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THE SHACKLES OF TERRA NULLIUS IN CHILD PROTECTION 'REFORMS'

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Introduction

In this chapter, we examine the distribution of power across state child protection decision-making, which enables state actors to earnestly pursue 'reforms' to improve outcomes for First Nations children while simultaneously administering institutions that justify the perpetuation of trauma. We argue that the systemic violence of state child protection systems is thereby masked in good intentions, while First Nations families remain subject to powers that relentlessly inflict harm. We unpack aspects of the vast differences in perception and experience of procedural and substantive justice between First Nations and non-Indigenous institutional parties in child protection decision-making. Our commentary draws on examples from New South Wales, given our proximity to and deeper experience in this jurisdiction, as illustrative of the broader structural challenges underpinning the continued call of First Nations for system transformation in all jurisdictions.

In investigating these differences, we address three themes. The first is the alienation of First Nations families and communities from child protection systems and their common experience of such systems as violent.[1] This is despite the 'achievement' of law reforms, resulting from tireless First Nations-led advocacy over an extended period, which provide for participatory and procedural rights.[2] This theme of reform without change reveals

1 *After the Apology* (Pursekey Productions Pty Ltd, 2017).

2 Terri Libesman and Kylie Cripps, 'Aboriginal and Torres Strait Islander Children's Welfare and Well-Being' in Lisa Young, Mary Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2nd ed, 2017) 308.

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deep-seated colonial values that resist transformational change. We suggest that the ongoing foundational legal concept *terra nullius* remains unresolved post *Mabo v State of Queensland [No 2]* ('Mabo No 2')[3] and stymies effective child protection reforms.

One of the factors that makes state child welfare systems resistant to change is the inherent, yet unacknowledged, whiteness[4] that underpins such institutions, including children's courts where many child protection decisions are made. The second theme that we explore is how colonial perspectives are structurally prioritised when making decisions about the lives of First Nations children and young people and furthermore, why state child protection systems are resistant to change. 'Reforms' presented as strengthening procedural protections in individual matters either remain unimplemented or are revealed as reproducing the structures that have underpinned protectionist and assimilationist policies, privileging colonial perspectives in decisions about First Nations children.

The third and final theme that we address is the necessity of moving beyond piecemeal reforms to state child protection and court structures, with their focus on procedural justice, to reforms that offer transformational change. We propose that effective reforms require the transfer of child protection powers from state institutions to First Nations as an expression of their inalienable collective interest in their children's futures and their inherent authority to determine these futures free from the interference of the state.[5] This is necessary to attain legitimate and effective child protection authority and relatedly, institutions for First Nations families and communities.

Failed Cycles of Review and Reform

The findings from child protection research, reviews and inquiries since *Bringing Them Home*[6] provide consistent evidence of the importance of First Nations' self-determination in child protection law, policy, services and decision-making.[7] Equally consistent is evidence of the failure to enact recommendations from prior inquiries and where reforms have been enacted, of

3 *Mabo v State of Queensland [No 2]* [1992] HCA 23.

4 Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press, 2015) 15.

5 Megan Davis, *Family Is Culture: Independent Review of Aboriginal Children and Young People in Out-of-Home Care* (Report, November 2019)) ('*Family is Culture*') <https://dcj.nsw.gov.au/children-and-families/family-is-culture.html>.

6 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing Them Home* (Report, 1997) <https://humanrights.gov.au/our-work/projects/bringing-them-home-report-1997>.

7 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing Them Home* (Report, 1997) <https://humanrights.gov.au/our-work/projects/bringing-them-home-report-1997>.

the failure to implement these reforms, including legal entitlements.[8] The latter includes longstanding legal rights such as the Aboriginal and Torres Strait Islander Child Placement Principles ('Placement Principles'), including rights to participation in service delivery and child protection decision-making.[9] Community-based reports such as *Family Matters* continue to note the failure of governments to implement these principles in full and the need to strengthen national indicators beyond limited and sometimes misleading placement data.[10]

For example, although reporting has historically conflated placement with family (whether Aboriginal or not) and ongoing connections and enjoyment of culture, *Family Matters* reported that the proportion of Aboriginal children placed with Aboriginal family members declined substantially from 2013 (53.6 per cent) to 2022 (40.7 per cent), with little corresponding data about their enjoyment of cultural connections that underpin identity and resilience.[11] This misrepresents the broad spirit and intent of the Placement Principles for Aboriginal children to remain with their family, for their family and community to be involved in decisions about their lives, and through them, for Aboriginal children to be able to enjoy connections to their Aboriginal community and culture consistent with their rights and developmental needs. There have been proposals to improve the range of indicators to match this broad intent, including the development of a draft set of indicators in 2018, but many indicators are still 'under development'.[12] These failings coincide with enormous levels of increased child protection intervention in First Nations families over the past three decades, which is most pronounced at the most severe intervention: out-of-home care.[13]

This pattern of formal reform without change is illustrated by recent qualitative research that examines the implementation and breach of section 12 of the *Children and Young Person's (Care and Protection) Act 1998* (NSW) ('*Care and Protection Act*'). Section 12 provides for the participation of First

8 Davis (n 5); Teresa Libesman et al., *Aboriginal Participation in Child Protection Decision-Making in New South Wales* (Report, December 2023) ('*Aboriginal Participation in Child Protection Decision-Making*') <https://dcj.nsw.gov.au/children-and-families/family-is-culture.html>.

