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# First Nations Voices in Child Protection Decision Making: Changing the Frame

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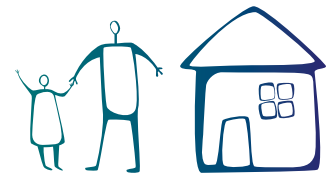
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### Article abstract

*First Nations children in Australia remain vastly over-represented in the child protection (CP) and out-of-home care (OOHC) systems, and in juvenile detention and adult incarceration systems. To change this, we need to tackle the problem at the source; by maintaining our efforts for the implementation of First Nations rights, so that self-determination and cultural safety are embedded into the child protection system from a family's first contact and by constantly identifying opportunities in the current system to keep our children safe. Using policy and research literature, this paper identifies the principal barrier to change as the continuing failure of settler governance to recognise the fundamental importance of First Nations rights, including the need to embed self-determination and a specific, First Nations cultural framework into the child protection system.*

*The article also offers personal reflections on the essential role of self-determination in keeping our children safe, drawing on Aunty Glendra Stubbs' experiences in community-based advocacy and support of families for nearly three decades. Her reflections are linked to the literature and First Nations advocacy that support the findings and opportunities for change proposed in this paper.*



## First Nations Voices in Child Protection Decision Making: Changing the Frame

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### Abstract

*First Nations children in Australia remain vastly over-represented in the child protection (CP) and out-of-home care (OOHC) systems, and in juvenile detention and adult incarceration systems. To change this, we need to tackle the problem at the source; by maintaining our efforts for the implementation of First Nations rights, so that self-determination and cultural safety are embedded into the child protection system from a family's first contact and by constantly identifying opportunities in the current system to keep our children safe. Using policy and research literature, this paper identifies the principal barrier to change as the continuing failure of settler governance to recognise the fundamental importance of First Nations rights, including the need to embed self-determination and a specific, First Nations cultural framework into the child protection system.*

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**Keywords:** *First Nations, Australia, child protection, rights, self-determination, safety*

### Author Biographies

Aunty Glendra Stubbs: A recognized intellectual and strategic leader, Aunty Glendra's insights have significantly informed several inquiries. As Chief Executive Officer (CEO) of the Link-Up New South Wales (NSW) Aboriginal Corporation [Link-Up (NSW)], she led an organization supporting Aboriginal peoples separated from their families and communities. Aunty Glendra Stubbs has held formal leadership positions in community-based healing and reconnection services, systems and

individual advocacy, and in the education of practitioners, services, magistrates, lawmakers, and other stakeholders within child protection and related systems.

Elizabeth Rice has three decades of experience in public policy at local and state government levels, including Commonwealth/State relations and multi-agency activities. Her involvement in Stolen Generations issues, including Stolen Wages, began in the early 1990s through work projects, where she met Aunty Glendra. From Aunty Glendra and Link-Up (NSW) she started to learn how far-reaching the effects of historic child removals were, how they continue to impact First Nations families, communities and Nations, and how current child protection practice risks creating new stolen generations. Like many settler Australians, she is still learning.

## **Author Notes**

The use of “I” refers to Aunty Glendra Stubbs. The use of “we,” except in the introduction to the paper, refers to Aunty Glendra Stubbs and the First Nations of Australia.

In the context of this article, the term “First Nations” refers to Aboriginal and Torres Strait Islander Peoples in Australia. Where no qualifier is needed, it is used alone to reinforce the reality that Australia was and is a land of many Nations, and to avoid atomizing First Nations life into individual, rather than inter-connected, areas. On occasion, the terms “Aboriginal,” “Aboriginal and Torres Strait Islander,” and “Indigenous” are used, reflecting the language of the documents being quoted or discussed.

The term “Stolen Generations” refers to First Nations children in Australia who were forcibly separated from their families through [assimilationist] government policies from the mid-1800s to the 1970s (Healing Foundation, 2020). The harms this caused, including inter-generational trauma, are documented in *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (*Bringing Them Home* [BTH]; Human Rights and Equal Opportunity Commission [HREOC], 1997). *Bringing Them Home* (HREOC, 1997) was tabled in the Australian Parliament on May, 26 1997. It “revealed the shocking extent of the forced separation of Aboriginal children from their families and communities, and the lifelong impacts of these separations on the Stolen Generations themselves, on their families and communities, and on their descendants” (Rule & Rice, 2015, p. 14). Many First Nations families and communities fear that current child protection policies, although ostensibly based on child welfare rather than assimilation, are creating new stolen generations.

The term “Australian Government” refers to the national government of Australia. This government is also referred to as the Commonwealth, the Commonwealth of Australia, the Commonwealth Government or the Federal Government.

The term “Australian governments” refers to all the governments in Australia collectively (at Commonwealth, State/Territory and Local Government levels).

The term “national policy,” as used in this paper, refers to decisions made collaboratively through the (former) Council of Australian Governments (COAG) comprised of the leaders of the Australian, State and Territory Governments, and the President of the Australian Local Government Association.

