Submission No 36

INQUIRY INTO CHILDREN AFFECTED BY PARENTAL INCARCERATION

Organisation: Indigenous Law and Justice Hub

Date Received: 12 May 2022

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SUBMISSION 36
RECEIVED 12 MAY 2022

Indigenous Law and Justice Hub
University of Melbourne

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Who we are

The Indigenous Law and Justice Hub, Melbourne Law School

The Indigenous Law and Justice Hub (ILJH) brings together legal experts and community leaders to produce rigorous legal research that can be directly applied in Indigenous advocacy and self-governance.

The ILJH's primary focus is two areas of law and policy that are of pressing importance for Indigenous peoples: Criminal In/justice and Treaty. Our aim is to support and amplify Indigenous voices in these fields by performing two chief functions:

> ***Research:*** *Production of high-quality, rigorous legal research; and*
>
> ***Access:*** *Improvement of community access to research and advice*

We also play a central role in developing our law students' understandings of Indigenous cultures, legal systems, and Indigenous experiences of settler law. This includes overseeing a review of the compulsory Juris Doctor curriculum to increase the representation of Indigenous knowledges and perspectives, as well as developing new subject offerings and learning opportunities.

For more information about the ILJH visit our website.

Contact us at mls-indigenous@unimelb.edu.au

Acknowledgement

The Indigenous Law and Justice Hub acknowledges the Wurundjeri people of the Kulin Nation, the Traditional Owners of the unceded land on which our University building sits. We acknowledge the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation.

Introduction

Thank you for the opportunity to make a submission to the **Inquiry into children affected by parental incarceration**, presently being conducted by the Legal and Social Issues Committee (Legislative Council) at the Parliament of Victoria.

Due to the crisis of persistent and increasing overrepresentation of Aboriginal and Torres Strait Islander people in the criminal legal system, we urge this inquiry to place central focus on the rights of Aboriginal and Torres Strait Islander children, including the rights connected to their status as members of Indigenous nations.

Incarceration has a devastating effect on families. Until governments in all jurisdictions take seriously the need to address the socio-economic drivers of First Nations incarceration resulting from colonisation, as documented by successive Royal Commission and Inquiry reports, over-incarceration of First Nations mothers, fathers and other caregivers will continue to cause serious and unjustifiable harm to children. In this context, while we welcome consideration of measures to enhance supports currently available to families impacted by incarceration, we consider these to ultimately be band-aid measures which will have limited impact in comparison to the promise of decarceration strategies.

In the spirit of the momentous progress in First Nations-Settler relations in Victoria, as signified by the Yoorrook truth-telling process and the ongoing Treaty negotiations, we encourage ambitious justice reforms in partnership with First Nations peoples.

Recommendations

As a research and teaching organisation housed within a leading Australian law school, this submission draws the Committee's attention to the following matters centrally within our experience:

Recommendation 1- Prioritise decarceration

Recommendation 2 - Centre children's rights approaches to criminal law, including arrest, bail and sentencing

Recommendation 3 – Support practitioners and decision makers to develop their capability for culturally appropriate practice with Indigenous peoples. For this to be achieved, compulsory and ongoing cultural awareness education should be introduced for lawyers throughout university studies and continuing professional development education

Recommendation 4 – Provide stable, long-term funding for Aboriginal and Torres Strait Islander community-controlled organisations

Contact us

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This inquiry must place central focus on Aboriginal and Torres Strait Islander children

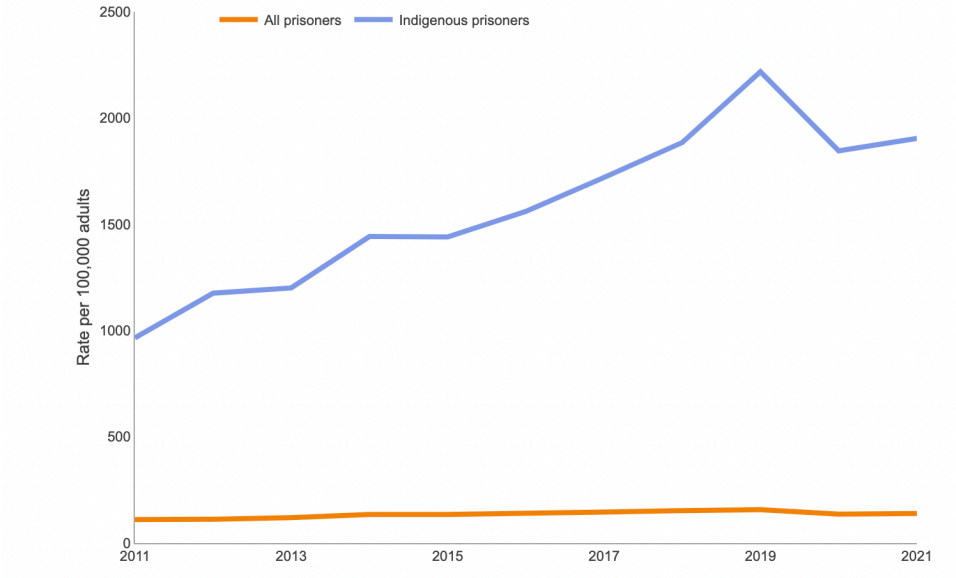
This government oversees a crisis in incarceration of Aboriginal and Torres Strait Islander people. This stark and preventable overrepresentation necessitates that this inquiry place central focus on the distinct needs of Aboriginal and Torres Strait Islander children and their families.

There is a causal link between historical and ongoing dispossession of Indigenous people initiated by settler colonialism and the disproportionate representation of Indigenous people in Australian criminal legal systems. This problematic relationship has remained unchanged since invasion, when 'justice' became employed as a tool of dispossession.[1]

Aboriginal and Torres Strait Islander people make up 30% of the prison population in Australia. 78% of those people have experienced prior adult imprisonment. [2]

In Victoria, as with the rest of the country, the imprisonment rate of Aboriginal and Torres Strait Islander people is significantly higher than the rate for the overall population, and this inequity continues to widen. [3]

Imprisonment rate per 100,000 adults for Aboriginal and Torres Strait Islander Victorians and for Victorians overall



Sentencing Advisory Council, 'Victoria's Indigenous Imprisonment Rates'[4]

The imprisonment rate of Aboriginal and Torres Strait Islander people in Victoria almost doubled in the decade between 2011 and 2021.[5] This is completely unacceptable.

