

**Submission  
No 42**

## **CHILD PROTECTION AND SOCIAL SERVICES SYSTEM**

**Organisation:** Jumbunna Institute for Indigenous Education & Research, UTS

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Submission to the Committee on  
Children and Young People  
regarding the inquiry into the  
child protection and social  
services system

Jumbunna Institute of Indigenous Education and Research,  
Research Unit

17 December 2020



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**17 December 2020**

To the Committee on Children and Young People

Re: Inquiry into the child protection and social service system

**The Jumbunna Institute's submission to this inquiry is enclosed.**

We appreciate the opportunity to contribute to this inquiry, exploring the effectiveness of the NSW child protection and social services system in responding to vulnerable children and families. We acknowledge the long history of inquiries in this area, and the ongoing advocacy of generations of Aboriginal and Torres Strait Islander people for the right to care for our children, to raise them strong in community and culture. We also acknowledge the disappointment and frustration of our communities as these recommendations remain unimplemented. For this inquiry to succeed in achieving real, lasting change where others have failed, it must commit to delivering structural reform, and change the very nature of the relationship between Parliament and Aboriginal communities.

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,



Distinguished Professor

Larissa Behrendt

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## Background to Inquiry

This inquiry is focused on the effectiveness of the NSW child protection and social services system in responding to vulnerable children and families. The Terms of Reference include elements regarding identification of children and families experiencing crisis, the role of various government agencies and service systems, current intake, assessment and case management frameworks, and the availability, adequacy and investment in prevention and early intervention services.

In our view, these questions have been asked repeatedly and comprehensively answered by numerous previous inquiries and reviews. Child protection systems, and particularly their ongoing disproportionate and harmful impacts on Aboriginal and Torres Strait Islander children, families and communities, has been the subject of significant focus over the last two decades. However, despite this attention, inequities persist and continue to grow.

Rather than recompiling the evidence of previous reviews and inquiries, and the clear advocacy of Aboriginal communities across NSW regarding the long overdue need significant structural reform, this submission focuses on the need to ensure that there is appropriate dialogue and accountability to drive the significant structural reforms needed to address the disproportionate and harmful impact of the child protection system in the lives of Aboriginal children, families and communities.

We encourage the Committee on Children and Young People ('the Committee') to review the findings and recommendations of previous recent reports, and particularly the submissions, recommendations, position papers and public comments of Aboriginal people, community groups, organisations and peak bodies. This includes submissions to and findings and recommendations of:

- *Family is Culture Review Report: Independent Review of Aboriginal Children and Young People in OOHC* (2019), chaired by Prof Megan Davis
- *Bringing Them Home Report* (1997) and subsequent related commentary and publications from Aboriginal communities
- Legislative Council's General Purpose Standing Committee No.2 *Child Protection* inquiry report
- *Independent Review of Out of Home Care in New South Wales: Final Report* completed by Mr David Tune AO PSM
- *Transferring out-of-home care to non-government organisations: Performance audit report for the Department of Family and Community Services* (2015) completed by the NSW Auditor-General
- *Their Futures Matter Performance Audit* (2020) completed by the NSW Auditor-General

Other processes, such as the Their Futures Matter *Moving the system from crisis to early help: connecting children, young people and families to the right support at the right time: Access System Redesign discussion paper* in 2019 explored similar themes to those outlined in the Terms of Reference. While NSW Auditor-General's *Their Futures Matter Performance Audit* (2020) outlines that this initiative did not move forward, and it is unclear if there is any further public reporting regarding this consultation process, exploring any submissions by Aboriginal community stakeholders to this and other review and consultation processes, in partnership with Aboriginal communities, may further contribute to the current inquiry. Through their contributions to these processes, and other public positions and advocacy, Aboriginal stakeholders have consistently offered alternative child protection systems and practices to improve outcomes for Aboriginal children and families.

## Inadequate Government Responses to Past Reviews

There is then considerable evidence available to the Committee already regarding the failures of contemporary child protection systems, and their disproportionate and harmful impacts on Aboriginal children, families and communities. In NSW alone, the government has undertaken repeated reviews just in the last handful of years; the 2015 'Tune Report' – an independent review of out-of-home care, Legislative Council reports into Reparations for the Stolen Generations in 2016 and the child protection system in 2017, as well as the independent review of Aboriginal children and young people in out-of-home care, the Family is Culture report, released in 2019. These have been complemented by reports from other accountability processes, including the NSW Ombudsman's Office and the NSW Office of the Auditor General. Other reviews have touched on similar issues, including the ongoing inquiry into First Nations deaths in custody, noting the care-criminalisation pathway and the way that the existing child protection system contributes to the over-incarceration of Aboriginal people in juvenile and adult prisons. In addition, there have been numerous consultation processes and discussion papers, inviting feedback from stakeholders towards a more effective approach to safeguarding the safety, welfare and wellbeing of Aboriginal children and young people. Aboriginal communities have participated in each of these processes, desperately hopeful for change.

But there has been no meaningful structural change.

