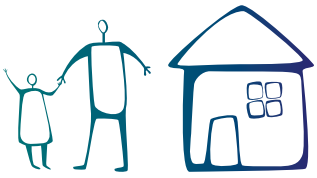
First Peoples
Child & Family Review



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Self-Determination, Public Accountability, and Rituals of Reform in First Peoples Child Welfare

Terri Libesman[a] and Paul Gray[b]

a Law Faculty, University of Technology Sydney
b Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney

Corresponding author: Terri Libesman, teresa.libesman@uts.edu.au

Abstract

First Peoples continue to face intergenerational harms as a result of settler systems of intervention in the lives of their families, including the forced removal of children. First Peoples resistance includes advocacy for systemic change, in particular, focused on foundations of greater accountability in child welfare systems, and recognition of First Peoples' right to self-determination. However, achieving these necessary structural changes remains a pressing challenge.

Using the example of the recent Aboriginal-led review of child welfare in New South Wales (NSW), Australia, 'Family is Culture', this paper explores the cycle of inquiry and response, and the repeated failures to enable self-determination or strengthen public accountability and oversight. Drawing on concepts including legitimacy and the rule of law, we conceptualise this pattern of reviews as a ritual of redemption by settler child – welfare systems, distancing themselves from 'past' wrongs while refusing to address the harmful foundations of these systems, thereby perpetuating the violence imposed on First Peoples children, families and communities. This contrasts with First Peoples' frameworks for child welfare reform, which must be urgently realised in order to establish such systems on more just and effective foundations.

Keywords: *child welfare, self-determination, accountability, legitimacy*

Introduction

First Peoples,[1] facing intergenerational and ongoing harms through the removal of their children from their families, communities and countries, have responded with calls to stop the cycles of settler-state intervention and violence and for the recognition of their rights to care for and ensure the well-being of their babies, children and youth. Across jurisdictions, there are a number of common threads to this advocacy including the need for structural reform that recognises the inherent jurisdiction of First Peoples in the well-being of their children and families and the transfer of authority to First Peoples within a human rights framework. At the same time, there is recognition of the responsibility of settler states for creating the conditions which underpin the disproportionate need for child welfare support, as they have failed to respond effectively to address these harms and their ongoing impacts on First Peoples children, families and communities.

States have responded to First Peoples' advocacy and demands for accountability of child welfare systems and recognition of self-determination with cycles of inquiries and reviews. Such reviews often shine a light on failings and recommend foundational reforms. However, state parties frequently treat this process as an accomplishment of accountability in itself, and claim righteousness with acknowledgment of *past* wrongs, while refusing to action critical structural reforms to safeguard the rights of First Peoples, their children and families. Instead, state actions to 'improve' child welfare do little to address the structural foundations of settler-state violence targeting First Peoples' families, perpetuating cycles of intervention and further entrenching settler authority over First Peoples' children, families and communities.

Drawing on the example of a recent comprehensive First Peoples-led Review of child welfare in NSW Australia, we analyse how this cycle of review and response inflicts ongoing harm and perpetuates state violence against First Peoples children, families and communities. We conceptualise this cycle, which is characteristic of a pattern of settler-state response to First Peoples' child welfare and policy more broadly, nationally and internationally, as a failure to grapple with two foundational issues: namely the denial of meaningful forms of self-determination and accountability. We argue that these two concepts are not only connected to, but critical for, the effectiveness of child welfare systems in caring for Aboriginal children and communities' safety and well-being. Colonial child welfare systems continue to lack relevance and legitimacy for Aboriginal communities. For child welfare laws and practices to support Aboriginal families, and to be supported by families and communities, they need to be perceived as legitimate and meaningful to those communities. Authorization of the laws, culture and ways in which families grow up children is necessary for Aboriginal child welfare systems to be relevant, effective, accountable and legitimate.

1 The authors acknowledge the distinct and diverse population of First Peoples internationally. We have chosen to use the term Aboriginal to refer to the numerous distinct peoples in the area now known as New South Wales, given this is the language adopted by those peoples for collective advocacy regarding the recognition and enjoyment of common rights and interests. We have chosen to use the term First Peoples in the international context.

