

**‘YOU CANNOT APOLOGISE FOR TREATING SOMEONE
BADLY, WITHOUT THEN CHANGING YOUR
BEHAVIOUR TOWARDS THEM IN THE FUTURE’:
An Analysis of Contemporary Approaches to Indigenous Child
Removal in Western Australia and British Columbia**

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I, Amelia Arndt, declare that the material contained in this Honours dissertation, except where properly acknowledged and attributed, is the product of my own work carried out during the Honours year and has not previously been submitted for a degree or an award at any tertiary education institution.

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05/11/2017

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ABSTRACT

The Indigenous peoples of Australia and Canada suffered horrific mistreatment at the hands of colonial governments. The colonial governments of Australia and Canada implemented brutal policies of assimilation to orchestrate the total absorption of Indigenous peoples into the non-Indigenous population. The key method used in this assimilation mission was the forced removal of Indigenous children. The trauma left by these policies still affect Indigenous populations today, despite national apologies and multiple attempts at reforming Indigenous child welfare legislation. Government inaction and inadequate and ineffective policies have rendered the government's apologies effectively meaningless, as they have been unable to stop the numbers of Indigenous children being removed from continuing to rise. There are now more Indigenous children residing in out-of-home care in Western Australia (WA), and British Columbia (BC), than at the height of the colonial policies of assimilation. These children have been removed not because their families put them at a greater risk, but because *their families are at a greater risk*.

Using an international human rights framework, this dissertation comprehensively examines the legislation, policies and practices of Indigenous child welfare in WA and BC. It reveals that action urgently needs to be taken to address the underlying causes of the overrepresentation of Indigenous children in out-of-home care, in order to reduce and prevent such large numbers of Indigenous children being removed from their families and culture. The governments in WA and BC should implement legislated roles ensuring Indigenous participation and consultation throughout the child welfare process. This should include culturally appropriate methods of prevention and support, which will in turn help to ensure that Indigenous children are able to maintain a connection to their culture, a vital lifeline for Indigenous peoples which helps to increase resilience and their sense of identity.

If action is not immediately taken, WA and BC are at risk of creating another 'stolen' generation of children, not by design as in the past, but by default. We should not continue to stand back and watch the numbers of Indigenous children being removed continue to increase. Action must be continually taken to ensure that the behaviours of the past do not continue to keep negatively affecting Indigenous populations in the future.

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I INTRODUCTION

‘You cannot apologise for treating someone badly, without then changing your behaviour towards them in the future.’¹

Former Prime Minister Kevin Rudd in February 2017.

While the distinct cultures and experiences of the Indigenous populations of Australia and Canada are unique to each community and individual, the first peoples of both nations have experienced remarkably similar historical treatment by their respective governments.² In relation to children, similar relentless policies of assimilation and eradication drove Indigenous child removal practices in each country, separating Indigenous children from their families and, in the process, often discarding their cultural identities. It is estimated that, under these historical policies, around 25,000 Indigenous children in Australia,³ and 200,000 Indigenous children in Canada were removed.⁴ The impact and effects of this treatment on and within Indigenous populations in both countries are strikingly similar and long lasting.⁵ The practice of child removal left generations suffering from a loss of identity, scarring their hearts and minds,⁶ and contributing to the prevalence of many social problems within Indigenous populations today, such as violence, substance abuse and incarceration.

¹ Kevin Rudd, ‘Why ‘Closing the Gap’ Remains Valid for the Future: the need for a new target on Indigenous child removal’ (speech delivered at the Australian National University, Canberra, 13 February 2017).

² Throughout this paper, the term ‘Indigenous’ will be used to refer to both Aboriginal and Torres Strait Islander people. While their individual and distinct cultures and traditions are recognised, they are intrinsically linked by their histories and by the government policies that affect them. The term ‘Indigenous’ will also be used as a collective noun to describe people of First Nations, Inuit and Metis descent in Canada, unless otherwise indicated.

³ Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, (Report, Human Rights and Equal Opportunity Commission, 1997) (‘*Bringing Them Home Report*’) Part 2, Chapter 2; Robert Manne, ‘In Denial: the Stolen Generations and the Right’ (2001) 1 *The Quarterly Essay* 1, 27.

⁴ Judge Edwin Kimelman, Manitoba Community Services, *No quiet place: Final report to Honourable Muriel Smith, Minister of Community Services by Judge Edwin Kimelman* (Report, Manitoba, 1985); Grand Chief Ed John, Ministry of Children and Family Development, *Indigenous Resilience, Connectedness And Reunification—From Root Causes To Root Solutions: A Report on Indigenous Child Welfare in British Columbia Final Report of Special Advisor Grand Chief Ed John* (Report, British Columbia, 2016) (‘*Indigenous Resilience, Connectedness And Reunification*’).

⁵ Philip Lynch ‘Keeping Them Home: The Best Interests of Indigenous Children and Communities in Canada and Australia’ (2001) 23 *Sydney Law Review* 501, 502.

⁶ *Ibid.*

The long-term effects of these policies have significantly contributed to the present disproportionate numbers of Indigenous children being placed in State care, despite national apologies,⁷ multiple inquests and reports into the matter,⁸ and legislative attempts to rectify the disproportionality. Indigenous children in Australia and Canada are currently being removed from their families and placed into care at higher rates than they were during the 19th and 20th centuries.⁹ This clearly presents an issue that needs to be addressed.

To address the contemporary issue of overrepresentation of Indigenous children in care in Australia and Canada, it is fundamentally important to understand the underlying factors and causes that are contributing to the disproportionate numbers of Indigenous children being removed.¹⁰ Without understanding and acknowledging the problems that underpin the necessity for these children to be removed, large numbers of Indigenous children will continue to be removed from their families and culture, and the traumatic effect of these removals will continue to be perpetuated throughout Indigenous populations.

A. Background

Child removal was the key method employed in both colonial Australia and Canada to implement the total assimilation of Indigenous cultures into Western society.¹¹ The governments of both nations held a similar belief that the first peoples of their land

⁷ Commonwealth, Parliamentary Debates, House of Representatives, 13 February 2008, 167-71 (Kevin Rudd, Prime Minister); Canada, Parliamentary Debates, House of Commons, 11 June 2008, 6849-51 (Stephen Harper, Prime Minister).

⁸ Department of the Prime Minister and Cabinet, *Closing the Gap Prime Minister's Report 2017* (Report, Department of the Prime Minister and Cabinet, 2017) ('*Closing the Gap Report 2017*'); *Bringing Them Home Report*, above n 3; *Indigenous Resilience, Connectedness And Reunification*, above n 4.

⁹ Leticia Funston, Sigrid Herring and ACMAG, 'When Will the Stolen Generations End? A Qualitative Critical Exploration of Contemporary 'Child Protection' Practices in Aboriginal and Torres Strait Islander Communities' (2016) 7(1) *Sexual Abuse in Australia and New Zealand* 51; CBC News, *Bennett: 'more children in care now than height of Residential schools'* (27 October 2016) CBC News – Politics, 00:16 <<http://www.cbc.ca/news/politics/bennett-more-children-in-care-now-than-height-of-residential-schools-1.3823844>>.

¹⁰ Lynch, above n 5, 506.

¹¹ Sonia Harris-Short, *Aboriginal Child Welfare, Self-Government and the Rights of Indigenous Children: Protecting the Rights of Indigenous Children*, (Ashgate Publishing, 1st ed, 2012) 34.

were a dying breed,¹² who were close to extinction;¹³ a process which could be sped up by assimilation. These colonial policies, especially the policies of forced child removal, clearly constitute massive violations to human rights standards when viewed today.

The child removal policies in both nations led to experiences that were extremely destructive of Indigenous culture and identity.¹⁴ Forced removal was an enormously traumatic experience for both the children removed and the families and communities left behind.¹⁵ The ramifications of these policies are still visible in the high levels of social, educational, health and economic disadvantage faced by Indigenous populations.¹⁶ The sustained, systemic human rights violations suffered over time by Indigenous peoples have resulted in high rates of disadvantage,¹⁷ to the point where Indigeneity has become globally synonymous with poverty, low standards of living and poor health care and outcomes.¹⁸

In addition to creating social and economic disadvantage, there are a myriad of social, spiritual and emotional disadvantages that are associated with removing an Indigenous child from their family. In Indigenous cultures, responsibility for emotional guidance and support, education, economic interactions and spiritual training, is shared.¹⁹ Children removed from this support network suffer from a loss of relations with a vast variety of kin who perform many roles and significantly influence the child's upbringing,²⁰ leaving many without parenting role models,²¹ and unable to parent their own children as a result of the trauma that they have suffered. Moreover, these

¹² Robert van Krieken, 'The "Stolen Generations" and Cultural Genocide: The Forced Removal of Australian Indigenous Children from Their Families and Its Implications for the Sociology of Childhood' (1999) 6(3) *Childhood: A Global Journal of Child Research*, 297, 301.

¹³ Ibid.

¹⁴ Clare Tilbury, 'The over-representation of Indigenous children in the Australian child welfare system' (2009) 18(1) *International Journal of Social Welfare* 57.

¹⁵ Elizabeth Colliver and Sabrina Fainveits, 'Family Matters Kids Safe in Culture, Not in Care Western Australia' (Issues Paper, Secretariat of National Aboriginal and Islander Child Care, 2014) 13.

¹⁶ Tilbury, above n 14; Clara Filipetti, 'The Treatment of Aboriginal Children in Canada: A Violation of Human Rights Demanding Remedy' (2016) 11(2) *First Peoples Child and Family Review* 60, 65.

¹⁷ Anna Cowan, 'UNDRIP and The Intervention: Indigenous Self-Determination, Participation, And Racial Discrimination In The Northern Territory Of Australia' (2013) 22(2) *Pacific Rim Law & Policy Journal* 247, 248.

¹⁸ *Closing the Gap Report 2017*, above n 8, 96; Statistics Canada, *Indigenous Peoples: Fact Sheet for British Columbia* (14/03/2016) Statistics Canada <<http://www.statcan.gc.ca/pub/89-656-x/89-656-x2016011-eng.htm>>.

¹⁹ Lynch above 5, 508; *Re CP* (1997) 21 Family Law Reports 486 [502].

²⁰ Ibid.

²¹ Colliver and Fainveits, above n 15, 8.

removals have led to ambiguities in or total loss of identity with one's own kin and country, features that are essential to Indigenous identity.²² Research has shown that significant childhood trauma, such as removal, has the potential to disrupt normal physical and mental development in a child and can severely impair their ability to regulate their behaviour.²³ The effects of this trauma can be seen in the higher rates of suicide,²⁴ violence,²⁵ substance abuse,²⁶ unemployment,²⁷ and incarceration in Indigenous populations.²⁸

B. *Significance of the Problem*

The lasting effects of the child removal policies, which underpin the prevalent problems and disadvantage that have arisen in Indigenous populations, have increased the risk of removal for Indigenous children in both nations. Indigenous children in both nations are currently being removed from their families, not because their families have put them at a greater risk, but because *their families are at a greater risk*, due to the higher rates of disadvantage and intergenerational effects of past removals

²² Lynch, above n 5, 508; *Re CP* (1997) 21 Family Law Reports 486 [502].

²³ Judy Atkinson, Jeffrey Nelson and Catherine Atkinson, 'Trauma, Transgenerational Transfer and Effects on Community Wellbeing' in N Purdie, P Dudgeon & R Walker (eds), *Working Together: Aboriginal And Torres Strait Islander Mental Health And Wellbeing Principles And Practice* (Australian Institute Of Health And Welfare, 2010, Canberra) 135, 136.

²⁴ In Australia, Indigenous suicide rates are double those of the non-Indigenous population: *The Department of Health, Indigenous and Torres Strait Islander suicide: origins, trends and incidence* (2013), Australian Government Department of Health <<http://www.health.gov.au/internet/publications/publishing.nsf/Content/mental-natsisps-strat-toc~mental-natsisps-strat-1~mental-natsisps-strat-1-ab>>. Indigenous suicides in Canada are not separately recorded; however, the most disturbing statistics put suicide for some Inuit groups at between 4 and 25 times the rate of non-Indigenous people: Canada, House of Commons, Standing Committee on Indigenous and Northern Affairs, *Breaking Point: The Suicide Crisis in Indigenous Communities*, 42nd Parl, 1st Sess, No 9 (19 June 2017) (Chair: MaryAnn Mihychuk) 4-7.

²⁵ Indigenous women are 35 times more likely to be hospitalised from family violence, and in Western Australia, are 17.5 times more likely to die from family violence. Around 90% of Indigenous Australian children are removed from their families because of family violence: *Closing the Gap Prime 2017*, above n 8, 95-6. Indigenous people in Canada are three times more likely to experience sexual assault and twice as likely as non-Indigenous people to experience spousal violence: Statistics Canada, *Family violence in Canada: A statistical profile, 2014* (21/01/2014) Statistics Canada <<http://www.statcan.gc.ca/daily-quotidien/160121/dq160121b-eng.htm?HPA>>.

²⁶ Indigenous Australians are also five times as likely to die from alcohol related causes and four times as likely to be hospitalised from alcohol related causes: *Closing the Gap Report 2017*, above n 8, 95.

²⁷ The Indigenous employment rate in WA is 39.5%, which is the second lowest employment rate in Australia: *ibid* 55.

²⁸ Indigenous Australians are three times as likely to be imprisoned as non-Indigenous Australians. WA has the highest Indigenous imprisonment rate in Australia: Australian Bureau of Statistics, *4512.0 - Corrective Services, Australia, March quarter 2017* (08/06/2017) Australian Bureau of Statistics, <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0>>. Throughout Canada, Indigenous people have the highest rates of crime, arrest and incarceration of any group: Carol LaPrairie, *Examining Indigenous Corrections in Canada* (Indigenous Corrections Ministry of the Solicitor General, 1996).

experienced by these populations. The continued removal of Indigenous children from their families has created a vicious cycle of intervention, which continues to perpetuate itself.²⁹ This cyclical grip on Indigenous communities is so strong that in some situations, children removed into care are amongst the fifth generation of children within a family to be removed into State care.³⁰

These tragic statistics should not be accepted as symptoms of Indigeneity, but as symptoms of a broken child welfare system. The Australian and Canadian governments have made attempts to address the problems facing Indigenous communities and have introduced legislation to limit the removal of children. However, their efforts have had limited success, and as a result, the cycle has continued. The governments of Western Australia (WA) and British Columbia (BC) are currently at risk of creating another generation of children ‘stolen’ – as would be said in Australia – from their families and communities, weakening and depriving them of their Indigenous cultural identity. Despite the best of intentions by politicians and other stakeholders, the risk arises in both jurisdictions, principally because of ineffective and inadequate legislation and government practices that are not addressing the underlying factors that lead to the need for removal.

Concerns about the risk of repeating history have been voiced at the highest levels. In 2008, then Prime Minister Kevin Rudd issued a stirring apology to the Indigenous children removed under these historical policies.³¹ In particular he stated, ‘the time has now come for the nation to turn a new page in Australia's history by righting the wrongs of the past and so moving forward with confidence to the future’.³² However, nine years later, in 2017, Rudd warned of creating another generation of ‘stolen’ children, not by design as in the past, but by default, through government inaction and the inadequacies of current child welfare practices.³³ He argued that the governments needed to readdress their policies and make new targets for Indigenous child removal. He crucially pointed out that apologies are effectively meaningless, unless

²⁹ Colliver and Fainveits, above n 15, 8.

³⁰ Heather Douglas and Tamara Walsh, ‘Continuing the Stolen Generations: Child Protection Interventions and Indigenous People’ (2013) 21(1) *The International Journal of Children's Rights* 59, 63.

³¹ Rudd, above n 7. Similar apologies have been voiced by other government figures.

³² *Ibid.*

³³ *Ibid.*

governments change their policies towards Indigenous child removal in the future.³⁴ Hence, attention must be drawn to the paternalistic and discriminatory attitudes still embedded in the legislative structures of contemporary child welfare policies.

C. Argument

The increased removal of Indigenous children from their families would not be required and could not possibly be justified if governments worked to adequately protect the human rights of Indigenous people and children. This means working together with Indigenous populations, to support in advance the people who need that support most, and to prevent risks to children, rather than taking punitive action to remove children once they are at risk, which is what occurs now. A resolute focus on removal once a child is at risk merely provides a temporary fix, without ever acknowledging the needs of Indigenous peoples or rectifying the underlying causes for the removals. The overrepresentation of Indigenous children in care presents a real and significant threat of ‘further damage to the connectedness and survival’,³⁵ of Indigenous populations. The degree of the threat highlights the fact that this should be an area of priority, in which the human rights of Indigenous people must be protected and promoted, particularly, the rights to self-determination, to participate in decision-making and obligations to consider the best interests of the child.

D. Methodology

This dissertation will approach the issue of contemporary Indigenous child removal in WA and BC from a human rights perspective. Analysing this issue from this particular perspective assists to conduct a deeper evaluation of the laws and policies that govern Indigenous child removal and highlight the discriminatory aspects of these practices that might not have been as obvious.

³⁴ Ibid.