The ILJH is alarmed in the lack of humanity and ambition involved in the Closing the Gap Agreement's targets on incarceration, which the Victorian Government is party to. These targets don't seek to achieve

[1] See Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (The Federation Press, 2016) 3.

[2] Data as at 30 June 2021. Australian Bureau of Statistics 'Prisoners in Australia' (Report, 9 December 2021) https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release.

[3] Sentencing Advisory Council, 'Victoria's Indigenous Imprisonment Rates' (website, last updated 28 April 2022) https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/victorias-indigenous-imprisonment-rates.

[4] Ibid.

[5] Ibid. Imprisonment rate of Aboriginal and Torres Strait Islander peoples in Victoria rose from 965.2 to 1903.5 per 100,000 adults between 2011 and 2021.

parity in imprisonment rates between Aboriginal and Torres Strait Islander people and the general population until well beyond our lifetimes.[6]

Aboriginal and Torres Strait Islander people in Victorian prisons are more likely to be on remand and serving shorter sentences than the general Victorian prison population.[7]

In 2020, 44 per cent of Aboriginal and Torres Strait Islander people in prison in Victoria were on remand compared with 20 per cent in 2010. This constituted a 431 per cent increase in the number of Aboriginal and Torres Strait Islander people held awaiting their trial, prior to any finding of guilt.[8]

A driving cause of this is the 2018 introduction of harsh bail laws in Victoria, introducing a reverse onus requirement to prove 'compelling reasons' or 'exceptional circumstances' to get bail if people engage in repeat wrongdoing, even where it is low-level offending.[9] The Inquiry into Victoria's criminal justice system found that these bail laws were impacting 'women, particularly Aboriginal women and women experiencing poverty, the most.'[10] A staggering 57 percent of women in Victorian prisons are unsentenced.[11] The ILJH joins leading legal organisations,[12] urging that the presumption of bail should be restored in Victoria, as part of an overall strategy of decarceration. It is not right that our system treats assesses the bail-risk of people who commit repeated low-level offences with the same hesitancy as the most serious violent offenders.

The shorter sentences imposed when Aboriginal and Torres Strait Islander people are sentenced are likely to indicate increased prevalence of 'crimes of poverty.'[13] This is consistent with the findings of the 2017 Pathways to Justice report by the Australian Law Reform Commission, which found that Aboriginal and Torres Strait Islander offending was characterised by low-level' offending, including justice procedure offences and failure to pay fines.[14]

The growth of imprisonment rate of Aboriginal and Torres Strait Islander women is having a devastating impact on families. In 2020 Aboriginal and Torres Strait Islander women represent 10% of the Victorian female prison population.[15]

The impact of imprisonment on the ability of Aboriginal and Torres Strait Islander women to fulfil their responsibilities to their families and communities was highlighted through consultations with the Aboriginal and Torres Strait Islander Social Justice Commissioner in the landmark *Wiyi Yani U Thangani (Women's Voices)* report.[16]

The consultation also found a significant intersection between concerns regarding imprisonment and removal of Aboriginal and Torres Strait Islander children. The number of Aboriginal and Torres Strait Islander children in out-of-home care in Victoria has steadily increased each year, reaching 2 450 children in

[6] See Australian Government, *National Agreement on Closing the Gap*, ('target 10: Adults are not overrepresented in the criminal justice system) and (target 11: Young People are not overrepresented in the criminal justice system)
[7] Corrections Victoria, *Profile of Aboriginal People in Prison* (2021) < https://files.corrections.vic.gov.au/2021-07/CV%20Prison%20Aboriginal%20Persons%202021%20Jul%20update.pdf>; Corrections Victoria, Profile of People in Prison (2021) <https://files.corrections.vic.gov.au/2021-06/Infograpic_Profile_of_people_in_prison2020.pdf>.

[8] Corrections Victoria, 'Profile of Aboriginal People in Prison' (2021).
[9] *Bail Act 1977 (*Vic) s4AA.
[10] Parliament of Victoria, Inquiry into Victoria's criminal justice system (March 2022), ('Finding 37').
[11] Victorian Aboriginal Legal Service, 'The Andrews Government must not kick bail reform down the road' (Media release, 24 March 2022).
[12] Ibid.
[13] Australian Human Rights Commission*, Wiyi Yani U Thangani (Women's Voices): Securing our Rights, Securing our Future Report* (2020), 42 ('*Wiyi Yani U Thangani*').

[14] See Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, December 2017) ('chapter three: Incidence').

[15] Corrections Victoria, Profile of Aboriginal People in Prison (2021).

[16] See *Wiyi Yani U Thangani* 165-210 ('Chapter 6: Law and Justice').

June 2020.[17] Rates of out of home care are over 15 times for Indigenous children than non-Indigenous children.[18] Children who have been involved in the Child Protection and/or out-of-home care systems are at greater risk of subsequent involvement in the criminal legal system. This cycle needs to stop.

The consultations showed how incarceration acted to exacerbate rather than reduce existing issues:

> "Once you go into these places, you have got to refer onto somewhere else and that is such a long process. And we get frustrated and we don't have any money, and our sense of pride goes down, and we more than usually go back to the abusive man, because you are kind of stuck" [19]

High rates of recidivism provide data to support what is evident from listening to the stories of those who experience the prison system; prisons are not rehabilitative, therapeutic or supportive environments to re-enter our communities from.

Aboriginal and Torres Strait Islander people are not safe in prisons; as of December last year the Australian Institute of Criminology had recorded 489 Indigenous deaths in custody in the 30 years since the Royal Commission into Aboriginal Deaths in Custody. This included 320 deaths in prison, 165 deaths in police custody or custody-related operations and 4 deaths in youth detention.[20]

The systematic privilege of being white, otherwise known as white supremacy, permeates the psyche of the criminal legal sector. It installs an unconscious bias in the judges and magistrates.[21] It likewise effects those working in the key administrative positions that help the courts and government departments make decisions impacting on Indigenous people. As former Chief Justice of Western Australia, Wayne Martin noted, the system itself is partly to blame.[22] In his words, across this system:

> *"Aboriginal people are much more likely to be questioned by police than non-Aboriginal people. When questioned they are more likely to be arrested rather than proceeded against by summons. If they are arrested, Aboriginal people are much more likely to be remanded in custody than given bail. Aboriginal people are much more likely to plead guilty than go to trial, and if they go to trial, they are much more likely to be convicted. If Aboriginal people are convicted, they are much more likely to be*

[17] Productivity Commission (Cth), '16 Child protection services - Children aged 0-17 years in care by Indigenous status and placement type, at 30 June 2020', *Report on Government Services 2021* < https://www.pc.gov.au/research/ongoing/report-on-government-services/2021/community-services/child-protection>.