9 Libesman and Cripps (n 2) 318–26.

10 SNAICC, *Family Matters Report 2023* (2023) 19 ('*Family Matters*'). <https://www.snaicc.org.au/resources/family-matters-report-2023/>

11 SNAICC, *Family Matters Report* 2023 (2023) 19 ('*Family Matters*'). <https://www.snaicc.org.au/resources/family-matters-report-2023/>.

12 'Aboriginal and Torres Strait Islander Child Placement Principles Indicators', *Australian Institute of Health and Welfare* (Web Page, 7 May 2024) <www.aihw.gov.au/reports/child-protection/child-protection-australia-2021-22/contents/indicators/atsicpp-indicators>.

13 SNAICC (n 10) 19. 'Out of home care' refers to situations in which a child is removed from the family home and placed in foster care (where the child is placed with an unrelated foster parent), residential care (where the child is placed in a residential facility) or kinship care (where the child is placed with a trusted relative or community member).

Nations families, kinship groups, communities and community organisations in all significant child protection decision-making.[14] However, the research found routine breaches of section 12 across all stages of child protection intervention in First Nations families' lives.[15]

This research interviewed families, Children's Court magistrates, First Nations and non-Indigenous children's out-of-home care organisations, and care and protection lawyers about their understanding and experiences of section 12. Three key findings were made. First, family members felt largely bewildered and pained by their experiences with the child protection system. Many families felt so alienated and outside the law's protection that they believed state actors could do whatever they wanted and that families had no protection from the state intervening in their lives, including the ultimate power to remove their children.[16] Many reported leaving the Children's Court without knowing what had happened and feeling that their account of events was not heard.[17]

Second, Children's Court magistrates found section 12 'interesting'; despite its decades-long history in legislation, none were familiar with the provision, and none could recall it being used in their courts.[18] The research asked about the participation of Aboriginal organisations and community groups, and again, the magistrates thought that this was an interesting idea but consistently noted that this did not generally occur.[19] All participants observed that usually the parents and sometimes grandparents provided affidavits. The interviewed magistrates largely perceived their courts as fair, with families and the Department having a chance to be heard. They also mostly presented as wanting to make their courts an approachable place for Aboriginal participants.

Third, community organisations reported to the researchers that they seldom if ever participated in the Children's Court decision-making process and were unfamiliar with it. Sometimes, departmental workers consulted with them; some community organisations said that they were consulted numerous times about the same questions but rarely felt that their viewpoint was heard or if it was heard, it was not given weight or even considered in the decision-making.[20]

This research illustrates the disjuncture between the perceptions of non-Indigenous actors within child protection institutions and the First Nations families subject to the power of these institutions. The research

14 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 12.
15 Libesman et al. (n 8) 107.
16 Libesman et al. (n 8) 71–77.
17 Libesman et al. (n 8) 77–79.
18 Libesman et al. (n 8) 107.
19 Libesman et al. (n 8) 71–77.
20 Libesman et al. (n 8) 71–77.

findings concur with the findings of *Family is Culture*,[21] discussed later in this chapter, which found that misleading and untested evidence resulted in the removal of First Nations children from their families. Although the legitimacy of the child protection system is presumed by non-Indigenous judicial officers and other institutional participants, it lacks legitimacy for many First Nations families and communities.[22] There is a foundational lack of trust in the system.

The Paradox of Reform without Change

The paradox of recognition and non-recognition plays out through reforms that are recited as important but that are then minimised in practice. Reforms such as the participation rights guaranteed by section 12 of the *Care and Protection Act* are not substantially implemented. These reforms are largely procedural, intended to treat First Nations families and communities with greater dignity and respect, and purport to enhance the transparency and impartiality in child protection decision-making. If substantially implemented, then they would make the child protection system less discriminatory and fairer.

Actors within the system perceive child protection decision-making to be about the best interests of individual children, while many First Nations people experience child protection institutions as both individually and collectively discriminatory. That is, they perceive the child protection system as targeting not just them but also their family and community as a system of control.[23] Procedural justice would reduce unfairness, but it would not address the underlying alienation. This requires systemic and structural change.

Systemic and structural changes require that a second, more foundational paradox of inclusion and non-inclusion in child protection be addressed. This is the paradox of the recognition of rights to participation and 'self-determination', with the implicit presumption that these rights will, or even can, be implemented within the existing state child protection framework. Although common ground exists between First Nations and non-Indigenous understandings of care and protection of children—for example, that children must be free from physical, sexual and emotional abuse—there are also considerable differences in the meaning of key concepts

21 Davis (n 5).

22 Terri Libesman and Paul Gray, 'Self-Determination, Public Accountability, and Rituals of Reform in First Peoples Child Welfare' (2023) 18(1) *First Peoples Child and Family Review* 81.