There has also been no shortage of rhetoric, from politicians, system administrators and practice leaders about their remorse over *past* failures, their concern for Aboriginal children and families, and their commitment to new ways of working. There has been acknowledgement of the enduring harms of removals, and promises not to repeat past mistakes, grounded in a commitment to Aboriginal self-determination and the right of all Aboriginal children to their family and their culture.

And still, there has been no meaningful change to these systems, who administers them, or their accountability to Aboriginal communities.

The above reviews all emphasised the failures of contemporary child protection frameworks, particularly for Aboriginal children and young people, their families, and communities. The Tune Report's first paragraph outlines this challenge clearly:

*"This independent review of out of home care (OOHC) has concluded that, overall, the NSW system is ineffective and unsustainable. Despite numerous reports and significant increased government expenditure, over a long period of time, the number of children and young people in OOHC has doubled over the past ten years, and continues to increase. Moreover, the system is failing to improve long-term outcomes for children and to arrest the devastating cycles of intergenerational abuse and neglect. Outcomes are particularly poor for Aboriginal children, young people, and families."*<sup>1</sup>

The *Family is Culture* report likewise notes the "well-trodden reform landscape that is littered with comprehensive and often unimplemented recommendations for reform."<sup>2</sup> Prof Davis acknowledged too the cynicism and frustration within Aboriginal communities as a result of this cycle review, recommendations, but no meaningful reform – a 'can-kicking exercise' that with reports gathering dust on a shelf. Indeed, these reports are now an embarrassing library of the failure of successive governments, compiling a shameful history of our inaction to do what we know is necessary to address these challenges and do better for children and young people and their families.

Among these repeated recommendations is the need for greater recognition of the principle of self-determination, greater investment in prevention, early intervention, and families supports, and compliance with the Aboriginal and Torres Strait Islander Child Placement Principles, understood as five inter-related elements of *prevention, partnership, placement, participation* and *connection* is been recommended.

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<sup>1</sup> David Tune AO PSM, *Independent Review of Out of Home Care in New South Wales – Final Report*, page 3.

<sup>2</sup> Megan Davis, *Family is Culture – Independent Review of Aboriginal Children and Young People in OOHC*, (2019) page 99.

A key recommendation of the 1997 *Bringing Them Home* report outlined the importance of self-determination in contemporary child protection systems. It encouraged governments to negotiate with Aboriginal communities regarding the measures best suited to the needs of their children and families, providing adequate investment in Aboriginal communities to support families and prevent the removal of Aboriginal children. This included the possibility of the transfer of legal jurisdiction in care and protection matters to Aboriginal communities themselves. However, the recent *Family is Culture* report noted that “the right to self-determination is not currently applied in the Aboriginal child protection system in NSW”.<sup>3</sup> This is despite more than 20 years of advocacy since *Bringing Them Home*, existing legislation that notes 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 possible”<sup>4</sup>, and numerous subsequent reviews echoing this call.

Similarly, despite elements of the Aboriginal and Torres Strait Islander Child Placement Principles being reflected in legislation, policy and practice, there remains widespread concerns about compliance. The *Family is Culture* report notes that “the Review’s file reviews revealed that in many cases, the four elements of the ACPP discussed in this part – partnership, participation, placement and connection – were ignored in their entirety in casework practice.”<sup>5</sup> Reinforcing the point about government failure to respond to the clear recommendations of various reviews, the *Family is Culture* report noted its disappointment in the absence of clear policy guidance regarding the intent, importance, implementation and monitoring of the Aboriginal and Torres Strait Islander Child Placement Principle, “particularly in light of the fact that over 20 years ago the Wood Report noted that ‘clear guidelines need to be developed and implemented to assist caseworkers to consistently and meaningfully apply the Aboriginal Placement Principles’”.<sup>6</sup>

Investment in family support programs similarly remains inadequate, representing only 13.4% of total expenditure in 2018/19.<sup>7</sup> Worryingly, this proportion has fallen from 18.1% in 2013/14, despite commitments to prioritise prevention and early intervention. Little of this is directed to Aboriginal communities through Aboriginal organisations, or towards approaches determined by Aboriginal communities themselves and tailored to their social and cultural context. Rather, governments persist with the imposition of international models that have not demonstrated effectiveness with Aboriginal communities, and where Aboriginal communities have little involvement in selecting which programs will be funded. A recent report by the NSW Auditor-General noted the “unintended impacts” of the most recent international programs, Multi-systemic Therapy for Child Abuse and Neglect, and Functional Family Therapy Child Welfare, that affected uptake and engagement, and therefore outcomes for, Aboriginal families.<sup>8</sup> While these impacts may have been unintended, they were not unforeseen. Aboriginal community organisations and peak bodies raised these very concerns, calling for investment in Aboriginal community-led solutions.

In the face of this inaction, Aboriginal children and young people continue to be disproportionately removed from their families by statutory child protection system. In 2018/19, 40% of all children in out-of-home care were Aboriginal children. Further, while Aboriginal children are over-represented at every point of the child protection system, this over-representation rises markedly across the continuum of intervention – Aboriginal children were over 5 times more likely to be subject to a notification, 7 times more likely to be the subject of a substantiation, and almost 10 times more likely to be in out-of-home care.<sup>9</sup> As intervention becomes more intrusive and intensive, Aboriginal children are increasingly affected. These worsening statistics have been met by more inquiries, but little commitment to meaningful structural change.