The Aboriginal and Torres Strait Islander Commission (ATSIC) was established under the Aboriginal and Torres Strait Islander Commission Act (1989) (Cth). ATSIC had a legislative mandate as an alternative voice on policy to government, one that better reflected the perspectives and interests of Aboriginal people (Behrendt, 2005). The abolition of ATSIC by the Australian Government in 2005 is one of the reasons the Uluru Statement from the Heart (First Nations National Constitutional Convention & Central Land Council (Australia) [FNNCC&CLC (Aust)], 2017) calls for a First Nations Voice to the Australian Parliament to be enshrined in the Australian Constitution, rather than solely in legislation. The Uluru Statement from the Heart (FNNCC&CLC (Aust), 2017) is the largest and most recent consensus statement from First Nations across Australia about what matters to them most, and what is required to achieve it: “a voice to parliament, treaty, and truth-telling” (FNNCC&CLC (Aust), 2017, p. 2).

## **Authors’ Acknowledgements**

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## **First Nations Voices in Child Protection Decision Making: Changing the Frame**

Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future. (Uluru Statement from the Heart, FNNCC&CLC (Aust), 2017, p. 1)

This paper examines the crucial role of self-determination in ensuring the well-being of First Nations children and young people in Australia. It argues that the current child protection system poses a considerable and ongoing threat to the children’s well-being, and to the well-being of their families and communities. The paper also advocates that these threats can be overcome only if child protection decision-making, from the earliest point of contact with a child and family, is grounded in cultural expertise. Achieving this structural and cultural orientation requires a change to the framework within which decisions about First Nations children are made, so that they are founded on First Nations knowledge and experience. Embedding First Nations rights into all aspects of the child protection system, including support services, is the most secure way to achieve this change.

The first part of the paper notes the colonial foundations of government interventions in First Nations family life, and the harms they have caused. It argues that current settler governance, with its embedded resistance to First Nations rights, continues to threaten the wellbeing of First Nations children, families and communities. This is demonstrated through the increasing over-representation of First Nations children in child protection and out-of-home care (Stubbs & Rice, 2017). The paper extends its analysis of threats to include the related over-representation of First Nations young people in juvenile detention and First Nations adults in the prison system. It then demonstrates that although Australian governments regularly inquire and report into over-representation in these areas, they fail to act on recommendations, particularly those that involve recognition and implementation of self-determination. The failure to recognize First Nations rights in relation to the well-being of First Nations children and young people is thus part of a broader, general pattern of failure to recognise First Nations rights.

The second part of the paper focuses on aspects of culture that, from the experience of first author Aunty Glendra Stubbs (Wiradjuri), are not well understood or implemented in child-protection decision-making. Aunty Glendra then shares some of her experiences in advocating for the rights of First Nations children, young people, and families, giving examples of everyday advocacy for change that support formal advocacy campaigns for structural reform.

Both parts of the paper draw on the extensive experience of Aunty Glendra as a descendant of the Stolen Generations and as an advocate for change for both adult survivors and children who experience separation from their families, communities, and culture today. Elizabeth Rice (second author) shares Aunty Glendra's commitment to change. At Aunty Glendra's invitation, she has worked alongside her on First Nations advocacy for over 20 years, emphasizing the need to hear and heed First Nations voices. As co-authors, we have made the decision not to formalize Aunty Glendra's observations and reflections. Therefore, this article is partially auto-ethnographic in its reflective analysis.

The remainder of our observations are based on socio-legal sources, including findings from public inquiries, particularly the landmark *Bringing Them Home* (BTH) report (Human Rights and Equal Opportunity Commission [HREOC], 1997), and the more recent *Family Is Culture* (FIC) report (Davis, 2019), as well as public monitoring data, where available. These sources support Aunty Glendra's analysis of Australian governments' escalating failures for First Nations children, families, and communities.

## **Interventions and Consequences**

### **Brief History**

Settler government interventions in the family lives of First Nations are longstanding, justified by flawed, self-serving beliefs that the best interests of First Nations children lay in their assimilation into settler society, requiring the disruption of First Nations families and cultures. The extent of

these interventions and their consequences, including their enormous and ongoing intergenerational impacts, are extensively described in the BTH report which covered the years 1910–1970 (HREOC, 1997). They are also prevalent across ongoing support for Stolen Generations survivors and child protection advocacy. By the end of Auntie Glendra’s time as CEO, Link-Up New South Wales (NSW) was seeing third and fourth generations of family removals – perpetuating harms despite apparent changes to policy and practice ostensibly intended to address harmful historic practices. The harm caused by these interventions is devastating not just to First Nations children and young people, but also to their families and communities. Without family and community, children cannot thrive, and without children, communities cannot thrive.

## Continuing Separations – Child Protection and Incarceration

There is ample evidence that settler governance, with its embedded, colonial assumptions, still threatens the everyday lives and futures of First Nations children, families, and communities. This is found in national statistics for child protection, out-of-home care, youth detention, adult imprisonment and deaths in custody, which demonstrates an extraordinary rate of First Nations Australians’ over-representation compared with settler Australians (Australian Institute of Health and Welfare [AIHW], 2021a). In many cases, the gap in rates is widening.