The Cycle of Review and Response

The Family is Culture review (the Review) examined the circumstances of all Aboriginal and Torres Strait Islander children entering out-of-home care in NSW in 2015-16, in an effort to identify the causes of the "high and increasing rates of Aboriginal and Torres Strait Islander Children and Young People in Out of Home Care in NSW" (Davis, 2019, p. XI). It placed these efforts in the context of an ongoing cycle of inquiries followed by a failure of governments to act to implement recommended reforms, citing numerous state and national processes that had explored similar issues, as well as inadequate action from governments in response – circumstances that are familiar to First Peoples internationally (Blackstock, 2019; Davis, 2019; Kaiwai et al., 2020; Libesman & Cripps, 2017; Royal Commission on Aboriginal Peoples, 1996; Truth and Reconciliation Commission of Canada, 2015; Wood, 2008).

The Review found widespread non-compliance with legislation, policy, and practice intended to safeguard the rights and interests of Aboriginal children and families, findings that resonate with many national and international reviews with respect to colonial child welfare systems' failures towards First Peoples. Davis (2019) outlined that NSW child protection and out-of-home care systems and practices were characterised by: 'rituals' of compliance that masked a widespread culture of non-compliance; including the forced removal of children without adequate justification or proper completion of a risk assessment; the removal of newborns from hospital or soon after without engagement with family and community; family members being overlooked as potential carers resulting in placements outside the family and community; limited ongoing contact with siblings, family, community and culture while in out-of-home care; and the presentation of misleading information to the Children's Court. The Review also noted 'rituals' of engagement with Aboriginal families and communities, but little action taken to deviate from standard practices, and poor application of the spirit and intent of the Aboriginal Child Placement Principle, despite its prominent place in legislation and policy. These failings of systems and practice contributed to the over-representation of Aboriginal children in out-of-home care in poor experiences and care outcomes.

The Review's recommendations provided a clear reform agenda for child welfare systems and practice; one that is consistent with First Peoples' approaches internationally (First Nations Child and Family Caring Society, 2019; Kaiwai et al., 2020; SNAICC, 2016). In particular, the reform agenda was grounded on two key principles: self-determination and public accountability. The Review concluded that, if adequately implemented, these two areas "will go a significant way to addressing the entrenched problem of the over-representation of Aboriginal children in the statutory child protection system" (Davis, 2019, p. XXXII).

The government's response to these findings and recommendations was for many Aboriginal communities disappointing, though not surprising. Rather than engaging openly with the Review's findings and committing to urgent structural reforms according to the recommendations, the government's response sought to recontextualise them as historical, and focused instead on the pre-

existing state-led reform agenda. The government argued that "many recommendations are currently being addressed by reforms through the Department of Communities and Justice (DCJ)" (NSW Government, 2020, p.2), and offered limited further commitments related to the Review's findings, while delaying others in deference to the government's own reform agenda (NSW Government, 2020). In short, it represents a commitment to 'stay the course', rather than responding to the serious issues identified by the Review, and particularly, an unwillingness to engage with the need for self-determination and accountability to Aboriginal communities.

This follows a pattern of inquiries since the report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander children from their Families, *Bringing Them Home* (Human Rights and Equal Opportunity Commission, 1997), which have repeatedly found a broken child protection system in need of a complete overhaul, followed by a failure to partner with Aboriginal communities to implement the necessary reforms (Davis, 2019). This occurs in the context of a long history in which Aboriginal peoples have endured the arbitrary removal of their children by settler authorities since colonisation (HREOC, 1997; Libesman et al., 2022; Swain, 2013). Similar experiences are echoed by other First Peoples. For example, a recent Māori-led review of child protection systems noted both the historic and ongoing intervention in their families and communities by the state, as well as state inaction to address these structural challenges, concluding that current systems and practices "are never appropriate for the long-term wellbeing of Māori" (Kaiwai et al., 2020, p. 74). Whilst the efficacy of Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families* (2019) is yet to be tested, the legislation was drafted after consultation with Canadian First Peoples by Indigenous Services Canada and the Department of Justice rather than jointly with First Peoples. Further, it does not provide funding commitments to enable effective implementation including the development, resourcing and evaluation of diverse existing and developing options for Canadian First Peoples to assume jurisdiction with respect to child welfare, and is being implemented at a time that the Canadian federal government persists in contesting the findings of the Canadian Human Rights Tribunal regarding the failure to equitably fund services for First Nations children and families (Blackstock, 2019). The exercise of state powers under legislation to remove children and intervene in First Peoples family life is built therefore on an ongoing history of violence and deficit of trust. Grounding the reform agenda on foundations of self-determination and public accountability aims to address this deficit of trust, providing an opportunity for reimagining child welfare systems and respecting the diversity of First Peoples within nation states and internationally. However, as the example of Family is Culture demonstrates, governments repeatedly fail to seize the opportunity for transformational reform, and perhaps more disturbingly, present many of the identified shortcomings as supposed solutions.