[18] Ibid.

[19] *Wiyi Yani U Thangani* 168 ('Quote from Rockhampton women consultation').

[20] Laura Doherty, *Deaths in custody in Australia 2020-21* (Australian Institute of Criminology, Statistical Reports 37 2 December 2021) 2.

[21] See, eg, Chris Cunneen, 'Judicial Racism' in Sandra McKillop (ed) *Aboriginal Justice Issues: Proceedings of a Conference Held 23-25 June 1992* (Australian Institute of Criminology, 1993).

[22] Wayne Martin 'Indigenous Incarceration Rates: Strategies for Much Needed Reform' (Seminar Paper, Law Summer School, 20 February 2015) 8-9 <https://www.supremecourt.wa.gov.au/_files/Speeches_Indigenous_Incarceration_Rates.pdf>.

imprisoned than non-Aboriginal people, and at the end of their term of imprisonment they are much less likely to get parole than non-Aboriginal people." [23]

Recommendation 1: Decarceration is the answer

In this context, steady decarceration must be our focus; we must move with purpose towards non-custodial alternatives. While the ILJH welcomes programs to support children of people who are incarcerated, supports are band-aid mechanisms which cannot heal the wounds of intergenerational cycles of incarceration. We must move towards approaches guided by empathy, humility, humanity and respect.

The situation is well captured by *Sisters Inside*:

"Aboriginal and Torres Strait Islander women continue to be punished for surviving historic oppression, ongoing violence and severe disadvantage. Systemic racism is evident at all levels of the criminal legal system." [24]

Recent actions of the Victorian Government are not indicative of a movement away from incarceration as a response to the entrenched social and economic disadvantage of Aboriginal and Torres Strait Islander people resulting from colonisation, nor are they consistent with the government's commitments in Burra Lotjpa Dunguludja. The 2022-23 Victorian Budget included significant investment in policing, but did not include funding for community-controlled legal support.[25] The Victorian Government's Community Safety Building Authority is currently managing a $791 million construction program on five Victorian prisons. There will be 106 more beds in the Dame Phyllis Frost Centre prison.[26]

There is a depth of understanding of these issues and pathways forward in:

- *The Royal Commission into Aboriginal Deaths in Custody (1991)*
- *The Pathways to Justice Report (2018)*
- *The Wiyi Yani U Thangani (Women's Voices) Report (2020)*

Yet, the marked investment of setting up these inquiries has not been followed by the same energy in implementing their recommendations. It is disheartening that the Commonwealth Government is yet to substantially implement the recommendations of the Royal Commission of 1991; is yet to formally respond to the Australian Law Reform Commission's 2018 report.

It brings to mind Sarah Krasnostien's recent Quarterly Essay:

"Royal or otherwise, commissions and public inquiries are a longstanding institutional feature of politics in Australia. They are used to serve a specialised fact-finding and/or advisory function. Another function: they buy time by providing the optics of accountability where an issue has got out of hand or is in-capable of a satisfactorily popular fix. A 2011 report by the Victorian Parliamentary Research Service noted it is

[23] Ibid.

[24] *Wiyi Yani U Thangani*, 165 ('Sisters inside submission').

[25] Department of Treasury and Finance (Vic), *2022/23 State Budget Overview* (2022), 59; Victorian Aboriginal Legal Service, 'The Andrews Government fails to invest in essential Aboriginal Legal services again' (Media Release, 3 May 2022).

[26] Community Safety Building Authority, 'Dame Phyllis Frost Centre Expansion' (website) < https://csba.vic.gov.au/dpfc>.

> *unclear where royal commissions fit into the accountability mechanisms of the political and legal systems. This might be their appeal. Public inquiries are a ritual of Australian society through which the violated moral order is condemned, and an idealised image of the collective is restored. However, our lack of loyalty to their findings indicates that, as an electorate, we value optics over operationalisation."*[27]

The Victorian Government, in collaboration with the Commonwealth Government should work to implement the recommendations of existing enquiries to decrease the prevalence of Aboriginal and Torres Strait Islander people in the Victorian prison system, including long-called-for reforms such as raising the age of criminal responsibility and committing to justice reinvestment approaches.

Recommendation 2: Children's rights must be upheld

In its assessment of current policies and services, the ILJH urges the inquiry to keep the rights of children at the forefront of its considerations. Given the gaps identified in our initial analysis presented here, we recommend a thorough review of applicable legislation and policies to embed child-rights frameworks.

Key sources of the rights of Aboriginal and Torres Strait Islander children are the *United Nations Convention on the Rights of the Child* ('UN CRC')[28], the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP')[29] and the Victorian *Charter of Human Rights and Responsibilities Act 2006* (the '*Charter*'). A catalogue of the particular rights we bring to the Committee's attention are outlined at **Appendix A.**

Article 3 of the UN CRC is clear in its prescription that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

Public authorities in Victorian are required to act consistently with human rights set out in the Charter. Most relevantly, s 17 of the Charter enshrines the right of a child to have their family unit protected in their best interest. S 32 of the Charter is an interpretive provision that provides that so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights. This includes the UN CRC.

The interests and rights of children connected to accused people should be considered at every stage of the criminal legal process. Presently the impact on children connected to an accused person, such as carers, is not a factor in determining whether the person is granted bail, nor is it an express consideration in the person's sentencing. We consider it would assist in appropriate decision making to have this information before the court.

Aboriginal and Torres Strait Islander children also have rights in relation to their membership of Indigenous nations, which should be considered in the context of parental incarceration. For instance, the UNDRIP 'recognises the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and wellbeing of their children, consistent with the rights of the child.'

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[27] Sarah Krasnostein, *Not Waving, Drowning*: *Mental illness and vulnerability in Australia* (Quarterly Essay 85, 2022) 10.

