



AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

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Premier Gladys Berejiklian

By web contact form only:

Dear Premier

Reforms to the Children and Young Persons (Care and Protection) Act 1998 and the Adoption Act 2000

Australian Lawyers for Human Rights (**ALHR**) write to express our very deep concern and disappointment at the rushed passage of amendments to the *Children and Young Persons (Care and Protection) Act 1998* and the *Adoption Act 2000*.

We are alarmed that the NSW Government has rushed through laws which expand the powers of Family and Community Services to permanently remove children from their families.

ALHR fears that measures which will see children in NSW's out-of-home care system placed in permanent homes within two years and which allow for forced adoptions risk creating another stolen generation in NSW.

We are confounded that the NSW Government has chosen to rush through such a significant piece of legislation with profoundly serious consequences for the children involved.

There has been inadequate consultation and transparency with key stakeholders including Aboriginal community bodies, and community legal advocates, yet these measures will predominantly impact Aboriginal and Torres Strait Islander children. Multiple peak organisations attempted to communicate their concerns with your Government, yet the choice has been made

to ignore their concerns and expertise and perpetuate the disempowerment and voicelessness of First Nations Peoples as regards legislative measures that directly impact them.

The amendments were tabled with no specific protections for Aboriginal and Torres Strait Islander children and their families. This is shocking given the lessons governments across Australia should have learnt from the *Bringing Them Home*¹ report and the *National Apology to the Stolen Generations*.²

Your Government's failure to allow a meaningful public engagement and consultation process means that the reforms have not drawn upon the expertise of those working directly in the sector and leaves these changes without the benefit of evidence-based global best practice. Sadly, it is ultimately children and their families who will suffer the consequences.

International Human Rights Law Obligations

ALHR reminds you that the NSW Government is obliged under international law to ensure that any domestic laws relating to the permanent removal of children from their families are consistent with the *Convention on the Rights of the Child (CRC)*³, the *Convention on the Elimination of all Forms of Racial Discrimination (CERD)*⁴ and the *Convention on the Elimination of Discrimination Against Women (CEDAW)*⁵. Further Australia has endorsed, and has obligations under, the *UN Declaration on the Rights of Indigenous Peoples (UNDRIP)*.⁶

International law makes it clear that, in all actions concerning children, the best interests of the child must be a primary consideration. The United Nations Committee on the Rights of the Child (**UNCRC**) has emphasised that, where government authorities and social welfare institutions seek to assess the best interests of an Indigenous child, they should consider the child's cultural

¹ Australian Human Rights Commission, *Bringing them Home Report: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) available at: www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf.

² *National Apology to the Stolen Generations* (2008) available at: www.australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples.

³ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: www.refworld.org/docid/3ae6b38f0.html.

⁴ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195

⁵ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13

⁶ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, A/RES/61/295, available at: www.refworld.org/docid/471355a82.html.

rights and his or her need to exercise these rights collectively with his or her community. This means that the Indigenous community should be able to contribute to defining what are the best interests of Indigenous children in the development of all legislation, policies, and programmes that affect Indigenous children.⁷

Measures that remove the requirement of parental consent in adoptions and introduce a two-year arbitrary timeframe may very well render it impossible for the best interests of individual children, from whatever community background, to be appropriately considered on a case by case basis.

No clear basis for the two-year timeframe has been explained, and ALHR is concerned that this is an arbitrary period which does not provide enough time for the readjustment and recovery of struggling families who may be waiting on public health sector rehabilitation services, families who have mental health issues, families affected by domestic violence or families dealing with intergenerational trauma.

There will be times where adoption may be in the best interests of the child but Australia's international legal obligations demand that all laws concerning the permanent removal of children be drafted in a manner consistent with the CRC and its core principles of non-discrimination, devotion to the best interests of the child, the right to life, survival and development, and respect for the views of the child. This is consistent with the principles enshrined in the Commonwealth *Family Law Act 1975*.

Pursuant to the CRC⁸ and the Aboriginal and Torres Strait Islander Child Placement Principle, where a child is to be removed from his or her home, the government must give adequate consideration to the benefits of continuity in the child's upbringing and the child's ethnic, religious, cultural, and linguistic background.

⁷ UN Committee on the Rights of the Child (CRC), *General comment No. 11 (2009): Indigenous children and their rights under the Convention [on the Rights of the Child]*, 12 February 2009, CRC/C/GC/11, available at: <https://www.refworld.org/docid/49f6bd922.html>.

⁸ Article 20(3) UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

Moreover, Aboriginal and Torres Strait Islander children are equal to all other Australian children and are entitled to be treated by the NSW Government without any kind of discrimination, including any discrimination based on their Indigenous origin or identity.⁹

Whilst these reforms do not overtly nor specifically target Aboriginal and Torres Strait Islander children and their families, with 38% of all children removed into statutory care being Aboriginal, it is clear they will be the group disproportionately affected by these rushed measures. Aboriginal children are only 5% of under 18s in NSW but they make up 37% of all young people in care.

Separating families on a permanent basis after two years, sometimes without parental consent, raises serious concerns with respect to infringements of Australia's international legal obligations and could lead to another stolen generation. This is of particular concern considering the already extremely high rates of Aboriginal and Torres Strait Islander children in out-of-home care, some of whom have not been placed with Aboriginal kinship and foster carers (contrary to the fundamental goals of the Aboriginal and Torres Strait Islander Child Placement Principle).¹⁰

Further, the new two year time frame effectively removes safeguards that the CRC obliges Australia to provide. Pursuant to the CRC, if a child is placed in out-of-home care, the government has an obligation to ensure periodic review of the treatment and conditions the child experiences in the out-of-home care setting.¹¹ However, these amendments will effectively remove those protections for children after two years. These amendments are retrograde, not reforming. As Tim Ireland, chief executive officer of AbSec noted:

*"Placements for children in out-of-home care are monitored to ensure children are safe and well cared for, and to provide important supports to children and those who care for them, promoting resilience and lifelong wellbeing. When children are adopted, these safeguards vanish overnight."*¹²

⁹ Article 2 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, and Article 2 UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, A/RES/61/295

¹⁰ See: <https://aifs.gov.au/cfca/publications/enhancing-implementation-aboriginal-and-torres-strait-islander-child/aboriginal-and>.

¹¹ Article 25 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

¹² <https://www.theguardian.com/commentisfree/2018/nov/23/new-adoption-laws-threaten-to-sever-another-generation-of-aboriginal-children-from-their-families?fbclid=IwAR3MwNKAIWWxq1Wz6Yx5D7tBaegPQiW2fAzLpQvs0OVVlzgngwdqUprvSNs>

Conclusion

ALHR reminds the NSW Government that Australia will appear before the UN next year to report on Australia's compliance with the CRC.

We call on your Government to reconsider these reforms and to listen to and work with AbSec and numerous other Aboriginal community organisations who have expressed the need for legislative change toward a system tailored to Aboriginal families, designed by Aboriginal people, and delivered by Aboriginal communities themselves.

We further call on your Government to create an Aboriginal Child and Family Commissioner as part of a new statutory body to focus investment in Aboriginal community-controlled child and family services and to provide early intervention for Aboriginal families.

We implore you to undertake an adequate period of comprehensive consultation with the public, including children and young people, and Aboriginal communities, before implementing these changes.

Yours faithfully



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About ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

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