The Foundations for Reform

Self-Determination

The principle that Aboriginal communities have the collective right to determine their political status and their social, economic and cultural future has long been a key theme of relevant reviews, as well as the advocacy of First Peoples. This positioning reflects both relevant international human rights frameworks such as the United Nations Declaration on the Rights of Indigenous Peoples, but also its status as a key evidence-based policy setting in improving outcomes for Indigenous peoples (Cornell & Kalt, 1998; Dudgeon et al., 2016; Harris-Short, 2012; Libesman, 2014). The Review emphasised the contrast between Aboriginal community expectations of a strong form of self-determination, and the government's existing passive approaches to self-determination, concluding that strong forms of self-determination are needed to achieve substantive changes in systems and practice (Davis, 2019).

The Review was clear, echoing previous inquiries including *Bringing Them Home,* that consultation with, and participation of, Aboriginal families and communities is not sufficient in upholding the right to self-determination. The principle of self-determination requires the transfer of decision-making authority to Aboriginal communities themselves, exercised through their own processes and representatives, and the resources to effectively implement these decisions for their children, families and communities. Despite this clear analysis, the government's response remained focused on processes of consultation and participation, as well as persisting with the inaccurate use of the term 'self-determination' that was criticised by the Review for "creating unrealistic expectations about what the state will permit in terms of autonomous arrangement" (Davis, 2019, p. 85). For example, the government's initial response to the Review only referred to the key issue of self-determination on one occasion, suggesting that participatory processes of alternative dispute resolution and Family Group Conferences "encourage greater self-determination" (NSW Government, 2020, p.5), although these processes are determined and administered by settler governments, thereby diminishing the concept of self-determination from one of autonomous governance of First Peoples to the mere participation of individuals. This misrepresentation of the principle of self-determination is particularly egregious – conflating it with consultation and participation while simultaneously exercising authority over Aboriginal peoples by controlling the means of that participation, and avoiding scrutiny for the way such systems perpetuate settler-colonialism through the continued exercise of power *over* Aboriginal children and families.

Further, while the Review positioned self-determination as a key structural reform, it is noteworthy that the government failed to engage with Aboriginal communities and their representatives in shaping its Response. This approach contrasts with the recommendations of the Review, and broader government policy to work *with* rather than doing *to* Aboriginal communities (NSW Department of Aboriginal Affairs, 2013).

Diminishing the principle of self-determination in these ways severely limits its intent in enabling First Peoples to shape and administer the systems for the safety and wellbeing of their children, while reinforcing settler authority and intervention in the lives of First Peoples children, families and communities. It co-opts the language of self-determination while failing to engage with its meaning and intent, and the opportunity it represents to transform child protection systems by and for First Peoples.

Accountability

Child protection legislation enables interference with the most intimate and fundamental of common law and human rights, namely the rights of parents to look after their children and for children to grow up in their families and culture. The gravitas of such intervention demands accountability. The rule of law – a foundational common law constitutional principle – requires that powers exercised by government and other officials be accountable (Harlow, 2014). The Review identified that "in order for an agency to be accountable to the public, it is essential for it to be transparent so that its performance can be discussed and analysed, and for there to be sanctions for poor performance" (Davis, 2019, p. 95). Yet, this Review, and numerous prior reviews, found child protection systems and practice, both within the department and in non-government out-of-home care (OOHC), are not accountable (Davis, 2019; Truth and Reconciliation Commission, 2015; Wood, 2008)

The Review argued for significant structural reform, including the establishment of a new independent oversight body, to address failings in public accountability (Davis, 2019). This oversight body would have broad powers of oversight, review, and complaints handling with legislated transparency and reporting requirements that reflected the significant powers of child protection systems, the unique responsibility of the state and non-government agencies to children in OOHC, and the need for a specialised focus to ensure accountability and public confidence. In particular, the oversight body would include an Aboriginal Commissioner and advisory mechanism, promoting engagement with and accountability to Aboriginal communities.