The numbers of First Nations children experiencing child protection interventions in Australia are increasing, as are the rates at which they “enter” these systems, compared with settler children. An even more disturbing finding is that the gaps between these rates are widening. For example, in 2019/20, Australian governments intervened in First Nations families at a far greater rate than in settler families. First Nations children received child protection services at a rate nearly eight times higher than settler children, and were subject of *care and protection orders* at 10 times the rate of settler children (AIHW, 2021a). Between 2016 and 2020, the rate for First Nations children in child protection services and subject to care and protection orders increased, while the rate for settler children decreased slightly (child protection services) or remained stable (order) (AIHW, 2021a). Thus, the gap in the rates between the two groups has widened. Data about out-of-home care is equally alarming. In 2019/20, First Nations children were *admitted* to out-of-home care “at ... 10 times the rate for non-Indigenous children,” with First Nations children growing up in out-of-home care<sup>1</sup> at 11 times the rate of non-Indigenous children (AIHW, 2021a, p. 50). The gap grew larger in both indicators between 2016/17 and 2019/20, with the rate increasing for First Nations children while the rate for settler children remained stable (AIHW, 2021a). These figures demonstrate entrenched systemic racism, with First Nations children disproportionately targeted by these systems, particularly at greater levels of intervention.

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1 This total excludes children who were on guardianship orders or adopted.

Outcomes in youth detention are even worse. On an average night in the June quarter of 2020, First Nations children (10–17 years) were 17 times more likely to be in youth detention than settler children (AIHW, 2021b). Unlike child protection, this gap appears to have narrowed from an astounding 25 times the rate of non-Indigenous children in 2016 (AIHW, 2021b), but still represents an alarming difference between detention rates for First Nations and settler youth.

Similarly, recent reporting regarding adult incarceration notes that “almost 2 in 5 (38%) adult prison *entrants* [emphasis added] were Indigenous,” even though First Nations comprise only 3.2% of the adult population of Australia (AIHW, 2019, p. 212). In terms of the *total prison population*, the 2019/20 crude rate of imprisonment of First Nations adults nationally was 15.3 times greater than for settler adults. The adjusted rate, taking account of age-profile differences in the two groups, was 11.7 times greater (Steering Committee for the Review of Government Service Provision [SCRGSP], 2021). The First Nations population has a younger age profile than the non-Indigenous population, which contributes to higher crude imprisonment rates. The adjusted rate, a common statistical measure, could nevertheless disguise the implications for the First Nations of their age distribution. According to SCRGSP (2020), “[t]his [imprisonment] ratio has not changed much in the last eight years” (p. 4.139).

The difference between the likelihood of a First Nations adult dying in prison compared with a settler adult is a direct reflection of the extraordinary rates at which First Nations adults are imprisoned. This finding of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) in 1991 “remains true today” (Doherty & Bricknell, 2020, p. 4). Specifically, “Indigenous people are [...] nearly 10 times more likely to die in prison custody than non-Indigenous people” (Senate Legal and Constitutional Affairs Legislation Committee, 2021, p. 68). The Australian Institute of Criminology (AIC) has confirmed that “there have been 517 deaths in custody” since RCIADIC (AIC, 2022).

The impact of these disproportionate rates of state intervention and control are not contained within each category of intervention, but interrelated. For example, the FIC report noted the role of *care criminalisation*, “the process whereby children placed in [out-of-home care] are more likely to be involved in the juvenile justice system by virtue of their [out-of-home care] status” (Davis, 2019, p. 230). Research has identified some of these factors:

Factors specific to the care experience, such as accumulated trauma, placement instability, separation from siblings and significant others, police interactions and the removal process itself, shaped children’s trajectory through the justice system. Criminalising practices operating within the [out-of-home care] system escalated children’s exposure to the [criminal justice system] for offences that would not have led to police involvement if these offences had occurred at home. The two factors – being in [out-of-home care] and offending – then exacerbated each other. (McFarlane, 2017, p. 424)

The Australian Law Reform Commission (ALRC) extends the effect to adult incarceration, noting that “the link between out-of-home care, juvenile justice and adult incarceration ... has been shown in many studies and reports,” which it linked to “the normalisation of incarceration in many Aboriginal families, and in particular those where children had been removed, or have been in juvenile detention” (ALRC, 2018, p. 486).

This is supported by the work of Chen et al. (2005), which noted the link between youth detention and adult imprisonment. That study (as cited in ALRC, 2018) indicated that:

90% of Aboriginal and Torres Strait Islander youths who appeared in a children’s court went on to appear in an adult court within eight years – with 36% of these receiving a prison sentence later in life. (p. 486)

The statistics above illustrate the strong, serious links between child removals, criminal justice system involvement, and deaths in custody. These links have been noted before in Australian Government reports in 1991 (Johnston, 1991) and 1997 (HREOC, 1997). This again highlights significant downstream harms to children and communities arising from disproportionate child protection intervention, and the need for significant structural reform to address these entrenched inequalities and their lifelong implications. As the BTH report made clear, recognition for the right to self-determination is central to the structural reforms that are needed (HREOC, 1997).