Most recently, the *Family is Culture* report focused on overcoming the over-representation of Aboriginal children in out-of-home care. The Review found a system had lost focus on

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<sup>3</sup> Davis, above n 2, 83

<sup>4</sup> Section 11, *Children and Young Persons (Care and Protection) Act 1998* (NSW)

<sup>5</sup> Davis, above n 2, 254

<sup>6</sup> Davis, above n 2, 255.

<sup>7</sup> Productivity Commission, Australian Government, *Report on Government Services – Child Protection Services*. (2020). See Table 16A.23

<sup>8</sup> NSW Auditor-General, *Their Futures Matter: Performance Audit*. (2020), Page. 30

<sup>9</sup> Productivity Commission, above n 7, See Tables 16A.1 and 16A.2

delivering on the spirit and intent of the Aboriginal Child Placement Principles, of working to keep Aboriginal children connected to their family, community, Country and culture. It found widespread non-compliance with legislation, policy and practice initiatives, and noted instances of children being removed from their family without adequate justification, Aboriginal family members being overlooked to care for children, and misleading information being presented to the Children's Court. The review noted too the "historical continuity" of contemporary practices – the use of police in removals, the removals of babies from hospitals, the setting of unrealistic goals in order for Aboriginal children to be restored to their families.

This historic continuity is perpetuated by the continued use of ill-suited assessment tools and decision making frameworks that have not been adequately validated by and for Aboriginal communities. It is perpetuated by the continued imposition of family support models that are not tailored to Aboriginal communities, have no evidence of their effectiveness with Aboriginal communities, and are selected without adequate consultation with the very communities they are intended to serve. It is perpetuated by placing non-Indigenous systems and processes to stand in judgement of Aboriginal children, families and communities, rather than recognising the right of Aboriginal peoples to administer our own systems and processes, aligned to our values, perspectives and the aspirations we have for our children.

The review also noted positive practices and opportunities to build on the strengths of Aboriginal communities. It noted too the recent significant reductions in the number of Aboriginal children entering out-of-home care, however noted that despite these apparent gains, the trends nevertheless raise "significant concerns around the increasingly disproportionate representation of Aboriginal children in the system."<sup>10</sup>

Through its recommendations, the Family is Culture review provided a clear roadmap for reform. It included two key areas for structural reform – greater recognition of the principle of self-determination, and the urgent need for effective public accountability and oversight. The review noted that, implemented well, these two areas of reform alone would significantly contribute to addressing the over-representation of Aboriginal children and young people in out-of-home care. It complemented these areas with further recommendations to strengthen access to community-based family supports, access to advocacy, and other legislative safeguards.

If Aboriginal communities felt hopeful for change given the findings and recommendations of the Family is Culture review, the government's response to the review has been predictably disappointing. Rather than grappling with these key issues as the lynchpins for broader reforms, the Government's initial response offered significantly diminished and arguably superficial proposals regarding public accountability and oversight, avoiding specifically those recommendations to increase scrutiny of the exercise of the government's substantial powers to intervene in and dismember families, and ignored the review's discussion of self-determination.<sup>11</sup> As such, this response has only served to reinforce an existing government-led reform agenda. It has included little commitment to meaningful structural change in response to the damning findings of the review. Aboriginal communities were unfortunately justified in their cynicism.

This cynicism was no doubt further compounded by the government's effort to frame the findings and recommendations of the Family is Culture review as historic, pointing to the apparent success of government-led reforms in reducing the number of children, including Aboriginal children, entering out-of-home care. However, as noted above, these trends were considered by the review, which noted that despite the reduction, there was nevertheless growing over-representation of Aboriginal children in the system. Further, the cause of this reduction and what it means for Aboriginal children and families has not been adequately explained. While the government points to reforms and initiatives including the permanency support program, Aboriginal Case Management Policy, and international models of intensive family supports,<sup>12</sup> these programs all commenced after the reduction was first observed, and at best can only offer only a partial explanation. What is clear is that the government's approach continues to disproportionately remove Aboriginal children from their families, and the

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<sup>10</sup> Davis, above n 2, 42

<sup>11</sup> NSW Government *NSW Government response to the Family is Culture Review Report* (2020)

<[https://www.facs.nsw.gov.au/\\_data/assets/pdf\\_file/0005/784517/NSW-Government-Response-to-FIC.pdf](https://www.facs.nsw.gov.au/_data/assets/pdf_file/0005/784517/NSW-Government-Response-to-FIC.pdf)>

<sup>12</sup> NSW Department of Communities and Justice, 'Family is Culture report is released' (Media Release, 7 November 2019)

<<https://www.dcj.nsw.gov.au/news-and-media/media-releases/family-is-culture-report-released>>



proportion of Aboriginal children in removals and in the out-of-home care population continues to rise.