Contrasting with these recommendations, the government pursued a significantly more limited commitment to public accountability, consolidating additional functions with an existing regulator whose oversight of out-of-home care providers was severely critiqued by the Review, but did little to extend the transparency and accountability with respect to the government's exercise of statutory authority. Given the routine breaches of legislation and policy identified in child protection practice by the Review, greater accountability of the statutory agency is essential. Further, the government took no action, and committed no additional investment, to strengthening transparency of the Children's Court or providing greater access to legal advocacy, despite their importance in promoting accountability. This is particularly critical given the chronic underfunding of Aboriginal Legal Services and other community legal services, as well as recent reductions in funding to this critical sector (McDonald & Daniels, 2019).

Finally, the Review's recommendation for greater transparency through the publication of regulatory compliance inspection reports and their presentation to Parliament, along with annual summaries and research outcomes, have been deferred, with the regulator committing to provide options as part of the planned review of the standards commencing in 2020 (NSW Office of the Children's Guardian, 2020). The failure to urgently address the need for significantly greater transparency in the monitoring of the out-of-home care system is deeply concerning, particularly in light of media reporting exposing violence, abuse and deprivation experienced by young people in out of home care (Scott, 2016). Similarly, the Review's recommendation to prohibit for-profit service providers given the risk of the potential conflict between the financial interests of such providers and the needs of children in out-of-home care has likewise been deferred (NSW Government, 2020; Office of the Children's Guardian, 2020). If the public is to have confidence in the sector, and the safety and wellbeing of children removed from their families in their name, it is critical that there is transparency from the regulator, and appropriate oversight of this role by parliamentary representatives. Aboriginal community mistrust of child protection systems is deepened by the lack of transparency of systems and oversight by Aboriginal community representatives.

Given these failures to address the significant gaps in transparency and oversight necessary for accountability across the child protection system, the appointment of an Aboriginal Deputy Children's Guardian remains too limited in its focus and function to gain the confidence of the Aboriginal community with respect to the role it is intended to serve. To be clear, greater scrutiny of the circumstances of Aboriginal children in out-of-home care is a positive step. However, the need for effective oversight and mechanisms for recourse is much broader given the challenge presented by non-compliance and routine breaches of the rights and interests of Aboriginal children and families identified by the Review. Such oversight must ensure that the rights of Aboriginal children are upheld from the first involvement of the child protection system and focus scrutiny on the exercise of authority by child welfare authorities throughout, rather than trying to seek redress for the harms inflicted by the statutory system after it has run its course. Simply put, appointing First Peoples officers within an inadequate regulatory framework does not address the significant flaws in the framework. In the absence of legislative, policy and cultural change to strengthen transparency and oversight, and therefore accountability, across the child protection system, such appointments will have only limited impact on safeguarding the rights and interests of First Peoples children in out-of-home care.

Implementing the Review's vision of a one-stop-shop for the effective monitoring and oversight of the child protection system, as well as promoting greater transparency of the regulatory body and Courts, must be prioritised. This includes empowering and resourcing the regulator to respond to complaints regarding breaches in the exercise of statutory power and improving access to advocacy, providing opportunities for recourse where breaches occur, and including clear mechanisms to promote accountability in the eyes of Aboriginal communities. The government's

response offers merely the facade of reform while doing little to address the critical oversight and accountability issues identified by the Review. In particular, the government's response does little to ensure scrutiny where it is most needed to address the concerns of Aboriginal communities – the government's own exercise of statutory authority to intervene in the lives of Aboriginal children, families and communities. Through such approaches, governments continue to exercise significant powers *over* First Peoples' families and communities, while avoiding scrutiny and accountability for those actions, and the harms they continue to cause.

Reconceptualising the Recommendations and Response

It is perhaps of little surprise that the government's Response, falling significantly short of the overhaul urged by the Review, has been criticised as inadequate by Aboriginal stakeholders (NSW Child, Family and Community Peak Aboriginal Corporation [AbSec], 2020; Aboriginal Legal Service NSW/ACT, 2020). As noted above, the current review represents only the latest example of a long-standing pattern of inquiry and inaction from governments in addressing the systemic racism that characterises settler-colonial child welfare systems. The landmark *Bringing Them Home Report* made recommendations for significant reform of contemporary child protection systems, including greater recognition of Aboriginal self-determination, with recommendations for the transfer of laws and their adjudication to Aboriginal communities, however many of these recommendations including those with respect to self-determination were never implemented (Anderson & Tilton, 2017). This issue was anticipated by the current Review, noting the cynicism of Aboriginal community members regarding the process of review which rarely results in the changes needed (Davis, 2019). It is likely that many in the Aboriginal community already fear that the government's Response to the Review, and in particular the narrow focus of reform that reinforces existing systems and authority, represents another missed opportunity for change.

