department of Communities' lawyers have a deeper appreciation for the realities, needs and strengths of Aboriginal and Torres Strait Islander families.

45. EMRIP is concerned that Aboriginal and Torres Strait Islander mothers and families experiencing child removal are not guaranteed a right to legal representation within the legislation or Acts that govern the way the Children's Court or child protection systems operate. EMRIP understands that until recently there have been extremely limited legal assistance options available to Aboriginal and Torres Strait Islander families. Although there are additional services available, resulting in greater access, this has not translated to a guarantee as services have limits across such a large area. Subsequently, for Aboriginal and Torres Strait Islander peoples living in remote or regional Australia, there may be no legal support available (even by phone), but more fundamentally the court house may be operated infrequently and out of the local police station. This immediately discourages and provides an unsafe environment for Aboriginal and Torres Strait Islander peoples attending and taking part in the court proceedings, even if there was a lawyer there to assist them. This is problematic.

46. EMRIP understands that, proceedings in the Children's Court still largely utilise affidavits. This can disadvantage Aboriginal and Torres Strait Islander families, for three reasons. First, to draft and file a technically correct and legally persuasive affidavit, access to a legal representation is pivotal. Second, even if one has a lawyer to assist to complete an affidavit, the process can be traumatic particularly as it often occurs shortly after removal when Aboriginal and Torres Strait Islander families are acutely distressed. This can impact on the ability to fully engage with the process and

provide the experience and wishes of the Aboriginal and Torres Strait Islander families to the court. Third, an affidavit is required to be 'sworn to be true' by certified professionals (lawyers, Justice of the Peace etc). The Aboriginal and Torres Strait Islander family might live in a very remote area and unable to access the technology required to print out the physical affidavit and then access an appropriately qualified person to 'swear' the affidavit. Collectively this raises access to justice issues.

47. In order to meaningfully recognise the principle of self-determination within the Statutory Review and to reduce the over representation of Aboriginal and Torres Strait Islander children in care, a key driver to the Department of Communities' reforms, EMRIP strongly suggests that to achieve these amendments and to protect and support the rights of Aboriginal and Torres Strait Islander women and children, a significant increase in resourcing be provided to Indigenous legal services and women's legal services and, cultural competency become a central pillar for Department of Communities' lawyers and Department of Communities' staff. EMRIP also strongly suggests that legislative consideration be provided to ensure consistency with the fundamental rights within the Declaration, specifically the right of self-determination and the right to culture.

4. Removal of children - Children deprived of a family environment

48. Indigenous children are removed from their families at increasingly high rates in Western Australia. The prolonged impacts of intergenerational trauma from the Stolen Generations and disempowerment continue to inform Aboriginal and Torres Strait Islanders' experiences of child protection interventions. EMRIP was informed that Indigenous children are not heard or consulted in child protection interventions. However, Indigenous children are at a higher risk of removal from their families and in placement in out of home care facilities; away from their communities and countries, where they cannot maintain a connection to family and culture. In addition, Indigenous children are disproportionately represented in the criminal justice system. EMRIP advises that stronger engagement with the Aboriginal and Torres Strait Islander family and close community in decision-making processes around child protection is crucial.

49. In this regard, EMRIP advises that the Aboriginal and Torres Strait Islander Child Placement Principle, which recognises the knowledge and experience of Aboriginal and Torres Strait Islander people to make the best decisions concerning their children and recognises the importance of staying connected to their family, culture and countries, should be fully implemented in all child protection decision making relating to Aboriginal children and families, including through the prevention of out-of-home care. In addition, EMRIP welcomes the Aboriginal Family-Led Decision-Making process, born as a pilot in 2021, while positive as it supports the right to self-determination, should be independently facilitated and long-term funded and not ignored. It should be implemented in partnership with Aboriginal organisations representing the affected communities, in addition to the work of ACCOS.

A. Out of Home Care Facilities

50. EMRIP finds that 'out-of-home care facilities' are devoid of any meaningful desire to understand and incorporate Indigenous orientated art and/or Indigenous role model figures and/or celebration of Indigenous sports and/or any Indigenous recipes and Indigenous cooking opportunities. It is well understood that culturally oriented activities such as art and sports can help reconnect with culture and Country. In addition, positive Indigenous role models can provide and foster a sense of belonging and pride. The lack of any inclination to include an 'Indigenous way of life' for Indigenous children in out of home care facilities does not protect their right to practise and revitalise their cultural traditions and customs and the right to maintain, control, protect and develop their culture. EMRIP found that some home care facilities were cold, grey, unwelcoming and barren, lacking any Indigenous presence, hardly a conducive environment for fostering Indigenous children. In addition, EMRIP understands that Aboriginal organisations are not supported to be an Out of Home care Facility.