A recent update by the Department of Communities and Justice regarding the government's progress on the Family is Culture reforms clearly further reinforces a government-led approach.<sup>13</sup> However, given that self-determination was identified as a key foundation of reform by *Family is Culture*, it seems a critical principle to guide the response to the review's recommendations, and all future reform efforts to achieve a better child protection and social services system for Aboriginal children and families. Indeed, the Progress Update notes a commitment to self-determination, including "Aboriginal Peoples' inherent right to self-determination" as a guiding principle in implementing the Family is Culture recommendations. Despite this apparent commitment, it is difficult to see how Aboriginal communities have been engaged and empowered to shape the response. While there is a commitment to now consult with Aboriginal communities, many significant decisions have already been made about numerous recommendations.

This is most clearly demonstrated with respect to the Review's recommendations regarding the establishment of an independent, empowered Child Protection Commission, with an Aboriginal commissioner and reference group appointed in consultation with community. The government has decided that these recommendations would best be achieved by appointing an Aboriginal Deputy Guardian, forming the Aboriginal Knowledge Circle with membership selected by the Minister, and through the *Children's Guardian Act 2019*, which imperfectly reflects the recommended functions of the proposed Child Protection Commission. Aboriginal communities did not freely choose any of these responses, and have in fact been critical of these initiatives as not going far enough, calling instead for greater adherence to the Review's recommendations. Rather than openly engaging with Aboriginal communities when the Review was first released, in the true spirit of partnership, the government's response raises concerns for communities about an approach that instead appears to retro-fit the Family is Culture recommendations into a pre-existing, government-led reform agenda, without adequate prior engagement with Aboriginal communities, or the opportunity for significant structural and legislative change towards a broader Aboriginal child and family framework that is truly grounded in the concept of self-determination.

While a key recommendation of the review was to establish an agreed position on the concept of self-determination, the government's response links this to the Aboriginal Case Management Policy. It does this despite the Aboriginal Case Management Policy being considered by the Review, and specifically criticised by the review, for not going far enough by merely "valuing" self-determination.<sup>14</sup> Nevertheless, the definition noted in the Policy outlines a more active role than currently afforded to Aboriginal communities through the reform process:

*"Upholding Aboriginal self-determination, the collective right of communities to freely pursue their economic, social and cultural development, and to develop and implement their own processes, services, supports and frameworks that sit around Aboriginal children and families."*<sup>15</sup>

Other elements, such as the decision to defer recommended legislative amendments for subsequent review commencing in 2024, have also been criticised by Aboriginal organisations as not adequately responding to the needs of Aboriginal children, families and communities. While the government outlines an approach by which "implementation of the Family is Culture recommendations will be led through a partnership approach with Aboriginal communities to ensure Aboriginal voices *inform* development and design"<sup>16</sup> (emphasis added), in the context of this already limited scope and frame as determined by government, and intent to deliver through internal DCJ mechanisms, it is difficult to see how this approach will rise above the inadequate consultation and participation paradigm criticised by the Family is Culture report.

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<sup>13</sup> NSW Government *Family is Culture Progress Report, 25 November 2020* (2020)

<sup>14</sup> Davis, above n 2, 85

<sup>15</sup> NSW Government, *Aboriginal Case Management Policy: Strengthening Aboriginal families, delivering outcomes for Aboriginal children and young people*, (2018), page 4.

<sup>16</sup> NSW Government, above n 13, 5

## Addressing the Cycle of Inaction – New Dialogue for Change

Despite the over-representation of Aboriginal children across the child protection system, and commitments to self-determination and partnership, the voices of Aboriginal communities are routinely marginalised. The NSW Auditor-General's Performance Audit of the Their Futures Matter reforms identified the lack of Aboriginal representation in governance and engagement with community expertise as a key weakness of the reform process, as well as the failure to sufficiently orient the reforms to the needs for Aboriginal children and families.<sup>17</sup> Despite the 'Tune Review' recommending a mechanism for specialist Aboriginal advice to guide reforms, no such mechanism was ever established.<sup>18</sup> Similarly, legislative reforms undertaken in 2018 were criticised by Aboriginal communities, noting in particular the failure to adequately engage with Aboriginal communities regarding the legislative changes and additional safeguards required to deliver better outcomes for Aboriginal children and families. As noted above, this pattern has again been repeated in the Family is Culture review, with only a belated attempt at "partnership" after key decisions have already been made, and key reforms already underway, significantly limiting the scope of community involvement and the opportunity for Aboriginal communities to exercise their right to self-determination.

The Family is Culture review itself noted that "the state has adopted many rituals of listening to Aboriginal peoples", from government advisory committees, to glossy brochures and policies espousing 'self-determination' and Reconciliation Action plans, but it does not often 'hear' what Aboriginal people are saying."<sup>19</sup> Rather than reflecting on the wisdom of this critique, the government's response continues to characterise the sort of ritual that the Review identified in various reviews and reform processes that preceded it.