This cycle of review, recommendations and response that fails to address the enduring issues that contribute to over-representation and poor outcomes for those subject to the system, reflect the 'ritual' of listening to First Peoples but failing to "hear" or act on what communities are saying. This is demonstrated in the lack of engagement in the development of the Response, the failure to engage with the Review's key themes, and the narrow response that creates the illusion of action but fails to address the crucial issues identified through the Review.

Through this cycle of acknowledging the harm and inadequacies of "past" practices, and committing to a series of reforms that fail to substantially alter the underlying structures or power dynamics, settler-colonial societies and institutions seek redemption while refusing to relinquish illegitimate power, and even reinforcing it (Tuck & Yang, 2012). These actions ultimately defend and perpetuate settler-colonialism and create barriers for the recognition of Indigenous peoples' sovereignty and futurity (Tuck & Yang, 2012). The rhetoric of reform masks the enduring power imbalances between

the settler-colonial state and First Peoples as well as the refusal to implement reforms that would shift this imbalance, contributing to distrust of statutory child protection systems.

A useful framework through which to consider this pattern is that of legitimacy. Legitimacy refers to the right to exercise power, and is relevant in considerations of the use of statutory child protection powers particularly given the significant and long-lasting impacts on individuals and communities (Cook, 2020). In brief, legitimacy in the exercise of state power requires that the power be exercised in accordance with defined rules, that reflect shared beliefs and values, and that operate with the consent of the broader community (Tankebe, 2013).

Tankebe (2013) challenges an apparent dichotomy between legitimacy and effectiveness, arguing that the perception that power is exercised effectively and to the benefit of the community is a key precondition of its legitimacy which requires being able to demonstrate that the outcomes achieved justify the exercise of significant power. Further, there are benefits associated with legitimacy, such as increased engagement and cooperation from communities, while "dull compulsion" refers to the process whereby the illegitimate exercise of power is "accepted" as a result of fear, powerlessness or pragmatism, including withdrawal from such systems (2013). This withdrawal and lack of cooperation with statutory systems are noted throughout the Review's report (Davis, 2019). However, rather than framing this as the "acceptance" of the exercise of illegitimate power, this act of withdrawal may be better thought of as strategies of resistance, particularly where the exercise of authority is supported by the use of force (Richardson, 2016; Wade, 1997). Aboriginal communities continue to resist the ongoing removal of their children by statutory authorities through multiple strategies, including advocacy and protest such as those that led to this Review (Davis, 2019).

Through the lens of legitimacy, strong forms of self-determination include key mechanisms to establish laws that reflect the values of the community they serve and operate with their consent (Libesman, 2014). Robust measures of oversight and accountability serve to give communities confidence that systems operate according to those laws, including policy, practice and adjudication, and deliver outcomes that justify the exercise of those powers. This is closely associated with the rule of law, which provides protection and recourse against the abuse of power (Krygier, 2009; Thompson, 1997). For exercises of power to be accountable there needs to be public scrutiny that is transparent, control with respect to how powers are exercised, and recourse when powers are abused (Fuller, 1969; Waldron, 2011). Echoing similar inquiries internationally, the Review found these to be lacking in the NSW child protection system (Davis, 2019).

Similarly, the rule of law is not only a mode of exercising political power but also a mode of association (Krygier & Czarnota, 1999; Stromseth et al., 2006). As Krygier (2009) observes, for the rule of law to be operative, laws must count. It requires not just laws and institutions for administering those laws, but fidelity to those laws; this is a core commitment and responsibility to the people, principles and values – the relationships which underpin those institutions. The rule of law requires reciprocal relations of trust between those who exercise power and those who

are subject to it. The Review made recommendations with respect to accountability to help build institutions that can help to foster fidelity and trust. The NSW government's response, rather than addressing the failure of the rule of law for Aboriginal peoples, further entrenches those flaws. It responds disingenuously to the report's findings and recommendations. The rituals of review and rhetoric of rights continue a long colonial tradition of governments asserting Aboriginal peoples' equality before the law whilst in practice denying their most foundational rights (Behrendt et al., 2019; Manderson, 2008). The NSW Government's response sits squarely in this ignoble tradition.