B. Dandjoo-Bidi-ak Pilot Court

51. To ensure continuing success of Dandjoo-Bidi-ak EMRIP recommends allocating more resources to (a) support the families, in particular the mother, that attend, (b) provide appropriate information to families to limit any circular conversations that could lead the case back to the general court system, (c) facilitate adequate judicial support and training to enable clear and robust decisions from the court. Given the aim of the court is to provide a culturally safe environment to empower and support Aboriginal families who are in care and protection matters, any obstacles that limit the family participation, in particular the mother, should be addressed.

C. Aboriginal and Women Legal Services - Indigenous Women

52. The wraparound services employed by the Aboriginal Legal Services places the child at the centre. This approach is consistent with an Indigenous approach and also the right that particular attention is required to be paid to children and the State is required to take all steps to guarantee and protect against all forms of violence and discrimination (art 22). In view of this, EMRIP recommends that the work of the Aboriginal Legal Services not only continue but is better resourced to extend their reach. Understanding the important work undertaken by Women Legal Services and Aboriginal Family Legal Services within this area, EMRIP supports continued and increased funding.

IV. Recommendations

1. Indigenous community-level decision-making is a critical step in improved service delivery for Indigenous Peoples and should be supported by the Government of WA. However, consistent with the right of self-determination, EMRIP is also of the view that, in alignment with Articles 3 and 4 of the Declaration, legal jurisdiction over child welfare should

eventually be housed in Indigenous Peoples' own self-governing, representative institutions, whenever possible and appropriate. The Government of WA should work in cooperation with Indigenous Peoples to support both community-level decision-making service delivery models alongside the development and capacity-building of Indigenous Peoples' self-governing, representative institutions, particularly in view of the lost opportunity with the Voice Referendum, and the the discontinuance of the United Nations Declaration on the Rights of Indigenous Peoples bill in the Senate.

2. Recalling the previous recommendation from the United Nations Committee on the Elimination on Racial Discrimination, EMRIP again recommends that an Indigenous Children's Commissioner be established for each State and Territory, in particular in Western Australia. EMRIP notes that a Children's Commissioner of Aboriginal descent is not a substitute for an Indigenous Children's Commissioner, and stresses the need for an Indigenous-specific Commissioner in each State and Territory.
3. Understanding the key role an Indigenous Children's Commissioner plays in monitoring, engaging and supporting the rights for Indigenous children, EMRIP recommends that certain and appropriate recommendations from the Commissioner be binding.
4. Acknowledging the potential to achieve more culturally appropriate and lasting outcomes, EMRIP recommends more resourcing and expansion of Dandjoo-Bidi-ak, Therapeutic Courts model within Western Australia. In addition, EMRIP recommends that more Indigenous judges be appointed as it is understood that this not only creates a certain amount of comfort for Indigenous Peoples but there is an expectation of an implicit cultural understanding.
5. Understanding the importance of how effective prevention can ameliorate the requirement for child removals, EMRIP recommends that more support and funding be applied in preventative stages rather than subsequent stages. Women's refuges and healing programs, culturally appropriate measures, maternal health supports, children and girl's empowerment programs, are all urgently needed.
6. Acknowledging the intention of the Department of Communities to include culture at the centre of, and within, their programs and policies, EMRIP recommends that more positions with decision-making roles are made available for Indigenous Peoples within the Department in all areas to ensure effective implementation.
7. Understanding the importance and impact an out-of-home environment can have on Indigenous children, EMRIP strongly recommends that a much more concerted effort is made to ensure the facilities are Indigenous friendly, not only in surroundings but also in the operation of the facility and forthcoming availability of Indigenous culture, cooking, art, sports, etc is prioritised. The WA State should support Indigenous peoples to develop and run indigenous out of home care as Indigenous peoples are best placed to ensure cultural safety for children in care.