In a recent analysis of the government's response to the Family is Culture review<sup>20</sup>, we considered the conceptual lens of legitimacy – the right of the state to exercise power, such as through policing and child protection systems.<sup>21</sup> The legitimate exercise of such power requires that it is done in accordance with defined rules which reflect the shared beliefs and values of the community, and with their collective consent.<sup>22</sup> While there is some debate regarding issues of legitimacy and effectiveness, it has been argued that these two factors are inter-dependent – for the exercise of power to be seen as legitimate, it must be perceived as being exercised effectively, and to the benefit of the community, in a way that justifies this use of power.<sup>23</sup>

It is not a new or surprising position that the experience of Aboriginal communities of child protection systems is of the illegitimate exercise of state power. Through this lens, the Review's recommendations regarding self-determination and public accountability aim to resolve the issues of legitimacy, by promoting the establishment of systems and processes designed and administered by, and accountable to, Aboriginal peoples. In contrast, the government's response has focused on those recommendations and actions that might improve the effectiveness of government services, but have ignored those key structural forms needed to build legitimacy and trust. However, the absence of legitimacy is likely to continuously undermine this quest for effectiveness.

Despite the reviews and the rhetoric, the apologies and assurances, the glossy brochures and commitments to change, the child protection system overseen by the NSW Parliament continues to inflict harm on Aboriginal children and families. While the names of the institutions that exercise control over the lives of Aboriginal children and families may have changed, the systems and accountabilities by which these powers continue to be exercised have not. Ultimately, the child protection system remain grounded in a dated colonial philosophy that assumes non-Indigenous people know what is best for Aboriginal people, and particularly

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<sup>17</sup> NSW Auditor-General, above n 8, 30

<sup>18</sup> NSW Auditor-General, above n 8

<sup>19</sup> Davis, above n 2, page XIII

<sup>20</sup> Paul Gray and Terri Libesman, 'The NSW Government's response to Family is Culture entrenches failings in child protection for Aboriginal peoples' (in press), *Indigenous Law Bulletin*

<sup>21</sup> Len Cook, 'Evidence, accountability and legitimacy: The oversight of child welfare services', (2020) *Statistical Journal of the IAOS*, Vol. 36, 365-373.

<sup>22</sup> Justice Tankebe, 'Viewing things differently: the dimensions of public perceptions of police legitimacy', (2013) *Criminology*, Vol. 51(1), 103-135

<sup>23</sup> Tankebe, above n 21

Aboriginal children, and have a sombre responsibility to intervene and rescue our children from us.

We know that this 'benevolent' intervention is inherently harmful to the children and young people it 'saves', and that these harms echo through communities, and across generations. We know that just and effective child and family systems for Indigenous peoples must reflect core principles, chiefly that they are based on the principle of self-determination and reflect our cultural perspectives, healing our families and communities, and supporting our children to thrive through holistic, culturally based approaches determined and administered by Indigenous peoples themselves. The Family Matters Campaign outlines four key building blocks<sup>24</sup>; access to quality, culturally safe universal and targeted child and family services, that Aboriginal people and organisations participate in, and have control over, decisions that affect their children, that laws, policies and practices are culturally safe and responsive, and that governments and services are accountable to Aboriginal people. Similarly, the Touchstones of Hope model, developed by and for First Nations communities in North America, outlines principles of self-determination, culture and language, holistic approaches, structural interventions and non-discrimination in addressing the persistent injustice and trauma inflicted by colonial child protection systems.<sup>25</sup> A recent review, *Trauma, Child Development, Healing and Resilience: A review of literature with focus on Indigenous peoples and communities*, likewise emphasised the enduring impacts of colonisation and the importance of family and community relationship, holistic, culturally grounded supports in healing, noting three conditions for healing and resilience: "reclaiming an interconnected relationships-based worldview and legal tradition; reconciliation of damaged relationships; and recovering the power to respectfully self-determine."<sup>26</sup>

In NSW, the Grandmother's Against Removals movement have developed guiding principles to increase and enhance the involvement of Aboriginal families and communities in child protection decision making.<sup>27</sup> AbSec – NSW Child, Family and Community Peak Aboriginal Corporation has outlined a comprehensive framework to guide the development of Aboriginal community-led holistic child and family supports, including an over-arching public health framework<sup>28</sup>, a developing Aboriginal commissioning approach<sup>29</sup>, complementary guidance regarding data processes for monitoring and continuous improvement of impact,<sup>30</sup> and an integrated, culturally-embedded and prevention-focused case management framework.<sup>31</sup> These frameworks reflect principles of self-determination, the critical role of family and community in development and supporting Aboriginal children to thrive, and the importance of culture in promoting resilience and improving outcomes for Aboriginal children and young people, their families, and communities.