From this perspective, the findings of the Review can be considered as emphasising the lack of legitimacy in the current systems that exercise statutory powers over Aboriginal children and families. The Review found that the defined rules, outlined in legislation and policy, are routinely ignored without meaningful oversight or consequence, and that the framework for intervention is not consistent with the values of Aboriginal communities, and does not meaningfully operate with their consent. Further, the Review's recommendations can be thought of as belonging to two key categories – those focused on establishing and demonstrating legitimacy, including the key structural reforms of self-determination and public accountability as well as proposed legislative change, and those focused on promoting legitimacy indirectly via the effective achievement of community outcomes, such as proportionate, needs-based investment in family supports, access to advocacy services, data collection and use, and casework policy and practice.

Through this paradigm, the government's response, and the broader pattern of government responses in Indigenous child welfare, demonstrates a fundamental misunderstanding of the relationship between effectiveness and legitimacy outlined by Tankebe (2013). Specifically, governments prioritise efforts to improve effectiveness, while ignoring the need to establish legitimacy through greater self-determination, empowered independent oversight of the exercise of statutory power, and the implementation of key legislative safeguards in the care and protection of Indigenous children. In doing so, governments undermine the efforts to improve the effectiveness of child protection systems for Indigenous children, and further entrench illegitimate and harmful systems grounded in settler-colonial violence and racism.

First Peoples across various jurisdictions have not only resisted the ongoing harmful impacts of settler state child welfare systems and practices, but have also articulated the foundations for a new approach and reform agenda for addressing these structural shortcomings. While differing in language and form across jurisdictions, these frameworks share many common features (First Nations Child and Family Caring Society, 2019; Kaiwai et al., 2020; SNAICC,2016). First, they are grounded in First Peoples' self-determination and autonomy. Second, they emphasise the importance of culture, grounding both systems and practice in the cultural values and perspectives of the communities they represent and serve. Third, they reinforce the need for healing and early intervention to support families and communities in their sacred caregiving responsibilities, and call for holistic, community-based and responsive child and family supports rather than systems

predicated on removal. Finally, First Peoples' approaches consistently demand oversight by First Peoples' communities, providing transparency and community confidence that such systems are oriented toward and delivering on the best interests of their children. In short, First Peoples' frameworks seek to address the problem of legitimacy, recognising First Peoples' inalienable right to determine the systems and processes to promote their children's wellbeing, and the resources to put them into practice.

It is notable that some jurisdictions in Australia, namely Victoria and Queensland, are exploring the transfer of decision- making authority normally invested in settler child protection authorities to Aboriginal communities through 'delegated authority' (Liddle et al., 2021). Such models are welcome insofar as they enable Aboriginal communities to make decisions that significantly affect the lives of their children, families and communities, in ways that are aligned to community values, perspectives and expectations, and accountable to communities for the outcomes achieved. In some cases, they have been complemented by formal recognition of cultural models of care (see *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Bill 2020*, 2020.

)However, there are a number of barriers to their implementation that must be actively addressed in partnership with Aboriginal communities (Queensland Aboriginal and Torres Strait Islander Child Protection Peak, 2021). Further, such 'delegated authority' models fall short of the frameworks outlined by First Peoples by failing to recognise the inherent rights of First Peoples to exercise authority with respect to their children's futures. Instead, the language of 'delegated authority' reinforces settler authority over Aboriginal children and families, without addressing the underlying issues of legitimacy. This delegated notion clearly sets a very precarious footing for the transfer and exercise of such authority; just as the settler state may delegate authority, it may likewise re-assert its authority, terminating the delegation and resuming settler intervention in the lives of Aboriginal children, families and communities. Under such frameworks, First Peoples' communities must constantly demonstrate "appropriate" exercise of this delegated authority to the satisfaction of settler systems, simultaneously reinforcing settler systems while divesting responsibility to First Peoples.