## **Australian Governments and Self-Determination**

Australian governments have been slow to recognize self-determination. This is evident from the failure to persist with the 1992 *National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders* (Council of Australian Governments [COAG], 1992) as well as Australia’s opposition in 2007 to the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* (UN General Assembly, 2007). Even when Australia did eventually endorse the Declaration it nevertheless continued to fail to embed its provisions into domestic law, policy, and practice (Australian Human Rights Commission, 2021). This reluctance to recognize and enable self-determination is also reflected in government decision-making regarding both child protection legislation and its operation, *and* its failure to adequately address “those structural drivers and barriers that lead children and families to encounter the child protection system” such as poor access to safe and stable housing, poverty, exposure to family violence, drug and alcohol misuse, mental ill-health, and barriers to accessing supports (Liddle et al., 2021, p. 14 & pp. 65–93).

Rather, Australian governments have selectively responded to these continuing structural and systemic threats to First Nations lives. Some responses have been made by individual jurisdictions, some by collaborative government action. Some have focused on structural factors (under the broad umbrella of First Nations “disadvantage”), some on over-representation, and

others on shared decision-making. At times, government attempts to address First Nations inequities have taken the form of inquiries and reports or national agreements.

While these initiatives have appeared to offer promise, they have delivered little substantive change, as the statistics outlined above attest. Many were not implemented, or were short-lived. Many of the initiatives that were pursued focused on how settler governments might more “effectively” administer child protection systems and exercise their authority over First Nations children and families, rather than self-determination. Reflecting on this pattern of performative inaction, Gray (2021) argued that “government reforms have been characterised by efforts to redeem the moral positioning of harmful systems of intervention, including through a cycle of reviews and inquiries, while responding in ways that retain and reinforce their authority to continue to intervene in the lives of First Nations children and families” (pp. 472–473). For example, the *National Commitment* (1992), probably the closest that national policy had come at that time to embracing First Nations self-determination, disappeared from COAG’s agenda after a change in government at the Commonwealth level. Later the Australian Government also abolished the statutory Aboriginal and Torres Strait Islander Commission (*ATSIC Act*, 2005), which pre-dated the *National Commitment*, but was to have had a key role in its implementation.

The Closing the Gap (CTG) framework has had a longer life. The language of “closing the gap” first appeared in COAG’s deliberations in July 2006 (COAG, 2006) and, after three years of various national reform initiatives, a *National Integrated Strategy for Closing the Gap in Indigenous Disadvantage* (CTG; COAG, 2009) was finalized. This strategy, like many others, seemed to be based on the belief that if only governments could “do it better,” improved results would follow. While its name drew on the name of the community campaign (Close the Gap), the CTG strategy did not adopt the human rights approach which was, and remains, central to this campaign (Close the Gap Campaign Steering Committee [CGCSC], 2021). Even this flagship national strategy has had poor results. As the latest CTG report notes, only “two of the continuing targets are on track” (National Indigenous Australians Agency, 2020, p. 11).

Another missed opportunity at national level has been the failure to implement Recommendations 43a–54 of the BTH report, which modelled a framework for a national, First Nations, community-based child well-being system (HREOC, 1997). Twenty-five years later this has yet to become a reality. Responses at State/Territory level have also failed to implement these recommendations. For example, despite the comprehensive reforms outlined by the recent FIC report (Davis, 2019), the government response has been deeply unsatisfactory, including delaying key legislative changes until at least 2024 (Gray, 2022). This again highlights the lack of urgency from settler governments to commit to fundamental reforms. In our view, this is grounded in an unwillingness to relinquish control over First Nations families and their exercise of child protection authority, despite challenges to the legitimacy of this authority (Libesman and Gray, in press).

## Results of (In)Actions

Government responses to serious and continuing threats to First Nations well-being have failed, with inequality persisting. Rates of over-representation have increased, with the gaps between First Nations and settler outcomes widening. In most cases, government responses show little integration of key factors necessary in any approach to reduce over-representation, embrace First Nations self-determination, and address fundamental causes of child protection involvement.

The Australian Government's approaches remain largely based on a combination of promises from governments to "do it better" and rhetorical invocations of self-determination. This rhetoric of self-determination is used with a variety of meanings, most of which, in practice, do not usually match the intention of *UNDRIP* or the views of First Nations peoples (Davis, 2019). However, the "refreshed" CTG process, which resulted in the current *National Agreement on Closing the Gap* (COAG, 2020), provides some hope for the future. This process was initiated by a group of First Nations organizations after COAG announced it would be updating CTG. These organisations, which developed into the Coalition of Peaks, came together "as an act of self-determination to be formal partners with Australian governments on Closing the Gap (Coalition of Peaks, 2020a). In doing so, First Nations organizations sought to change the nature of their relationship with governments to improve recognition of self-determination and First Nations decision making in policy and practice.