³⁵ Secretariat of National Aboriginal and Islander Child Care, ‘Genuine Participation of Aboriginal and Torres Strait Islander Peoples in Child Protection Decision-making for Aboriginal and Torres Strait Islander Children’ (Policy Paper, SNAICC, 2012).

The scope of this dissertation has been narrowed specifically to the practices of WA and BC, to gain an insight into the historic child protection policies of these jurisdictions and to compare these historic policies to the current practices of contemporary governments. The research conducted is largely doctrinal and based on a literature review approach. This dissertation aims to provide a systematic exposition of the laws and policies governing Indigenous child removal, focusing on areas of difficulty and predicting areas for improvement by evaluating the adequacy of the existing laws. This dissertation focuses on the Indigenous populations of WA and BC and collates and summarises existing quantitative data, which is then used to describe various aspects of their Indigenous populations. This dissertation also engages in some comparative research.

E. *Structure*

Chapter two will examine the human rights framework that relates to the rights of Indigenous peoples and child welfare.³⁶ Chapters three and four will then explore past child removal policies, to frame the current situations in WA and BC, as the histories of both jurisdictions can be used as a contextual framework, providing background and some explanation of this disproportionality. The chapters will then assess the current child welfare legislation in each jurisdiction, in line with the international human rights principles identified. Finally, chapter five will suggest areas of government policy and practice in relation to Indigenous child welfare, that need to be addressed by the governments to reduce Indigenous child removal rates. Shifting this focus will ensure that previous government mistakes are not repeated, which will hopefully ensure that the disadvantages and traumas visible in Indigenous populations are not carried on indefinitely. As Rudd pointed out in early 2017, a nation cannot apologise for treating part of its population ‘badly’ and then continue to demonstrate the same behaviour towards them.³⁷ It is unfortunate that the decade since his powerful apology has been largely squandered, despite the best of intentions of governments.

³⁶ The term ‘child welfare’ has been used throughout this paper in favour of the term ‘child protection’, as the term child protection has many historic and paternalistic connotations attached to it. In the past, the Australian and Canadian governments forcibly removed thousands of Indigenous children from their families under the guise of ‘protection’. The term child welfare is viewed as more appropriate, better reflecting the more child centric concept of ‘best interests’ upon which all child welfare legislation has been founded.

³⁷Rudd, above n 1.

II HUMAN RIGHTS: THE IMPETUS FOR CHANGE IN THE TREATMENT OF INDIGENOUS CHILDREN

Human rights instruments can be used as both an impetus for change in government policy, and as a framework in which the rights of children and Indigenous peoples can be articulated, specifically in regards to child removal.¹ The two most relevant instruments to Indigenous child welfare are the *United Nations Convention on the Rights of the Child (UNCRC)*,² and the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*.³ These instruments both reflect fairly recent developments in international law, which acted as instigators for change in both countries in an attempt to rectify the earlier historical treatment of Indigenous people and children. These instruments recognise two fundamental concepts which must frame all Indigenous child welfare policies, in order for such policies to be effective at addressing the disproportionality between Indigenous and non-Indigenous children: namely, the ‘best interests’ of the child, and the right of Indigenous peoples to self-determination.

This chapter will give an overview of these two concepts, which will then be used as framework against which the child removal policies of WA and BC can be comparatively measured. These concepts will be presented in order to demonstrate how their introduction into international law served as the impetus for change in Australia and Canada’s treatment of their Indigenous peoples. This will serve as the foundation for later assessments of the concept’s ability to act as an instigator for change in Australia and Canada’s current treatment of their Indigenous peoples.

¹ Terri Libesman ‘A Human Rights Framework for Contemporary Aboriginal and Torres Strait Islander Children’s Wellbeing’ (2008) 12(2) *Australian Indigenous Law Review* 68.

² *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (‘*Convention on the Rights of the Child*’).

³ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) (‘*Declaration on the Rights of Indigenous Peoples*’).

A. *Best Interests of the Child*

At its core, the *UNCRC* recognises the fundamental right of all children to be protected from harm, abuse and neglect, and to grow up in a safe, culturally sensitive environment.⁴ The *UNCRC* acknowledges the primary role of parents in the care and protection of children,⁵ as well as the role of State Parties to help families, to provide support, and to intervene if necessary.⁶ On removal, however, the *UNCRC* states that a child must not be removed from their parents unless the removal is deemed *absolutely necessary*.⁷ The *UNCRC* is centred upon the concept of the ‘best interests’ of the child.⁸ This required centrality is somewhat lost in the child welfare policies of Australia and Canada, which place far too much emphasis on removal and not enough focus on protection from harm in the first place.

The *UNCRC* is culturally sensitive and acknowledges that the best interests of the child can be more complex for Indigenous children.⁹ It also recognises the importance of maintaining and protecting an Indigenous child’s connection to family and culture. The preamble of the instrument states that the cultural heritage, traditions and values of a child must be considered to ensure the protection and harmonious development of the child.¹⁰ Article 5 further recognises the traditional role, rights and responsibilities of Indigenous communities in educating and preparing children for adult life.¹¹ The *UNCRC* places a heavy emphasis on the right of children to be cared for by someone who respects their culture and language.¹² These considerations were intended to introduce some level of flexibility into the concept of ‘best interests’, to allow for Indigenous child-rearing practices to be taken into account, while not detracting from the rights of the children involved.¹³ This recognition supports the belief that simply removing an Indigenous child from risk does not guarantee their safety, as the

⁴ Mick Gooda, *Children’s rights must come first* (10 March 2016) Australian Human Rights Commission <<https://www.humanrights.gov.au/news/stories/childrens-rights-must-come-first>>.

⁵ Jennifer Lock, New South Wales Law Reform Commission, *The Aboriginal Child Placement Principle*, (1997) 162.

⁶ *Convention on the Rights of the Child*, art 18.

⁷ *Convention on the Rights of the Child*, art 9.

⁸ *Ibid* art 3.

⁹ Melinda Jones, ‘Myths and Facts Concerning the Convention on the Rights of the Child in Australia’ (1999) 5(2) *Australian Journal of Human Rights* 126.

¹⁰ *Convention on the Rights of the Child*, preamble.

¹¹ A De Jonge, ‘Australia’s Aboriginal youth and the UN Convention on the Rights of the Child’ (1995) 3(1) *The International Journal of Children’s Rights* 69, 76.

¹² *Convention on the Rights of the Child*, art 20.

¹³ Lock, above n 5, 168.

separation from their family, culture and community can result in the child's quality of life, security, sense of identity and access to opportunities being dramatically compromised.¹⁴ When it comes to Indigenous children, the safety, wellbeing and welfare of the child has been acknowledged as being inextricably linked to their culture and community, as for Indigenous people, this connection is not a perk, but a lifeline.¹⁵ The *UNCRC* recognises that the right to self-determination is essential to the concept of best interests, and that Indigenous input can assist to ensure that children maintain a connection to their culture and therefore, ensure that their best interests are upheld.¹⁶

B. *Right to Self-Determination*

The *UNDRIP* is the overarching human rights instrument for Indigenous people, which constitutes the minimum standards required in order to protect and ensure their survival and wellbeing.¹⁷ The *UNDRIP* is a Declaration and as such, is not strictly binding upon UN parties.¹⁸ However, the UN's position is that the rights of the *UNDRIP* must be respected in order to uphold the rights under the *UNCRC* and other instruments.¹⁹ One of *UNDRIP*'s distinct themes is self-determination, which has been proclaimed as the 'mother of all rights' for Indigenous peoples.²⁰ Self-determination forms the foundation for the enjoyment of all other rights by Indigenous peoples,²¹ and while the term is not defined in the *UNDRIP*, it can be summarised by two essential principles. Firstly, the importance of Indigenous participation in matters that affect them and secondly, through the principle of freedom from discrimination. More than 20 separate provisions contained within the *UNDRIP* uphold the right of Indigenous

¹⁴ Gooda, above n 4.

¹⁵ Ibid.

¹⁶ De Jonge, above n 11.

¹⁷ Megan Davis, 'The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 6(30) *Indigenous Law Bulletin* 6.

¹⁸ International Declarations are non-binding and aspirational instruments, and do not hold the same legal status as an international convention or treaty: *ibid*.

¹⁹ The UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, clarified the status of the Declaration, stating that it can, and should be, used to guide and influence the development of law and policy in relation to Indigenous peoples: Human Rights Council, *Annual Report of the Special Rapporteur on the rights of Indigenous Peoples*, GAOR, 9th Sess, Agenda Item 3, UN Doc A/HRC/9/9 (11 August 2008).

²⁰ James Anaya, 'Superpower Attitudes Towards Indigenous Peoples and Group Rights' (1999) 3(1) *American Society Of International Law* 251, 257.

²¹ Ibid.

peoples to participate in decision-making,²² This includes, of course, decisions about child protection and welfare.

C. *Human Rights Instruments and Indigenous Child Welfare Policies*

The rights provided for Indigenous children under the *UNCRC* and *UNDRIP* go beyond merely paying due regard to the *desirability* of continuing a child's upbringing in a culturally tolerant and appropriate way, and impose an *obligation* that Indigenous children's cultural backgrounds must not be denied. States must protect the right of Indigenous peoples to practice their cultural traditions. As such, States must provide effective mechanisms for the prevention of, and redress for, any action that has the effect of depriving Indigenous peoples of their cultural values or ethnic identities.²³ It is the role of the State to balance all of these factors. Ultimately, the method by which and the extent to which a State implements these rights into their laws, policies and practices will determine whether these rights are realised as international law requires.

D. *Legislative Shift Towards Human Rights*

The implementation of human rights instruments was one of the reasons that there were, finally, legislative shifts in the child welfare policies of Australia and Canada.

1 *Australia*

Following the Second World War, there were rapid developments in international law, with an increasing focus on human rights, culminating in the establishment of the United Nations (UN) and the introduction of the *Universal Declaration of Human Rights*.²⁴ These developments prompted growing political recognition in the Australia for the need to reassess the treatment of Indigenous people.²⁵ Government practices towards Indigenous children, for example, began to shift from assimilation towards

²² Secretariat of National Aboriginal and Islander Child Care, 'Genuine Participation of Aboriginal and Torres Strait Islander Peoples in Child Protection Decision-making for Aboriginal and Torres Strait Islander Children' (Policy Paper, SNAICC, 2012) 4.

²³ *Declaration on the Rights of Indigenous Peoples*, art 8.

²⁴ Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 November 2012, 5 (Anthony De Paulo Buti).

²⁵ *Ibid.*

the concepts of best interests of the child and self-determination.²⁶ Following an overwhelmingly successful referendum in 1967, which gave the federal government the power to make laws over Indigenous peoples,²⁷ each state in Australia repealed all legislation that allowed for the removal of Indigenous children under the guise of ‘protection’.²⁸

2 Canada

The legislative shift towards human rights in Canada became more obvious during the late 1970s and 1980s, when several highly critical reports into the number of Indigenous children being removed were released.²⁹ These reports, and the efforts of First Nations communities,³⁰ prompted the provinces to revise their child welfare policies and work to prevent Indigenous adoption outside their communities.³¹ In 1989, the Canadian government ratified the *UNCRC*.³² This ratification signified the beginning of many attempts to revamp the Canadian child welfare system to provide more culturally appropriate services. By the mid-1980s, the number of Indigenous child welfare agencies significantly increased.³³ These agencies were largely funded by the federal government,³⁴ and greatly increased the rights of self-determination for the First Nations peoples, giving them greater power and control over the provision of child welfare services.

²⁶ Secretariat of National Aboriginal and Islander Child Care, ‘Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements’ (Policy Paper, SNAICC, 2013) 4.

²⁷ John Gardiner-Garden, ‘From Dispossession to Reconciliation’ (Research Paper 27, Parliamentary Library, Parliament of Australia, 1999) 4-6.

²⁸ The last of the ‘Protection’ Acts – the *Native Welfare Act 1963* (WA) – was officially repealed in 1972, as the federal government gained control of Aboriginal affairs. Australian Human Rights Commission, Timeline - *History of separation of Aboriginal and Torres Strait Islander children from their families*, Australian Human Rights Commission <<https://www.humanrights.gov.au/timeline-history-separation-aboriginal-and-torres-strait-islander-children-their-families-text>>.

²⁹ Manitoba, Manitoba Community Services, *No quiet place: Final report to Honourable Muriel Smith, Minister of Community Services by Judge Edwin Kimelman* (Report, Manitoba, 1985) (‘*Kimelman Report*’); Peter Johnston, *Native Statement of Reconciliation Children and the Child Welfare System* (James Lorimer Limited, 1st ed, 1983).

³⁰ Erin Hanson, Sixties Scoop (19 July 2017) Indigenous Foundations <http://indigenousfoundations.arts.ubc.ca/sixties_scoop/>.

³¹ *Ibid.*

³² Clara Filipetti, ‘The Treatment of Aboriginal Children in Canada: A Violation of Human Rights Demanding Remedy’ (2016) 11(2) *First Peoples Child and Family Review* 60, 63.

³³ By the 1990s, there were 17 Indigenous child welfare agencies, a number which continued to rise: Anna Kozlowski et al, *First Nations Child Welfare in British Columbia* (2011) Canadian Child Welfare Portal <<http://cwpr.ca/infosheets/first-nations-child-welfare-british-columbia>>.

³⁴ Vandna Sinha and Anna Kozowski, ‘The Structure of Aboriginal Child Welfare in Canada’ (2013) 4(2) *The International Indigenous Policy Journal*, 4.

E. *Conclusion*

This chapter has briefly discussed how the concepts of the best interests of the child and Indigenous self-determination can be used as a framework for Indigenous child welfare policies for two purposes. Firstly, to show how the introduction of these principles into international law was the impetus for change in Australia and Canada's treatment of their Indigenous peoples. Secondly, to provide a foundation for later chapters to assess how the invocation of these human rights principles can serve as an instigator for change to improve the current situation, and to assist in examining if a lack of compliance, despite apparent commitments to the human rights instruments, is the reason why the problem of Indigenous overrepresentation in care is still lingering.

The next chapter will examine Australia's history of Indigenous child removal and how WA's current child welfare policies and practices developed out of these historical policies. It will assess current policies practices against the international human rights instruments to determine their consistency with such instruments.

III THE HISTORICAL AND CONTEMPORARY OVERREPRESENTATION OF INDIGENOUS CHILDREN IN CARE IN AUSTRALIA

At the core of Australia's colonial history is a pattern of exploitation and mistreatment of Indigenous peoples, based on paternalistic policies that sought to assimilate Indigenous peoples into the broader population. The impact of these policies was undeniably traumatic and long lasting. While the legislative framework has changed substantially over time, the rate of Indigenous children in care remains disproportionately high and the numbers continue to increase, indicating that there is a major crisis facing Indigenous communities in Australia.¹ Despite the apparent good intentions of governments, the policies and practices in place are inadequate and ineffective at addressing the overrepresentation of Indigenous children in the child welfare system. Given the substantial scale and stark reality of this issue, it is clear that Indigenous child welfare policies in Australia need urgent rethinking and revision.² This chapter will, by a brief overview of historical child removal practices, provide a contextual framework for the development of WA's contemporary legislation and practices.

A. *History of the 'Stolen Generations'*

Between 1910 and 1970, Australian state governments forcibly removed around 25,000 Indigenous children from their families and communities,³ creating a generation that is now known as the 'Stolen Generations'. The government's intention was to engineer, through assimilation, the effective disappearance of Aboriginal culture. For children, the key method used to execute policies of assimilation was removal, with the ultimate goal of 'breeding-out' and stripping all traces of

¹ Secretariat of National Aboriginal and Islander Child Care, 'Family Matters Report – Measuring trends to turn the tide on Aboriginal and Torres Strait Islander child safety and removal' (Report, SNAICC, 2016) 10.

² Ibid.

³ Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, (Report, Human Rights and Equal Opportunity Commission, 1997) ('*Bringing Them Home Report*') Part 2, Chapter 2; Robert Manne, 'In Denial: the Stolen Generations and the Right' (2001) 1 *The Quarterly Essay* 1, 27.

Aboriginality,⁴ in order to ‘accustom’ the Indigenous population to live within ‘white’ Australia.⁵ These policies were partially justified by the alleged inability of Indigenous parents to raise their children in a Western manner.⁶ The colonial governments believed that they were acting with ‘God’s blessing’,⁷ as they had an ‘imperative duty’,⁸ towards the ‘protection and amelioration of the condition of the Aborigines’.⁹

While these practices went on all over the country, the colony in WA arguably produced the most discriminatory and wide-reaching laws controlling Indigenous people, incorporating methods of both assimilation and absorption to manage the Indigenous population.¹⁰ Commencing in the 1870s, WA enacted the first in a series of paternalistic Indigenous ‘Protection’ Acts, which remained in effect in various forms until 1972.¹¹ These Acts were supported by the belief that Indigenous Australians were ‘irreclaimable savages’.¹² The Acts created the position of Chief Protector of Aborigines, who was granted legal guardianship over all Indigenous children.¹³ Children of mixed descent were particularly vulnerable, as their lighter skin meant that they were viewed as being easier to integrate into ‘white’ society.¹⁴ Indigenous children who had been forcibly removed from their families were often placed in orphanages, missions or children homes, or were adopted or fostered out to primarily non-Indigenous families.¹⁵ The removal of young Indigenous children

⁴ Martin Renes, ‘The Stolen Generations, a Narrative of Removal, Displacement and Recovery’ in Martin Renes (Editor) *Lives in Migration: Rupture and Continuity* (Australian Studies Centre, University of Barcelona, 2011) 30, 35.