8. EMRIP advises that the age for criminal liability be raised from ten years old and culturally appropriate and accessible legal services be available for Indigenous children. It is noted that this could be achieved with supporting the Dandjoo-Bidi-ak court initiative, supporting Aboriginal Legal Services, Aboriginal Family Legal Services and supporting Women's Legal Services. The effect of colonisation on Indigenous Peoples has created an uneven playing field particularly within the criminal justice system. Given the disproportionate incarceration rates of Indigenous youth and the alarming removal rates for Indigenous children, EMRIP recommends continued and increased resourcing of Aboriginal Legal Services and Women's Legal Services.
9. Given that the UN Declaration on the Rights of Indigenous Peoples captures fundamental rights, such as the right to self-determination (Articles 3, 4) non-discrimination (article 2, 22), the prohibition against forced assimilation (Article 8), removal of people from traditional lands and territories (Articles 7, 10) and a right to culture (Articles 11, 14, 15 and 31) EMRIP recommends that consideration be given to statutory implementation of these rights within relevant child protection legislation.
10. EMRIP supports the development of a national human rights act that references both the Convention on the Rights of the Child and the UN Declaration on the Rights of Indigenous Peoples. EMRIP also encourages states and territories, including Western Australia, to develop similar human rights legislation which include the recognition of Indigenous peoples' cultural rights.
11. More generally, having regard to the experiences in other countries that have convincingly demonstrated that outcomes for Indigenous children and families improve significantly, across the board, when jurisdiction of family/children's law matters is transferred to Indigenous Peoples' self-governing (i.e. representative) institutions, or at minimum, shared with those of the state, EMRIP underscores and recommends that Australia consider national legislation to support Indigenous Peoples' right of self-determination in child and family law matters within the states and territories and also encourages the states and territories to shift their overall approach in child welfare, through both legislation and policy, to one grounded in the right of self-determination of Indigenous Peoples rather than a state-led, service delivery model.
12. EMRIP welcomes, supports and encourages continued national, state and territorial-level work to advance the core elements of the Uluru Statement from the Heart and its commitment to Treaty, Truth and Voice. EMRIP also encourages Australia to pass implementing legislation that recognises the fundamental rights articulated in the United Nations Declaration on the Rights of Indigenous Peoples, including a review of existing laws and policies and the creation of a national action plan. In this regard, EMRIP recalls article 38 of the Declaration which strongly urges that, in consultation and cooperation with Indigenous Peoples, appropriate measures are undertaken, including legislative measures to realise the fundamental rights in the Declaration.

ANNEX I: Terms of Reference

Country Engagement - Australia¹ Terms of Reference²

October 2023

I) Mandate

A. Country engagement mandate

Pursuant to paragraph 2 of Human Rights Council resolution 33/25, the EMRIP should:

- (a) Upon request, assist Member States and/or Indigenous Peoples in identifying the need for and providing technical advice regarding the development of domestic legislation and policies relating to the rights of Indigenous Peoples, as relevant, which may include establishing contacts with other United Nations agencies, funds and programmes;
- (b) Provide Member States, upon their request, with assistance and advice for the implementation of recommendations made at the universal periodic review and by treaty bodies, special procedures or other relevant mechanisms;
- (c) Upon the request of Member States, Indigenous Peoples and/or the private sector, engage and assist them by facilitating dialogue, when agreeable to all parties, in order to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

B. Terms of reference under resolution 33/25

In accordance with the EMRIP's methods of work (A/HRC/36/57, Annex 1), terms of reference should be agreed for every country engagement activity in the light of the mandate of the Expert Mechanism. Modalities of engagement, timelines and the types of activity envisioned, as well as the expected final product, should be prepared by the Expert Mechanism in consultation with the requester(s) and other relevant stakeholders. The terms of reference should also include modalities for the disclosure of information, in agreement with the requester and other stakeholders.

II) Requester

Noongar Family Safety and Wellbeing Council³ (11 July 2018). The Member State agreed with the request for a country engagement mission and is fully cooperating with the EMRIP in its preparations.

III) EMRIP Delegation

Members: Sheryl Lightfoot, Chair and North America member of the EMRIP and Head of Mission and Valmaine Toki, EMRIP member from the Pacific. Belen Rodriguez de Alba, EMRIP Secretariat Team Leader, United Nations Human Rights Office.

IV) Dates of Country Engagement Mission

The EMRIP will undertake a country engagement mission from 1 to 10 October 2023, visiting Perth, Albany, and Geraldton in Western Australia and including EMRIP closed meetings.