One of the group's achievements is the introduction of a new CTG target, Target 12: "By 2031, reduce the rate of over-representation of Aboriginal and Torres Strait Islander children in out-of-home care by 45 per cent" (COAG, 2020, p. 34). Another achievement is their partnership agreement with Australian governments on *Closing the Gap* (COAG, 2019), through which they are joint signatories to the current CTG agreement (COAG, 2020). This partnership agreement "sets out how the Council of Australian Governments and the Coalition of Peaks work and share decisions together on the design, implementation and monitoring of Closing the Gap strategies and policies" and commits to "three yearly Aboriginal and Torres Strait Islander led-reviews on *Closing the Gap*" (Coalition of Peaks, 2020b). However, these promising developments exist, as the annual report of Close the Gap (the community campaign) notes, alongside "the continued political inaction on the Uluru Statement from the Heart and the Voice to Parliament, youth incarceration and cultural heritage protections have highlighted important roadblocks to achieving the social equity" needed for First Nations wellbeing (Lowitja Institute, 2021, p. 11). As such, there is understandable caution about their long-term implementation and action, and therefore the outcomes they achieve for First Nations children, families, and communities.

Given generally poor results from settler governments and their ongoing difficulty in embracing the single factor most likely to create better outcomes, self-determination, we need to stay focused on all three elements that cause and sustain this insupportable state of affairs. This includes the structural factors that drive entry into the child-protection system in the first place, the legislative, policy, and practice factors that influence rates of entry and retention in that system, and the continued interference by settler governments in First Nations affairs.

Finally, we need agreement about the meaning of critical terms. Even when governments use the term self-determination there is no consistency in its meaning, as Davis (2019) identified in the context of child protection and out-of-home care. This led to the recommendation to work with First Nations stakeholders to “develop an agreed understanding on the right to ‘self-determination’ for Aboriginal peoples in the NSW statutory child protection system, including any legislative and policy change” (Davis, 2019, p. xi). Another term with varying interpretations is “the best interests of the child.” As *General Committee Comment No. 11* (United Nations Committee on the Rights of the Child 2009) indicates, these interests need to be understood through a cultural framework (Articles 30 and 31). The next section provides some practical examples of why and how a First Nations cultural framework is essential to the well-being of our children, families, and communities.

## **Self-Determination, Culture, and Child Protection**

Much of my work in advocacy and education has focused on emphasizing the important role of culture, particularly in child protection systems. Cultural ignorance or blindness can skew decision-making – to the detriment of children and their best interests. Recognizing this has been a particular challenge for child protection with the dominant settler view on the best interests of First Nations children grounded in fundamental differences in culture and world view. Failure to address this challenge has caused, and is still causing, significant harms, as demonstrated in the outcomes data and reports discussed earlier in this paper, and in the many First Nations contributions to public debate on self-determination (General Purpose Standing Committee (GPSC) No. 2, 2016).

All people have an inalienable right to live according to their culture (UN General Assembly, 2007, Articles 3, 5, 8, 11–12, 14–16, 31–32, 36). Respecting this right requires a nuanced understanding of cultural difference as, even when cultures share a value, that value can be expressed in significantly different ways, which need to be interpreted accurately. Cindy Blackstock (2008), who is a member of the Gitksan Nation in Canada, has written succinctly on these differences as they relate to First Nations and Western societies generally, identifying their implications for service delivery. These resonate with the Australian experience. Some of the differences Cindy Blackstock (2008) highlights are:

- i. First Nations cultures are more likely to value ancestral knowledge.
- ii. Their concept of time reaches backwards and forwards – and they think of impacts on seven generations of children to come.
- iii. They place more emphasis on connectedness with the natural world.
- iv. They have more emphasis on the whole person and the interconnections between all aspects of well-being.
- v. They believe that your place in the world is special to the extent that you “live in a good way and pass along the information and values necessary to sustain your group across time” (Blackstock, 2008, p. 3).
- vi. They operate as communities rather than just collections of individuals focussing on current generations.

These types of differences in cultures, let alone our rights to our own cultures, mean that we need a very good fit between these world views and the decisions made about how to ensure the well-being of our children, families, and communities. This is true for First Nations in Australia as elsewhere and must be respected if we are to act in a First Nations child's best interests, which must be understood through the framework of the child's specific culture.

There is not just one First Nations culture. We are many Nations with many cultures. A one-size-fits-all approach to legislation, policies, programs, and practices is doomed to fail. We know the protocols around decision-making in, and between, our Nations, and know that we cannot speak for another Nation. In our policy-making, we respect these protocols and are skilled in applying them to reforms designed to overcome problems created by settler governance. For example, Recommendations 43a-54 of the *BTH report* (HREOC, 1997) provided a blueprint for First Nations self-determination in the areas of our children and young people's well-being across Australia that respected local community autonomy and governance in terms of process and implementation.