Aboriginal communities have the solutions. We know what our children need to thrive. The solutions proposed by Aboriginal communities are grounded both human rights frameworks, including the Convention on the Rights of the Child and the Declaration on the Rights of Indigenous Peoples, and evidence. In contrast, it seems that the historic and contemporary evidence, including those outlined in the reviews and reports noted above, suggests that existing non-Indigenous (colonial) child protection systems are incapable of safeguarding the safety, welfare and wellbeing of Aboriginal children – they are structurally and systemically unable to meet the needs of our children, or heal our families and communities. In closing her

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<sup>24</sup> SNAICC – National Voice for our Children, *The Family Matters Roadmap*, (2016), see < [TheFamilyMattersRoadmap.pdf](#)>

<sup>25</sup> Cindy Blackstock, Terry Cross, John George, Ivan Brown, and Jocelyn Formsma, *Reconciliation in Child Welfare: Touchstones of Hope for Indigenous Children, Youth and Families*. (2006) First Nations Child and Family Caring Society of Canada / National Indian Child Welfare Association

<sup>26</sup> Patti LaBoucane-Benson, Nicole Sherren, and Deanna Yerichuk, *Trauma, Children Development, Healing and Resilience: A review of literature with focus on Indigenous peoples and communities*. (2017) PolicyWise for Children and Families. Edmonton, Alberta.

<sup>27</sup> Grandmothers Against Removals *Guiding Principles for strengthening the participation of local Aboriginal community in child protection decision making* (2015), see < [Download Grandmothers Against Removal – Guiding principles - PDF File \(nsw.gov.au\)](#)>

<sup>28</sup> AbSec, *Achieving a Holistic Aboriginal Child and Family Service System for NSW* (2016); AbSec, *Aboriginal Community Response: Communities for kids*, (2017); AbSec, *Our Families, our way: Strengthening Aboriginal families so their children can thrive*, (2017)

<sup>29</sup> AbSec, *An Aboriginal Commissioning Approach to Aboriginal child and family services in NSW: A conceptual design*, (2018)

<sup>30</sup> AbSec, *Data processes for Aboriginal organisations: a discussion paper*, (2020)

<sup>31</sup> NSW Government, above n 15

foreword of the Family is Culture report, Prof Davis echoed a key message of the Uluru Statement from the Heart:

*“When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.”<sup>32</sup>*

Through countless reviews, the problems of contemporary child protection systems have been repeatedly diagnosed. The necessary structural reforms have been clearly prescribed. Aboriginal communities have been consistent in their view of the solutions, and their commitment to engage with government processes towards achieving a more responsive and effective child and family system that supports, rather than severs, families.

The failure to enact meaningful change then is not a matter of being unclear of the issues, or what to do about them, or the engagement of Aboriginal people, but rather a failure of government to turn recommendations and rhetoric to action. It is this failure of political will, and the performative nature of reviews and responses without action or accountability that fuels the cynicism and frustration of Aboriginal communities. Our communities rightly ask when these systems, and those that administer and oversee them, will finally take responsibility for the ongoing harm they inflict, and actually respond to the mountains of evidence, rather than simply adding to them through further reviews. That is the challenge that must be confronted and overcome by this inquiry.

Drawing from state and national developments, we argue that a new approach to the politics of child protection is needed. In the Chair’s foreword to the Parliamentary Inquiry into Child Protection, the Hon. Greg Donnelly MLC reflected on the “manifest failure of politics and the bureaucracy to deal with the issue of child protection in New South Wales”, imploring politicians to work eschew the “political gamesmanship” and work more collaboratively in the interests of children and young people.<sup>33</sup>

In this spirit, and reflecting the core principle of self-determination, collaborative efforts to improve child protections and social service systems in the interests of Aboriginal children and families must include, and even be led by, Aboriginal community representatives. This mode of negotiation between Aboriginal representatives, selected through community governance processes, is a cornerstone of the *National Agreement on Closing the Gap*, which for the first time includes a child protection target; to reduce the over-representation of Aboriginal and Torres Strait Islander children in statutory out of home care by 45% by 2031.<sup>34</sup> Achieving this will require our shared attention and effort across subsequent parliaments and governments.

Establishing these processes for negotiation between Aboriginal communities and government should be directed towards driving the structural reforms identified across numerous reviews and inquiries, and overseeing efforts to improve outcomes for Aboriginal children and families. This should include a clear and resourced strategy for implementing the reforms provided through the *Family is Culture* review, prioritising in particular the key structural reforms of recognition for Aboriginal self-determination, and strengthened mechanisms for public accountability and oversight, including the establishment of an independent Child Protection Commission, working with Aboriginal stakeholders to appoint an Aboriginal Commissioner and Aboriginal Advisory Body.

Investment in Aboriginal community-led prevention, family preservation and restoration services, as well as advocacy supports, must also be prioritised. The key legislative safeguards identified by the review should also be urgently progressed by this parliament in partnership with Aboriginal community stakeholders and peak bodies, rather than delaying as proposed in the government’s response. Failing to act with urgency will only mean thousands more Aboriginal children and families may be adversely affected by known weaknesses in our child protection systems and legislative framework. Such neglect of our responsibility to children and young people cannot be accepted.