23 Debra Swan and Jen Swan, 'Demanding Change of Colonial Child Protection Systems Through Good Trouble: A Community Based Commentary of Resistance and Advocacy' (2023) 18(1) *First Peoples Child and Family Review* 28.

such as the best interests of the child[24] and the requirements that are necessary to achieve this common goal. These differences reflect cultural values, experiences, and family and community structures that shape the very ways that societies and childhoods are understood and organised. Collectivist First Nations values differ markedly from the presumed whiteness that imbues contemporary state child protection systems. These values are founded in collective community differences.

Contemporary state child protection institutions recognise the need for procedural justice for First Nations families but resist implementing reforms to this end. Overcoming this resistance and inertia is critical to improving First Nations' child protection experiences, but this is not sufficient to achieve justice. Innovations such as the Victorian Koori family hearing day—Marram-Ngala Ganbu—provide an exemplar of how greater procedural justice within non-Indigenous child protection systems can be achieved. Established in 2016, Marram-Ngala Ganbu, which sits in Broadmeadows and Shepparton in the state of Victoria, provides a more supportive and appropriate environment for making child protection decisions with respect to First Nations children and seeks to address many of the elements that create a lack of cultural safety. The participants, who include family, extended family, child protection staff, family support services, lawyers and ACSASS (a Victorian First Nations service),[25] sit at a round table with the Children's Court magistrate. Families are assisted with accessing legal representation and family support services and understanding court proceedings. Proceedings are conducted informally, with fewer cases heard on a court day, which allows more time for matters to be heard. Marram-Ngala Ganbu has seen greater compliance with legal rights, including an increase in First Nations family participation in child protection proceedings, greater compliance with the Aboriginal Child Placement Principles and a more balanced inclusion of First Nations and departmental information, which is essential for optimal judicial decision-making.[26] Despite Marram-Ngala Ganbu's success in enabling a fairer implementation of state child protection laws, it has not been extended since its inception.

Procedural reforms will improve families' experiences in state child protection systems by making them less discriminatory and fairer, but they do not address the foundational *terra nullius* principle within child protection. The transfer of child protection authority to First Nations institutions is necessary to develop child protection services that embed First Nations values.

24 Wendy Hermeston, 'Safe, Protected . . . Connected? The Best Interests of Aboriginal Children and Permanency Planning in the NSW Care and Protection System' (PhD Thesis, University of Technology Sydney, 2021).

25 Lakidjeka—Aboriginal Child Specialist Advice and Support Service ('ACSASS').

26 Kerry Arabena et al., *Evaluation of Marram-Ngala Ganbu* (Report, November 2019) <https://www.childrenscourt.vic.gov.au/file/evaluation-marram-ngala-ganbu>.

Governments have committed to this transfer of authority to Aboriginal communities through *Safe and Supported: The National Framework for Protecting Australia's Children 2021–2031*.[27] However, as we have noted, governments have a poor record when it comes to realising the intent of reforms, particularly where those reforms challenge the authority of state systems over Aboriginal children, families and communities.

Colonial Mindsets in Judicial Institutions

The Australian judicial system is largely presided over by people from non-Indigenous backgrounds. As a system imported from England, this is not surprising, with Australian law imposed on top of enduring First Nations legal systems that have governed social structures on the continent for millennia. In contrast, the relatively recent imposition of western legal systems designed by, built for and exercised by non-Indigenous people in the service of colonisation has produced decisions and shaped knowledge through a prism of legal whiteness. These decisions have had at their heart the destruction of First Nations families, communities and way of life. This continues to be the prevailing experience of First Nations peoples.

The appointment of First Nations judicial officers offers some scope for reducing such alienation. Over the past five years, the number of Aboriginal and Torres Strait Islander people joining courts across the country as either judges or magistrates has been increasing. This includes recent appointments such as Lincoln Crowley to the Supreme Court of Queensland, Louise Taylor to the Supreme Court of the Australian Capital Territory, David Woodroffe to the Local Court in the Northern Territory, Michael Lundberg to the Supreme Court of Western Australia and Nathan Jarro to the District Court of Queensland.[28]

Of course, several First Nations trailblazers took up roles on the bench long before these recent appointments. Local Court Magistrate Patricia O'Shane,

27 Commonwealth of Australia, *Safe and Supported: The National Framework for Protecting Australia's Children 2021–2023* (2021) <www.dss.gov.au/sites/default/files/documents/12_2021/dess5016-national-framework-protecting-childrenaccessible.pdf>.

28 'The Honourable Justice Lincoln Crowley,' *Supreme Court Library Queensland* (Web Page) <www.sclqld.org.au/collections/explore-the-law/judicial-profiles/crowley-200364>; Matt Garrick, 'Decorated Former Lawyer David Woodroffe Formally Sworn in as Northern Territory's First Aboriginal Court Judge,' *ABC News* (online, 3 January 2023) <www.abc.net.au/news/2023-01-03/david-woodroffe-appointed-first-nt-indigenous-court-judge/101823466>; 'First Aboriginal Judge for ACT Supreme Court', *ACT Government* (Web Page, 26 July 2023) <www.act.gov.au/our-canberra/latest-news/2023/july/first-aboriginal-judge-for-act-supreme-court>; Supreme Court of Western Australia, 'Appointment of New Supreme Court Judge' (Media Statement, 21 September 2022); 'His Honour Judge Nathan Jarro', *Supreme Court Library Queensland* (Web Page) <www.sclqld.org.au/collections/explore-the-law/judicial-profiles/jarro-198282#:~:text=In%20March%202018,%20Judge%20Jarro,Honourable%20Justice%20Martin%20Moynihan%20AO>.