Twenty-five years on, these recommendations have been almost entirely ignored by Australian governments, while rates of intervention in First Nations family life have increased markedly. Yet other people are still making decisions for us and about us, without expert cultural knowledge of our diverse communities and Nations. This diversity of cultures is not abstract, but shapes the lived experiences of individuals, reflecting their specific Country, language, and kin relationships (Tighe, 2021).

Similarly, Beaufile (2021) notes that a child or young person who is removed from their family confronts a sudden change in family life. For First Nations children, a significant part of that change is the separation from the everyday expression of culture that defines who they are and how they live. This is critical as "cultural identity is not just an add-on to the best interests of the child," but is at the heart of how our children grow up to be First Nations people (Bamblett & Lewis, 2006, p.44). Failure to understand the importance of cultural identity will undermine attempts to maintain First Nations children's culture. These attempts, often in the form of cultural plans, commonly include attendance at broader intermittent community events. While such efforts are welcome, participating in these events is only one small part of cultural identity. Decision-makers need to recognize that these public activities are an external reflection of the *lived* everyday culture of First Nations families and communities. This is what is fundamental, as culture is caught, not just taught. It is embedded in everything we do every day, and our children and young people need to be embedded in that life every day as well.

## **Cultural Expertise in Decision-Making is Essential**

In its preamble, *UNDRIP* (UN General Assembly, 2007) recognizes "*in particular* the right of Indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child" (p. 3). Neither responsibility nor authority is shared at present, and outcomes are not improving. To reverse these poor results, governments need our cultural expertise.

Our expertise is multi-faceted, covering all the areas that need to be part of shared decision-making and shared responsibility. For example:

- i. We are the experts on our diverse Nations and their cultures.
- ii. We are the experts on the ways settler systems have affected, and continue to affect, our Nations and cultures.
- iii. We are the experts on the changes today's governments need to make to ensure self-determination for First Nations peoples.
- iv. We are the experts on how our Nations can adapt to settler systems, without sacrificing the integrity of our own Nations and cultures.

These capabilities have been demonstrated in First Nations contributions to government-initiated reports and strategies, including the BTH (HREOC, 1997) and FIC (Davis, 2019) reports, the CTG Strategy (COAG, 2009) and the refreshed *National Agreement on closing the gap* (COAG, 2020), and in First Nations-initiated campaigns such as Close the Gap and Family Matters, which generate their own reports and frameworks (CGCSC, 2022; Liddle et al., 2021; Secretariat of National Aboriginal and Islander Child Care (SNAICC), 2016 ), and the *Uluru Statement from the Heart* (FNNCC&CLC (Aust), 2017).

However, we are not just experts on system design. We also have “on the ground” knowledge of our communities and how they work. That means we are also experts on how legislation, policy, programs, and practices affect our peoples, whether proposals relate to First Nations specifically or are designed for the population. Our expertise is particularly valuable here, as we can identify specific, but often unrecognized impacts of “whole-of-population” proposals on First Nations lives. As Mohamed (Lowitja Institute, 2021) recently expressed it: “Governments are not the solution, we are the solutions to governments” (p. 44). First Nations expertise is therefore central to shaping both systems and practice approaches to drive improved outcomes for children, families, and communities.

## **Culture and Care Proceedings**

All the issues discussed so far influence the interim and final decisions made by courts in care proceedings. Two critical issues affecting the outcomes of these proceedings are: who is believed and why. Statistics from the NSW Children's Court illustrate this point, with the then-President of the NSW Children's Court acknowledging that:

At that initial stage the allocation of parental responsibility tends to be about 99 per cent, and at the establishment phase, probably about 90 per cent of the children who have been reviewed and removed are found to be in need of care and protection. (GPSC No. 2, 2017, p. 72)

In other words, by the time care proceedings commence it is usually too late for the family to retain care of their children.

This is one of the many flow-on effects of all the issues already outlined in this paper: the failure to recognise and act on First Nations rights; the failure to recognize and respect the importance of cultural differences between First Nations and settler societies, including different ways of parenting and being a family, and different forms of social and community organization; and the failure to value First Nations expertise. Further, the Aboriginal community-led advocacy group Grandmothers Against Removals provide evidence of how many of these issues, from systemic racism to lack of understanding of how the local family culture works, can influence the decisions that lead to care proceedings (GPSC No. 2, 2016, pp. 28–41). This evidence also provides an example of what Davis (2019) refers to as “the importance of Aboriginal activism, especially Aboriginal grandmothers, as an informal regulator in the child protection system” (p. xii). These highlight two of the major changes that are needed in the child protection system. The first is that from the earliest point of contact with a child and family, decision-making must be culturally expert. The second is that independent legal assessment of the child protection authority’s allegations must be made before care proceedings commence.