The inequality that characterises and is perpetuated by the NSW child protection and social services system through its disproportionate intervention in the lives of Aboriginal children and

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<sup>32</sup> Davis, above n 2, page XVIII

<sup>33</sup> NSW Legislative Council General Purpose Standing Committee No. 2, *Child Protection*, (2017)

<sup>34</sup> Coalition of Aboriginal and Torres Strait Islander Peak Organisations, and Australian Governments, *National Agreement on Closing the Gap*, (2020), see < <https://www.closingthegap.gov.au/sites/default/files/files/national-agreement-ctg.pdf>>

families must be urgently addressed. Aboriginal communities remain frustrated and fatigued at the cycle of reviews and inaction, without accountability. Children and families, and the communities that support them, continue to struggle against a system that fails to uphold their rights or safeguard their interests, without meaningful mechanisms for recourse in the case of breaches of legislation, policy and practice.

In the eyes of Aboriginal communities, this is not a small matter of refining and improving established systems to make them more effective in how they make decisions about, and intervene in the lives of, Aboriginal children and families. Rather, government's must recognise that current systems and frameworks, built on the foundations of assimilationist approaches that were designed to separate Aboriginal children from their families, communities and culture, cannot be repurposed to support and preserve our families. The disproportionate intervention in Aboriginal families of historic and contemporary systems is not an unintended flaw, but a deliberate feature. To demonstrate different values and achieve different outcomes, systems must be redesigned with those values and outcomes in mind. They must be reimagined, centring Aboriginal children, respecting the critical role of their families in their lifelong wellbeing, and empowering Aboriginal communities to develop and deliver the services and supports our families need to heal so that our children will flourish.

## Moving Forward

Ending this inequality requires comprehensive structural reform, grounded in Aboriginal self-determination, establishing systems that address the underlying causes of involvement in child protection systems, as well as improving the responsiveness of services and supports to the needs of Aboriginal children and families. Numerous inquiries and reviews spanning more than two decades, including a handful in just the last few years, have outlined this need for structural change. Most recently, the *Family is Culture* review has provided a clear and comprehensive roadmap for reform. Implementing its recommendations, in partnership with Aboriginal communities, must be prioritised, starting with the structural foundations of self-determination and public accountability.

Sadly, the cycle of reviews and inquiries arguably form a part of the 'ritual' of listening to Aboriginal people and communities. The evidence of past inquiries and reviews though outlines how seldom our voices are genuinely heard in the reforms that are enacted in response. Reports are produced, recommendations are made, there is a response from government, but the key structural challenges remain unchanged. There is no meaningful accountability for this inaction. The disproportionate intervention of the state in the lives of Aboriginal children and families continues to grow.

The *Family is Culture* is the most recent example of a comprehensive review into the over-representation of Aboriginal children in out-of-home care. It provides a clear roadmap for reform. The key challenge that faces us is to address the "manifest failure of politics and bureaucracy" to make the necessary changes to transform the system. The government's response to the findings and recommendations of the *Family is Culture* review further reinforced the cynicism of Aboriginal communities that there is not the political will to address this critical human rights issue. In considering the review's recommendations, the government centred non-Indigenous processes and governance, failing to engage Aboriginal community representatives, including those involved in the review process and those that called for the review in the first place. The response, both in how it was developed, and in its content, has continued to diminish Aboriginal peoples' right to self-determination, contrary to the established evidence, has failed to substantially strengthen mechanisms for transparency and accountability, and has failed to commit the necessary resources to implementing the review's reforms.

**Recommendation 1:** Commit to the full, resourced implementation of the *Family Is Culture* recommendations, in genuine partnership with Aboriginal communities, their organisations and peak bodies, with particular focus on the key structural reforms of self-determination, and accountability and oversight, as well as greater access to Aboriginal community-based family supports and advocacy services.

**Recommendation 2:** That legislative changes to strengthen safeguards for Aboriginal children and families recommended by the *Family is Culture* review be

prioritised for immediate action, in partnership with Aboriginal communities, their organisations and peak bodies.

**Recommendation 3:** That the government reforms existing systems to enable Aboriginal community-controlled approaches to child protection and social services system design and implementation, consistent with the principle of self-determination, through an Aboriginal community-led commissioning framework, with proportionate investment across a public health framework.

Overcoming this cycle of inaction or piecemeal response in the face of clear and consistent recommendations across multiple reviews requires changes to the governance and administration of the system and its relationship with Aboriginal children, families and communities. It requires establishing mechanisms for ongoing dialogue between Aboriginal communities, their organisations and peak bodies to drive the reform agenda, with a commitment to fundamental reforms that enable local communities to determine the systems and supports their children and families need, and provides adequate and equitable needs-based resourcing to deliver Aboriginal community-led solutions.

The Family is Culture review included a clear recommendation for the establishment of an independent, empowered Child Protection Commission, as a “one-stop-shop’ for oversight and monitoring of the child protection system in NSW”<sup>35</sup>. This was recommended to include at least one Aboriginal Commissioner, and an Aboriginal Advisory Body, appointed in consultation with the Aboriginal community. In reflecting on the recommended functions of the Commission, the Review’s broader conversation regarding transparency of such bodies, including reporting to parliament, and the importance of Aboriginal communities shaping the membership of the Aboriginal Advisory Body that works alongside the commissioner, it appears likely that the full and faithful implementation of this recommendation would have contributed to shifting the relationship between Aboriginal communities and government, and change the conversation about systems and practice reform for Aboriginal children, families and communities. This would likely align with other initiatives, such as the development of Aboriginal Community Controlled Mechanisms as part of the Aboriginal Case Management Policy, towards a more transparent dialogue about systemic change. Such principles are also reflected in the National Agreement on Closing the Gap, and the Uluru Statement, which both emphasise the importance of a new relationship and dialogue about systemic change.