Magistrate Sue Gordon and District Court Judge Bob Bellear all held judicial roles in the 1990s and were the first Indigenous Australians to do so. Various other Aboriginal and Torres Strait Islander people have been appointed to judicial positions in magistrate and local courts, while Matthew Myers AM remains the only First Nations person to be appointed to the federal judiciary as a member of the Federal Circuit Court in 2012.[29]

Outwardly, these are important appointments—certainly not only for the individuals but also for their families and the First Nations community overall. At an institutional level, these appointments are important because they represent a point of difference in the exercise of judicial power, and they contribute to a judiciary that better reflects the community over which it exercises authority. They represent a fusion of knowledge of First Nations ways of knowing and doing alongside western legal expertise, and they bring these perspectives to bear at what Torres Strait Islander scholar Martin Nakata calls the 'cultural interface'[30] of the courtroom.

These perspectives are significant—they mark a subtle shift in the largely monocultural composition of the Australian judiciary and provide a means of imbuing legal decision-making with First Nations understandings of the law. This is an acknowledgement that the law, like all social institutions, is not neutral. Rather, it is informed by the personal backgrounds of individuals, knowingly and unknowingly, within broader socio-cultural structures, that underpin the standpoints of judicial officers. These appointments are significant for improved procedural and substantive justice outcomes, but as minority figures within a colonial system, their inclusion alone is insufficient to achieve transformative change.

The perspectives that First Nations judicial officers bring means that they are equipped with a deeper understanding of the issues affecting First Nations communities and are perhaps more likely to understand the importance of relevant legal provisions, such as section 12 discussed previously. The *Family is Culture* report made a similar point and noted the importance of judicial officers 'with specialised knowledge of Aboriginal culture and a proven ability to communicate and work with Aboriginal families', specifically, the appointment of Aboriginal magistrates to improve decision-making regarding Aboriginal children and families.[31] In the five years since, updates about the progress of these recommendations suggest that various actions have been undertaken to determine the need and benefit of specialist magistrates and that the appointment of specialist magistrates is 'on track'. However,

29 Department of Social Services, 'Australia's First Indigenous Federal Magistrate Welcomed' (Media Release, 10 February 2012) <https://formerministers.dss.gov.au/13588/australias-first-indigenous-federal-magistrate-welcomed/>.

30 Martin Nakata, 'The Cultural Interface' (2007) 36(S1) *The Australian Journal of Indigenous Education* 7.

31 Davis (n 5) 391.

these actions do not appear to have considered in any way this stated preference for Aboriginal magistrates, or magistrates with specialised knowledge of Aboriginal culture, to consider child protection matters that affect Aboriginal children.[32] Although many of the sitting First Nations judicial officers are in courts without child protection jurisdiction, the roles of both professional and cultural knowledge are pertinent to understanding the limitations of inclusion within courts.

In a criminal setting, this may mean a better understanding of the contextual factors for bail and sentencing and the available community support services. In a child protection setting, this will extend to understanding not only the interaction between First Nations communities and child welfare authorities but also the ongoing legacies of colonisation and the Stolen Generations. This deep understanding, founded in experience from the First Nations standpoint, may also bring with it an ingrained judicial scepticism when it comes to accepting departmental, police and, indeed, First Nations evidence on face value. This may mean that First Nations judicial officers are more likely to interrogate and ask questions. Former Aboriginal Magistrate Pat O'Shane was well known for her interactions with police while she was on the bench.[33]

Similarly, First Nations Federal Circuit and Family Court Judge Matthew Myers has been very public about the devastating impact of state child protection systems on First Nations families; he has cited the increase in the rate of removals since the Stolen Generations and the urgent need for reform,[34]

32 New South Wales Department of Communities and Justice, *Family is Culture Progress Report* (25 November 2020) 29 <https://dcj.nsw.gov.au/documents/children-and-families/family-is-culture/family-is-culture-response-progress-report-november-2020.pdf>; New South Wales Department of Communities and Justice, *Family Is Culture Progress Report* (May 2021) 78 <https://dcj.nsw.gov.au/documents/children-and-families/family-is-culture/family-is-culture-response-progress-report-may-2021.pdf>; New South Wales Department of Communities and Justice, *Family Is Culture Progress Report* (August 2021) 79 <https://dcj.nsw.gov.au/documents/children-and-families/family-is-culture/family-is-culture-response-progress-report-august-2021.pdf>; New South Wales Department of Communities and Justice, *Family Is Culture Progress Report* (February 2024) 41 <https://dcj.nsw.gov.au/documents/children-and-families/family-is-culture/February_2024_-_Family_is_Culture_Response_Progress_Report.pdf>.

