



Justice • Rights • Reconciliation

Australians for Native Title and Reconciliation Qld

**Submission in response to:
Incarceration Rates of Aboriginal and Torres Strait Islander
Peoples Discussion Paper
September 2017**





Justice • Rights • Reconciliation

Submission

To: Australian Law Reform Commission
Date: 4 September 2017
Topic: Incarceration Rates of Aboriginal and Torres Strait Islander Peoples
Discussion Paper

Australians for Native Title and Reconciliation Queensland (AQ) is an independent advocacy organisation that works for rights, justice and reconciliation with Aboriginal and Torres Strait Islander peoples. AQ has been working on the issue of over-representation of Aboriginal and Torres Strait Islander children in out-of-home care as one of its most recent campaigns. We have attended various forums and met with key stakeholders, and community members. AQ has also signed the Family Matters Statement of Commitment as a Strategic Alliance Member. AQ is aware of the links between out-of-home care and the justice system. AQ therefore welcomes the opportunity to provide our insight in relation to the incarceration rate of Aboriginal and Torres Strait Islander people.

Yours sincerely



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The link between out-of-home care and the justice system

As noted within the Discussion Paper *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, significant research has linked out-of-home care (OOHC) and incarceration. Mendes and Baidawi (2013) provide a detailed review of literature supporting these links both domestically and internationally. Given these links, AQ argues that the levels of over-representation of Aboriginal and Torres Strait Islander children within institutional care settings directly impacts on the numbers of Aboriginal and Torres Strait Islander youth and adults in incarceration. Data contained within the *Young people in child protection and under youth justice supervision 2014–15* report evidences this stating

Indigenous young people in the child protection system were more than twice as likely to be under youth justice supervision as non-Indigenous young people (10.4% compared with 4.3%). (Australian Institute of Health and Welfare [AIHW] 2016, p. 8)

AQ therefore agrees and supports the ALRC's proposal that a national review of the laws and processes operating within the care and protection systems of the various states and territories is essential to addressing the over-representation of Aboriginal and Torres Strait Islander people within both the institutions of welfare and of justice.

Out-of-home care (OOHC) data

As at June 30 2016 there were 16,846 Aboriginal and Torres Strait Islander children in OOHC representing a rate of 56.6 per 1,000 children and 9.8 times the rate of non-Indigenous children (AIHW 2017). Current projections show '... that the population of Aboriginal and Torres Strait Islander children in OOHC will triple in the next 20 years if nothing is done to interrupt current trajectories' (Secretariat of National Aboriginal and Islander Child Care [SNAICC] 2017, p. 4).

AQ therefore urges the ALRC to take the following recommendations into account in order to reduce the drift of Aboriginal and Torres Strait Islander children between the welfare and justice systems.

Recommendations

- 1. AQ supports ALRC's recommendation to undertake a national review of the laws and processes operating within the care and protection systems of the various states and territories.**
- 2. AQ recommends the development a national target to eliminate the over-representation of Aboriginal and Torres Strait Islander children in OOHC.**
- 3. AQ recommends the development of a national target and strategy to increase proportional investment in prevention and early intervention services that are community controlled.**
- 4. AQ recommends the implementation of consistent legislation across all States and Territories that incorporates all five elements of the Aboriginal and Torres Strait Islander child placement principle (ATSICPP), prevention, partnership, placement, participation and connection and wording that reflects its underlying intent.**
- 5. AQ recommends the implementation of consistent legislation across all States and Territories that provides for the right to self-determination for Aboriginal and Torres Strait Islander peoples in decision making in relation to the welfare of their children.**
- 6. AQ recommends the implementation of consistent legislation across all States and Territories to allow the delegation of decision making authority to the chief executive of an Aboriginal and Torres Strait Islander agency powers to Aboriginal and Torres Strait Islander organisations.**
- 7. AQ recommends the implementation of consistent legislation across all States and Territories to allow greater access for kinship carers.**

1. Undertake a national review of legislation

Given the links between OOHC and incarceration AQ fully supports the Discussion Paper *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples'* proposal that a national review of the laws and processes operating within the care and protection systems of the various states and territories be undertaken as a further essential response to address the over-representation of Aboriginal and Torres Strait Islander people within both the institutions of welfare and of justice.

2. Develop a national target

AQ fully supports the recommendation proposed by Family Matters to

Develop and implement a comprehensive, adequately resourced national strategy and target, developed in partnership with Aboriginal and Torres Strait Islander peoples, to eliminate the overrepresentation of Aboriginal and Torres Strait Islander children in out-of-home care. (SNAICC 2017, p. 6)

3. Increase proportional investment in prevention and early intervention services

Despite the *National Framework for Protecting Australia's Children 2009-2020* (the National Framework) with its public health model recommending universal and secondary levels of support should receive the attention and funding required (COAG 2009) the majority of funding for child protection is directed towards the tertiary end of responses within the child protection system (SNAICC 2016). In 2014-15, only 17 per cent of overall child protection funding was invested in support services for children and their families, amounting to just over \$700 million, as compared to \$3.5 billion or 83 per cent of funds spent on child protection statutory intervention and OOHC services (SNAICC 2016). Not only does funding need to be redirected towards preventative measures investment needs to be directed to Aboriginal and Torres Strait Islander family support services to ensure culturally appropriate responses.

