
THE ROYAL COMMISSION AND INTERNATIONAL CHILD RIGHTS LAW

by Hannah McGlade and Megan Davis

INTRODUCTION

The Royal Commission into Institutional Responses to Child Sex Abuse ('Royal Commission') was established by Letter's Patent on 11 January 2013 expressly noting the significance of international human rights law. It acknowledges that 'all children deserve a happy and safe childhood' and that 'Australia has undertaken international obligations to take all appropriate legislative, administrative, social and educational measures to protect children from sexual abuse and other forms of abuse.'¹ The Interim Report, however, has given only a cursory glance at the role of international human rights law in regards to child rights and the protection of children from abuse.² Acknowledging that Australia ratified the United Nations Convention on the Rights of the Child in 1990 ('Convention')³, agreeing to protect and promote the rights of children is the first step, implementing those rights into domestic law is now paramount.

As two Aboriginal international human rights lawyers who appeared before the United Nations Committee on the Rights of the Child ('Committee') in 2005 and 2012 respectively, we urge the Royal Commission to make Australia's human rights obligations in regard to victims of child sexual abuse a central consideration of its recommendations, including the imperative of consultation with the Aboriginal and Torres Strait Islander community. In particular we note that the Committee, in its Concluding Observations on Australia, already provides a critical framework for the work of the Royal Commission in seeking to make recommendations to prevent the occurrence of such abuse in the future.

COMMITTEE ON THE RIGHTS OF THE CHILD

The state parties' obligations to implement the rights of the child set out in the Convention are monitored through the United Nations Expert Committee ('UN Committee') process.⁴ State parties are required to submit 'country reports' detailing efforts of the state to implement the right of the child established by the Convention. As recent as 2012 the Australian government presented its report to the UN Committee in Geneva. The author, Hannah McGlade, was part of the non-government delegation who attended the 2012 meeting of the UN Committee in Geneva, hoping to brief

Committee experts of the many issues confronting Aboriginal and Torres Strait Islander children in Australia.

The Committee members gave their time to speak with the Australian delegation and were keen to hear of the plight of Indigenous children and families. Through their questioning, it was clear that Committee members were frustrated with the Australian Government's apparent lack of understanding of the rights of the child and lack of domestic implementation of those rights.

The Report of the Committee or 'Concluding Observations'⁵ provides essential guidance on what is now required in Australia to improve children's safety and overall human rights. As such, it is imperative that the Royal Commission, mandated to acknowledge the *Convention*—and with its role in considering systemic issues—gives proper consideration to international child rights law as it goes about its future work. The Royal Commission is required to 'identify best practices and recommend the laws, policies, practices and systems that will effectively prevent or, where it occurs, respond to the sexual abuse of children in institutions.'⁶ This responsibility should align with the further development of our obligations of the Convention.

The 2012 Concluding Observations are a critical starting point in understanding Australia's obligations under the Convention and the measures required to improve the protection of the rights of the child. Those measures include, but are not limited to, a National Child Rights Act and independent monitoring. The following is a brief summary of a few of the significant recommendations of the Committee that should aid the Commission in its work.

A NATIONAL CHILD RIGHTS ACT

The Committee reiterates a previous recommendation that federal and state governments strengthen efforts to bring Australian law and practice into conformity with the principles of the Convention; and in particular the remedies that are available in cases of violations of the rights of the child. The Committee recommended that Australia enact a national comprehensive child rights act,

incorporating the Convention principles and providing guidelines for the consistent, direct application of the Convention across the country.⁷ The Committee is concerned there is no national plan of action for implementing the *Convention* as a whole, and recommends Australia develop and implement a comprehensive strategy for the realisation of the *Convention* and a framework for states to adopt plans and strategies. If the Commission is to take seriously the international obligations to 'take all appropriate legislative, administrative, social and educational measures to protect children from sexual abuse and other forms of abuse'⁸, then it must take seriously the limitations that the Committee has identified as impeding the implementation of these obligations.