33 Paul Tatnell, 'Calling Police 'F—ing' Pigs Not Offensive: O'Shane', *Sydney Morning Herald* (online, 7 May 2010) <www.smh.com.au/national/nsw/calling-police-fing-pigs-not-offensive-oshane-20100507-uiu8.html>; see also Tim Dick, 'Judges Rule O'Shane Was Right to Jail Bullying Man for Contempt', *Sydney Morning Herald* (online, 20 January 2007) <www.smh.com.au/national/judges-rule-oshane-was-right-to-jail-bullying-man-for-contempt-20070120-gdpab9.html>.

34 'Removal of Kids Horrifies Nation's Only Indigenous Federal Judge', *The Australian* (11 December 2014) <https://www.theaustralian.com.au/subscribe/news/1/?sourceCode=TAWEB_WRE170_a_GGL&dest=https%3A%2F%2Fwww.theaustralian.com.au%2Fnational-affairs%2Findigenous%2Fremoval-of-kids-horrifies-nations-only-indigenous-federal-judge%2Fnews-story%2Ffb2543c80d949061>.

including engaging directly with First Nations communities and using his influence to elevate their perspectives. During one interview on the *Law Report* in 2023, Judge Myers recounted an exchange with community members and described being 'scoffed' at for remarks that he had made about First Nations children having as many as ten placements during their time in out-of-home care.[35] The data were met with derision and commentary from the community that these figures were incorrect. Judge Myers discussed how he engaged with the community to explore in greater depth their perspectives and lived experiences of child welfare systems. The audience members indicated that the figures presented were very 'light'. One Aboriginal woman in the audience indicated to Judge Myers that she herself had experienced at least twenty placements during her time in care. It is hoped that Judge Myers continues to draw on the lived experiences of Aboriginal people to affect change and to apply a healthy scepticism when engaging with quantitative data that present a potentially narrow perspective about the lived realities of the First Nations children, families and communities affected by state child protection systems.

Judge Myers has also spoken up at conferences and in the media about the need for change, including suggesting that First Nations families consider utilising the Family Court jurisdiction instead of the Children's Court to obtain better outcomes.[36] This is worth consideration for families affected by contemporary child protection systems but does not address the dominating structures that perpetuate poor outcomes within child protection jurisdictions or the foundational paradox of ongoing *terra nullius*.

The judiciary has much to answer for regarding its complicity in the ongoing removal of First Nations children from their families. The considerable discretion afforded to judicial decision-makers provides significant opportunities to extend procedural fairness and demand that institutional actors meet a high threshold to justify state intervention and the separation of families. Alleged harms requiring intervention should be considered against the harms and poor outcomes associated with out-of-home care, and there should be much greater insistence on exhaustive efforts to create safety and preserve families so that removal is truly an intervention of last resort.[37]

Consistent with legislative mandates for the participation of Aboriginal families and communities in decision-making, such as section 12 of the *Care*

35 Damien Carrick, 'US Lawyer Faces Sanctions Over Chat GPT Use: What Family Courts Can Do for Indigenous Australians', *The Law Report* (ABC Radio National, 13 June 2023) <www.abc.net.au/listen/programs/lawreport/chatgpt-lawyer/102405786>.

36 Damien Carrick, 'US Lawyer Faces Sanctions Over Chat GPT Use: What Family Courts Can Do for Indigenous Australians', *The Law Report* (ABC Radio National, 13 June 2023) <www.abc.net.au/listen/programs/lawreport/chatgpt-lawyer/102405786>.

37 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9(2)(c).

and Protection Act, the voices of First Nations families and communities must not only be sought by child protection workers but heard by judicial officers. If there is broad agreement about the need for different decisions to achieve better outcomes for First Nations children, then such efforts must reconsider issues of procedural justice in the context of necessary structural change. In the absence of structural change, we will see endless cycles of reform and legislative amendment without progress, further entrenching a system in which colonial knowledge and authority reign supreme at great cost to First Nations children and families.

Limitations of Colonial Systems in Judicial Decision-Making

It is important that there are now more First Nations judicial officers. They challenge the overwhelming whiteness of judicial institutions and the way that the law interacts with First Nations communities. However, as a minority group that forms less than 1 per cent of the overall judicial population, the extent to which such challenges are possible is limited. As much as First Nations judicial officers might bring their unique cultural standpoint to judging and are more likely to have knowledge of the legislative provisions aimed at reducing discrimination, their presence is not a panacea.

First Nations judges and magistrates are ultimately constrained to operate within the realm of state law. They cannot overturn decades of colonial decisions that have had a detrimental impact on First Nations peoples. They can challenge, but they cannot change the inadequacies and the structural racism within the policies and practices of child welfare systems. They cannot unilaterally implement the decades of reviews and inquiries aimed at addressing the overrepresentation of First Nations children in the child protection system. First Nations judicial officers by themselves cannot stem the tide of removals facing future generations of First Nations children. Although their contributions are important, they should not be overstated; First Nations judges and magistrates provide a way of shifting rather than piercing the whiteness that prevails in our courtrooms.

Achieving the transformational change that has long been envisioned by First Nations people requires more than the addition of First Nations judicial officers. Furthermore, state laws post-*Mabo* remain committed to retaining the 'skeleton of principle'[38] that developed from the law of England. The re-establishment of First Nations jurisdictions to oversee the rights and interests of First Nations children under First Nations laws and governance remains the catalyst for change that is necessary to reject the ongoing spectre of *terra nullius* in the child protection system.