⁵ Robert van Krieken, ‘The “Stolen Generations” and Cultural Genocide: The Forced Removal of Australian Indigenous Children from Their Families and Its Implications for the Sociology of Childhood’ (1999) 6(3) *Childhood: A Global Journal of Child Research*, 297, 301.

⁶ Renes, above n 4, 36.

⁷ Western Australia, *Parliamentary Debates*, Legislative Council, 5 December 1870, 7 (Frederick Weld).

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Renes, above n 4, 37.

¹¹ Karen Whitney, ‘Dually Disadvantaged: The Impact of Anglo-European Law on Indigenous Australian Women’ (1997) 4(13) *James Cook University Law Review*, 13, 29.

¹² Western Australia, *Parliamentary Debates*, Legislative Council, 5 December 1870, 7 (Maitland Brown).

¹³ The *Aborigines Act 1905* (WA) was the first official statute that conferred full control to the Chief Protector of Aborigines over Indigenous children. The *Aborigines Amendment Act (Natives Administration Act) 1935* (WA) further broadened the scope of these powers: Anna Haebich *Broken Circles: Fragmenting Indigenous Families 1800-2000* (Fremantle, Fremantle arts Centre Press, 2001) 186-7.

¹⁴ *Bringing Them Home Report*, above n 3, Part 2, Chapter 2.

¹⁵ The Australian Bureau of Statistics estimated that around one third of the children removed were raised by non-Indigenous foster or adoptive parents, almost one third raised in missions and a third of were raised in orphanages and children’s homes: Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander Survey 1994*, Australian Bureau of Statistics,

involved severing the emotional, cultural and geographical bonds with the child's Indigenous heritage in a process of displacement, silencing and denial of ethnic origins. Children who were removed were often isolated from their siblings and forbidden from using their own language.¹⁶ They received a minimal education, and were often subject to terrible abuse and neglect.¹⁷

It is now recognised that these policies were both inhumane and blatantly discriminatory, and represented sustained breaches to the human rights of Indigenous people. Indigenous families and communities were torn apart, a brutal intrusion that many have been unable to recover from.

B. *The Impact of Human Rights and the Start of Legislative Change*

The growing international focus on human rights acted as an impetus for legislative change in regards to Australia's Indigenous child welfare policies. This change was further propelled in the early 1970s, amongst growing concerns for Indigenous rights and child welfare within the Indigenous community and led to the establishment of Indigenous Child Care Agencies (ICCA).¹⁸ The Aboriginal and Torres Strait Islander Child Placement Principle (the Principle) originated from the ICCA movement in the 1970s. The Principle was first incorporated into state laws in 1983,¹⁹ *officially* ending the various government policies of assimilation,²⁰ but not reducing the number of Indigenous children being removed.

<[http://www.ausstats.abs.gov.au/ausstats/free.nsf/0/0604B8F7C929EB69CA2572250004958B/\\$File/41900_1994.pdf](http://www.ausstats.abs.gov.au/ausstats/free.nsf/0/0604B8F7C929EB69CA2572250004958B/$File/41900_1994.pdf)>.

¹⁶ Up until the 1960s, children in the Kimberly were physically punished for using their Indigenous languages: *Bringing Them Home Report*, above n 3, 133.

¹⁷ Although the children were supposedly in the 'protection' of the State, 1 in 5 children who were fostered and 1 in 10 who were institutionalised reported sexual abuse, and 1 in 5 children reported being physically abused: *ibid* 140.

¹⁸ Secretariat of National Aboriginal and Islander Child Care, 'Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements' (Policy Paper, SNAICC, 2013) 4.

¹⁹ The Principle was incorporated into the child protection laws in the Northern Territory in 1983, New South Wales in 1987, South Australia in 1993, Queensland and the Australian Capital Territory in 1999, Tasmania in 2000 and, finally, Western Australia in 2006: Australian Human Rights Commission, *Timeline - History of separation of Aboriginal and Torres Strait Islander children from their families*, Australian Human Rights Commission <<https://www.humanrights.gov.au/timeline-history-separation-aboriginal-and-torres-strait-islander-children-their-families-text>>.

²⁰ Renes, above n 4, 37.

In 1990, Australia ratified the *UNCRC*,²¹ solidifying its commitment to upholding the rights of all children. Shortly after, in 1997, the Australian Human Rights Commission released the *Bringing Them Home Report*,²² which detailed the shocking mistreatment experienced by the Stolen Generations and warned of the growing overrepresentation of Indigenous children in State care. The Report resulted in each state and territory government apologising to the victims of these policies – the Stolen Generations – culminating in 2008 with a national apology in Parliament.²³ Then, in 2009, the Federal Government ratified the *UNDRIP*, becoming one of the last countries in the UN to do so.²⁴ All of these actions are said to underscore Australia’s commitment towards reconciliation with its Indigenous population and to its duty to protect and uphold the human rights of Indigenous children.

C. Contemporary Overrepresentation of Indigenous Children in Care

Unfortunately, despite the massive policy shifts, best of government intentions, and repeated attempts to rectify matters,²⁵ Indigenous children are still severely overrepresented within the Australian foster care system.²⁶ In WA, Indigenous children represent around 55 percent of the children residing in care, despite only representing 7 percent of the state’s child population.²⁷ In WA, Indigenous children are 17.5 times more likely to reside in care, a dramatic blowout from the national

²¹ Secretariat of National Aboriginal and Islander Child Care, above n 18, 4.

²² *Bringing Them Home Report*, above n 3.

²³ Commonwealth, Parliamentary Debates, House of Representatives, 13 February 2008, 167-71 (Kevin Rudd, Prime Minister).

²⁴ When the *UNDRIP* was first conceived in 2007, Australia was one of only four countries to vote against its adoption (the other three countries were the United States, Canada and New Zealand). In 2009, the federal government endorsed the *UNDRIP*: Megan Davis, ‘To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On’ (2012) 19 *Australian International Law Journal* 17, 18, 25.

²⁵ Jacyntha Krakouer, *Literature review relating to the current context and discourse on Indigenous cultural awareness in the teaching space: Critical pedagogies and improving Indigenous learning outcomes through cultural responsiveness* (Literature Review, Australian Council for Educational Research, 2015).

²⁶ Out-of-home care is the ‘general term used to describe *all forms of alternate accommodation* provided for children and young people under the age of 18 years who are unable to live with their biological parents. It may include both short and longer-term foster care, kinship care and residential care’: Department of Health ‘Fact Sheet - Meeting the primary health care needs of Children and Young People in Out-of-Home Care under the Medicare Benefits Schedule (MBS)’ (2015) 1.

²⁷ Commissioner for Children and Young People Western Australia, Profile of Children and Young People in Western Australia (2014) 38. See also Hon Andrea Mitchell, *WA’s plan to build safe and strong families* (28 September 2016) Government of Western Australia Media Statements <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2016/09/WAs-plan-to-build-safe-and-strong-families.aspx>>.

average of 9.5.²⁸ Moreover, academics, politicians and Indigenous activists throughout Australia have raised ongoing concerns that the numbers of Indigenous children being removed is, in fact, sharply rising.²⁹ In fact, as figure 1 shows, only 10,000 less Indigenous children were removed in 2016 than were taken during the Stolen Generations.³⁰

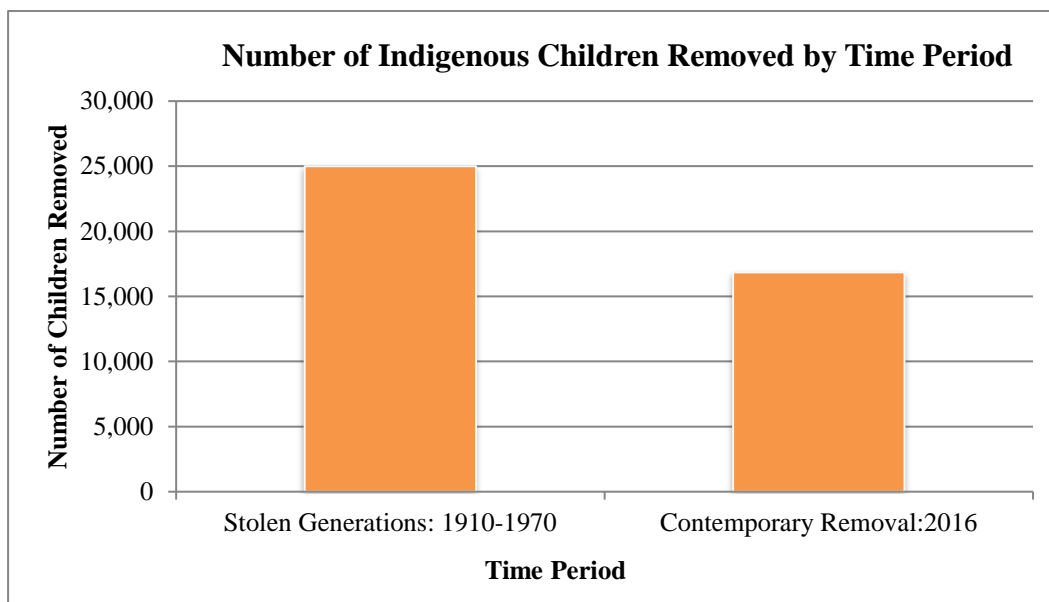


Figure 1: Number of Indigenous children removed during Stolen Generation compared to 2016.³¹

The disparities between the level of interventions and removals of non-Indigenous and Indigenous children in WA are significant. Indigenous children and their families are receiving more interventionist treatment, and are receiving far more attention from

²⁸ Kristy Raithel, Rachel Kilo and Callin Ivanovici, ‘Child Protection Australia 2015-16’ (Report, No 66, Australian Institute of Health and Welfare, 16 March 2017) 52.

²⁹ Kevin Rudd ‘Why ‘Closing the Gap’ Remains Valid For the Future: the need for a new target on Indigenous child removal’ (speech delivered at the Australian National University, Canberra, 13 February 2017); Victoria Laurie ‘Second wave of stolen generations in WA’, *The Australian* (Sydney) 12 December 2016; Dan Conifer, *Bringing Them Home: 20 years after report, Indigenous children are worse off than before* (26 May 2017) ABC News <<http://www.abc.net.au/news/2017-05-26/bringing-them-home-report-20-years-on-children-worse-off/8560568>>; Michelle Brown, *Bringing them Home: Aboriginal children in out of home care still increasing* (29 May 2017) ABC News <<http://www.abc.net.au/news/2017-05-29/bringing-them-home-removal-of-aboriginal-children-on-rise/8564946>>.

³⁰ Productivity Commission for the Steering Committee for the Review of Government Service Provisions, Parliament of Australia, *Report on Government Services 2016 – Volume F: Community Services*, (2016) (‘*Report on Government Services 2016*’).

³¹ It is difficult to accurately estimate exactly how many Indigenous children were forcibly removed during the ‘Stolen Generations’. Many removals were not recorded, or did not specify if a child was Indigenous and many records did not survive: *Bringing Them Home Report*, above n3, Part 2, Chapter 2.

child welfare authorities.³² Indigenous children are overrepresented at every point of the child welfare system.³³ Alarming, this overrepresentation has continued for the last 15 years.³⁴ Indigenous organisations have predicted that this level of disproportionality will continue to rise, with the number of Indigenous children in care tripling by 2035.³⁵

In 2017, former Prime Minister Kevin Rudd voiced concern that Australia was at risk of creating ‘another Stolen Generation, not by design, but by default’.³⁶ In this situation, it is not the increased levels of government intervention that are problematic, but more the nature of the intervention.³⁷ The government’s focus remains on intervention and removal, rather than on the prevention and the provision of support to families who are at risk. This approach ignores the reality of the severe social and economic disadvantage experienced by many Indigenous Australians, which is to a large extent, the justification for the removals in the first place. By failing to address the cause of the problem, the problem continues to perpetuate itself, requiring the removal of more and more children.³⁸ Even though the past policies have been removed and are now widely condemned, the same paternalistic ideologies still exist underneath the surface of these contemporary practices, only now the discriminatory behaviour of the government is more covertly demonstrated by their actions in not actively working towards a solution, continuing the devastation of past governments by stealth.³⁹

³² In 2015, Indigenous children were 5 times as likely to be reported to child protective services. These reports were 6.3 times as likely to be investigated and 6.7 times as likely to be substantiated: Secretariat of National Aboriginal and Islander Child Care, above n 1, 7.

³³ Ibid 16.

³⁴ Since 2004, child welfare notifications regarding Indigenous children have escalated by 108 percent, investigations have increased by 97 percent, substantiations of these investigations have risen by 86 percent, the amount of protection orders issued have increased by 65 percent and the likelihood of an Indigenous child residing in OHC has climbed by 67 percent: Ibid 7; *Report on Government Services 2016*, above n 30, 15.1.

³⁵ The disproportionality between the number of Indigenous children and non-Indigenous children in care is also predicted to dramatically increase: Secretariat of National Aboriginal and Islander Child Care, above n 1, 23.

³⁶ Rudd, above n 29.

³⁷ Secretariat of National Aboriginal and Islander Child Care, above n 32, 7.

³⁸ Adam Dean, ‘Child protection and Aboriginal and Torres Strait Islander children’ (CFCA Resource Sheet, Child Family Community Australia, 2016).

³⁹ Heather Douglas and Tamara Walsh, ‘Continuing the Stolen Generations: Child Protection Interventions and Indigenous People’ (2013) 21(1) *The International Journal of Children’s Rights* 59, 62.

This chapter will now examine the Indigenous child welfare policies currently in place, in light of Australia's human rights requirements, in order to assess their shortcomings and strengths, given their clear ineffectiveness at preventing the large number of removals they were designed to decrease.

D. *The Aboriginal and Torres Strait Islander Principle*

Throughout Australia, the Principle is the key policy measure used to guide culturally respectful practices that are attuned to Indigenous rights. It is codified within the various child welfare Acts of each state and territory.⁴⁰ The Principle is based on the belief that Indigenous children are better off cared for by their own families and communities, a policy which recognises and attempts to put an end to the discriminatory practices of the past.⁴¹ It consists of five core elements – prevention, connection, participation, partnership and placement.⁴² These elements all work in conjunction with each other, focusing on different aspects of child welfare, which together work to protect the best interests of the children involved, as well as the Indigenous community. The Principle is meant to align with Australia's international obligations to respect, protect and promote the rights of children and Indigenous peoples and to bring an end to discriminatory laws and policies.⁴³ It protects the rights of children and communities to collectively enjoy their culture, something that is also recognised as contributing to their 'best interests'.⁴⁴ The Principle recognises the right of Indigenous people to self-determination and is part of a framework that balances and supports the best interests of the child with the needs of the Indigenous community.⁴⁵ In WA, the Principle is contained in sections 12-14 of the *Child and Community Services Act 2004 (WA) (CCSA)*.

⁴⁰ In WA, the Principle is contained in the *Child and Community Services Act 2004 (WA)* ('CCSA') ss 12-14.

⁴¹ Secretariat of National Aboriginal and Islander Child Care, above n 18, 4.

⁴² Secretariat of National Aboriginal and Islander Child Care, 'Understanding and applying the Aboriginal and Torres Strait Islander Child Placement Principle' (Policy Paper, SNAICC, 2017) 6-8.

⁴³ Secretariat of National Aboriginal and Islander Child Care, 'Whose Voice Counts? Aboriginal and Torres Strait Islander participation in child protection decision-making' (Report, SNAICC, 2013) 7.

⁴⁴ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*Convention on the Rights of the Child*') art 5, 30, and Preamble; see also Jennifer Lock, New South Wales Law Reform Commission, *The Aboriginal Child Placement Principle*, (1997) 162, 168.

⁴⁵ *Bringing Them Home Report*, above n 3, Chapter 26, Standard 6, Recommendation 51a-e.

As discussed in chapter 1, the *UNCRC* extends the best interests of Indigenous children to include cultural considerations.⁴⁶ Section 11 incorporates this by recognising that all Indigenous-based participatory rights within the Act coexist with the other rights of children, most importantly, the right to be free from abuse and neglect.⁴⁷

(a) *Placement*

The placement aspect of the Principle is codified by s 12 of *CCSA*,⁴⁸ which provides a framework guiding how the placement of Indigenous children into care should be prioritised, with the intention that the removal of an Indigenous child from their home should be viewed as a *last resort*.⁴⁹ This provision is especially important in protecting the right of Indigenous children to not be forcibly removed from their group to another group.⁵⁰ The placement hierarchy is demonstrated below.



Figure 2: Placement hierarchy as dictated by s 12 of the *CCSA*.⁵¹

The placement hierarchy intends to preserve a child’s connection to their culture,⁵² while also providing scope for Indigenous parties to be involved in the placement process.⁵³ This legislative emphasis on the participation of Indigenous parties demonstrates the government’s recognition of the important role that Indigenous communities can play in the child welfare process and ensuring that Indigenous children are not completely removed from the protective influences of their culture. Section 12 aligns with art 3(2) of the *UNCRC*, which states that the rights and duties

⁴⁶ *Convention on the Rights of the Child*, art 3.