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INDEPENDENT MONITORING

The Committee noted that there are now Children's Commissioners or Independent Guardians in all states and territories, and legislation to establish the National Children's Commissioner ('NCC'). However, it expressed concern that the NCC be adequately resourced to ensure the full realisation of its mandate, especially with regards to addressing and remedying complaints from children. Furthermore, the Committee importantly recommends that Australia appoint a Deputy Commissioner for Aboriginal and Torres Strait Islander children at national and state levels to ensure the effective monitoring of child rights in Aboriginal communities.⁹

VIOLENCE AGAINST CHILDREN

The Committee is 'gravely concerned' at the high levels of violence against women and children, noting that Aboriginal women and children are particularly affected. The Committee recommended that Australia develop further the National Plan to Reduce Violence Against Women and their Children (2010-2022) including measures that ensure the factors contributing to the high levels of violence against Aboriginal women and children are well understood and addressed in national and state plans.¹⁰

Australia should also implement the recommendations of the United Nations Secretary-General's Study on Violence against Children and provide information on the implementation of the study in its next report. In particular, this should include: The development in each state of a national comprehensive strategy

to prevent and address all forms of violence against children; the introduction of a national legal ban on all forms of violence against children in all settings; the consolidation of a national system of data collection, analysis and dissemination; and a research agenda on violence against children.

NON-DISCRIMINATION

Reminding Australia of its obligations as a state party under articles 19¹¹ and 37 (a)¹² and the General Comment No 13 (2011)¹³ on the right of the child to freedom from all forms of violence, the Committee is concerned that racial discrimination remains a problem. In particular, the Committee noted there is 'serious and widespread discrimination faced by Aboriginal and Torres Strait Islander children' in relation to provision of and access to basic services and significant over-representation in the justice system and in out-of-home care.¹⁴ Also, the Committee observed there is inadequate consultation and participation of Aboriginal and Torres Strait Islander people in policy design, decision making, and program implementation. This is an important observation for the Royal Commission as Aboriginal organisations such as the Secretariat of National Aboriginal and Torres Strait Islander Child Care ('SNAICC') and the National Congress of Australia's First Peoples have raised concerns about how the Commission is engaging with Indigenous communities, taking into account the cultural and social aspects of our peoples in order to engage effectively.¹⁵

Responding to such discrimination, the Committee called on Australia to take affirmative action and other urgent measures for the benefit of Indigenous children to address disparity in access to services. It recommended that an Aboriginal and Torres Strait Islander Steering Group report on the development, planning, implementation and review of the 'Closing the Gap' targets in the specific context of child development, wellbeing and protection; and also ensure there is 'effective and meaningful participation' of Indigenous people in policy design, decision making and implementation of programs that affect Aboriginal people.¹⁶

PRESERVATION OF IDENTITY

The Committee was concerned by the large numbers of Aboriginal and Torres Strait Islander children being separated from their homes and communities and placed into care which does not adequately facilitate their cultural and linguistic identity.¹⁷ Accordingly, it recommended Australia review its progress and implementation of the recommendations of the *Bringing Them Home* report, to ensure full respect for the rights of Indigenous children to their identity, name, culture and family relationships.

CHILDREN DEPRIVED OF FAMILY

The Committee was 'deeply concerned' at the significant increase

in the high numbers of children being removed from families and placed in to out-of-home care.¹⁸ It was noted that from 2005 to 2010, there was approximately a 51 per cent increase—yet there is an absence of national data documenting the criteria and decision making leading to a child being removed from family. The Committee was ‘seriously concerned’ with the ‘widespread reports of inadequacies and abuse occurring in Australia’s system of out-of-home care’, including:

- inappropriate placements of children
- inadequate screening, training, support and assessment of care givers
- shortage of care options, poorly supported home-based carers and mental health issues exacerbated by (or caused in) care
- poorer outcomes for young people in care than for the general population in terms of health, education, well-being and development
- abuse and neglect of children in care
- inadequate preparation provided to children leaving care when they turn 18
- Aboriginal and Torres Strait Islander children who are often placed outside their communities, and in that context, the need for more Aboriginal care providers.¹⁹

This recommendation of the Committee is a critical one that urges Australia to ‘examine the root causes of the extent of child abuse and neglect.’²⁰ This examination of root causes of child abuse is, in part, what the Commission will achieve in its work. The Committee has called for general data on the reasons that children are being placed in care with a view to addressing them in order to reduce the number of such children. Australia should strengthen programs of family support by targeting the most vulnerable families, thereby reducing the number of children placed in out-of-home care and, preferring family-based care if needed.