V) Purpose

Consistent with the EMRIP's mandate, the Expert Mechanism intends to focus its country engagement mission on:

- i. Increasing awareness of the rights of the Aboriginal and Torres Strait Islander community regarding the removal of Aboriginal and Torres Strait Islander children, as recognized under UN human rights law, including the Declaration.⁴
- ii. Providing advice and guidance to the Aboriginal and Torres Strait Islander community and the Member State on the implementation of the Declaration Articles 3 & 4 (self-determination), Article 2 (non-discrimination), Article 8 (forced assimilation), and Article 10 (removal of people from traditional lands and territories), in relation to the “contemporary removal of Aboriginal children,” as agreed upon by both parties.⁵ The advice will include guidance on implementing the right to self-determination,⁶ transferring jurisdiction over child protection to Aboriginal bodies,⁷ strengthening Indigenous representation in government, confronting discrimination and systemic bias in the child protection system and ensuring a culturally appropriate institutional environment,⁸ addressing the root causes of child protection involvement, such as domestic violence,⁹ reducing the link between out of home care and later incarceration,¹⁰ providing “culturally appropriate early intervention and prevention programs and models,”¹¹ increasing access to “services for Aboriginal children in out of home care with disability and psychosocial needs,”¹² and aligning the Children and Community Services Amendment Act 2021 (Western Australia) with the Declaration.¹³
- iii. The report will build upon, and provide assistance and advice on implementing, recommendations made previously to Australia by the Human Rights and Equal Opportunity Commission, in its 1997 *Bringing Them Home*¹⁴ report, and UN bodies, including the Special Rapporteur on Violence Against Women, its Causes and Consequences, in 2018 ([A/HRC/38/47/Add.1](#)), the Special Rapporteur on the Rights of Indigenous Peoples, in 2017 ([A/HRC/36/46/Add.2](#)), the Committee on the Elimination of Racial Discrimination, in 2017 ([CERD/C/AUS/CO/18-20](#)), and the Committee on the Rights of the Child, in 2019 ([CRC/C/AUS/CO/5-6](#)).

VI) Activities

The country engagement will consist of the following activities:

- Establish and maintain transparent communications between both parties;
- Information gathering to identify existing mechanisms, bodies or frameworks already in place or being established to address the removal of Aboriginal and Torres Strait Islander children from their families and identify the barriers to the implementation of the right to self-determination as it relates to child protection.

- Bilateral and multilateral meetings with stakeholders including (list non exhaustive): Noongar Family Safety and Wellbeing Council members; SNAICC – National Voice for Our Children representatives; Yorganop and Aboriginal community members and affected families; Curtin-I-Care researchers and family advisory; Carrolup Centre for Truth-telling; Yokai Stolen Generations members; the Yorgum and Albany community; Aboriginal Family Legal Services; Aboriginal Legal Service of Western Australia; National Suicide prevention group; Western Australia Aboriginal Engagement Directorate staff; Western Australia Minister for Child Protection, Women’s Interests, Prevention of Family and Domestic Violence, and Community Services, Simone McGurk; the Western Australia Director General of Communities, Mike Rowe; Western Australia Commissioner for Children and Young People, Jacqueline McGowan-Jones; Federal Minister for Indigenous Australians, Linda Burney; Senator for Western Australia Pat Dodson; Australian Human Rights Commission staff; NGOs working on Indigenous issues; and other interested parties;
- Facilitating and promoting dialogue between the Noongar Family Safety and Wellbeing Council and the government of the Member State on the removal of Aboriginal and Torres Strait Islander children and facilitating a consultation between the government and the Aboriginal and Torres Strait Islander community on the Children and Community Services Amendment Act 2021 (Western Australia);
- Provide technical advice to the government of the Member State on the implementation of the Declaration, in relation to the contemporary removal of Aboriginal children;
- At the end of the mission, a multilateral meeting with all stakeholders together to discuss the way forward, including preliminary advice from the EMRIP to be elaborated in a Technical Advisory Note after the mission.
- Undertake follow-up activities as agreed by both parties.

VII) Outputs

Following the mission and within a timeframe agreed upon by both parties, the EMRIP will submit to the Noongar Family Safety and Wellbeing Council and the government of the Member State, an independent Technical Advisory Note consisting of an analytical synopsis of issues raised and explored; any agreements that may have been achieved during or after the mission; and recommendations on how to take the situation forward. This Technical Advisory Note will be shared with the requester and the government of the Member State, both of whom may submit comments.

VIII) Follow-Up and Disclosure:

The EMRIP will indicate on its website that it intends to carry out this mission and include general information on the mission;

The EMRIP will issue a press statement at the end of its country engagement; this statement should neither reveal the substantive issues or the conclusions of the country engagement;

The Technical Advisory Note will be made public on the EMRIP’s webpage, as agreed by both parties;

The EMRIP's annual session in July 2024 will include an Agenda Item on country engagement with a view to offering both parties an opportunity to share their dialogue efforts and/or best practices. All parties to the request should agree to participate in such debates;

The EMRIP could also, upon request, offer an opportunity for bilateral closed meetings between the parties during its annual session;

Upon request, and depending on the EMRIP's assessment of future developments and the availability of resources, the EMRIP may undertake a follow-up mission to the Member State.