⁴⁷ Secretariat of National Aboriginal and Islander Child Care, above n 42, 11; Philip Lynch ‘Keeping Them Home: The Best Interests of Indigenous Children and Communities in Canada and Australia’ (2001) 23 *Sydney Law Review* 501, 506.

⁴⁸ *CCSA* s 12.

⁴⁹ *Ibid* ss 12-14.

⁵⁰ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) (‘*Declaration on the Rights of Indigenous Peoples*’) art 7(2).

⁵¹ *CCSA* s 12.

⁵² Explanatory Memorandum, Child and Community Services Bill 2003 (WA) cl 7.

⁵³ *Bringing Them Home Report*, above n 3, Chapter 26.

of parents and interested parties must be protected and that their interests must be considered.⁵⁴ By providing such parties the opportunity to do so, s 12 works towards promoting the right of Indigenous parties to self-determination in matters that affect them.

(b) *Participation and Partnership*

Participation is crucial to the realisation of human rights,⁵⁵ particularly under the *UNDRIP* and *UNCRC*. Participation primarily comes from the right to self-determination,⁵⁶ and assists Indigenous populations and legislating governments in working towards overcoming discrimination and to give a voice to minorities in decision-making matters that affect them.⁵⁷ Section 13 recognises the right to self-determination of Indigenous peoples,⁵⁸ again demonstrating the government's understanding that the participation of Indigenous communities is key to positive social change.⁵⁹

Sections 14 and 81 of the *CCSA* recognise the important role that communities and Indigenous organisations should play in Indigenous child welfare, by entrenching their right to participate in decision-making and placement decisions.⁶⁰ This is reflective of the right of Indigenous peoples to participate fully in matters that affect them.⁶¹ Collaborations with Indigenous run organisations and communities further assist child welfare agencies and the government in providing more effective, culturally sensitive services.⁶² This acknowledgement is very important, as within Indigenous communities, children provide an important link between the past and the future,⁶³ ensuring their survival through the continuation of their languages and traditions.

⁵⁴ *Convention on the Rights of the Child*, art 3(2).

⁵⁵ Elizabeth Colliver and Sabrina Fainveits, 'Family Matters Kids Safe in Culture, Not in Care Western Australia' (Issues Paper, Secretariat of National Aboriginal and Islander Child Care, 2014) 11.

⁵⁶ *Ibid.*

⁵⁷ Secretariat of National Aboriginal and Islander Child Care, above n 43, 11.

⁵⁸ *CCSA* s 13.

⁵⁹ Secretariat of National Aboriginal and Islander Child Care, above n 43, 7.

⁶⁰ *CCSA* ss 14, 81.

⁶¹ *Declaration on the Rights of Indigenous Peoples*, art 5.

⁶² Secretariat of National Aboriginal and Islander Child Care, above n 43, 11.

⁶³ Lock, above n 44, 51.

(c) *Connection*

As a signatory party to the *UNDRIP*, WA must ensure that all Indigenous children's links to their culture are maintained; that all Indigenous children are given access to their own culture and languages, and must provide effective mechanisms to prevent any action which has the effect of depriving an Indigenous person of their cultural values or ethnic identity.⁶⁴ Section 9(g) of the *CCSA* directs that encouragement and support should be given to enable children to maintain a connection with their parents and siblings.⁶⁵ The placement hierarchy established in s 12 further recognises and aims to protect the right of Indigenous children specifically to maintain a connection to their culture, by ensuring that placement decisions are made in consideration of this connection.⁶⁶

(d) *Prevention*

The *CCSA* largely ignores the 'prevention' element of the Principle. While each of the other elements are protected to varying degrees, no section specifically refers to the preventative measures that must be taken, or support that must be given to the families and communities of Indigenous children. Nor does the *CCSA* refer to any Indigenous specific groups or organisations that should be given legislatively endorsed support or authority in the provision of child welfare services. The closest the *CCSA* comes to codifying this element of the Principle is in s 9(b), which states that the preferred way of safeguarding and promoting a child's wellbeing is to support their parents, family and community.⁶⁷ Section 9(b) does not provide guidance as to what measures must be provided or followed, any timeline for when support should be given or further clarification of what constitutes support, and applies to all children, not just Indigenous children specifically.⁶⁸ This omission is in contradiction of the principles and rights contained in the *UNDRIP*, which declares that States must provide effective mechanisms of prevention,⁶⁹ and recognises the right of Indigenous families and

⁶⁴ *Declaration on the Rights of Indigenous Peoples*, art 8, 13-14.

⁶⁵ *CCSA* s 9(g).

⁶⁶ Explanatory Memorandum, Child and Community Services Bill 2003 (WA) cl 4-7.

⁶⁷ *CCSA* s 9(b).

⁶⁸ *Ibid.*

⁶⁹ *Declaration on the Rights of Indigenous Peoples*, art 8.

communities to retain shared responsibility for the raising and well-being of their children.⁷⁰

E. *Conclusion*

Despite the apparent consistency of WA's legislation with the relevant international human rights concepts of 'best interests' and self-determination, the *CCSA* is still clearly ineffective in addressing the underlying problems leading to the overrepresentation of Indigenous children in care.

The next chapter will examine Canada's historical child removal policies and practices and track their development into contemporary child welfare system. It will then seek to determine whether in BC, like in WA, despite the best intentions of the governments and monumental shifts in policy, the laws and policies are not working in practice to stem and reduce the number of Indigenous children being removed from their families and communities.

⁷⁰ *Ibid*, preamble.

IV THE HISTORICAL AND CONTEMPORARY OVERREPRESENTATION OF INDIGENOUS CHILDREN IN CARE IN CANADA

Like Australia, Canada's history is also dominated by government-led exploitation and mistreatment of their Indigenous peoples,¹ underpinned by a policy of assimilation. Indigenous people were viewed as a 'problem' that needed to be absorbed into mainstream society.² The justification was the same as in Australia: Indigenous people were a 'dying race',³ and Indigenous children needed to be removed from their 'savage' parents.⁴

This chapter will firstly examine the Canadian Residential Schools movement and how this movement developed into the 'Sixties Scoop', before analysing how these policies shifted into today's more 'culturally appropriate' child welfare system. This chapter argues that the overrepresentation of Indigenous children in care in Canada is reflective of its extensive, government-endorsed history of trying to assimilate Indigenous children and to strip them of their cultural identity. There are now more Indigenous children living in care in Canada than there were during the peak of assimilationist policies.⁵ This presents a significant problem that must be addressed, to ensure that the negative impacts of these historical policies are not further perpetuated in current generations.

¹ Sonia Harris-Short, *Aboriginal Child Welfare, Self-Government and the Rights of Indigenous Children: Protecting the Rights of Indigenous Children*, (Ashgate Publishing, 1st ed, 2012) 33.

² The first documented Aboriginal boarding schools were established in the 1600s by various religious orders: Aboriginal Healing Foundation, *The Healing Has Begun: An Operational Update from the Aboriginal Healing Foundation*, (Report, Aboriginal Healing Foundation, 2002) ('*The Healing Has Begun*').

³ Harris-Short, above n 1, 34.

⁴ *Ibid.*

⁵ This is an issue that the Minister of Indigenous Affairs and Northern Development, Carolyn Bennett, has repeatedly spoken out about in the media: CBC News, *Bennett: 'more children in care now than height of Residential schools'* (27 October 2016) CBC News – Politics, 00:16 <<http://www.cbc.ca/news/politics/bennett-more-children-in-care-now-than-height-of-residential-schools-1.3823844>>; NPR, 'Canadian Government To Investigate Thousands Of Missing Indigenous Women', *Weekend Edition Sunday*, 20 March 2016 (Carolyn Bennett) <<http://www.npr.org/2016/03/20/471161660/canadian-government-to-investigate-thousands-of-missing-indigenous-women>>.

A. History of Indigenous Child Removal

1 Residential Schools

Indigenous children were the main target of the government's assimilation policy and, as a result, were forcibly removed in large numbers from their families and community. Education was the key method used to assimilate Indigenous children into white society.⁶ In the late 1860s, the Canadian government became involved in the administration of 'Residential Schools', which until that point, had been run by religious institutions.⁷ These schools were widely used until the 1970s.⁸ During this period, around 150,000 Indigenous children were placed in the schools.⁹ The *Indian Act 1894* (Canada) empowered the federal government to force 'Status' Indian children to attend residential schools;¹⁰ however, other non-Status Indigenous children were also removed and forcibly detained in these institutions.¹¹ Some children were voluntarily placed at the schools under their parents' misguided belief that the schools would provide their children with better opportunities, while others were involuntarily surrendered by their parents, under duress or the threat of fines or imprisonment.¹²

⁶ Canada, *Royal Commission on Aboriginal Peoples, Looking Forward Looking Back*, volume 1, (Report, Ottawa, Canada Communication Group, 1996) ('RCAP'); *The Healing Has Begun*, above n 2; Harris-Short, above n 1, 34.

⁷ *The Healing Has Begun*, above n 2, 3.

⁸ The last of the residential schools were officially closed in the 1990s. In British Columbia, 28 schools were in operation between 1861 and 1984: Julie Cassidy, 'The Stolen Generations – Canada and Australia: The Legacy of Assimilation' (2006) 11(1) *Deakin Law Review* 131, 142.

⁹ British Columbia, Ministry of Children and Family Development, *Indigenous Resilience, Connectedness And Reunification—From Root Causes To Root Solutions: A Report on Indigenous Child Welfare in British Columbia Final Report of Special Advisor Grand Chief Ed John* (Report, British Columbia, 2016) ('*Final Report of Special Advisor Grand Chief Ed John*') 36.

¹⁰ The *Indian Act* governs many issues, including healthcare, education, land rights and governance, however, the Act only applies to 'Status' Indians. Not all Indigenous people in Canada have 'Status' under the *Indian Act*. The Act excludes Inuit and Metis People, and 'Non-Status Indians'. The legal definition of the term 'Indian' has significantly changed since the terms introduction in 1850. The federal government maintains an official 'Indian Register', which lists all of the 'Status Indians' who are entitled to receive the full benefits provided under the Act. Many First Nations people residing on reserves have 'Status': Megan Furi, Jill Wherrett 'Indian Status and Band Membership Issues' (Research Paper, Library of Parliament, Parliament of Canada, 1996) 1-5; see also Julie Cassidy, 'The Canadian Response to Aboriginal Residential Schools' (2009) 16(2) *Murdoch University Electronic Journal of Law* 38, 48.

¹¹ In Canada, there was no distinction between children of mixed heritage as there was in Australia: Cassidy, above n 10, 48.

¹² *Ibid.*

Upon arriving at the Residential Schools, children were typically stripped of their traditional clothing and belongings, isolated from their siblings,¹³ and – in the lowest of dehumanisation – assigned numbers instead of names.¹⁴ Children as young as four were sent up to 1,200 kilometres away from their homes and communities,¹⁵ all in an attempt to divorce the children from their cultural identities. Indigenous children residing in Residential Schools received limited to no formal education, as training was focused on learning skills for industrial and menial labour.¹⁶ The conditions at the Residential Schools were generally appalling.¹⁷ Neglect, physical and sexual abuse were widespread.¹⁸ The children who inhabited the schools were isolated, lonely and filled with fear,¹⁹ and sustained permanent and irreversible trauma from their experiences.

2 ‘Sixties Scoop’

In the 1960s, the federal government began to integrate Indigenous and non-Indigenous services,²⁰ and transfer responsibility for child welfare to the provinces.²¹ This transfer only served to increase the intense government intrusion into Indigenous life.²² The 1960s thus saw a huge increase in the incidence of Indigenous child removals into fostering and adoption placements.²³ By the 1970s, this practice had replaced Residential Schools as the primary alternative care system for Indigenous children.²⁴ These policies are now widely referred to as the ‘Sixties Scoop’,²⁵ and

¹³ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciliation for the Future – Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Report, Manitoba, 2015) (‘*Final Report of the Truth and Reconciliation Commission*’) 45.

¹⁴ *Ibid* 44.

¹⁵ *Ibid* 41.

¹⁶ *The Healing Has Begun*, above n 2, 4.

¹⁷ *RCAP*, above n 6, 362.

¹⁸ *Ibid* 345, 353, 358-9, 364-6 and 369-70.

¹⁹ *Final Report of the Truth and Reconciliation Commission*, above n 13, 45.

²⁰ Terri Libesman, ‘Child welfare approaches for Indigenous communities: International perspectives’ (CFCA NCPC Issues No. 20, Child Family Community Australia, 2004).

²¹ Raven Sinclair, ‘The Indigenous Child Removal System in Canada: An Examination of Legal Decision-Making and Racial Bias’ (2016) 11(2) *First Peoples Child and Family Review* 8, 9.

²² *Ibid*.

²³ During this period, an estimated 1 in 3 First Nations children had been removed from their families through either foster care or adoption: Libesman, above n 20; Sinclair, above n 21, 9.

²⁴ *Ibid*.

²⁵ Peter Johnston first coined the term ‘Sixties Scoop’ in 1983. The term has been accepted widely amongst the literature: Peter Johnston, *Native Statement of Reconciliation Children and the Child Welfare System* (James Lorimer Limited, 1st ed, 1983).

carried on until the 1980s.²⁶ During this period, it is estimated that close to 20,000 Indigenous children were adopted,²⁷ largely to non-Indigenous families.²⁸ Children caught in the ‘scoop’ were subjected to increased isolation and assimilation, as they were separated from their families, peers, and from all influences of their culture.²⁹ Many children were subject to horrible abuse and neglect, largely because the government imposed minimal background checks on adoptive and foster parents.³⁰

B. Contemporary Overrepresentation

As in contemporary Australia, Indigenous children in Canada are severely overrepresented in the OHC system. Nationally, Indigenous peoples represent 4 percent of the general population, but account for 48 percent of children in OHC.³¹ These figures dramatically rise in BC, where Indigenous children amount to 8 percent of the child population,³² but 62 percent of the children in OHC,³³ a figure that has skyrocketed from 52 percent since 2007.³⁴ In BC, Indigenous children are 17 times more likely to reside in OHC than non-Indigenous children.³⁵

²⁶ Libesman, above n 20; Sinclair, above n 21, 9.

²⁷ Official records state around 11,132 Status Indians were adopted during this period, however, the actual number is believed to be much higher. The exact number of children placed into ‘alternative care’ during this period is unknown. This is in part due to the fact that the statistics do not account for children who were not ‘Status Indians’ under the *Indian Act*, as well as children whose racial status or background may not have been recorded in the belief of increasing their ‘adoptability’: Sinclair, above n 21, 10; Manitoba, Manitoba Community Services, *No quiet place: Final report to Honourable Muriel Smith, Minister of Community Services by Judge Edwin Kimelman* (Report, Manitoba, 1985) (‘*Kimelman Report*’); Margaret Philp, ‘The land of lost children’, *The Globe and Mail* (Toronto), 21 December 2002, 54.

²⁸ Between 1969 and 1979, 78% of all Aboriginal adoptions involved children being adopted by non-Aboriginal families: Ernie Crey, Suzanne Fournier, *Stolen From Our Embrace: The Abduction of First Nations Children and the Restoration of Aboriginal Communities* (Douglas & McIntyre, 1st ed, 1998) 3; see also Erin Hanson, Sixties Scoop (19 July 2017) Indigenous Foundations <http://indigenousfoundations.arts.ubc.ca/sixties_scoop/>.

²⁹ Tae Mee Park, ‘In The Best Interests of The Aboriginal Child’ (2003) 16 *Windsor Review of Social and Legal Issues* 43, 45.

³⁰ Raven Sinclair, Identity Lost and Found: Lessons from the Sixties Scoop (2007) 3(1) *First Peoples Child and Family Review* 65, 75.

³¹ Billie Allan and Janet Smylie, ‘First Peoples, Second Class Treatment: The Role of Racism in the Health and Well-Being of Indigenous Peoples In Canada’ (Report, Wellesley Institute, 2015) 7.

³² Council of the Federation Secretariat, ‘Aboriginal Children in Care Working Group, Aboriginal Children in Care: Report to Canada’s Premiers’ (Report, Council of the Federation Secretariat, 2015) (‘*Report to Canada’s Premiers*’) 7.

³³ *Final Report of Special Advisor Grand Chief Ed John*, above n 9, 11.

³⁴ *Ibid.*

³⁵ Bernard Richard, ‘Delegated Aboriginal Agencies: How Resourcing Affects Service Delivery’ (Representative for Children and Youth, 2017) 4.

As Figure 3 shows, almost as many Indigenous children were removed into OHC in 2016, as were removed during the entire ‘Sixties Scoop’ period, which lasted for around 20 years. The disproportionate representation of Indigenous children in care amply demonstrates that, despite radical changes in approach and intentions, and significant legislative reform, the system is failing. In fact, more children are being removed now than ever before.