**Recommendation 4:** That the government commit to the establishment, in genuine partnership with Aboriginal communities, of an Independent Child Protection Commission, and prioritise this and other recommendations from *Family is Culture* to strengthen the transparency, accountability and oversight of child protection systems, and related services to address the over-representation of Aboriginal children and families across the child protection system.

Beyond the commitment to establishing the Child Protection Commission, and community involvement in the appointment of an Aboriginal Advisory, there are other opportunities to change the context of dialogue between Aboriginal communities and government. Given the cynicism and fatigue Aboriginal communities have regarding inquiries and reviews, it is critical that this opportunity is taken to disrupt ‘business as usual’. Achieving different outcomes requires us to do something different. The Committee can take immediate action to demonstrate a commitment to a new cooperative approach by reflecting on their own processes, and how they might better partner with Aboriginal community representatives, experts and other stakeholders in how the Committee gathers and considers its evidence and develops recommendations. Such an approach should be informed by the accepted principles of Indigenous child welfare, including the right to self-determination. For example, rather than a series of hearings featuring Aboriginal stakeholders focused on extracting evidence, the Committee might consider holding more open dialogues with Aboriginal community stakeholders to develop a mutual understanding of the issues, and to shape the recommendations for action in partnership with Aboriginal stakeholders, and to contribute to the oversight of government responses to this inquiry.

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<sup>35</sup> Davis, above n 2, page 127

**Recommendation 5:** That the Committee partner with Aboriginal community representatives, experts and other stakeholders to consider how they might better engage Aboriginal communities in the current inquiry, consistent with the principles outlined in *Family Is Culture* and other relevant frameworks for Indigenous child welfare reform.

Building on such an approach, the Committee might further consider the role they play in promoting transparency and accountability of the state's child protection system more broadly, and particularly its ongoing and disproportionate impact on Aboriginal children, families, and communities. This might include more regular engagement with Aboriginal communities, through their own representatives and mutually agreed processes, towards strengthened oversight and accountability, elevating Aboriginal community voices, and building confidence in the child protection and social service systems and their interactions with Aboriginal children and families. It is not unusual for Parliamentary Committees to have responsibility for the regular review of certain statutory schemes, providing oversight and accountability to strengthen public confidence as well as greater opportunities to action reforms in the public interest. Such oversight might be similarly extended to children and young people identified at Risk of Significant Harm and the system's responsible for responding effectively on their behalf, alongside strengthened accountability, transparency and reporting mechanisms for existing regulatory bodies, and for the future independent Child Protection Commission. For Aboriginal children, this would require a distinct approach in partnership with Aboriginal communities, respecting the rights of Aboriginal peoples to self-determination, and the evidence that self-determination contributes to improved outcomes in service delivery to Indigenous peoples.<sup>36</sup> It would seem that ongoing processes of active oversight and dialogue is likely to be more effective than cycles of reviews that don't engage Aboriginal communities in decision making or driving the solutions. Importantly, while the examination of the child protection and social service systems and the development and implementation of reforms continue to be conducted solely by non-Indigenous authorities, through non-Indigenous processes, we are unlikely to see new solutions, or to overcome the inequalities inherent in systems that share their foundations with past harmful approaches.

**Recommendation 6:** That the government and parliament consider their role in promoting transparency and public accountability of child protection systems, and the need to partner meaningfully with Aboriginal communities in developing and implementing systems and practice reforms that reimagine Aboriginal child protection and social service systems consistent with Indigenous child welfare frameworks, particularly self-determination. This includes the administration of such systems by Aboriginal communities, through our own processes, and according our values, priorities and aspirations for our children.

Through this inquiry, the Committee can show leadership towards a new approach by considering its own role in respecting the right of Aboriginal peoples to self-determination. This means reflecting on how Aboriginal voices are heard in existing processes, and how new mechanisms or approaches might further empower Aboriginal communities to not only participate in these inquiries and ongoing reforms, but to lead them, and make decisions about the systems that disproportionately affect our children, our families, our communities; our futures.

Such steps are needed to pivot from harmful practices that position non-Indigenous people and systems as the decision makers regarding Aboriginal communities, and limiting the involvement of Aboriginal people and communities to inadequate standards of consultation and participation. Without these steps, the Committee process merely perpetuates one of the key issues of the current system - non-Indigenous people determining what they feel is best for Aboriginal children and families, rather than respecting the right of Aboriginal communities to determine our own future.

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<sup>36</sup> Stephen Cornell and Joseph P. Kalt, 'Sovereignty and Nation-Building: The Development Challenge in Indian Country Today', (1998) *American Indian Culture and Research Journal*, Vol. 22 (3), 187-214