[28] The UN CRC catalogues an extensive range of human rights for children and is the most ratified human rights treaty. It came into force in September 1990 and was ratified by Australia on December 1990.

[29] The UNDRIP provides a set of minimum standards for the survival, dignity, security and wellbeing of Indigenous Peoples. The Declaration was adopted by an overwhelming majority of the General Assembly of the United Nations in 2007.

Incarcerated Indigenous people have important responsibilities in passing on cultural knowledge to children in their community.

In its 2019 review of Australia's implementation of the UN CRC, the UN Committee on the Rights of the Child noted that a key concern was 'the continuing overrepresentation of Aboriginal and Torres Strait Islander children in alternative care, often outside their communities'.[30] The Committee reiterated its previous recommendations to:

a) strongly invest in measures for children and their families aimed at avoiding the removal of children from their families; to limit removal, when it is deemed necessary, to the shortest time possible; and to ensure that children, their families and communities participate in decision-making in order to guarantee an individualized and community-sensitive approach;
b) strongly invest in measures developed and implemented by Aboriginal and Torres Strait Islander children and communities to prevent their placement in out-of-home care, provide them with adequate support while in alternative care and facilitate their reintegration into their families and communities.[31]

We consider that these measures can be best addressed in conjunction with decarceration measures. Childs-rights approaches are an important starting point to both reduce incarceration, and assist children who are impacted by it.

A. Attendance and arrest

Witnessing attendance and arrests are incidences which are likely to expose children to significant trauma. The ILJH considers that the applicable policies do not embed child-rights approaches, and do not support police practice which minimise adverse impacts on children.

The Victoria Police Manual on 'Bail and remand' states that the attendance process requires police to ask a question about whether the accused have responsibility for children.[32] However this is not elaborated on. The Victoria Police Manuals on 'Crime attendance and investigation', 'Arrests and warrants to arrest' and 'Protecting children' are silent on what police protocols are when attending a crime scene where a child may be in attendance.

This signifies insufficient attention to the rights of the child in these circumstances. For example, when an accused is arrested or detained, it is unclear what processes, if any, are in place to ensure that the child is not left alone, where and for how long the child can be held, and how a child may be entrusted to the care of a relative/kin. It is insufficient to leave such important matters to individual police discretion.

In assessing whether appropriate policies are in place, we urge the Committee to consider articles 12 and 20 of the UN CRC, which enshrines special protections for all children deprived of their family environment, with particular regard to their cultural backgrounds and continuity of care. Children should be given the opportunity to safely express their preference for who their temporary carer should be in circumstances where both parents are unavailable. Police officers should be informed of Aboriginal Child Placement Principles if facilitating temporary care arrangements while a child's parents or carers are detained.

[30] Committee on the Rights of the Child, 2019, Concluding observations on the combined fifth and sixth periodic reports of Australia, the Committee on the Rights of the Child, CRC/C/AUS/CO/5-6, [33].

[31] Ibid.

[32] Victoria Police, 'Bail and remand' (Police Manual, 2021) 22 ('Appendix 4').

B. Bail

In addition to restoration of a presumption towards bail as part of an overall decarceration strategy, the *Bail Act 1997* (Vic) should be examined to enable consideration of the best interest of children connected to people seeking bail.

The *Bail Act* does not require consideration of the accused' responsibilities to care for their children, nor the immediate need to clarify arrangements in order to transfer this responsibility to another appropriate adult.

The Victoria Police Manual on Bail and Remand states that the police bail decision maker may determine an application for bail where the accused is an Aboriginal person who has not been accused of a Schedule 1 offence or does not have a terrorism record.[33] The police bail decision maker is informed about whether the accused is responsible for children by the informant. However, the weight to be given to this information is not prescribed. Given police officers are the first port of decision making in regard to the granting of bail to Aboriginal people, training is necessary to ensure that bail decision making by police officers is carried out appropriately and that the best interest of the child are understood in the context of Aboriginal and Torres Strait Islander cultures.

Under ss 3A and 3AAA(1)(h) of the *Bail Act*, the Court must take into account any 'issues that arise due to a person's Aboriginality' including their cultural background, ties to extended family or place and any other relevant cultural issues or obligation. These sections have led to some consideration of the impact of continued incarceration of a parent on their relationship with their children and associated cultural obligations.

[33] Ibid [5.1]

Jana Hooper's Case

In Jana Hooper's case[34] the court utilised the Bail Act provisions enabling consideration of a person's Aboriginality to take account of Jana's role in the cultural life of her children and family, and to make a finding of 'exceptional circumstances' to grant bail.

Hooper is an Aboriginal woman accused of a serious violent offence against her former partner. Hooper has seven children aged between 7 and 19 years old, four of whom have been diagnosed as being on the autism spectrum. She also has a grandchild aged 2, the child of her oldest daughter, and her second oldest daughter is expecting a child. Hooper brought two bail applications. The first, brought in April 2020, was unsuccessful. The second application was heard in August 2021 and was successful.

Between Jana Hooper's first and second bail application, the Court of Appeal in *HA (a pseudonym) v The Queen* (*'HA'*) stated in relation to ss 3A and 3AAA(1)(h):

> **Those provisions are an important and salutary recognition that cultural connection can play a significant role in the rehabilitation of offenders who are of Aboriginal heritage. A number of programs have been developed in Victoria, and in other jurisdictions, which demonstrate that the reconnection of an Aboriginal offender with culture and Country can constitute a pivotal factor diverting such a person from entrenched offending behaviour.**
>
> **The provisions in the Act are also a recognition of the unacceptable over-representation of Aboriginal and Torres Strait Islander peoples in custody, which regrettably persists some 30 years after the landmark report of the Royal Commission into Aboriginal Deaths in Custody. That report addressed the factors that contributed to those incarceration rates, including a number of failures by the criminal justice system to deal justly with Aboriginal and Torres Strait Islander persons who come before the courts. *The courts have a duty, in cases such as this, to be conscious of the need to avoid compounding those incarceration rates, unless there is good cause to do so.*[35]**

In Hooper's case, her lawyers made substantive submissions on her behalf of the impact that remand would have on her children. The Court was provided with numerous letters from Hooper's children stating that, 'notwithstanding the fact that the children are all receiving adequate care from family members, they are greatly affected by her incarceration and desperately want her home with them.'[36] Submissions were made to the effect that the continued incarceration of their mother contributes to the cycle of incarceration and separation common in that community.[37] Noting the Court of Appeal's decision in *HA,* Hooper submitted that in such circumstances, where incarceration can be avoided, it should be.