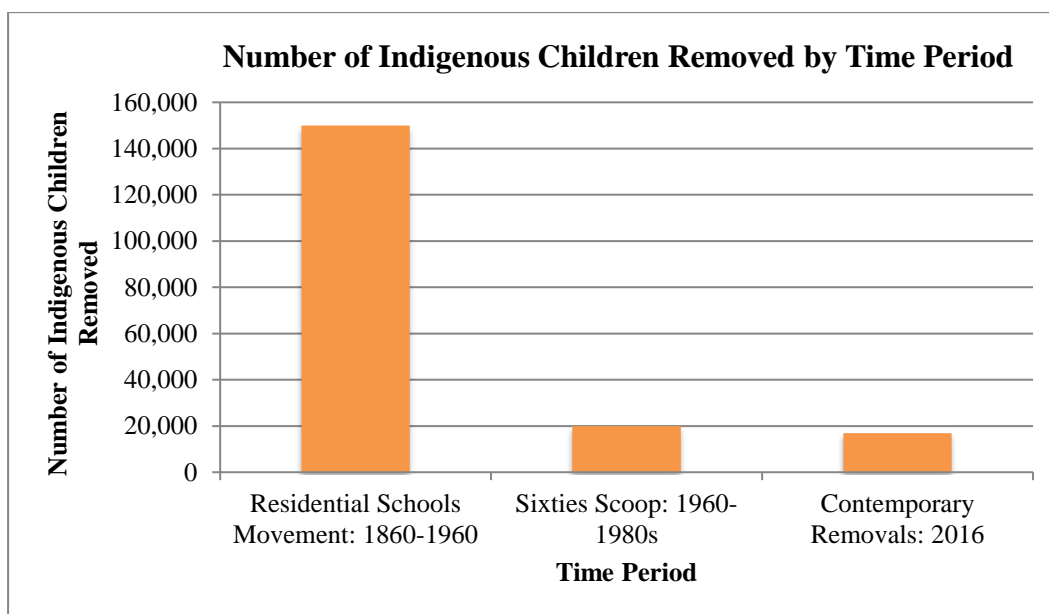


Figure 3 Number of children in care during the Residential Schools and 'Sixties Scoop' era compared to number of Indigenous children in care in 2016.³⁶

Indigenous children are persistently subjected to higher levels of what Indigenous commentators and academics have called ‘relentless and staggering’ government intrusion and intervention.³⁷ Solving this issue and reducing the number of Indigenous children in OHC presents an urgent and ongoing challenge to the Canadian federal government and provincial governments.³⁸

This chapter will now assess the effectiveness and competency of the Canadian Indigenous child welfare system against a human rights framework, in order to determine the weaknesses and inefficiencies within the system, and shed some light on the factors contributing to the overrepresentation of Indigenous children in OHC.

³⁶ *Final Report of Special Advisor Grand Chief Ed John*, above n 9, 36. Sinclair, above n 21, 10; *Kimelman Report*, above n 27; Philp, above n 27. Diagram by the author.

³⁷ *Ibid.*

³⁸ Allan and Smylie, above n 31, 7.

C. Structure of the Child Welfare System

Canada has a decentralised child welfare system. The present distribution of child welfare services between the federal government and Canadian provinces and territories is very complex and inefficient in the way that it is structured. The federal government maintains responsibility for the provision of services and funding to First Nations families living on reserves.³⁹ The *Constitution Act 1867* (Canada) bestowed responsibility for ‘Indians and lands reserved for Indians’ upon the federal government;⁴⁰ though this responsibility has since been somewhat limited to the funding of services for ‘Status’ First Nations children who reside on reserves.⁴¹ The provinces and territories are, therefore, responsible for the provision of funding to all other Indigenous peoples.

Further complicating governance and funding matters, the federal government has entered into treaties with several First Nations governments that bestow rights to self-government, including in relation to child protection and welfare. The terms of the different treaties with respect to child welfare have been remarkably different. The 1981 Spallumcheen First Nation By-Law, for instance, allows the Spallumcheen First Nations to not operate within or adhere to provincial standards.⁴² In contrast, the Nisga’a Lisims First Nation has a 1999 treaty with the Federal Government, which makes them comply with provincial laws and regulations.⁴³ This inconsistency means that different Indigenous groups receive different responsibilities and inequitable treatment from the federal government.

The child welfare system in BC under the *Child, Family and Community Service Act* (CFCSA) is multi-layered and very complex.⁴⁴ This complexity means that child welfare services are not distributed equally across the province and services are not distributed efficiently. The system has been simplified in the graphic below.

³⁹ *Indian Act* R.S.C 1985 c. I-5; *Canada Act 1982* (UK), c 11, sch B (‘*Constitution Act 1982*’).

⁴⁰ *Constitution Act 1982*, s 91.24.

⁴¹ Furi and Wherrett, above n 10, 1-5;

⁴² Centre for Research on Children and Families, McGill University et al, ‘The Structure of Aboriginal Child Welfare in Canada’ (2013) 4(2) *International Indigenous Policy Journal* 1, 8.

⁴³ *Ibid.*

⁴⁴ *Child, Family and Community Service Act* RSBC 1996 C46 (‘CFCSA’).

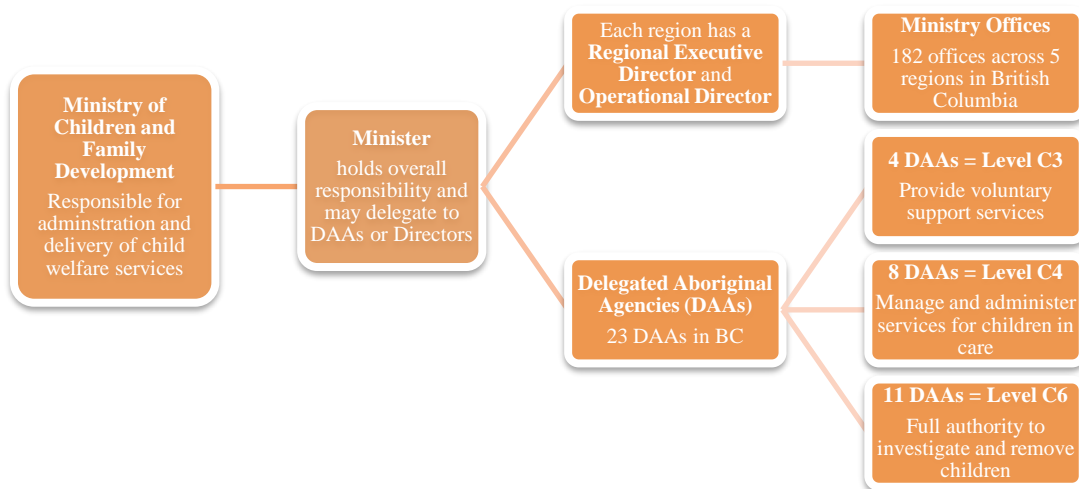


Figure 4: Structure of child welfare system in British Columbia.⁴⁵

An inherent weakness of the child welfare system in BC is its ineffective structure. The way the system is structured undermines the likelihood of it achieving its ambitions. This structure was developed with the intention to provide more culturally appropriate avenues for Indigenous child welfare but it has been weighed down by its complexity. While no system will ever be perfect, a simplified, less bureaucratic system would be more efficient. An overarching, inflexible federal scheme is not the answer, but the lack of participation and consultation provided for in this system is key to its failures. The intentions behind this structure provide a good example for WA, but these intentions are lost amongst the multiple layers and delegations within the system. In trying to be particular, BC has gone too far.

1 *Child, Family and Community Service Act*

Unlike the Principle contained in the *CCSA* in WA,⁴⁶ the provisions relating to Indigenous child welfare are interspersed throughout the *CFCSA* and integrated into each section dealing with the provision of child welfare services.

As discussed earlier, the WA legislation provides a solid example of the different elements that should be supported in relation to child welfare decisions for Indigenous

⁴⁵ Diagram by the author.

⁴⁶ *Child and Community Services Act 2004* (WA) ('*CCSA*') ss 12-14.A ss 12-14.

children.⁴⁷ For ease of comparison, the *CFCSA* will be examined and analysed against these five elements to assess its consistency with international human rights principles, in order to determine the contributory effect this has had on the overrepresentation of Indigenous children in care.

(a) *Placement*

Section 71 of the *CFCSA* creates a hierarchy; guiding Indigenous placements into OHC,⁴⁸ and requiring that all placement decisions must be made in the child's best interests.⁴⁹ The *CFCSA* does not enforce a strict priority-based placement hierarchy as such, as seen in s 12 of the *CCSA*. Instead, it offers separate guidelines for Indigenous children, recognising that their best interests are often broader than the normal considerations for non-Indigenous children. Section 71 has been simplified below.



Figure 5: Representation of recommended placement hierarchy for Indigenous children under s 71 *CFCSA*.⁵⁰

This key section is, to a large extent, consistent with the principles of international law. The placement options and priority system all seek to recognise and protect Indigenous children's connection to culture, family and community, and preserve their cultural identity. The rights of Indigenous children are separated from the rights of non-Indigenous children, albeit not entirely. This acknowledges the difference in Indigenous children's best interests, while also demonstrating that whilst cultural considerations are an important factor of Indigenous best interests, they are not the overriding or only factor that must be considered, as all children should be placed in a

⁴⁷ The five core elements identified are placement, participation, partnership, prevention and connection.

⁴⁸ *CFCSA* s 71(1).

⁴⁹ *Ibid.*

⁵⁰ *Ibid* s 71(3). Diagram by the author.

home that best suits all of their needs.⁵¹ A notable difference from the *CCSA* is a lack of legislative emphasis on consultation with or participation of Indigenous organisations and communities in decision making. Whilst s 3 of the *CFCSA* states that Indigenous people should be involved in the planning and delivery of services to their families and children, under s 71, placement decisions should be made by the Director *without* external consultation. This again indicates that whilst the intent behind the *CFCSA* is consistent with international human rights principles, the actual implementation of the legislation is hindering BC's ability to manage the number of Indigenous children in OHC.

(b) Participation and Partnership

The *CFCSA* also acknowledges that Indigenous parties and organisations should be notified of child welfare proceedings, and that families and communities should be involved in the planning and delivery of services,⁵² demonstrating a positive commitment to Indigenous involvement. There are a large variety of provisions in the *CFCSA* that legislate for Indigenous participation and partnership in the child welfare decision-making process.⁵³ The large varieties of provisions are key to demonstrating BC's acknowledgement of the importance of Indigenous participation to the success and effectiveness of the system. These sections dictate that if an Indigenous child is removed from its family and placed into OHC, a designated representative of the child's band or community must be notified of court hearings and encouraged to participate in planning and decision-making for the child.⁵⁴ The Minister and Director may make agreements with Indian bands or other legal entities representing Indigenous communities.⁵⁵ This further bolsters the right of Indigenous peoples to participate in child welfare decisions extending on the principle stated in s 3,⁵⁶ as well as further enabling the rights of Indigenous communities to self-determination, in line with the international human rights standards.

⁵¹ Sharon Detrick, 'Compilation of the Travaux Préparatoires' in Sharon Detrick (ed), *The United Nations Convention on the Rights of the Child: A Guide to the 'Travaux Préparatoires'* (Martinus Nijhoff Publishers, 1992) 31, 132-133.

⁵² *CFCSA* s 71.

⁵³ *Ibid* ss 3, 33-44, 36, 38-9, 49, 54, 90, 93.

⁵⁴ *Ibid*.

⁵⁵ *Ibid* ss 90, 93.

⁵⁶ *Ibid* s 3.

The right of Indigenous peoples to self-determination is not enshrined in the *CFCSA*, as it is in the *CCSA*.⁵⁷ Under the *CFCSA*, Indigenous people have the right to participate, which, though fundamental to the realisation of self-determination, is not equivalent to self-determination. However, the Constitutional recognition provided by s 35 of the *Constitution Act* (Canada),⁵⁸ would offer more protection than is available in Australia.

The *CFCSA* merely suggests that parents and interested parties should be involved, without taking any real steps to protect their rights or ensure that their views are taken into account, despite the fact that the *UNCRC* places an obligation on State Parties to ensure that the rights and duties such parties are protected and taken into account in all decisions relating to children.⁵⁹ Under the *UNDRIP*, Indigenous people should be able to participate fully in any decision-making that affects them.⁶⁰ However, the *CFCSA* only protects the right for interested parties to be notified.⁶¹ These limitations further hinder the ability of Indigenous peoples to be involved in the child removal process in practice, despite the apparent good-natured intentions behind the legislation and seeming consistency with human rights principles.

(c) Connection

Under international law, maintaining a connection to culture is given great importance, and the importance of this connection is well recognised within the *CFCSA*. The *CFCSA* recognises the importance of preserving and protecting an Indigenous child's cultural identity, a factor that is essential to maintaining their safety and wellbeing.⁶² The *CFCSA* states that a child's cultural identity must be preserved when making decisions regarding an Indigenous child's care.⁶³

⁵⁷ The right of Indigenous peoples to self-determination is codified in s 13 *CCSA*. Under this provision, Aboriginal people and Torres Strait Islanders should be allowed to participate in the welfare and care of their children with as much self-determination as possible, in the administration of the Act.

⁵⁸ Section 35 recognises and protects Aboriginal treaty rights and inherently, the right of Indigenous people to self-government: *Constitution Act 1982* s 35.

⁵⁹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*Convention on the Rights of the Child*') art 3(2).

⁶⁰ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) ('*Declaration on the Rights of Indigenous Peoples*') art 4.

⁶¹ *CFCSA* ss 3, 33-44, 36, 38-9, 49, 54, 90, 93.

⁶² *Ibid* ss 2, 4.

⁶³ *Ibid* ss 2(f), 3(c).

One of the guiding principles of the *CFCSA* is that the safety and wellbeing of children should remain a paramount consideration in all decisions,⁶⁴ and that the cultural identity of Indigenous children should be preserved.⁶⁵ Section 4 aligns with the *UNCRC*,⁶⁶ by stating that the importance of preserving a child's cultural connection must be considered in determining the child's best interests.⁶⁷ Sections 35 and 42 declare that at court hearings for the removal of a child, the Director must prepare a report that includes an interim care plan including the steps to be taken to preserve the child's Indigenous identity.⁶⁸

(d) Prevention

The *CFCSA* provides extensive guidance on the measures and provision of support services to all families, far beyond what is legislated in the *CCSA* in WA. Section 5 allows the Director to make a written agreement with a parent to provide services to support and assist a family to care for a child.⁶⁹ This section encompasses a wide range of support measures, such as services for children and youth, counselling, in-home support, respite care, parenting programs and services to support children who have witnessed domestic violence. The agreement may be made for up to a six-month period and may be renewed.⁷⁰ Section 6 allows parents to make voluntary care arrangements with the Director, if a parent is unable to provide care for the child in the home. The Director must consider if there is a less disruptive way of assisting the parent to care for the child, such as in-home support services.⁷¹ As part of the agreement, the parent will still be involved and informed at all times and maintain contact with the child. Under section 8, agreements can also be made with the child's kin.⁷²

⁶⁴ *Ibid* s 2.

⁶⁵ *Ibid* s 2(f).

⁶⁶ *Convention on the Rights of the Child*, art 20(3).

⁶⁷ *CFCSA* s 4.

⁶⁸ *Ibid* ss 35, 42.

⁶⁹ *Ibid* s 5.

⁷⁰ *Ibid* 5(3).

⁷¹ *Ibid* s 6.

⁷² *Ibid* s 8.

D. Conclusion

As in Australia, the Canadian child welfare system is largely consistent with international principles, although it is somewhat lacking in certain areas. However, despite the best intentions and efforts of the government to develop more culturally appropriate structures and policies pertaining to Indigenous child welfare, these structures and policies have not effectively dealt with the issues causing Indigenous overrepresentation in OHC. The government of BC must take action to change its behaviour towards its Indigenous people, and to address the inefficiencies in its policies and structures.

The next chapter will undertake a comparative analysis of the long-lasting factors that have contributed to the overrepresentation of Indigenous children in care and examine the reasons why this problem is lingering, despite the apparent best intentions of the governments of WA and BC.

V COMPARATIVE ANALYSIS OF CONTRIBUTING FACTORS TO OVERREPRESENTATION

'The road to hell was paved with good intentions and the child welfare system was the paving contractor'.¹

Canadian Judge Edwin Kimelman in 1985

As Kevin Rudd has pointed out, the action of an apology is itself undermined, unless a government changes the behaviour that required an apology.² Although the legislative frameworks and policies relating to child welfare have undergone extensive change since the mid-20th century, until the current problems exacerbating the overrepresentation of Indigenous children in OHC are properly addressed, the overrepresentation will not be rectified. The devastating, trans-generational effects that historical policies of assimilation and child removal have had on contemporary Indigenous populations have been widely acknowledged. However, the remnants of these historic child removal policies continue to impede the health and wellbeing of Indigenous populations. The negative effects of these policies have led to the social and economic disadvantage suffered by many Indigenous peoples, which has in turn resulted in high rates of poverty and neglect, and subsequently, the overrepresentation of Indigenous children in the child welfare system. Many other factors have also contributed to this contemporary overrepresentation, including:

- inconsistent and inadequate funding and disproportionate government spending in child welfare;
- a lack of respect and protection for children to maintain a cultural connection;
- a lack of education and awareness regarding Indigenous cultural practices;
- a lack of consultation and participation with Indigenous communities and cultural leaders; and

¹ Manitoba, Manitoba Community Services, *No quiet place: Final report to Honourable Muriel Smith, Minister of Community Services by Judge Edwin Kimelman* (Report, Manitoba, 1985) ('*Kimelman Report*').