38 *Mabo v Queensland [No 2]* (1992) HCA 23 [29] (Brennan J).

Colonial Mindsets in Child Protection Practice

Executive structures and practices are highly influential, both in terms of the experiences of children and families and in the judicial decision-making process. Reforms within these executive agencies have similarly focused on practice to 'improve' the quality of decisions and uphold the 'best interests' of children, including First Nations children. These include practice efforts to improve 'engagement' for family and community participation in decision-making, structures to provide 'independent' expertise to inform the court, such as Children's Court Clinics, and the appointment of children's legal representatives to advocate for their interests. Although these processes are well intentioned, they nevertheless offer little substantive change to the structural barriers that have characterised colonial interventions in First Nations families for more than two centuries.[39] Despite wide acknowledgement of the need for structural change, cycles of reform frequently reinforce the same flawed colonial logics and result in the same avoidable, poor outcomes.

Child protection practice standards emphasise the central role of family, community and culture, including cultural safety in achieving positive outcomes for children and young people.[40] Practice expectations include applying relevant international human rights instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP').[41] UNDRIP requires working alongside First Nations families and adhering to the relevant rights-based legislative provisions and policies. In New South Wales, this includes the Aboriginal and Torres Strait Islander principles[42] and the Aboriginal Case Management Policy, a comprehensive policy document developed by the New South Wales Child, Family and Community Peak Aboriginal Corporation ('AbSec').[43]

39 Terri Libesman, Kate Ellinghaus and Paul Gray, 'Colonial Law and Its Control of Aboriginal and Torres Strait Islander Families' in Peter Cane, Lisa Ford and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 433.

40 New South Wales Department of Communities and Justice, *Practice Framework Standards for Child Protection and Out of Home Care Practitioners* (2020). <https://dcj.nsw.gov.au/documents/service-providers/deliver-services-to-children-and-families/child-protection-services/practice-framework-standards.pdf>.

41 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) <https://social.desa.un.org/sites/default/files/migrated/19/2018/11/UNDRIP_E_web.pdf>.

42 *Children and Young Person's Care and Protection Act 1998* (NSW) ss 11–14 ('*Care and Protection Act*').

43 'About the Aboriginal Case Management Policy', *New South Wales Government* (Web Page) <https://dcj.nsw.gov.au/service-providers/oohc-and-permanency-support-services/aboriginal-case-management-policy/aboriginal-case-management-policy-statement/about-acmp.html>.

However, statutory child protection officials are granted wide discretion in applying these standards and in determining how they contribute to child protection decision-making. In this way, decisions about the futures of First Nations children, individually and collectively, remain under the authority of state institutions and processes and often avoid scrutiny or oversight from First Nations communities.

As with the finding that key legislative provisions are routinely not applied by judicial officers, these legislative and policy settings are not reliably implemented in practice.[44] The discretion afforded to child protection officers and the deference shown to their perspectives by judicial officers[45] present a significant barrier to achieving just outcomes for First Nations children and their families and communities. For example, the *Family is Culture* review found examples of child protection officers' non-compliance with practice frameworks and legislation and numerous examples of practitioners presenting misleading evidence about families to justify child protection decision-making. The review noted that

> In light of the sheer number of policy documents, codes of conduct, legislative instruments and training materials that address the issue of the standard of evidence to be supplied to the Children's Court, the Review was perplexed to discover that FACS [the NSW Department of Family and Community Services] provided the Children's Court with misleading or untrue evidence in a significant proportion of the case files that were reviewed. The gravity of the occurrence varied on a case by case basis. While it is possible some of the mistakes and omissions could be attributed to human error, in some cases it was difficult to understand how the error could have occurred during the normal course of events.[46]

This has significant implications for the quality of decision-making regarding the future of First Nations children and for procedural justice being afforded to First Nations families and communities.

Certain decision-making processes and tools further entrench non-Indigenous frameworks and perspectives. This includes the continued use of imported safety and risk assessment tools despite criticisms from First Nations families, communities and researchers that they perpetuate inequalities and contribute to the over-representation of First Nations children forcibly removed from their

44 Davis (n 5); SNAICC (n 10); SNAICC—National Voice for Our Children, '*Family Matters Report 2022* (Report, October) (SNAICC, 2022) <https://www.snaicc.org.au/resources/family-matters-report-2022/>.

45 Elizabeth Fernandez et al., *A Study of the Children's Court of New South Wales* (Report, 2014).

46 Davis (n 5) 384.

families.[47] Such tools provide a façade of rigorous, valid assessment underpinning child protection decision-making by both child protection authorities and judicial officers that effectively marginalises First Nations perspectives and experiences. These tools also minimise the consideration of protective factors and other strengths present in First Nations families that contribute to experiences of safety for First Nations children.