Taking the precedent of *HA* and Hooper's submissions into account, Tinney J relevantly stated:

> **[53] The indications are that should she be released on bail, [her connection to her culture], which would be to the undeniable benefit of herself and her children, may well be able to be substantially strengthened to the long-term advantage of her whole family, and her**

[34] *Re Hooper (No 2)* [2021] VSC 476.

[35] [2021] VSCA 64, [58] – [59] (emphasis added).

[36] *Re Hooper (No 2)* [2021] VSC 476, [30(c)].

[37] *Re Hooper (No 2)* [2021] VSC 476, [30(c)].

> **place in the indigenous community may serve to increase her prospects of successfully complying with bail.**
>
> **[58] A number of the other matters on the list of factors relied upon … in proof of exceptional circumstances are also of some importance. In particular, I have regard to the desirability if possible of the applicant being reunited with her children, and the availability of very strong and extensive cultural and practical support for her in the community should she be released on bail. There is a good deal of material indicating the significant steps the applicant has taken since her incarceration to turn her life around from the chaotic and troubling lifestyle she was living beforehand. If these changes are genuine and can be maintained, there is a real prospect not only of the applicant being reunited with her children, but of the future prospects of the family being enhanced.**[38]

The ILJH considers that this is a positive example of courts taking into account the rights of children connected to accused persons, including cultural rights of Aboriginal people. We consider that this positive outcome is likely to demonstrate sophisticated empathy and cultural awareness by practitioners involved, supporting the case we make under recommendation three of this submission, that cultural awareness education for practitioners and decision makers can make a positive impact on justice outcomes.

However, such an outcome is achieved through the work of practitioners involved despite, rather than because of enabling provisions in the legislation. The 'exceptional circumstances' threshold and presumption against bail are prohibitive and should be reversed. The need to consider the best interests of the child should be legislated as a factor to consider as part of the surrounding circumstances in all bail applications. The best interest of the child should include the impact of parental incarceration, particularly in light of the compounding effect of the overincarceration of Aboriginal and Torres Strait Islander people.

Additionally, legislation could include a mandatory consideration of the opinions of children, family and community when determining bail applications by Aboriginal and Torres Strait Islander people. This would assist with the enshrining of rights afforded by art 35 of UNDRIP, namely the right of Indigenous peoples to determine the responsibility of individuals in their communities, and art 12 of the *UN CRC*, which affords every child the right to express their views in all matters affecting them, and to have their views considered in accordance with their age and maturity.

C. Sentencing

Further consideration should be given to amending the *Sentencing Act 1991* (Vic) so that the best interest of children, and the distinct cultural rights of Aboriginal and Torres Strait Islander children, are key factors in the sentencing of their parents, and other adults connected to them, in all cases.

Presently, the impact of sentencing on dependents is only considered to be a mitigating factor in 'exceptional' circumstances. The Australian Law Reform Commission has already advocated for a change in approach, to consider impacts on dependents in all circumstances.[39]

In Victoria, magistrates and judges may exercise their discretion in consider hardship to offenders' families and dependants as a mitigating factor, though this is not required by any express provision.[40]

[38] *Re Hooper (No 2)* [2021] VSC 476, [58].

[39] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No 103, 2006) 190 [6.127].

[40] *Sentencing Act 1991* (Vic) s 5(2)(g).

In contrast, s 16A(2)(p) of the Commonwealth's *Crimes Act 1914* provides that the court must take into account 'the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.' Nonetheless, courts have read down such provisions to require that the hardship on others must be 'exceptional' to be a mitigating factor.

The Victorian Court of Appeal in *Markovic v The Queen* noted that the 'exceptional circumstances test' was developed for the following reasons:

> First, it is almost inevitable that imprisoning a person will have an adverse effect on the person's dependants … Secondly, the primary function of the sentencing court is to impose a sentence commensurate with the gravity of the crime. Thirdly, to treat family hardship as the basis for the exercise of leniency produces the paradoxical result that a guilty person benefits in order that innocent persons suffer less. Fourthly, to treat an offender who has needy dependants more leniently than one equally culpable co-offender who has none would 'defeat the appearance of justice' and be 'patently unjust'.[41]

The ILJH considers that courts should have before them information regarding the impact of sentencing on children connected to the person being sentenced, and the impact on these children's rights. Importantly, we do not distinguish between dependent children and other children connected to the person being sentenced. We consider that while impact on a dependent child may be more significant in a court's reasoning, there are likely to be many circumstances where an impact on a non-dependent child is substantial. This may include where a person has a significant role in a child's cultural development.

Other jurisdictions have demonstrated the positive outcomes that can be achieved where there is a strong rights-based approach to sentencing. The *African Charter on the Rights and Welfare of the Child* provides a useful framework for understanding the rights of the child as related to incarceration and sentencing. It provides in relation to mothers being sentenced:

> *Article (30) - States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:*
> *(a) ensure that a non-custodial sentence will always be first considered when sentencing such mothers;*
> *(b) establish and promote measures alternative to institutional confinement for the treatment of such mothers;*
> *(c) establish special alternative institutions for holding such mothers;*
> *(d) ensure that a mother shall not be imprisoned with her child;*
> *(e) ensure that a death sentence shall not be imposed on such mothers;*
> *(f) the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.*

This rights framework expressly considering how to mitigate the impact on children of imprisoned mothers. This prioritising alternatives to imprisonment with the overarching aim of reformation so that mothers can be reunited with their families and communities. Such a provision could be expanded in the domestic context to apply to all caregivers.

[41] (2010) 30 VR 589, 591–2 [6]–[7] (citations omitted).

M v The State [2007] ZACC 18 - CONSTITUTIONAL COURT OF SOUTH AFRICA

The South African Constitutional Court's decision in *M v The State* is viewed by International Human Rights scholars as a gold standard of what can be achieved by centring the best interest of children in sentencing decisions.

M was a 35 year old single mother of three boys aged 16, 12 and 8. She was convicted on multiple counts of credit card fraud, the total amount of which involved about AUD $2 600. She was sentenced to four years' direct imprisonment in the Regional Court. She partially succeeded on appeal at the High Court, and her sentence was reduced to the possibility of release under correctional supervision [1] after serving eight months of imprisonment.