² Kevin Rudd 'Why 'Closing the Gap' Remains Valid for the Future: the need for a new target on Indigenous child removal' (speech delivered at the Australian National University, Canberra, 13 February 2017).

- a lack of preventative and support measures for vulnerable children and families.

These factors will now be examined comparatively in order to assess their impact on the levels of overrepresentation and suggest areas for reform.

A. *Disadvantage and Neglect*

Indigenous children are being removed from their families, not because their families have put them at a greater risk, but because *their families are at a greater risk* due the intergenerational effects of past removals and the high rates of disadvantage evident in Indigenous populations.³

The Indigenous populations of Australia and Canada experience higher levels of social and economic disadvantage than the wider populations.⁴ Indigenous populations also demonstrate much higher rates of domestic violence, substance abuse and mental illness.⁵ These factors all place Indigenous families at a much higher risk of government intervention, and subsequently, place children at a higher risk of removal.

Indigenous children in Canada and Australia are more likely to be removed from their families for neglect than for any other reason.⁶ Neglect has no legislated definition in either jurisdiction, but is strongly linked with disadvantage and poverty.⁷ Neglect is

³ Melisa Brittain and Cindy Blackstock, 'First Nations Child Poverty: A Literature Review and Analysis' (First Nations Children's Action Research and Education Service (FNCARES), 2015) 72, 76.

⁴ First Nations people residing on reserves experience the poorest living conditions in all of Canada: *ibid* 77.

⁵ 'It is now generally accepted that an individual's perceived lack of control over their lives can contribute to a burden of chronic, unhealthy stress contributing to mental health issues, violence and substance abuse': Darren Dick and Tom Calma (Aboriginal and Torres Strait Islander Social Justice Commissioner), *Social determinants and the health of Indigenous peoples in Australia – a human rights based approach* (30 April 2007) Australian Human Rights Commission <<https://www.humanrights.gov.au/news/speeches/social-determinants-and-health-indigenous-peoples-australia-human-rights-based#endnoteb23>>.

⁶ In Australia, 38.3 percent of substantiated reports regarding Indigenous children concerned neglect. By comparison, only 21 percent of substantiated reports for non-Indigenous children were found to be for neglect: Kristy Raithel et al, 'Child welfare Australia 2014–15' (Child Welfare Series No. 63, Australian Institute of Health and Welfare, 2016). In British Columbia in 2016, 73.9 percent of Indigenous children had been placed in out-of-home care following substantiated reports of neglect, while by comparison; only 64.4 percent of non-Indigenous children were placed into care following substantiated reports of neglect: Council of the Federation Secretariat, 'Aboriginal Children in Care Working Group, Aboriginal Children in Care: Report to Canada's Premiers' (Report, Council of the Federation Secretariat, 2015) (*Report to Canada's Premiers*) 43.

⁷ Elizabeth Colliver and Sabrina Fainveits, 'Family Matters Kids Safe in Culture, Not in Care Western Australia' (Issues Paper, Secretariat of National Aboriginal and Islander Child Care, 2014) 6.

recognised as constituting a failure to act in the child's best interests, which carries a risk of cumulative harm over time.⁸ Neglect can include 'situations in which a child's caregiver fails to provide adequate clothing, food or shelter, deliberately or otherwise',⁹ and is very distinct from child abuse, which is defined as a deliberate and harmful act that presents an immediate risk of harm to the child's wellbeing.¹⁰

Disadvantage is an issue that needs to be acknowledged as a leading factor contributing to the overrepresentation of Indigenous children in OHC. Government inaction and ineffective policies are not addressing the disadvantage experienced by Indigenous populations, or offering support to vulnerable families. Instead, the governments are only intervening when it is too late, judging families to be unfit and removing their children. Removing children from their homes as a result of neglect does almost nothing to effectively prevent neglect from occurring in the first place. The fact that the rising numbers of children in care shows no signs of decreasing represents a repeated failure by the governments to address the underlying causes of overrepresentation.¹¹ This deliberate and ongoing pursuit by governments has resulted in the continued impoverishment of Indigenous people, which has been used to justify the high levels of child removal, whilst furthering an overtly assimilative agenda, mirroring the policies of the past by stealth.¹²

B. Lack of Respect and Protection for Maintaining a Cultural Connection

Legislative limitations within the *CCSA* and *CFCSA* restrict the practical ability of the governments to ensure that a connection to Indigenous culture is maintained. There is a clear connection between maintaining a strong cultural identity and increased resilience,¹³ mental stability,¹⁴ and emotional wellbeing.¹⁵ A strong cultural connection can act as a protective measure against substance abuse and mental health

⁸ Ibid 10.

⁹ Brittain and Blackstock, above n 3, 72.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid 75.

¹³AM Dockery, 'Traditional Culture and the Wellbeing of Indigenous Australians: an Analysis of the 2008 NATSISS' (Centre for Labour Market Research Discussion Paper Series 2011/1, Curtin Business School, 2011).

¹⁴Colliver and Fainveits, above n 7, 11.

¹⁵*Report to Canada's Premiers*, above n 6, 23.

issues.¹⁶ Ensuring that a cultural connection is maintained further ensures the strength and resilience of Indigenous populations, rendering Indigenous children less vulnerable to government intervention. The destruction of this connection by past policies has had disastrous results.¹⁷ Increasing the ability of Indigenous people to reengage with cultural practices and reclaim their cultural identity is the key to empowering Indigenous people and alleviating the disadvantage evident within these populations.¹⁸

The *CCSA* and *CFCSA* both recognise the importance of maintaining a cultural connection and aim to protect this connection through their respective placement hierarchies. These hierarchies ensure that children remain connected to parents, siblings and their wider communities. Both countries could improve their provisions protecting this cultural connection by clarifying and solidifying the rights of Indigenous peoples to self-determination, by increasing the legislative involvement of Indigenous parties and organisations in the child welfare process.

C. Inconsistent and Inadequate Government Spending

Inconsistent and inadequate government spending is a problem that has exacerbated the overrepresentation of Indigenous children in care in both WA and BC, albeit in slightly different ways.

In WA, government spending has been disproportionately spent on statutory intervention and care services instead of on prevention and protection. Although prevention is recognised as one of the five core elements of Indigenous child welfare, most government resources are misdirected towards child removal and OHC services, thus providing a temporary fix, rather than long-term solution to the problem. As figure 6 demonstrates, the disproportion between government funding on preventative services and statutory intervention is huge.

¹⁶ Ibid; Muriel Bamblett and Peter Lewis, 'Detoxifying the Child and Family Welfare System for Australian Indigenous Peoples: Self-Determination, Rights and Culture as the Critical Tools' (2007) 3(3) *First Peoples Child and Family Review* 43, 49.

¹⁷ Jennifer Lock, NSW Law Reform Commission, *The Aboriginal Child Placement Principle*, Research Report 7 (1997) 160, 52.

¹⁸ Shaun Lohoar, Nick Butera and Edita Kennedy, 'Strengths of Australian Aboriginal cultural practices in family life and child rearing' (CFCA Paper No. 25, Child Family Community Australia, 2014) 1.

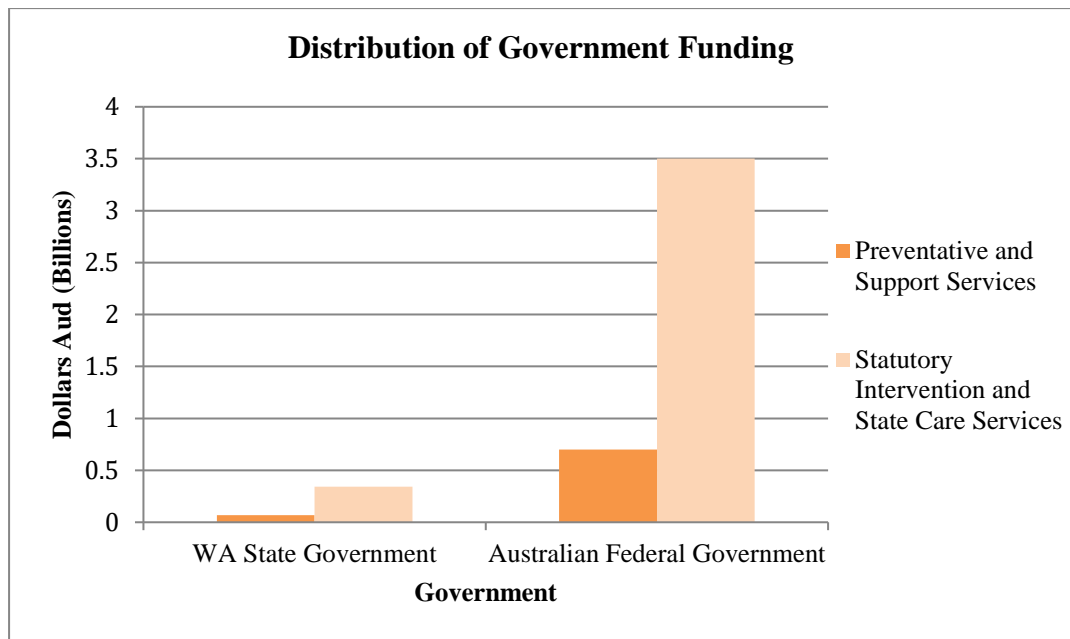


Figure 6: Graph representing distribution of Government funding.¹⁹

Funding and implementing a preventative, rather than punitive, approach would provide greater benefits and increase efforts to address the issue of overrepresentation, rather than continuing to fuel the problem.²⁰ A preventative approach would be more cost efficient for the government, potentially saving across many areas such as education, health and the judicial system.²¹

Moreover, the WA government has not consistently directed sufficient funds to Indigenous-run organisations, which assist in achieving self-determination, and at the same time, are more effective in providing culturally sensitive services.²² Indigenous

¹⁹ In 2014-15, \$700 million was invested in support services for children and their families, amounting to a mere 17 percent of the total funding allocated to child welfare in Australia. In comparison, 83 percent of the funding (\$3.5 billion) was allocated to child welfare statutory intervention and out-of-home care services. In WA in 2013, \$68.1 million was spent on family support and intensive family support services, compared to \$341.5 million spent on child welfare and out-of-home care services: Secretariat of National Aboriginal and Islander Child Care, above n 6, 8. Diagram by the author.

²⁰ Colliver and Fainveits, above n 7, 14.

²¹ Ibid.

²² Queensland, for example, has the second lowest rate of overrepresentation in Australia, indicating that their policies and programs are being implemented more effectively than in WA, which has the worst rate of overrepresentation in Australia. In 2016, the Queensland state government announced it was investing over \$150 million over 5 years to go towards revamping parenting and support and wellbeing services delivered by Aboriginal and Torres Strait Islander organisations. Whilst this funding is not the only factor leading to lower rates of overrepresentation in Queensland, it does demonstrate the importance of thoughtful government financial support and the positive effect that effective spending can have in addressing the issue of overrepresentation: Productivity Commission for the Steering Committee for the Review of Government Service Provisions, Parliament of Australia, *Report on Government Services 2016 – Volume F: Community Services*, (2016) (*Report on Government Services 2016*) 226; Colliver and Fainveits, above n 7, 15.

organisations are instrumental in ensuring that culturally competent services are easily accessible to Indigenous peoples, as they assist in gaining community support, engaging local leaders, gain trust and build relationships within the community. Indigenous run organisations are better able to tailor their services to the needs of the community and work in collaboration with families and Indigenous leaders.²³ In 2012, only 21 percent of investment in community services for Indigenous Australians reached Indigenous families through Indigenous-controlled services.²⁴

In comparison, government funding in BC is generally distributed in a more consultative, although somewhat inequitable and inconsistent manner. BC has established multiple support mechanisms to empower its Indigenous citizens to participate in decision-making, but these efforts have been hindered by inefficient funding, reducing their effectiveness. Funding for individual agreements between the Minister of Children and Family Developments (MCFD) and Delegated Aboriginal Agencies (DAAs) are negotiated on a regional basis,²⁵ and the MCFD has no standard, defined or transparent policy for determining the basis on which funding is distributed. This has resulted in inequitable and inconsistent funding arrangements between the MCFD and each of the 23 DAAs.²⁶ Consequently, the level and types of support available to Indigenous children and families varies significantly based on where the child lives and which DAA serves it.²⁷ These considerable disparities have led to DAAs being significantly overstuffed and unable to provide services comparable to those served by the MCFD.²⁸ Overburdened caseworkers are unable to comply with provincial standards or provide support services to vulnerable children and families,²⁹ which in turn leads to an increase in removals by a system that is ill-equipped to cope, and results in more children being placed into care, instead of receiving adequate support aimed towards prevention. DAAs can only be effective if they are given the

²³ South Australian Government, 'Recognising the Strength of Culture: Aboriginal Cultural Response for the Child and Family Health Service' (Research Discussion Paper, Government of South Australia, 2016) 16-18.

²⁴ Colliver and Fainveits, above n 7, 15.

²⁵ Bernard Richard, 'Delegated Aboriginal Agencies: How Resourcing Affects Service Delivery' (Representative for Children and Youth, 2017) 4.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Child welfare employees engaged by various DAAs have reported having an average caseload of 50 percent more than the level recommended. The Aboriginal Operational and Practice Standards and Indicators recommend that employees oversee no more than 15 cases at a time: *ibid* 5.

²⁹ Ibid.

proper tools to do so. The disproportionate funding received by DAAs is further evidence of the lack of importance placed by the provinces on these services and this is an attitude that needs to change.

In 2016, the Canadian Human Rights Tribunal issued a landmark decision that held that the federal government had repeatedly and deliberately underfunded First Nations child and family services on reserves.³⁰ Its funding policies were found to have created a financial incentive to remove Indigenous children from their homes and place them into care.³¹ The Tribunal held that Indigenous children were discriminated against solely because of their race, and that the federal government had further discriminated against these children in providing inequitable access to services available to others.³² In doing so, the federal government failed its duty to ensure the safety and wellbeing of Indigenous children, and to provide culturally appropriate services.³³ The Tribunal held that the policies had an adverse impact on First Nations people, further aggravating historical trauma and perpetuating disadvantage. It found that this policy and subsequent failures had led to the increased removals of Indigenous children and therefore, the overrepresentation of Indigenous children in the OHC system.³⁴ The Tribunal held that the government was aware of the adverse impacts of its policies and chose to ignore them.³⁵ This is not a case of the remnants of paternalistic attitudes affecting future policies, but evidence of the actual and blatant discrimination and racism embedded into the structures of the federal government, and evidence that the ideals of former colonial policies are still alive and well.

³⁰ *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada)* [2016] CHRT 2 (*FNCFCFS v Attorney General*).

³¹ *Ibid* [384]. Federal funding payments are triggered by the removal of an Indigenous child into care and court order authorising the removal. No funding is received if the child is placed with extended family or within the community. This has led to an increase in court orders issued and consequently, a dramatic rise in the removal of Indigenous children: British Columbia, Ministry of Children and Family Development, *Indigenous Resilience, Connectedness And Reunification—From Root Causes To Root Solutions: A Report on Indigenous Child Welfare in British Columbia Final Report of Special Advisor Grand Chief Ed John* (Report, British Columbia, 2016) (*Final Report of Special Advisor Grand Chief Ed John*) 31.

³² Under International law, Indigenous people are free and equal and have the right to be free from discrimination in the exercise of their rights, in particular based on their Indigenous identity and origin: *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) (*Declaration on the Rights of Indigenous Peoples*) art 2; *Final Report of Special Advisor Grand Chief Ed John*, above n 31, 41.

³³ *FNCFCFS v Attorney General* [383].

³⁴ *Ibid* [268], [273], [279].

³⁵ *Ibid* [46].

The First Nations Child and Family Caring Society brought this challenge against the federal government in the Canadian Human Rights Tribunal, an avenue not accessible to Indigenous Australians. The Tribunal, by critically assessing government policies, is able to act as an impetus for change. In WA, there is no Bill of Rights and no Human Rights Tribunal. This case, while alarming in its findings, demonstrates a strength in the Canadian system and represents a commitment to human rights that WA lacks.