Davis (2019) recognised these key ideas and made several recommendations about reforming the NSW Children’s Court, including that all care proceedings are heard by specialist magistrates and establishment of a dedicated court list for care proceedings involving First Nations children. Critically, the recommendations on those matters are preceded by one recommendation which aims to reform what happens before child protection proceedings are even commenced. It states:

The NSW Government should establish an independent statutory agency to make decisions about the commencement of child protection proceedings (including decisions about what orders are to be sought in the proceedings), and to conduct litigation on behalf of the Secretary of the Department of Communities and Justice in the Children’s Court of NSW care and protection jurisdiction. (Davis, 2019, Recommendation 122)

Despite the urgency of reducing the over-representation of our children in child protection and out-of-home care, this recommendation is one of the many legislative reforms that has not yet been accepted for early implementation (NSW Department of Communities and Justice, 2020; 2022). However, without these changes it is unlikely that legal systems will achieve different child protection outcomes for First Nations children and families.

## **Reflections on Advocacy**

To change systems characterized by a lack of recognition of self-determination and cultural understanding, augmented by poor results, we need to work on two fronts. We need to maintain our efforts for structural reform so that we can change systems fundamentally, and we need to continue our efforts to improve the application of systems affecting First Nations children and families

today. On national issues, we need to continue to campaign for action to integrate the provisions of *UNDRIP* into domestic law, policy, and practice, and for the need for a constitutionally enshrined First Nations Voice to Parliament. On State/Territory issues we need to keep campaigning for change to, or repeal of, unjust legislation or policies. This includes the 2018 legislative amendments in NSW that streamline the process from removal to “permanent care” (including adoption and guardianship), which will disproportionately affect First Nations children and families (Legislation Review Committee, 2018; Longbottom et al., 2019). These efforts across many fronts continue to be led by First Nations communities and advocates.

We cannot wait until settler governments embrace structural reform. We need to identify, and seize upon, the opportunities that present themselves through current government initiatives as well as through the contacts we make with decision-makers and service providers at all levels of settler governance. In other words, we can simultaneously campaign for structural reform *and* push systems incrementally towards more just approaches, and better outcomes, through relationships with key decision makers. In the rest of this section, we will focus on these approaches.

## **Operational Influence**

Operational influence is a critical aspect of our First Nations rights advocacy, as even when legislation is changed, practice can undermine its intent. Care proceedings are a case in point. Although legislation was eventually passed in all Australian jurisdictions to ensure that the removal of First Nations children from their families and communities was no longer race-based, in practice our children are still removed at a rate far exceeding that of settler children. Another example of poor implementation is the Aboriginal Child Placement Principle which is embedded to some extent in legislation in all jurisdictions in Australia (Arney et al., 2015; Hunter et al., 2020; Libesman, 2008). Davis (2019) cites “the application of the Aboriginal Child Placement Principle (ACPP)” as a “stark example” of ritualism in the out-of-home care system (p. 25), where “the outward appearance of compliance – formal participation in a system of regulation – shields a culture of non-compliance” (p. xiv).

## **Service Innovation**

Another way in which we can change the implementation of either legislation or policy is by identifying gaps in services and advocating for funding for them to be operated by First Nations services. For example, the Link-Up (NSW) Family Link service owes its origins to Link-Up’s awareness of a gap in knowledge about finding kin for a First Nations child entering out-of-home care. Link-Up advocated for the funding of a service that would fulfill the requirements of the Aboriginal Child Placement Principle, arguing that it could provide an effective service by drawing on its existing expertise in reuniting families separated by former welfare interventions. This advocacy was successful and Link-Up’s Family Link service now provides “kinship, family contact and cultural information” linking children at risk of entering, or already in, out-of-home care “to families, country, and community, ensuring a sense of social, emotional, and physical well-being” (Link-Up [NSW], 2022).

## Relationships with Settler Society and Services

Relationships are crucial to all types of advocacies. Over the decades, I have had many opportunities to build relationships with both decision-makers and service providers. At times this has taken the form of less-visible advocacy to people who have the administrative discretion to implement changes in practice. In other instances, it has involved serving on state and national bodies that are governmental and non-governmental, either as a representative of my organization or as a person capable of advocating for our peoples' interests. This has given me the opportunity to highlight issues relevant to our peoples and organizations, and to point out the specific, and possibly unrecognized, impacts on First Nations Australians arising from proposals that were seemingly culturally neutral from a settler-governance perspective.

The relationships formed through these activities, as well as my engagement with other service providers, also provided the basis for partnerships with other organizations. This included settler organizations whose aims were compatible with ours and could support the realisation of our aspirations for children and families. In one such example, our organisation partnered with two settler organizations to transfer service delivery to First Nations leadership after three years of joint operation. These types of relationships have also provided opportunities to educate child protection workers, magistrates, and others who needed to understand more about our cultures, including our forms of family and community organisation and the protocols surrounding them, to the extent that these can be shared with non-First Nations people. Workplace education represents a valuable opportunity to help settlers and their organizations understand why respecting First Nations family and community culture and systems is essential to working effectively with First Nations clients. This is essential to overcoming the valid distrust of First Nations people of both government and non-government services, who have been complicit in historic and ongoing intrusions in the lives of First Nations children, families, and communities. This mistrust goes *deep* because of the enormous impacts these intrusions have had, and are still having, on First Nations children, families, and communities, and it goes *wide* as many types of authorities were involved in the separations. This deep and wide mistrust will remain until First Nations people are confident that they can trust both a particular representative of the authorities/service provider and the organisation(s) they come from. That this is still a current issue is illustrated throughout the FIC report (Davis, 2019). Without this understanding, settler services and staff can unknowingly create and perpetuate circumstances which prevent First Nations people from taking even the first steps to engage with services, come forward to inquiries, or challenge failures in process.