She applied to the Constitutional Court of South Africa for leave to appeal against the remaining term of imprisonment. Upon careful consideration of the rights of children, Sachs J, with whom the majority agreed, suspended her sentence of four years on condition that M is not convicted of a dishonesty offence during that period, and repaid her victims. During the first three years, she would be under correctional supervision, including 10 hours of community service weekly.

In particular, the ILJH draws the Inquiries' attention to Sachs J's brief explanation of the bests interests of a child should look like in the context of sentencing a parent:

> **[24] ... A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.**
>
> **...**
>
> **[46] A rather perfunctory question put to M by the Regional Magistrate and by the prosecutor at her trial centred around whether, if she went to prison, the children would not be on the street. That enquiry was inadequate. The quality of alternative care should have been more fully investigated, as well as the potential impact that splitting the children up and moving them would have had on their schooling and other activities. Similarly, attention should have been paid as to who would maintain the children in M's absence. It might well be that the Regional Magistrate would have decided that the behaviour of M was so bad that even if the effect on the children would be drastic, a custodial sentence could not be avoided. In these circumstances, however, the Court should have ensured through an appropriate order that the negative impact on the children was reduced as much as possible. Yet, no social worker's report was called for. Nor was any other method used for acquiring adequate information.**

D. During imprisonment

Article 9 of the *UN CRC* provides that children have a right to maintain direct contact, on a regular basis, with parents from whom they are separated. Culturally safe programs facilitating visitation between children and their parents and carers are a vital component of this right.

The impact of trauma and incarceration on parenting also necessitates the continued support of parenting programs for Aboriginal and Torres Strait Islander people in prison who are parents. Such programs would accord with art 18 of the *UN CRC,* which states that appropriate assistance should be given to parent when they require support to raise their children.

While there are a number of family engagement and parenting programs offered by Corrections Victoria, culturally safe visitation and parenting programs available to incarcerated Aboriginal and Torres Strait Islander parents are far and few between. The Department of Justice and Community Safety should work closely with community-controlled organisations to develop targeted programs.

Though the African Charter is not binding on Australia, it also provides a useful framework for consideration of children's rights applicable during parents imprisonment:

- *Article 19 (2) – Every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis.*
- *Article 19 (3)- Where separation results from the action of a State Party, the State Party shall provide the child, or if appropriate, another member of the family with essential information concerning the whereabouts of the. absent member or members of the family. States Parties shall also ensure that the submission of such a request shall not entail any adverse consequences for the person or persons in whose respect it is made.*
- *Article 25 (1) - Any child who is permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance*

Recommendation 3: Educate for cultural safety in service provision

Access to culturally safe legal service provision requires practitioners within these institutions, including judges, lawyers, police, social workers, medical service providers and other decision makers to work with sufficient cultural awareness and commitment to culturally appropriate practices. Mandated education on Indigenous content to enable culturally safe practices is woefully lacking across a range of professional settings. This means that professionals are generally not equipped with formal education to support them to identify their own biases and empathise with Aboriginal and Torres Strait Islander people through some insight into their world views and ways of knowing. Such education would support practitioners to better ask the right questions, work safely, and understand the impacts of incarceration on Aboriginal and Torres Strait Islander kids- enabling them to better put this information before the courts. To assist the Committee, the ILJH wishes to bring to the committee's attention our experience in the legal sector and our work on embedding Indigenous content across the legal curriculum.

In our curriculum work the ILJH has adopted the following working definition of Indigenous content:

> *Content which exposes and explores experiences of Aboriginal and Torres Strait Islander peoples in settler legal systems, as well as content which highlights the pluralism of systems of law on Country. This content must by its nature challenge the premise that settler law is fair, just, objective and inclusive.*
>
> *Indigenous content also includes the need to develop curricula which supports legal graduates to develop interpersonal skills; to work with appropriate empathy and cultural awareness within intercultural environments such that they may effectively work alongside Indigenous peoples and other marginalised communities in achieving their aspirations. Additionally, equipping students with the skills to bear witness to stories of persistent hardship and marginalisation, surviving within settler legal institutions, and supporting others while maintaining their own wellbeing. These are interrelated aspirations for legal curricula.42*

There are currently no regulatory requirements for lawyers to complete cultural awareness training or specific education on Indigenous content to work with and represent Aboriginal and Torres Strait Islander people in the criminal legal system, other than those that may be mandated by particular employers; this is not mandated throughout tertiary study or continuing professional development in the profession. The need for this content to be mandated for practitioners, and police, was highlighted by the Aboriginal and

[42] See Eddie Cubillo, *185 Pelham Street - Melbourne Law School: Lands of the Wurundjeri People of the Kulin Nations, Traditional Owners of the land on which we learn* (Law Institute of Victoria Journal, forthcoming – on file with author).

Torres Strait Islander women consulted throughout the Australian Human Rights Commission's *Wiyi Yani U Thangani* report. [43]

A key driver of the lack of Indigenous content in curricula is that there is no requirement for law schools to teach this content to gain accreditation of a Bachelor of Laws or Juris Doctor degree. Australian legal education is regulated by what is known as the 'Priestely 11' knowledge areas, overseen by the Law Admissions Consultative Committee of the Legal Services Council. At present, Aboriginal and Torres Strait Islander laws and jurisprudence is excluded from the Priestely 11.[44]

The Council of Australian Law Deans (CALD) acknowledged the lack of Indigenous content across Australian legal curricula in 2020, including in its statement on racial discrimination that:

> *"CALD urges all Australian law schools to work in partnership with First Nations peoples to give priority to the creation of culturally competent and culturally safe courses and programs. In so doing, CALD acknowledges the part that Australian legal education has played in supporting, either tacitly or openly, the law's systemic discrimination and structural bias against First Nations peoples."* [45]

Cultural awareness education is also not a requirement for the continuing professional development required for maintenance of a legal practicing certificate.

The ILJH advocates for developments in relation to cultural awareness and cultural safety education similar to the recommendations of the Truth and Reconciliation Commission of Canada, to:

- *Ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.*
- *We call upon law schools… to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.*[46]

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[43] *Wiyi Yani U Thangani* 176.