D. Lack of Education and Awareness Regarding Indigenous Cultural Practices

Indigenous childrearing practices and values can be very different from Western practices.³⁶ Indigenous communities focus on extended kinship relationships. Built into these relationships are protective mechanisms, including shared parental responsibility and the different roles of multiple carers, as well as an emphasis on self-reliance of the individual.³⁷ All of these factors are seen as vital to the development of Indigenous children. Understanding these cultural differences is thus critical to ensuring the effective assessment of child welfare concerns and in supporting the needs of Indigenous children.³⁸

In WA, over half of the families that the Department of Child Protection and Family Support (CPSF) come into contact with are Indigenous; yet, only 9.2 percent of their staff are Indigenous.³⁹ The majority of child welfare workers within the MCFD are also non-Indigenous.⁴⁰ The lack of Indigenous staff in both departments, combined with limited access to culturally-appropriate training and education for department employees, means that the people responsible for delivering child welfare services are often not adequately equipped to understand the effect of historical factors felt in Indigenous communities; the issues and challenges faced by Indigenous families and

³⁶ Janet Stanley, Adam M. Tomison and Julian Pocock, 'Child abuse and neglect in Indigenous Australian communities' (NCPC Issues No. 19, Child Family Community Australia, 2003) 2.

³⁷ M Bamblett et al, 'Not One Size Fits All' Understanding the Social and Emotional Wellbeing of Aboriginal Children' (Report, La Trobe University, 2012) 30.

³⁸ Secretariat of National Aboriginal and Islander Child Care, 'Whose Voice Counts? Aboriginal and Torres Strait Islander participation in child welfare decision making' (Report, SNAICC, 2013) 11; Terri Libesman, 'Can International Law Imagine the world of Indigenous children?' *International Journal of Children's Rights* (2007) 15(2) 283, 307.

³⁹ Department for Child Protection and Family Support, *Workforce and Diversity Plan 2013-2017* (2013) 14.

⁴⁰ *Report to Canada's Premiers*, above n 6, 12.

communities; or the different child rearing techniques and ideologies developed by Indigenous peoples. This is particularly important given that most investigations of Indigenous families are based on concerns of neglect; yet, limited to no consideration or guidance is given to understand the underlying issues that give rise to those concerns during the child welfare process.⁴¹ The establishment of effective cultural training and education would allow for child welfare staff to more appropriately partner with Indigenous families and communities to find sustainable solutions on their own merit, without state intervention.⁴²

E. *Lack of Consultation and Participation with Indigenous Communities and Cultural Leaders*

Due to Australia and Canada's brutal history of forced child removal, many Indigenous families have a deep-rooted suspicion towards child welfare services and perceive any contact with these services as a threat to the removal of their children.⁴³ This apprehension tends to leave many Indigenous people reluctant to approach child welfare agencies when they need assistance.⁴⁴ Incorporating more effective consultation and participation methods into the child welfare process would help to alleviate this distrust and in turn, increase Indigenous engagement with the process. This would potentially have a positive effect on the number of removals, by assisting families to work together with government services to prevent ever being in that situation.

Active involvement and community engagement in the child welfare process and decision-making is key to positive change and the long-term success of any Indigenous-related policy.⁴⁵ The right to participation, consultation and self-determination is recognised in the *CCSA* and *CFCSA*,⁴⁶ however, there has been an overall failure in practice to include Indigenous communities in the child welfare

⁴¹ *Declaration on the Rights of Indigenous Peoples* art 15; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*Convention on the Rights of the Child*') art 19.

⁴² Sarah De Leeuw, 'State of Care: The Ontologies of Child Welfare in British Columbia' (2014) 21(1) *Cultural Geographies* 59, 68.

⁴³ Secretariat of National Aboriginal and Islander Child Care, above n 38, 11.

⁴⁴ *Ibid.*

⁴⁵ R Donato and L Segal 'Does Australia have the appropriate health reform agenda to close the gap in Indigenous health?' (2013) 37(2) *Australian Health Review* 232, 235; Secretariat of National Aboriginal and Islander Child Care, above n 38, 10.

⁴⁶ *Child and Community Services Act 2004* (WA) (*CCSA*) ss 12-14.

process. The legislative roles given to Indigenous organisations and parties are discussed in very general terms, including that such parties should be notified,⁴⁷ or involved,⁴⁸ without clarifying the exact role or extent to which they should be involved. Without proper clarification, their legislative right to involvement is symbolic at best and merely provides another avenue for the government to maintain power over such a vulnerable minority, without ever truly addressing the underlying problems leading to the high need for removals.

WA is still one of only three states in Australia to not require external consultation with Indigenous organisations prior to decision-making.⁴⁹ Queensland probably has the strongest regime in relation to Indigenous participation, explicitly requiring Indigenous inclusion in *all* child welfare decisions,⁵⁰ imposing a *compulsory* requirement on Indigenous consultation prior to judicial decisions, and specifying exactly who must participate in child placement decisions and how participation can be realised.⁵¹ Mandatory consultation seems to have had a positive impact on the level of overrepresentation experienced in the states requiring it, with Queensland having the second lowest rate of overrepresentation in Australia.⁵²

⁴⁷ *CFCSA* ss 33-4, 38, 49, 54.

⁴⁸ *CCSA* ss 12(2)(d), 13-14; *CFCSA* ss 3, 9.

⁴⁹ ACT and NT are the only other jurisdictions to not incorporate this.

⁵⁰ *Child Welfare Act 1999* (QLD) 6.

⁵¹ *Ibid.*

⁵² Australian Institute of Health and Welfare, 'Child Protection Australia 2015-16' (Child Welfare Series 66, 16 March 2017) 52.

Legislative requirements for Indigenous involvement are an important measure to facilitate participation, but have minimal impact when there is no mechanism in place to implement them.⁵³ BC has 23 DAAs involved in the provision of child protective services to the Indigenous population. DAA's are able to administer more culturally competent and appropriate services, foster trust with child welfare authorities and facilitate engagement with the communities. The DAAs have a fairly wide-reaching scope in their coverage of the provision of services to Indigenous children and their families in BC, servicing around 148 of the 198 First Nations bands,⁵⁴ and holding responsibility for around 47 percent of the Indigenous children in OHC.⁵⁵ This wide-reaching scope increases the DAAs ability to meaningfully impact the communities and make positive change. In comparison, WA only has one recognised entity that is approved for consultation.⁵⁶ This limits WA's ability to include Indigenous parties in child welfare decisions, encourage participation and engagement, and to make positive impacts in supporting the community. This lack of Indigenous inclusion is indicative of remnant paternalistic attitudes, of governments imposing solutions that they see fit, rather than by cooperating with and consulting the community.

F. *Lack of Preventative and Support Measures*

The implementation and legislative inclusion of support methods and preventative measures are widely recognised as being more effective than emergency intervention.⁵⁷ The legislative inclusion of such methods by the government would provide a more sustainable, long-term solution than the removal of children into State care.

⁵³ Secretariat of National Aboriginal and Islander Child Care, above n 6, 45.

⁵⁴ Sonia Harris-Short, *Aboriginal Child Welfare, Self-Government and the Rights of Indigenous Children: Protecting the Rights of Indigenous Children*, (Ashgate Publishing, 1st ed, 2012) 11.

⁵⁵ *Final Report of Special Advisor Grand Chief Ed John*, above n 31, 30.

⁵⁶ Yorganop is an out-of-home care placement service that works in partnership with government agencies. It is the only Indigenous foster care agency in WA. See Ruah Community Services, 'Perth Aboriginal Resources Directory' (Directory, Ruah Community Services, 2015) 61; Government of Western Australia Department of Communities, Child Protection and Family Support, *Caring for Aboriginal and Torres Strait Islanders* (1 February 2011) Government of Western Australia Department of Communities Child Protection and Family Support <<https://www.dcp.wa.gov.au/FosteringandAdoption/InterestedInFosterCaring/Pages/CaringforATSI.aspx>>.

⁵⁷ *Report to Canada's Premiers*, above n 6, 23.

Despite the obvious benefits of implementing and legislating for such methods, the *CCSA* does not actively promote any methods of prevention or support that must be provided at any stage of the child welfare process, especially before removal. Instead, the *CCSA* focuses on the removal of children when problems are identified. This resolute focus on removal does nothing to actually address the factors leading to the increased need for removal in Indigenous populations. The increased removal wouldn't be required and couldn't possibly be justified if the government adequately protected the rights of Indigenous peoples and worked to support and collaborate with them, rather than by taking the more punitive action of removing the children once they are already at risk.

BC provides a much more effective example of including support and prevention methods into its legislation. This is a really positive aspect of the *CFCSA*, which WA could look to model its own provisions on. While the prevention methods contained in the *CFCSA* are not 'Indigenous specific', its provisions do allow for more sustainable, less disruptive, long-term solutions for at risk children and families, rather than just removal. The system in BC has a wide range of preventative services available, which are aimed at resolving family problems; however, despite these measures, the general focus of the legislation is still on separating children from families, rather than encouraging family preservation.⁵⁸ A concentrated government effort towards more effectively implementing these measures in practice is needed.

G. Conclusion

The factors described above all contribute significantly to the lingering problems leading to the overrepresentation of Indigenous children in OHC. It is clear that the governments of WA and BC have the tools to effect and implement change, and reduce the numbers of Indigenous children in OHC. However, these tools are not being effectively implemented, and the poor implementation of government policy is one of the leading reasons as to why Indigenous children continue to be overrepresented in care.

⁵⁸ Ibid.

VI CONCLUSION

In both Australia and Canada, historical policies of assimilation and the forced removal of thousands of children have caused permanent, trans-generational trauma to their Indigenous populations. The lingering effects of these policies have contributed to the high rates of Indigenous children currently being removed from their families, not because their families have put them at a greater risk, but because *their families are at a greater risk*. In response to this trauma, the governments of both countries worked to implement new, more culturally appropriate policies and practices to prevent such large numbers of removals, to make amends and to repair some of the damage that earlier policies created. As demonstrated by increasingly large numbers of Indigenous children being removed from their homes today, the problem of overrepresentation has not been fixed and is as persistent as ever. This has created more trauma, disadvantage and poverty, factors that are now endemic to these populations.

The echoes of colonialism are evident in the apparent unwillingness of the governments of WA and BC in closing the funding gap, creating respectful partnerships with Indigenous organisations and families, and in actually implementing culturally appropriate policies and practices. It is clear that current policies, tainted by the airs of paternalism, are insufficient and ineffective at addressing the trauma and disadvantage faced by many Indigenous peoples and the poor implementation of these policies is leading to the removal of Indigenous children at unprecedented rates. Given then disproportionate number of Indigenous children in OHC and the proven impacts of removal, immediate action must be taken to reassess existing government policies.

Both Australia and Canada need to take positive actions towards addressing the disadvantages suffered by many Indigenous peoples. Alleviating disadvantage should assist in lowering the rates of neglect of children, which would significantly reduce the amount of removals taking place because of neglect. Increasing government focus on prevention and support services would further assist in achieving this aim. By increasing the ability of Indigenous organisations to play a role in the provision of child welfare services, each jurisdiction would be incorporating more effective and culturally appropriate solutions to Indigenous child welfare. In BC, this would be

through effective and equal funding to DAAs. In WA, this would be through actively promoting and supporting the establishment of more Indigenous organisations. This would, in turn, hopefully ensure that Indigenous children are better equipped to maintain a connection to their families and culture, a vital factor which acts as a lifeline for Indigenous peoples, increasing the resilience of Indigenous children and communities, thereby further reducing their risk of removal. Both countries need to incorporate more legislative emphasis on Indigenous involvement and consultation in the child welfare process, not just in principle, or hidden within the legislation for the benefit of appearing to be culturally appropriate, but through clearly defined roles and pathways for participation. WA and BC should also increase the education and training provided to their workforces responsible for child welfare. Child welfare workers need to be better informed of Indigenous childrearing practices and historical trauma, so that they can work together with Indigenous populations and deliver more culturally-appropriate services. This kind of co-operation would ensure that the government and Indigenous communities are better able to address and reduce the levels of Indigenous overrepresentation in OHC.

In relation to human rights, the biggest strengths of WA's child welfare system are found within its legislation. The *CCSA* contains multiple provisions, which are consistent with, and act to codify the rights of Indigenous children and peoples found in international law. However, its system lacks the necessary measures and support to effectively implement these 'ideals' in practice, in terms of human rights tribunals and Indigenous child welfare organisations. To address this, the WA government should assess whether establishing its own Bill of Rights or some other form of codified human rights, like those implemented in Victoria and the Australian Capital Territory,¹ would assist in introducing more government accountability, and work to increase the number of Indigenous child welfare organisations. This would make the enforcement of human rights more accessible to all; give everyone the opportunity to challenge the government and its policies; and would ensure that human rights can continue to be an instigator and impetus for change.

¹ *Charter of Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT).

While BC already has these measures in place, with 23 DAAs and a national Human Rights Tribunal, the effectiveness of these measures is hindered by problems with implementation. BC's child welfare legislation is also somewhat lacking in specificity, reducing its consistency with international human rights principles. BC could strengthen and improve the effectiveness of its system by simplifying the structure of its child welfare system, and introducing more transparent, equal and efficient government funding between different Indigenous groups, regions and DAAs.

As Kevin Rudd said, 'you cannot apologise for treating someone badly, without then changing your behaviour towards them in the future'.² The governments of WA and BC have largely only taken superficial measures in rebranding their legislation, rather than actually changing their behaviours towards Indigenous child welfare. The time has now come to take real action to fully address and ameliorate the overrepresentation of Indigenous children in care, rather than to continue to skirt around the underlying issues of disadvantage and intergenerational trauma and simply remove vulnerable Indigenous children. Action based on removal has had disastrous results in the past and the continued removals are likely to perpetuate those disastrous results further. As Rudd said, '[w]e should have the maturity as a polity to recognise where we succeed and where we fail, in this critical area of public policy'.³ We should, therefore, have the foresight and respect for the Indigenous peoples of Australia and Canada in order to take action.

² Kevin Rudd 'Why 'Closing the Gap' Remains Valid for the Future: the need for a new target on Indigenous child removal' (speech delivered at the Australian National University, Canberra, 13 February 2017).

³ Ibid.

VII BIBLIOGRAPHY

A. Articles/Books/Reports

Aboriginal Healing Foundation, *The Healing Has Begun: An Operational Update from the Aboriginal Healing Foundation*, (Report, Aboriginal Healing Foundation, 2002)

Allan, Billie and Janet Smylie, 'First Peoples, Second Class Treatment: The Role of Racism in the Health and Well-Being of Indigenous Peoples In Canada' (Report, Wellesley Institute, 2015)

Anaya, James, 'Superpower Attitudes Towards Indigenous Peoples and Group Rights', (1999) 3(1) *American Society Of International Law* 251

Arney, Fiona et al, 'Enhancing the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Policy and practice considerations' (CFCA Paper No. 34, Child Family Community Australia, 2015)

Arzey, Sylvia and Luke McNamara, 'Invoking international human rights law in a "Rights-Free Zone": Indigenous justice campaigns in Australia' (2011) 33(3) *Human Rights Quarterly* 733

Atkinson, Judy, Jeffrey Nelson and Catherine Atkinson, 'Trauma, Transgenerational Transfer and Effects on Community Wellbeing' in N Purdie, P Dudgeon & R Walker (eds), *Working Together: Aboriginal And Torres Strait Islander Mental Health And Wellbeing Principles And Practice* (Australian Institute Of Health And Welfare, 2010, Canberra) 135

Atkinson, Roslyn, 'Denial and Loss: Removal of Indigenous Australian Children from their Families and Culture' (2005) 5(1) *Queensland University of Technology Law and Justice Journal* 27

Australian Institute of Health and Welfare, 'Child Protection Australia 2015-16' (Child Welfare Series 66, 16 March 2017)

Bamblett, M, et al, 'Not One Size Fits All' Understanding The Social And Emotional Wellbeing Of Aboriginal Children' (Report, La Trobe University, 2012) 30

Bamblett, Muriel and Peter Lewis, 'Detoxifying the Child and Family Welfare System for Australian Indigenous Peoples: Self-Determination, Rights and

Culture as the Critical Tools' (2007) 3(3) *First Peoples Child and Family Review* 43

Barsh, Russell, 'Indigenous Peoples and the UN Commission on Human Rights: A Case of the Immovable Object and the Irresistible Force' (1996) 18 *Human Rights Quarterly* 782

Behrendt, Larissa, 'The Protection of Indigenous Rights: Contemporary Canadian Comparisons' (Research Paper No. 27, Parliamentary Library, Parliament of Australia, 2000) 5

British Columbia, Ministry of Children and Family Development, *Indigenous Resilience, Connectedness And Reunification—From Root Causes To Root Solutions: A Report on Indigenous Child Welfare in British Columbia Final Report of Special Advisor Grand Chief Ed John* (Report, British Columbia, 2016)

Brittain, Melisa and Cindy Blackstock, 'First Nations Child Poverty: A Literature Review and Analysis' (First Nations Children's Action Research and Education Service (FNCARES), 2015)

Brown, Michelle, 'Bringing them Home: Aboriginal children in out of home care still increasing' (29 May 2017) ABC News <<http://www.abc.net.au/news/2017-05-29/bringing-them-home-removal-of-aboriginal-children-on-rise/8564946>>

Canada, House of Commons, Standing Committee on Indigenous and Northern Affairs, Breaking Point: *The Suicide Crisis in Indigenous Communities*, 42nd Parl, 1st Sess, No 9 (19 June 2017) (Chair: MaryAnn Mihychuk) 4-7.)