Better outcomes for Aboriginal and Torres Strait Islander children, and indeed any target group, are best achieved when the target population has input and control over the delivery of services and organisations work in partnership with communities. Incorporating Aboriginal and Torres Strait Islander values, knowledge and cultural practices when developing service models is also critical. (Queensland Aboriginal and Torres Strait Islander Child Protection Peak [QATSICPP] 2016, p. 20)

4. ATSI CPP

Whilst components of the ATSI CPP are contained across all State and Territory legislation nowhere is the principle defined in full resulting in a lack of understanding its intent and inconsistent implementation (Tilbury et al. 2013). The original intent of the ATSI CPP was ‘... to enhance and preserve Aboriginal and Torres Strait Islander children's connection to family and community, and sense of identity and culture’ (Tilbury et al. 2013, p. 7). Additionally Tilbury et al. (2013, p. 3) noted that the placement hierarchy for OOHC comprises only one element from ‘... a range of interventions to protect an Aboriginal or Torres Strait Islander child at risk of harm’.

Australia's peak body for Aboriginal and Torres Strait Islander child care, SNAICC has conceptualised the aims of the ATSI CPP as:

(1) recognition and protection of the rights of Aboriginal and Torres Strait Islander children, family members and communities in child welfare matters; (2) self-determination for Aboriginal and Torres Strait Islander people in child welfare matters; and (3) reduction in the disproportionate representation of Aboriginal and Torres Strait Islander children in the child protection system. (Tilbury et al. 2013, pp. 6-7)

Introducing nationally aligned legislation that contains all five elements of the ATSI CPP is consistent with the original intent and aims of the ATSI CPP as well as the recommendations of the *Royal Commission into Aboriginal Deaths in Custody* (RCIADIC)

(Johnston 1991), the *Bringing Them Home* report (Human Rights and Equal Opportunity Commission [HREOC] 1997), the *Queensland Child Protection Commission Inquiry* (QCPCI) (Queensland Government 2013), the *National Framework for Protecting Australia's Children Third Three-Year Action Plan 2015-2018* (Commonwealth of Australia 2015), and the *Family Matters Report* (SNAICC 2016).

5. Self determination

Currently self-determination with respect to the care and protection of Aboriginal and Torres Strait Islander children is not included as a recognised principle across all State and Territory legislation. Nor is there consistency across relevant legislation relating to Aboriginal and Torres Strait Islander peoples' rights to self-determination with respect to participation and consultation in decision making (SNAICC 2016).

The general right to self-determination for Aboriginal and Torres Strait Islander people is enshrined within the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) (United Nations 2008) and was adopted by the Australian government in 2009. Recommendations 43a, 43b and 43c of the *Bringing Them Home* report (HREOC 1997) specifically address the implementation of self-determination in relation to the wellbeing of Aboriginal and Torres Strait Islander children. Self-determination is also one of the three aims of the Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) (Tilbury et al. 2013) and is also consistent with Key Recommendation 5 from the *Family Matters Report* (SNAICC 2016). Introducing self-determination as a recognised principle across all relevant State and Territory legislation aligns with Articles 3 and 4 of the *UNDRIP* (United Nations 2008), reflects the aims and intent of the ATSICPP (Tilbury et al. 2013) and strengthens recommended legislation relating to the delegation of function powers to the chief executive of an Aboriginal or Torres Strait Islander agency.

6. Enabling powers

Currently only legislation contained in s18 of the *Children, Youth and Families Act 2005* (Vic) provides for the delegation of functions and powers in relation to Aboriginal and Torres Strait Islander children. The issue of greater Aboriginal and Torres Strait Islander control of Aboriginal and Torres Strait Islander child welfare has been raised in a number of reports including the *RCIADIC* (Johnston 1991), the *Bringing Them Home Report* (HREOC 1997), the *Inquiry into compliance with the intent of the Aboriginal Child Placement Principle in Victoria* (Jackomos & Buchanan 2016) and the *Family Matters Report* (SNAICC 2016).

Introducing nationally consistent legislation across all States and Territories enabling the chief executive to delegate functions and powers in relation to a child that is the subject of a child protection order to the chief executive of an Aboriginal or Torres Strait Islander agency will not only support the recommendations of the above mentioned reports but also aligns with the aims of the ATSICPP as well as the “partnership” component (Tilbury et al. 2013).

Additionally introducing the relevant quality and safeguard measures and the sharing of information to support the delegation of powers is vital to ensure the ongoing safety and wellbeing of a child. A time frame should therefore be implemented for the transfer of powers as capacity and expertise increases and the proportionately required resourcing of Aboriginal or Torres Strait Islander agencies to be determined and provided.

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Legislation

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