[44] In 2019 the Law Admissions Consultative Committee released a paper proposing revising the descriptions of the 11 existing Academic requirements for admissions to the Australian legal profession, including proposing the requirement that property courses cover the 'principles of Indigenous Australian law that form the basis of Aboriginal and Torres Strait Islander Claims to Land' and that Constitutional law courses cover 'the broad theoretical basis, and the social and historical context, of Australian constitutional law, including the relationship between Aboriginal and Torres Strait Islander Peoples and the Australian constitutions.' In September 2020, the LACC resolved to defer indefinitely the adoption of the Prescribed Areas of Knowledge that were to be implemented on 1 January 2021, and they have not been adopted at the time of writing.

[45] Council of Australian Law Deans, 'CALD Statement on Australian Law's Systemic Discrimination and Structural Bias Against First Nations Peoples' (Web Page, 3 December 2020) <https://cald.asn.au/blog/2020/12/03/cald-statement-on-australian-laws-systemic-discrimination-and-structural-bias-against-first-nations-peoples/>.

[46] Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (2015) ('Recommendation 27 and 28').

Recommendation 4: Long-term, stable funding for First Nations led programs

Muriel Bamblett AO, CEO of Victorian Aboriginal Child Care Agency (VACCA) provided evidence to the committee during hearings and told a story common to many Aboriginal and Torres Strait Islander community-controlled organisations; funding is short-term, unstable and often comes with arduous reporting requirements which inhibit organisations providing maximum benefit to community.

This section of our submission draws on the research completed by our Co-Director, Dr Eddie Cubillo in the context of his PhD,[47] telling the story of Aboriginal and Torres Strait Islander Legal Service's struggle to justify its funding. The level of funding ATSILS receive constrains their capacity to pursue their broader aspirations to represent Indigenous peoples in criminal and family legal matters, as well as in other forms of advocacy. A change of approach which enhances resourcing significantly is critical to support the unique benefit of community-controlled organisations in providing trusted, culturally appropriate services to First Nations people.

The Victorian Government has acknowledged commitment to self-determination of Aboriginal and Torres Strait Islander people, guided by article 3 of UNDRIP.[48] It states that 'Aboriginal people in Victoria are the people best placed to know what works when it comes to achieving better outcomes for their own communities'.[49] Under article 3 Indigenous peoples have the right to full and effective participation in decisions which directly or indirectly affect their lives. The unique cultural rights of Aboriginal and Torres Strait Islander people alongside the general rights of children reinforces the importance of ensuring that Aboriginal and Torres Strait Islander communities lead the pathway for change. In this respect, community-controlled organisations and services are vital embodiments of the right to self-determination. To do this work, Aboriginal and Torres Strait Islander organisations need proper funding.

In 2005, government funding of ATSILS was overhauled: the process changed from grant funding to competitive tender. The short lead-in time for these changes to service contracts did not allow for proper long-term planning, projection of services, or the stability of funded organisations. It prevented ATSILS from incorporating their governing structures in a way that embedded their cultural and community values and integrity. Instead, the government incorporation model required ATSILS to enter the competitive tender process, which pushed them further from their community. It pushed them further from the ethos of self-determination and community acceptance, which these service providers had once embodied.

In 2014, the Productivity Commission conducted an inquiry into access to justice arrangements within Australia.[50] Its final report highlighted what ATSILS have known for a long time, namely, that lack of adequate funding for their services in civil and family law matters is a major issue in Australia, and that this leads to involvement with child protection systems and experiences of violence. The Productivity Commission also found that the 'inevitable consequence of these unmet legal needs is a further cementing of the longstanding over-representation of Indigenous Australians in the criminal justice system'.[51]

[47] Eddie Cubillo, What Does 'Self-Determination' Mean in the Context of Legal Service Provision for Aboriginal and Torres Strait Islander Legal Services (ATSILS)? (PhD Thesis, June 2021) On file with the Author.

[48] Victorian Government, *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement (Phase 4)* (2018), 11.

[49] Department of Premier and Cabinet (Vic) *Victorian Government Aboriginal Affairs Report* (2016) 10.

[50] See Productivity Commission, *Access to Justice Arrangements* (Inquiry Report, No 72, 5 September 2014).

[51] Ibid, vol 2, 784.

These stories were told directly as part of Dr Cubillo's research with key ATSILS stakeholders. As Nigel Browne, an Indigenous man and former prosecutor in the Northern Territory, highlighted when interviewed, these funding cuts are demoralising and destabilising:

> *"I don't think there's ever adequate funding from year to year. When you throw in uncertainty about future funding [that] puts stress on people, sometimes I think rather unduly, because you'll have someone who's got 20 files on the go and they're not sure whether they're going to be employed two months from now. I mean in such high stress, high burnout roles, you really don't need that sort of uncertainty… generally speaking I don't think they're funded adequately at all."* [52]

John Mackenzie, former Principal Legal Officer of ATSILS NSW, echoed these sentiments:

> *"[T]he incredible effect of decades long of starving them of proper funding to be able to do their job, they've had to so narrow their services that they're ending up with almost just employing lawyers and people to do the admin and the secretarial work, and not much more."* [53]

ATSILS are to this day required to continually justify their existence, beg for non-recurrent funding to top up the inadequate recurrent funding and live daily with the (not so quietly spoken) suggestion that 'mainstream' legal services might or should subsume their role. This is despite the important role the ATSILS play in meeting the distinct and pressing legal needs of Aboriginal people.

The role of Aboriginal and Torres Strait Islander legal services as a source of knowledge on community needs and aspirations to inform the policy making process should be embraced, rather than discouraged. This was highlighted as early as the Royal Commission into Aboriginal Deaths in Custody, which recommended:

> *That Governments negotiate with appropriate Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self-determination principle is applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will particularly affect Aboriginal people.*[54]

Yet the destabilisation of funding that ATSILS has faced over the years has been accompanied by continuous opposition from government to ATSILS providing advocacy beyond court representation, such as assisting with policy and law reform.

ATSILS have been the major drivers of critical reform for Indigenous peoples in the justice system and have fiercely advocated for their peoples. As far back as 1972, the ATSILS (QLD) took the lead in collaborating

[52] Interview with Nigel Browne (Eddie Cubillo, Darwin, 12 August 2019). Nigel is a Larrakia man and was formerly Crown Prosecutor in the Northern Territory.