Conclusion

The exercise of power by settler-colonial authorities in the lives of Aboriginal children and families is central to settler-colonialism (Nakata, 2017; Tuck & Yang, 2012). First Peoples have continued to resist this intervention, and advocate for recognition of their political rights as Indigenous peoples including the right to self-determination, as well as greater accountability of governments in their intervention in Indigenous families. In recent decades, a cycle of reviews and inquiries, followed by limited government reform, has emerged. Reviews have emphasised the importance of self-determination and public accountability in addressing the systemic racism that characterises contemporary child welfare systems (Davis, 2019; Kaiwai et al., 2020; Truth and Reconciliation Commission, 2015). Connecting concepts of legitimacy and the rule of law with principles of self-

determination and accountability, this paper has emphasised a persistent failure of governments to grapple with the key structural flaws of these systems in a way that transforms the underlying relationship between settler states and First Peoples, despite stated commitments to change that might achieve better outcomes for Indigenous children, families and communities. Importantly, this lens uses the broader concept of legitimacy in the exercise of state power to suggest that this failure of government is likely to undermine efforts to improve outcomes for First Peoples children and families, perpetuating and exacerbating past harms.

The exercise of statutory authority to intervene in, and even dismember, families, is an extraordinary use of state power. The legitimacy of this use of power is grounded in the trust and confidence of the community that the system operates with integrity, and according to rules and norms reflective of the values of the communities served (Libesman, 2014). In this way, the operation of child welfare systems occupies the intersection of the interests of parents and families and the interest of communities in the wellbeing of children. Statutory child protection systems represent the mechanism by which this collective interest is upheld, ensuring that minimum standards of care, based on the shared expectations and aspirations of a community for their children and understandings of childhood, are extended to all children.

However, rather than grapple with the 'historical continuity' of child welfare systems (Davis, 2019) and the ongoing illegitimate exercise of state power to intervene in the lives of First Peoples children, families and communities inherited from settler-colonial violence, government rhetoric and reform continues to focus on more 'effectively' wielding this power. This is demonstrated in the NSW Government's response to this Review, which focuses on strengthening settler systems while ignoring or minimising the need for structural reform grounded on self-determination and accountability. In doing so, the response reflects and perpetuates the failings identified through the Review. It also demonstrates a fundamental misunderstanding of the relationship between legitimacy and effectiveness. In this, it is emblematic of a broader tension regarding child welfare systems, and the ongoing intervention of settler states in the lives of First Peoples' children, families and communities. A reform agenda focused on addressing the illegitimate exercise of statutory power of current child welfare systems is urgently needed. This can only be achieved through structural change that recognises First Peoples' right to self-determination, enabling First Peoples-led system design, implementation and ongoing administration of child welfare systems grounded by First Peoples' values and perspectives, operating with their consent and oversight. This means not only transferring authority to First Peoples in responding to the needs of their children, families and communities, but adequately resourcing communities commensurate with the need to enable the implementation of community-led solutions.

This issue of the legitimate exercise of authority regarding the safety, welfare and well-being of Aboriginal children goes to the heart of the relationship between First Peoples and the settler state. Nakata has argued for the need for democratic renewal, one that opens a place for Indigenous

children in their nation's future, rather than "being made to feel that they are being pulled between a white future and a black past" (Nakata, 2018, p. 112). Nakata (2018, p. 69) notes that "Aboriginal and Torres Strait Islander Peoples have only ever had their claims to the past legitimised; our claims to the future continue to be denied." Reforming child protection systems is an essential part of this renewal. Given the history of settler-colonial intervention in the lives of Indigenous children and families, and the subsequent impact on the lives of individuals, families, and communities across generations, there can be few domains where structural reform of this relationship is more urgent. This can only be achieved by establishing legitimate systems for the care and protection of Indigenous children, by and for their communities, and in some cases may operate informally within communities, although remaining subject to settler intervention and override. Governments must show significantly greater humility and courage, acting with urgency to enable, through legislation and equitable, needs-based resourcing, child welfare systems to be transformed and reimagined by First Peoples to operate consistent with their values, through First Peoples governance, and with empowered First Peoples oversight and accountability. As Davis (2019, p.85) pointed out, such systems should operate "free from unwarranted state interference," enabling community-based responses and services to support families and address enduring socioeconomic disadvantages that contributes to risks in child protection involvement and intervention. Unless and until these foundations change, such systems wielded by settler states will continue to reflect the colonial violence on which they were founded, rather than the need for reparations and healings that settler governments consistently espouse.

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