CONCLUSION

The work of the Royal Commission is groundbreaking. It demonstrates that Australia, as a signatory to the Convention, will not remain silent in the face of widespread, systemic sexual abuse of children. Concerted attention to the domestic implementation of children’s human rights is critical to Australia’s future efforts to address institutional child sexual abuse and the Royal Commission should strive to ensure its important work takes place within a human rights framework.

International human rights law, specifically the Convention, is binding on Australian governments, and must be more fully considered. There is very little analysis that we can provide here, given the Interim Report provides only a passing mention of the framework upon which much of the child protection system

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should be predicated. It is for this reason that international human rights law must be engaged with, especially the forensic analysis the Committee undertakes in overseeing, periodically, Australia’s implementation of the rights of the child. This must be taken into consideration when conceiving of ways to prevent such widespread abuse occurring again. The Committee’s work and the associated jurisprudence provides the foundation for the development of improved child protection mechanisms and is based on standards of law that support Indigenous children, recognise Indigenous peoples proper role in child protection and the right of Indigenous children to remain safely in the care of family and community. It is not sufficient to provide a cursory nod to ‘principles outlined in the United Nations’ particularly when some of those principles are not appropriately or effectively implemented as the Convention requires. It is of limited value to refer to ‘specific provisions’ that ‘support culturally informed decisions when it comes to children from Aboriginal and Torres Strait Islander backgrounds’²¹ when extensive literature reveals the structural problems in Australia in adequately achieving such ‘principles’. This is why any analysis must be rooted in the work that has already been done by the Committee. In addition, we refer to the excellent submissions of the Australian Human Rights Commission to the Royal Commission²² that adopt a robust international human rights law approach drawing on the Concluding Observations of the Committee. Finally, we refer the Commission to the General Comment issued by the Committee on the Indigenous child and its elaboration of their distinct rights under the Convention.²³

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- 1 Commonwealth, Royal Commission into Institutional Response to Child Sex Abuse ('RCIIRCSA'), Terms of Reference <<http://www.childabuseroyalcommission.gov.au/about-us/terms-of-reference>>.
 - 2 RCIIRCSA, Interim Report (2014) Vol 1.
 - 3 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC').
 - 4 *Ibid* art 44.
 - 5 United Nations Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) ('*Concluding Observations*').
 - 6 RCIIRCSA, above n 2, 1 [1.2].
 - 7 *Concluding Observations*, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [3].
 - 8 RCIIRCSA, above n 1.
 - 9 *Concluding Observations*, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [4].
 - 10 *Ibid* [10-11].
 - 11 CRC art 19.
 - 12 CRC art 37(a).
 - 13 United Nations Committee on the Rights of the Child, *General comment No. 13 (2011): The right of the child to freedom from all forms of violence*, UN Doc CRC/C/GC/13 (18 April 2011) ('*General Comments*').
 - 14 *Concluding Observations*, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [7].
 - 15 National Congress of Australia's First Peoples, 'Joint Statement from Congress member organisations on the Royal Commission into Institutional Responses into Child Sexual Abuse' (Media Release, 27 November 2013 <<http://nationalcongress.com.au/royal-commission-must-consider-aboriginal-and-torres-strait-islander-issues/>>).
 - 16 *Concluding Observations*, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [7].
 - 17 *Ibid* [9].
 - 18 *Ibid* [12-13].
 - 19 *Concluding Observations*, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [12].
 - 20 *Ibid*.
 - 21 RCIIRCSA, above n 2, 110.
 - 22 See submissions by Australian Human Rights Commission at: <<https://www.humanrights.gov.au/our-submissions-royal-commission-institutional-responses-child-sexual-abuse>>.
 - 23 *General Comments*, UN Doc CRC/C/GC/13 (18 April 2011).
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