[53] Interview with John McKenzie (Eddie Cubillo, Sydney, 11 June 2019). John was formerly the Principal Legal Officer of ATSILS NSW. He is currently the NSW Legal Services Commissioner.

[54] See Recommendation 188 in the *Royal Commission into Aboriginal Deaths in Custody* (n 1) vol 5.

with the University of Queensland to offer the services of social work students to Indigenous clients.[55] In Victoria, the Aboriginal Victorian Legal Services established an adoption agency several years before the emergence of the Aboriginal Child Placement Principles.[56] Thalia Anthony and Will Crawford have highlighted the work ATSILS have conducted with various elder groups in developing court processes and other programs that are community focused and well developed. Such programs provide ongoing support in navigating the justice system, which empowers the community and has a positive impact in deterrence and reducing recidivism.[57] These examples provided early evidence that Indigenous peoples, when allowed to make decisions and govern themselves, produce outcomes that best suit their community and achieve results. We urge governments to work in partnership with community-controlled services, and do so beyond the context of direct service-provision.

One interviewee, Cheryl Axelby (Co-Chair Change the Record) noted:

> *"Our cultural strengths go unrecognised because of the dominant cultural world view, its colonial historical aspect of dealing with our people in a racial and often harsh and unjust manner, rather than one of a rehabilitative and strengthening and creating positive opportunities for change, to address causal factors such as poverty, intergenerational trauma and health and wellbeing."* [58]

We urge that all programs to support children of incarcerated people prioritise the knowledge and expertise of community-controlled organisations, and include appropriate, long-term funding.

[55] Jill Brown and Roisin Hirschfield, *Aboriginal and Islanders in Brisbane* (Report, Australian Commission of Inquiry into Poverty, 1974) 90.

[56] Phil Slade, 'The ALS – Funding and Guidelines' (1976) *Legal Service Bulletin* 144, 145.

[57] Thalia Anthony and Will Crawford, 'Northern Territory Indigenous Community Sentencing Mechanisms: An Order for Substantive Equality' (2013/2014) 17(2) *Australian Indigenous Law Review* 79, 83-84, 89.

[58] Interview with Cheryl Axelby (Eddie Cubillo, Adelaide, 10 October 2019). At the time of interview, Cheryl was Chief Executive Officer of the Australian Legal Rights Movement.

Appendix A - Human Rights Frameworks

The following human rights framework form a baseline of the rights of children, particularly Aboriginal and Torres Strait Islander children. That must be protected through reform of services and policies currently in place.

Children's Rights

The United Nations Convention on the Rights of the Child

The following articles of the United Nations Convention on the Rights of the Child (UN CRC) are most relevant to the ILJH's submissions:

- **Article 3:** The best interests of the child shall be the primary consideration in all actions concerning children. In undertaking to ensure a child receives the necessary care, State Parties must also consider the rights and duties of those who are legally responsible for the child.
- **Article 9:** A child shall only be separated from his or her parent(s) when it is in the best interests of the child and determined by a judicial review. State Parties shall also respect the right of a child who is separated from a parent to maintain direct contact with their parents on a regular basis.
- **Article 12:** Every child has the right to express their views in all matters affecting them, and to have their views considered in accordance with their age and maturity.
- **Article 18:** Parent(s) and legal guardians have the primary responsibility for the upbringing and development of their child. Appropriate assistance should be given to parent(s) and legal guardians when they require support to raise their children.
- **Article 20:** Special protection and assistance are to be given to all children who are deprived of their family environment with particular regard given to their cultural backgrounds and continuity of their care.
- **Article 25:** Requiring regular reviews of out of home care placements.
- **Article 30:** All children have the right to use the language, customs and religion of their family.

Charter of Human Rights and Responsibilities 2006 (Vic)

The Victorian Charter sets out fundamental civil, political and cultural rights of all people in Victoria. Public authorities are required to act consistently with human rights set out in the Charter.

The Charter sets out fewer rights in respect of children specifically. Most relevantly, s 17 of the Charter enshrines the right of a child to have their family unit protected in their best interest.

S32 of the Charter is an interpretive provision that provides that so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

s32 also provides that International law and the judgements of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision. This enables utilisation of instruments such as the UN CRC.

The review of the Charter in 2011 and 2015 did not lead to any further inclusion of rights found in the UN CRC.[59] However, in 2015 recommendations were made to include the right of Indigenous people to self-determination. This recommendation has not yet been acted on.

[59] 2011 Review [261].

Cultural Rights of Aboriginal and Torres Strait Islander Children

United Nations Declaration on the Rights of Indigenous Peoples

Central to UNDRIP are the principles of self-determination, participation in decision-making, underpinned by free, prior and informed consent and good faith, respect for and protection of culture, and equality and non-discrimination.

The most relevant sections of UNDRIP to this submission are:

Preamble

…

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and wellbeing of their children, consistent with the rights of the child.

…

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

…

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

…

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

…

Aboriginal Child Placement Principles

When deciding to place an Aboriginal child in out-of-home care, the *Children, Youth and Families Act 2005* (Vic) mandates the application of Aboriginal Child Placement Principles.[60] The principles prioritise the Aboriginal and Torres Strait Islander child's connection to family, culture and community when making

[60] *Children, Youth and Families Act 2005* (Vic) s 12(1)(c).

decisions concerning out-of-home care. In doing so it upholds the rights of the family and community of Aboriginal and Torres Strait Islander children to retain shared responsibility for the well-being of their children, as recognised in UNDRIP. The successful application of the principles also has the flow on effect of protecting rights afforded by art 14(3) of UNDRIP — namely, facilitating the continued access to an education in their own culture and provided in their own language.

Aboriginal Child Placement Principles are a reflection of the recognition of a child's family and communities capacity to support a child's connection to family, community, culture and Country.[61]

Aboriginal Child Placement Principles also invite an interrogation of the 'primary carer' narrative, and the underlying assumptions made when underestimating the pivotal role that extended family and community members have in the care and wellbeing of Aboriginal children. A child's connection to family and community through kinship must be better understood and incorporated into existing policies relating to the placement of a child and inquiries of an individual's responsibilities as a parental figure.

[61] See SNAICC – National Voice for our Children, *Understanding and applying the Aboriginal and Torres Strait Islander Child Placement Principle* (2007).

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RECEIVED 12 MAY 2022