Canada, *Royal Commission on Aboriginal Peoples, Looking Forward Looking Back*, volume 1, Report (Ottawa: Canada Communication Group, 1996)

Cassidy, Julie, 'The Canadian Response to Aboriginal Residential Schools' (2009) 16(2) *Murdoch University Electronic Journal of Law* 38

Cassidy, Julie, 'The Stolen Generations – Canada and Australia: The Legacy of Assimilation' (2006) 11(1) *Deakin Law Review* 131

Cassidy, Julie, 'Unhelpful and Inappropriate? The Question of Genocide and the Stolen Generations' (2009) 13(1) *Australian Indigenous Law Review*, 114

Centre for Research on Children and Families, McGill University et al, 'The Structure of Aboriginal Child Welfare in Canada' (2013) 4(2) *International Indigenous Policy Journal* 1

Colliver, Elizabeth and Sabrina Fainveits, 'Family Matters Kids Safe in Culture, not in Care Western Australia' (Issues Paper, Secretariat of National Aboriginal and Islander Child Care, 2014) 13

Commissioner for Children and Young People Western Australia, Profile of Children and Young People in Western Australia (2014) 38

Conifer, Dan, 'Bringing Them Home: 20 years after report, indigenous children are worse off than before' (26 May 2017) ABC News <<http://www.abc.net.au/news/2017-05-26/bringing-them-home-report-20-years-on-children-worse-off/8560568>>

Council of the Federation Secretariat, 'Aboriginal Children in Care Working Group, Aboriginal Children in Care: Report to Canada's Premiers' (Report, Council of the Federation Secretariat, 2015)

Cowan, Anna, 'UNDRIP and The Intervention: Indigenous Self-Determination, Participation, And Racial Discrimination In The Northern Territory Of Australia' (2013) 22(2) *Pacific Rim Law & Policy Journal* 247

Cram, Fiona, et al, 'Understanding Overrepresentation of Indigenous Children in Child Welfare Data: An Application of the Drake Risk and Bias Models' (2015) 20(3) *Child Maltreatment* 170, 170.

Crey, Ernie and Suzanne Fournier, *Stolen From Our Embrace: The Abduction of First Nations Children and the Restoration of Aboriginal Communities* (Douglas &McIntyre, 1st ed, 1998)

Davis, Megan, 'The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 6(30) *Indigenous Law Bulletin* 6

Davis, Megan, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17

De Jonge, A, 'Australia's Aboriginal youth and the UN Convention on the Rights of the Child' 3(1) (1995) *The International Journal of Children's Rights* 69

De Leeuw, Sarah, 'State of Care: The Ontologies of Child Welfare in British Columbia' (2014) 21(1) *Cultural Geographies* 59

Dean, Adam, 'Child protection and Aboriginal and Torres Strait Islander children' (CFCA Resource Sheet, Child Family Community Australia, 2016)

Department for Child Protection and Family Support, *Workforce and Diversity Plan 2013-2017* (2013) 14

Department of Health, 'Fact Sheet - Meeting the primary health care needs of Children and Young People in Out-of-Home Care under the Medicare Benefits Schedule (MBS)' (2015)

Department of the Prime Minister and Cabinet, *Closing the Gap Prime Minister's Report 2017* (Department of the Prime Minister and Cabinet, 2017)

Detrick, Sharon, 'Compilation of the Travaux Préparatoires' in Sharon Detrick (ed), *The United Nations Convention on the Rights of the Child: A Guide to the 'Travaux Préparatoires'* (Martinus Nijhoff Publishers, 1992)

Dockery, A. M. 'Traditional Culture and the Wellbeing of Indigenous Australians: an Analysis of the 2008 NATSISS' (Centre for Labour Market Research Discussion Paper Series 2011/1, Curtin Business School, 2011)

Donato, R. and L. Segal, 'Does Australia have the appropriate health reform agenda to close the gap in Indigenous health?' (2013) 37(2) *Australian Health Review* 232

Douglas, Heather and Tamara Walsh, 'Continuing the Stolen Generations: Child Protection Interventions and Indigenous People' (2013) 21(1) *The International Journal of Children's Rights* 59

Fairthorne, Jenny, et al, 'Early mortality from external causes in Indigenous mothers: a retrospective cohort study' (2016) 16(1) *BMC Public Health*, 461.

Filipetti, Clara, 'The Treatment of Aboriginal Children in Canada: A Violation of Human Rights Demanding Remedy' (2016) 11(2) *First Peoples Child and Family Review* 60

Funston, Leticia, Sigrid Herring and ACMAG, 'When Will the Stolen Generations End? A Qualitative Critical Exploration of Contemporary 'Child Protection' Practices in Aboriginal and Torres Strait Islander Communities' (2016) 7(1) *Sexual Abuse in Australia and New Zealand* 51

Furi, Megan and Jill Wherrett, 'Indian Status and Band Membership Issues' (Research Paper, Library of Parliament, Parliament of Canada, 1996)

Gardiner-Garden, John, 'From Dispossession to Reconciliation' (Research Paper 27, Parliamentary Library, Parliament of Australia, 1999)

Gerlach, Alison J, Annette J Browne and Margo Greenwood, 'Engaging Indigenous Families in a Community-Based Indigenous Early Childhood

Programme in British Columbia, Canada: A Cultural Safety Perspective' (2017) 11(1) *Health & Social Care in the Community* 1763

Gough, Pamela et al, 'Pathways to the overrepresentation of Aboriginal children in care' (2005) 23(E) *CECW Information*

Haebich, Anna, *Broken Circles: Fragmenting Indigenous Families 1800-2000* (Fremantle, Fremantle Arts Centre Press, 2001)

Harris-Short, Sonia, *Aboriginal Child Welfare, Self-Government and the Rights of Indigenous Children: Protecting the Rights of Indigenous Children*, (Ashgate Publishing, 1st ed, 2012)

Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Report (1997) 22

Human Rights Council, *Annual Report of the Special Rapporteur on the rights of Indigenous Peoples*, GAOR, 9th Sess, Agenda Item 3, UN Doc A/HRC/9/9 (11 August 2008).

Johnston, Peter, *Native Statement of Reconciliation Children and the Child Welfare System* (James Lorimer Limited. 1st ed, 1983).

Jones, Melinda, 'Myths and Facts Concerning the Convention on the Rights of the Child in Australia' (1999) 5(2) *Australian Journal of Human Rights* 126

Kimelman, Edwin, Manitoba Community Services, *No quiet place: Final report to Honourable Muriel Smith, Minister of Community Services by Judge Edwin Kimelman* (1985)

Krakouer, Jacynta, *Literature review relating to the current context and discourse on Indigenous cultural awareness in the teaching space: Critical pedagogies and improving Indigenous learning outcomes through cultural responsiveness* (Literature Review, Australian Council for Educational Research, 2015)

LaPrairie, Carol, *Examining Indigenous Corrections in Canada* (1996, Indigenous Corrections Ministry of the Solicitor General).

Laurie, Victoria, 'Second wave of stolen generations in WA', *The Australian* (Sydney) 12 December 2016

Libesman, Terri, 'A Human Rights Framework for Contemporary Aboriginal and Torres Strait Islander Children's Wellbeing' (2008) 12(2) *Australian Indigenous Law Review* 68

Libesman, Terri, 'Can International Law Imagine the world of Indigenous children?' *International Journal of Children's Rights* (2007) 15(2) 283

Libesman, Terri, 'Child welfare approaches for Indigenous communities: International perspectives' (CFCA NCPC Issues No. 20, Child Family Community Australia, 2004)

Lock, Jennifer, New South Wales Law Reform Commission, *The Aboriginal Child Placement Principle*, (1997)

Lohoar, Shaun, Nick Butera and Edita Kennedy, 'Strengths of Australian Aboriginal cultural practices in family life and child rearing' (CFCA Paper No. 25, Child Family Community Australia, 2014)

Lynch, Philip, 'Keeping Them Home: The Best Interests of Indigenous Children and Communities in Canada and Australia' (2001) 23 *Sydney Law Review* 501

Manne, Robert, 'In Denial: the Stolen Generations and the Right' (2001) 1 *The Quarterly Essay* 1

Nagy, Rosemary and Robinder Kaur Sehdev, 'Introduction: Residential Schools and Decolonization' (2012) 27(1) *Canadian Journal of Law and Society* 67

Park, Tae Mee, 'In The Best Interests of The Aboriginal Child' (2003) 16 *Windsor Review of Social and Legal Issues* 43

Philp, Margaret, 'The land of lost children', *The Globe and Mail* (Toronto), 21 December 2002, 54

Productivity Commission for the Steering Committee for the Review of Government Service Provisions, Parliament of Australia, *Report on Government Services 2016 – Volume F: Community Services*, (2016)

Raithel, Kristy, et al, 'Child welfare Australia 2014–15' (Child Welfare Series No. 63, Australian Institute of Health and Welfare, 2016)

Raithel, Kristy, Rachel Kilo and Callin Ivanovici, 'Child Protection Australia 2015-16' (Report, No 66, Australian Institute of Health and Welfare, 16 March 2017) 52

Read, Peter, 'Reflecting On The Stolen Generations' (2014) 8(13) *Indigenous Law Bulletin*, 3

Renes, Martin, 'The Stolen Generations, a Narrative of Removal, Displacement and Recovery' in Martin Renes (Editor) *Lives in Migration:*

Rupture and Continuity (Australian Studies Centre, University of Barcelona, 2011) 30

Richard, Bernard, 'Delegated Aboriginal Agencies: How Resourcing Affects Service Delivery' (Representative for Children and Youth, 2017) 4

Secretariat of National Aboriginal and Islander Child Care, 'Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements' (Policy Paper, SNAICC, 2013) 4

Secretariat of National Aboriginal and Islander Child Care, 'Family Matters Report – Measuring trends to turn the tide on Aboriginal and Torres Strait Islander child safety and removal' (Report, SNAICC, 2016)

Secretariat of National Aboriginal and Islander Child Care, 'Genuine Participation of Aboriginal and Torres Strait Islander Peoples in Child Protection Decision-making for Aboriginal and Torres Strait Islander Children' (Policy Paper, SNAICC, 2012)

Secretariat of National Aboriginal and Islander Child Care, 'Understanding and applying the Aboriginal and Torres Strait Islander Child Placement Principle' (Policy Paper, SNAICC, 2017)

Secretariat of National Aboriginal and Islander Child Care, 'Whose Voice Counts? Aboriginal and Torres Strait Islander participation in child protection decision-making' (Report, SNAICC, 2013)

Sinclair, Raven, 'The Indigenous Child Removal System in Canada: An Examination of Legal Decision-Making and Racial Bias' (2016) 11(2) *First Peoples Child and Family Review* 8

Sinclair, Raven, *Identity Lost and Found: Lessons from the Sixties Scoop* (2007) 3(1) *First Peoples Child and Family Review* 65

Sinha, Vandna and Anna Kozowski, 'The Structure of Aboriginal Child Welfare in Canada' (2013) 4(2) *The International Indigenous Policy Journal* 1

South Australian Government, 'Recognising the Strength of Culture: Aboriginal Cultural Response for the Child and Family Health Service' (Research Discussion Paper, Government of South Australia, 2016)

Stanley, Janet, Adam M. Tomison and Julian Pocock, 'Child abuse and neglect in Indigenous Australian communities' (NCPC Issues No. 19, Child Family Community Australia, 2003) 2

Tilbury, Clare, 'The over-representation of Indigenous children in the Australian child welfare system' (2009) 18(1) *International Journal of Social Welfare* 57

Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciliation for the Future – Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Report, Manitoba, 2015)

van Krieken, Robert, 'The "Stolen Generations" and Cultural Genocide: The Forced Removal of Australian Indigenous Children from Their Families and Its Implications for the Sociology of Childhood' (1999) 6(3) *Childhood: A Global Journal of Child*

Whitney, Karen, 'Dually Disadvantaged: The Impact of Anglo-European Law on Indigenous Australian Women' (1997) 4(13) *James Cook University Law Review*, 13

Zabawa, Zachary Adam, *Where to Now? : First Nation-Led Research, Self-Determination, and the Role of the Settler State in British Columbia* (University of British Columbia, 2017) 32

B. Cases

First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada) [2016] CHRT 2

Re CP (1997) 21 Family Law Reports 486 [502]

C. Legislation

Aborigines Act 1905 (WA)

Aborigines Amendment Act (Natives Administration Act) 1935 (WA)

Canada Act 1982 (UK), c 11, sch B ('Constitution Act 1867')

Charter of Rights and Responsibilities Act 2006 (Vic)

Child and Community Services Act 2004 (WA)

Child, Family and Community Service Act RSBC 1996

Explanatory Memorandum, Child and Community Services Bill 2003 (WA)

Human Rights Act 2004 (ACT)

Indian Act R.S.C 1985 c. I-5

Indian Child Welfare Act 25 U.S.C. § 1901 (1978)

Native Welfare Act 1963 (WA)

D. Treaties

Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976)

United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007)

E. Other

Australian Bureau of Statistics, *4512.0 - Corrective Services, Australia, March quarter 2017* (08/06/2017) Australian Bureau of Statistics, <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0>>

Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander Survey 1994*, Australian Bureau of Statistics,

<[http://www.ausstats.abs.gov.au/ausstats/free.nsf/0/0604B8F7C929EB69CA2572250004958B/\\$File/41900_1994.pdf](http://www.ausstats.abs.gov.au/ausstats/free.nsf/0/0604B8F7C929EB69CA2572250004958B/$File/41900_1994.pdf)>

Australian Human Rights Commission, Timeline - *History of separation of Aboriginal and Torres Strait Islander children from their families*, Australian Human Rights Commission <<https://www.humanrights.gov.au/timeline-history-separation-aboriginal-and-torres-strait-islander-children-their-families-text>>

CBC News, *Bennett: 'more children in care now than height of Residential schools'* (27 October 2016) CBC News – Politics, 00:16 <<http://www.cbc.ca/news/politics/bennett-more-children-in-care-now-than-height-of-residential-schools-1.3823844>>

Commonwealth, Parliamentary Debates, House of Representatives, 13 February 2008, 167-71 (Kevin Rudd, Prime Minister)

Canada, Parliamentary Debates, House of Commons, 11 June 2008, 6849-51 (Stephen Harper, Prime Minister)

Department of Health, *Indigenous and Torres Strait Islander suicide: origins, trends and incidence* (2013), Australian Government, Department of Health <<http://www.health.gov.au/internet/publications/publishing.nsf/Content/mental-natsisps-strat-toc~mental-natsisps-strat-1~mental-natsisps-strat-1-ab>>

Dick, Darren and Tom Calma, *Social determinants and the health of Indigenous peoples in Australia – a human rights based approach* (30 April 2007) Australian Human Rights Commission <<https://www.humanrights.gov.au/news/speeches/social-determinants-and-health-indigenous-peoples-australia-human-rights-based#endnoteb23>>

Gooda, Mick, *Children's rights must come first* (10 March 2016) Australian Human Rights Commission <<https://www.humanrights.gov.au/news/stories/childrens-rights-must-come-first>>

Government of Western Australia Department of Communities, Child Protection and Family Support, *Caring for Aboriginal and Torres Strait Islanders* (1 February 2011) Government of Western Australia Department of Communities Child Protection and Family Support

<<https://www.dcp.wa.gov.au/FosteringandAdoption/InterestedInFosterCaring/Pages/CaringforATSI.aspx>>

Hanson, Erin, *Sixties Scoop* (19 July 2017) Indigenous Foundations <http://indigenousfoundations.arts.ubc.ca/sixties_scoop/>

Kozlowski, Anna, et al, *First Nations Child Welfare in British Columbia* (2011) Canadian Child Welfare Portal <<http://cwrp.ca/infosheets/first-nations-child-welfare-british-columbia>>

Mitchell, Andrea, *WA's plan to build safe and strong families* (28 September 2016) Government of Western Australia Media Statements <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2016/09/WAs-plan-to-build-safe-and-strong-families.aspx>>

NPR, *Canadian Government To Investigate Thousands Of Missing Indigenous Women, Weekend Edition Sunday*, 20 March 2016 (Carolyn Bennett) <<http://www.npr.org/2016/03/20/471161660/canadian-government-to-investigate-thousands-of-missing-indigenous-women>>

Ruah Community Services, 'Perth Aboriginal Resources Directory' (Directory, Ruah Community Services, 2015) 61

Rudd, Kevin, 'Why 'Closing the Gap' Remains Valid for the Future: the need for a new target on Indigenous child removal' (speech delivered at the Australian National University, Canberra, 13 February 2017)

Statistics Canada, *Family violence in Canada: A statistical profile, 2014* (21/01/2014) Statistics Canada <<http://www.statcan.gc.ca/daily-quotidien/160121/dq160121b-eng.htm?HPA>>

Statistics Canada, *Indigenous Peoples: Fact Sheet for British Columbia* (14/03/2016) Statistics Canada <<http://www.statcan.gc.ca/pub/89-656-x/89-656-x2016011-eng.htm>>

Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 November 2012, 5 (Anthony De Paulo Buti)

Western Australia, *Parliamentary Debates*, Legislative Council, 5 December 1870, 7 (Maitland Brown)

Western Australia, *Parliamentary Debates*, Legislative Council, 5 December 1870, 7 (Frederick Weld)