Similarly, recent reforms to increase the use of 'family group conferencing' have been represented by state administrators as a key commitment to increasing the involvement of First Nations families and communities in decisions about their children.[48] However, their structural positioning emphasises accountability to child protection authorities rather than to the families and communities that they are ostensibly intended to empower. This is likely to compound the identified risks whereby family and community voices are co-opted and marginalised[49] while presenting a false narrative that families and communities have been afforded an opportunity to be meaningfully engaged and heard in decisions about their children.

Cycles of reform intended to strengthen safeguards for First Nations children and families tend to be co-opted by state child protection authorities, positioning First Nations children and families within systems in ways that marginalise their voices and recreate and reinforce colonial systems of intervention. For example, recent legislative changes in New South Wales require child protection authorities to provide timely and purposeful assistance to families to prevent unnecessary removals and increase the rate of restorations.[50] Although the foundation of this 'active efforts' standard emphasises the responsibility of state authorities to assist families, subsequent guidance about the new laws developed by the executive child protection agency clearly diminishes this intent by defining active efforts in accordance with existing rights rather than a new higher standard[51] that warranted the inclusion of

47 Jorge Branco, 'Indigenous Organisations Call for Child Safety Tool to Be Scrapped', *Nine News* (online, 17 January 2023) <www.9news.com.au/national/child-safety-nsw-indigenous-organisation-calls-for-racist-child-safety-tool-to-be-scrapped/15f2d936-4b5d-473a-92c9-8bb2009bcc4c>.

48 'Impact on Aboriginal Families', *NSW Department of Communities and Justice* (Web Page) <https://dcj.nsw.gov.au/service-providers/deliver-services-to-children-and-families/child-protection-services/shaping-a-better-child-protection-system/impact-on-aboriginal-families.html>.

49 Tarar Ney, Jo-Anne Stoltz and Maureen Maloney, 'Voice, Power and Discourse: Experiences of Participants in Family Group Conferences in the Context of Child Protection' (2013) 13(2) *Journal of Social Work* 184; cited in AbSec, *Shaping a Better Child Protection System—AbSec Submission* (2017) <https://drive.google.com/file/d/1ScJYz_3u80wq2kWvQ9QyUn989KJFrWxy/view?usp=sharing>.

50 'Understanding the Family Is Culture Laws', *New South Wales Department of Communities and Justice* (Web page) <https://dcj.nsw.gov.au/children-and-families/family-is-culture/new-laws.html>.

51 'Understanding the Family Is Culture Laws', *New South Wales Department of Communities and Justice* (Web page) <https://dcj.nsw.gov.au/children-and-families/family-is-culture/new-laws.html>.

stronger legislative provisions.[52] In reality, these 'reforms' merely recreate the same harmful practices that they were intended to prevent.

The establishment of Children's Court Clinics[53] and the appointment of Independent Legal Representatives[54] to advocate for the interests of children before the court reflect procedural 'reforms' that have arguably further reinforced the structures that undermine the rights and interests of First Nations children. These examples ostensibly serve the interests of children and families by ensuring access to adequate expertise in assessing the needs of children, determining how these needs might best be met, and providing children an independent voice in court processes. Such roles can be highly influential in judicial decision-making, as they are seen as impartial and objective.[55] However, these reforms also further entrench non-Indigenous perspectives and authority in the decision-making about First Nations children.[56] The expertise valued by the Children's Court Clinics is steeped in non-Indigenous knowledge systems despite these fields being implicated in past and ongoing systems of harm, and the known paucity of culturally valid theoretical frameworks and assessment tools is also a problem.[57] Such expertise presumes a similar epistemic *terra nullius* and fails to recognise the knowledge and practices that confer safety to raise generations of First Nations families. This false 'gap' is thus filled with ill-suited non-Indigenous frameworks and tools.

Similarly, although independent legal representatives play a significant role in representing the interests of First Nations children in court processes (particularly for infants and young children), there is no expectation that these representatives will have suitably demonstrated knowledge and awareness of the developmental needs of First Nations children or how their best interests are conceptualised by their community to inform the advocacy on their behalf. Rather, such legal representatives are empowered to make representations regarding the interests of First Nations children about which they may be entirely ignorant.[58] Although they are described as 'independent', their standpoint disproportionately represents non-Indigenous perspectives, and this informs their contributions to the judicial process, including their

52 Davis (n 5).

53 'Children's Court Clinic', *Children's Court New South Wales* (Web page) <https://childrenscourt.nsw.gov.au/care-and-protection/children-s-court-clinic.html>.

54 'Legal Representation for a Child or Young Person', *Department of Communities and Justice* (Web page) <www.facs.nsw.gov.au/families/legal/care-and-protection-proceedings/legal-representation>.

55 Fernandez et al. (n 45) 30.

56 Clare Tilbury, 'Obtaining Expert Evidence in Child Protection Court Proceedings' (2019) 72(4) *Australian Social Work* 392, 399.

57 Ash Wright et al., 'Attachment and the (Mis)apprehension of Aboriginal Children: Epistemic Violence in Child Welfare Interventions' (2024) *Psychiatry, Psychology and Law* 1.

58 Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report, 8 November 1997) 13, 58 <https://www.alrc.gov.au/publication/seen-and-heard-priority-for-children-in-the-legal-process-alrc-report-84/>.

examination of child protection agency and 'expert' evidence concerning First Nations families and children.