Beyond service provision, these relationships are essential in supporting broader change to the foundations of the relationship between First Nations and settler society. As recent research demonstrates, many settlers walk with us in our efforts to have our rights recognized. Deem et al. (2021) report on the results of a survey involving a representative sample of Australians which found support for a constitutionally-enshrined First Nations Voice to Parliament, with 51.3% in

favour, 27.9% undecided, and 20.8% opposed. A recent report by the UNSW Indigenous Law Centre indicates even stronger support (Larkin et al., 2021), with 90% of the submissions to the Indigenous Voice co-design process believing the Voice “should be constitutionally-enshrined in line with the *Uluru Statement from the Heart*” (Larkin et al., 2021).

Engaging settler society requires that settlers understand First Nations systems and protocols. Not all settlers understand that First Nations Australia comprises many, many Nations, and that each Nation recognizes its own members and has diplomatic protocols for how to engage with First Nations people from other Nations, and with other non-members of the Nation. These protocols include entry to the Nation’s country, which is formalised in the Welcome to Country (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2022).

This protocol includes the responsibility of ensuring, before the welcome is given, that it is safe to allow the non-members to enter the Nation. This is not so different from the position in continental Europe, which also has many Nations. As many Australians are aware, each of these European Nations has its own protocols about entry into the Nation, including restrictions on entry, and everyone must satisfy those entry requirements before they will be permitted to enter the Nation’s territory. Settler Australians will also be aware that a European Nation will not tolerate another Nation’s making unilateral decisions for it or affecting its sovereignty. First Nations seek the same understanding of the diversity of their nations and politics.

Again, not all settlers are aware of the extent to which the community is the foundation of First Nations society, or of the way that loss, grief, and trauma caused by the separation of First Nations children from their families and Country has affected, and continues to affect, not just the individuals and their families, but whole communities and generations. A useful comparison here may be found in the devastating and often very lengthy droughts that affect some parts of Australia. These droughts affect everyone in the area. The financial difficulties facing individual farmers and their families, and the resulting impacts on their social and emotional wellbeing, together with the significant impacts on the local economy, affect the whole community (Edwards, Gray, & Hunter, 2008; Kiem & Austin, 2013; Sartore et al., 2008).

In other circumstances, opportunities for engagement with settler society can arise from the simple act of providing support to a First Nations person in a formal situation. A recent example is a Coroner’s Court hearing, at which a First Nations person was addressing the Court about the death of her father, who had died in palliative care in prison because he had been refused permission to return to Country to die. The Magistrate accepted cultural advice and made recommendations for change for those in prison requiring palliative care, including First Nations people (Coroners Court of New South Wales, 2021, pp. 56–59). These are just some examples of the daily challenges we face and how individual and collective advocacy can help mitigate the effects of these challenges. They do not replace the need to continue to advocate for structural reform in accordance with *UNDRIP*, but they do provide valuable opportunities to keep our children safer within current systems.

## Conclusion

First Nations have long-established systems for governing their own societies that have served them well for many thousands of years. Settler governance has failed to recognise these systems, along with the knowledge, skills, and experience which formed and continue to sustain them. Instead, it has overlooked and intervened in First Nations systems. These interventions continue. Persistent inequities in child protection are the end result of a long chain of interventionist legislation, policy, programs, services, and practices that are based on settler assumptions about how First Nations should live or do live. These interventions have profound impacts on our families, on our communities, and on our Nations.

These impacts are compounded by the way that settler governments interpret both the problems and their solutions. Poorer outcomes and inequalities are understood as problems within First Nations families and communities, rather than as a predictable result of contemporary child protection systems themselves, and therefore “solutions” are usually framed by governments as requiring “improved” settler administration rather than structural reform. This frame can be used both to disguise the root causes of First Nations over-representation in the intervention systems and to reinforce a particular stereotype of First Nations peoples. This allows settler governments to marginalize First Nations rights while paying lip-service to them through the rhetoric of self-determination. It can also be used to polarize public debate into rights-based approaches versus practical measures, as though they are incompatible alternatives.

First Nations constantly advocate for the changes that are needed to overcome these “problems” and ensure the well-being of our children, families, and communities, but even when our voices are heard they are often not heeded. None of the tragedies resulting from over-representation are necessary, and they can be stopped at the source if settler governments respect our rights, heed our voices, and trust our expertise.

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