Despite the apparent reforms to improve the quality of representation of First Nations families, child protection systems continue to privilege non-Indigenous expertise while simultaneously acknowledging that such judgments have underpinned systems of harm for generations. Furthermore, in our experience, when First Nations expertise is included, there remains a significant challenge in translating cultural concepts so that they are understood by non-Indigenous legal systems and decision-makers.[59] Once again, this emphasises the importance of First Nations judicial officers in child protection decisions.

These challenges highlight that state institutions—whether government authorities, 'experts' or judges—should not be considered 'independent' in matters regarding the integrity and survival of First Nations families as they share an interest in First Nations' dispossession and the dismemberment of First Nations families. Meanwhile, the recognition of the rights and interests of First Nations children predominantly depends on the professional and cultural humility of non-Indigenous 'experts'.

Many of these systems and professions have sought to improve their cultural awareness and cultural safety—whether in ongoing professional development or through the introduction of policy or practice standards. Such efforts are important but are ultimately limited: they may mitigate some of the harms associated with structural violence but cannot themselves achieve an end to this violence. Ending the violence is necessary for the collective safety of First Nations children, families and communities. In this way, the aim of achieving 'cultural safety' in state child protection systems is itself misleading because such systems are imbued with colonial violence. No amount of cultural awareness will render these systems 'safe' for First Nations children, families or communities.

Cultural safety and addressing this colonial violence require that the current approach to the exercise of child protection authority by state systems, including legislatures, government agencies and judiciaries, be discontinued. The legitimate authority of First Nations to govern themselves and determine the futures of their children, families and communities must be recognised. Although current policy frameworks have committed to some 'transfer' or 'delegation' of authority from the state to First Nations communities[60] and courts have taken positive steps to establish more inclusive settings,[61] care

59 James Beaufils, '"That's the Bloodline": Does Kinship and Care Translate to Kinship Care?' (2023) 58 *Australian Journal of Social Issues* 296.

60 Department of Social Services, *Safe and Supported: Aboriginal and Torres Strait Islander First Action Plan 2023–2026* (Australian Government, 2022).

61 'The Winha-Nga-Nha List Commences at Dubbo Children's Court', *Aboriginal Legal Service (NSW/ACT)* (Web Page, 7 September 2023) <www.alsnswact.org.au/the_winha_nga_nha_list_commences_at_dubbo_children_s_court>.

should be taken to ground reforms in Indigenous peoples' human rights to self-determination, autonomy, and self-governance. This requires an end of ongoing systems of violence rather than colonial states benevolently and conditionally sharing their authority with First Nations peoples.

Conclusion

The discord between, on the one hand, legislative and human rights commitments to participation and self-determination and, on the other hand, First Nations communities' and organisations' experiences within child protection systems requires the political will to address it. Although research, reviews and many participants in child protection systems express a commitment to Aboriginal peoples' rights to participation and self-determination, there is an enormous gap between good will (and good words) and what happens in practice. Child protection reforms are supposedly well-intentioned, but the cycles of harm that they recreate are foreseeable and, in this sense, should also be considered intentional outcomes of such policy settings.[62]

Alex Broom and colleagues note that in the context of social structures and institutions, 'some actions are more possible and, indeed, more highly and frequently rewarded than others'.[63] In relation to state child protection systems and practice, the grounding of decisions about First Nations children in interventionist and assimilationist frameworks remains 'more possible' and drives First Nations peoples' experiences of marginalisation, violence and harm. Decisions about the rights, interests and futures of First Nations children continue to be determined by non-Indigenous institutions, non-Indigenous processes and predominantly non-Indigenous people. Non-Indigenous knowledge systems and ideas of 'expertise' are continually prioritised and valued, despite the known role of these disciplines and experts thereof in past and ongoing harms experienced by First Nations peoples. Meanwhile, limited procedural reforms largely provide a façade of progress while simultaneously masking how these reforms recreate structural violence and resist deeper structural transformation.

This gap is evidenced in the failure to substantially implement reforms, such as the Aboriginal Child Placement Principles, and rights, such as those provided by section 12 of the *Care and Protection Act*. We argue that even if these reforms were to be implemented, there are limits to what can be achieved within state child protection systems. To attain child protection institutions that embed Aboriginal community and family values and that are accountable to Aboriginal individuals and communities, the foundational

62 Alex Broom et al., 'The Administration of Harm: From Unintended Consequences to Harm by Design' (2023) 43(1) *Critical Social Policy* 51.

63 Alex Broom et al., 'The Administration of Harm: From Unintended Consequences to Harm by Design' (2023) 43(1) *Critical Social Policy* 67.

terra nullius that grounds existing child protection frameworks needs to be rejected.

If we are to challenge the *terra nullius* mindsets in child welfare, then we must go beyond the procedural safeguards administered by non-Indigenous authorities and decision-makers. First Nations peoples must be empowered to make decisions grounded in their expectations of child-rearing and aspirations for the futures of their children. This is a critical foundation for all child protection systems—the expression of the collective interests of a community in the future of its children and through the children, the future of the community. This requires a transfer of child protection jurisdiction, on equal terms, to First Nations communities and institutions.