



Australian
Human Rights
Commission

The rights of the child and family reunification

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1 Introduction

The Australian Human Rights Commission (the Commission) welcomes the opportunity to make a submission to the Office of the United Nations High Commissioner for Human Rights on the theme 'the rights of the child and family reunification'. This short submission will reflect on the main human rights concerns affecting children separated from their families in Australia.

It will examine concerns about family separation in migration and cross-border situations as well as concerns about children removed from parental care due to fears for their safety and wellbeing. It will explore this later issue with specific regard to Aboriginal and Torres Strait Islander children and will look at what is needed to ensure families can be safely kept together.

2 Family separation issues resulting from Australia's refugee and asylum seeker policies

Family separation, including the separation of children from their parents, is a common consequence of forced displacement. Families may become separated from each other accidentally or intentionally and may face barriers to reunification even after protection has been secured. For many refugees who have settled in Australia, family separation remains a consistent and pressing concern.¹

In particular, people who arrived in Australia by boat before August 2012, many of whom hold permanent refugee or humanitarian visas, and people who sought asylum in Australia by boat between 13 August 2012 and 1 January 2014 and were not transferred to offshore detention, lack access to viable opportunities for family reunion, and consequently face the prospect of remaining separated from their families on an indefinite basis.²

There are several avenues under Australia's Refugee and Humanitarian Program through which people in Australia can seek to reunite with relatives, including children, living overseas who are in humanitarian need, including 'split family' provisions, the Special Humanitarian Program, and the Community Support Program. People who hold a permanent Protection Visa are considered the lowest priority for processing of family reunion applications through these streams.³

Similarly, refugees who are now permanent residents of Australia who arrived by boat prior to August 2012 receive the lowest processing priority on applications for Family stream visas, which lie outside of the Refugee and Humanitarian Program, unless there are special circumstances of a compassionate nature or other compelling reasons.⁴

People who sought asylum by boat between August 2012 and January 2014 and who have been found to be refugees hold a Temporary Protection Visa or Safe Haven Enterprise Visa and are not eligible to propose relatives for resettlement under the Refugee and Humanitarian Program.⁵

Issues of family separation are further exacerbated by travel restrictions faced by the holders of a number of different temporary visas.⁶

Due to the lack of viable avenues for reunification, people in these cohorts, including parents of children who remain overseas, are likely to face prolonged and indefinite separation from their families as a direct result of Australian government policy and practice.

Under the CRC, Australia has obligations to ensure that in all actions concerning children, the best interests of the child be a primary consideration and ensure 'as far as possible' that a child can 'know and be cared for by his or her parents'.⁷ The prolonged separation of children from parents can have significant and long-term impacts on mental health and attachment relationships and the Commission considers that families in these situations should have the opportunity to reunite.⁸

The Commission has previously recommended that, at a minimum:⁹

- the Department of Home Affairs should afford the same priority and apply the same eligibility criteria to all applications for family reunion lodged by humanitarian entrants, regardless of the type of humanitarian visa held by the applicant or their mode of arrival of Australia
- the Australian Government should amend the Migration Regulations 1994 so that conditions restricting overseas travel) does not apply to Temporary Protection Visas and Safe Haven Enterprise Visas
- the Australian Government should introduce legislation to permit holders of Temporary Protection Visas and Safe Haven Enterprise Visas to sponsor family members overseas for temporary residence in Australia.

3 Children in out-of-home care

In Australia, there are approximately 46,000 children living in various forms of out-of-home care. These children have been removed from the care of their parents based on substantiated reports of abuse or neglect, with most reports relating to emotional abuse (54%), followed by neglect (22%) and physical abuse (14%).¹⁰

Over 30,000 children have been in out-of-home care for two years or more and over half of children (54%) were in placements with a relative or 'kin' carer, who can be someone directly related to the child, most commonly a grandparent, or a known family friend.¹¹

Funding in statutory child protection systems across Australia is disproportionately directed towards acute services, including the provision of out-of-home care.

Additionally, Australian research has shown that when children who have been in out-of-home-care for a period of time return to the care of their parent(s), families and children are not always provided with or able to access appropriate ongoing supports to ensure long-term safety and wellbeing.¹²

Coordinated and strategic national investment in early intervention and prevention initiatives is critical to minimise the extent to which children need to be placed in out-of-home care or other forms of substitute care, and ensure families can stay together, where possible. This includes preventing domestic and family violence and providing stable housing for women escaping violence with their children, as these are known to be key issues leading to child removal from their families.

3.1 Aboriginal and Torres Strait Islander children

Aboriginal and Torres Strait Islander children continue to be significantly overrepresented in the child protection system at every decision-making point. As the Commission highlighted in its *Wiyi Yani U Thangani* report, in every jurisdiction, Aboriginal and Torres Strait Islander children are far more likely to be the subject of notifications, which are subsequently investigated, substantiated, subjected to protection orders and placed in out-of-home care, compared to non-Indigenous children.¹³

The Convention on the Rights of the Child recognises that children have the right to preserve their identity, and that alternative care options for a child separated from their family should be considered with due regard for the desirability of continuity in a child's upbringing and for the child's ethnic, religious, cultural and linguistic background.

The Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) provides a comprehensive approach to protecting the rights of Aboriginal and Torres Strait Islander children. There are five elements of the ATSICPP, the first four of which focus on: prevention and protecting children's rights to grow up in family and community; partnership and ensuring the participation of communities in service design and delivery; maintaining children's connection to family and culture when in out-of-home-care; and ensuring that children, parents and family members can participate in decisions regarding care and protection.

The fifth element of the ATSICPP sets out a hierarchy for the placement of Aboriginal and Torres Strait Islander children in out-of-home care, starting with Aboriginal and Torres Strait Islander relatives or extended family members and ending with placement with a non-Indigenous carer or in a residential setting *as a last resort*.

Statistics show that in 2019–20, 63% of Indigenous children were placed with Indigenous or non-Indigenous relatives or kin, or other Indigenous caregivers.¹⁴ Despite strong statements of commitment to the ATSICPP by various Australian governments, the principle has not been fully translated into child welfare legislation, and, where implementation has occurred, emphasis has largely been placed on the placement hierarchy to the exclusion of the other elements.¹⁵

The Commission has consistently raised the need for greater legal implementation of and adherence in practice to the ATSICPP.¹⁶ In particular, to the principles that would lead to a reduction of Aboriginal and Torres Strait Islander children being removed from parental care. Removal from family severs ties to country, kin and culture and ruptures communities through the trauma it brings to the individuals and families. Out-of-home care also leads to poor outcomes in a range of areas, including health, education and employment, as well as an increased vulnerability of ending up in the juvenile or adult criminal justice systems.¹⁷

During 2018–19, Aboriginal and Torres Strait Islander children were overall less likely to be reunified to parental care than non-Indigenous children with varied rates of reunification across Australia's states and territories.¹⁸ However, Aboriginal and Torres Strait Islander children who did return to parental care during 2017–18 were as likely as non-Indigenous children to remain reunified in the 12 months that followed.¹⁹

The Commission's *Bringing them Home* report, released in 1997, documented Australia's stolen generation and proposed an approach to child protection grounded in self-determination with a focus on prevention and family support.²⁰ In 2020, the Commission again called for significant change. The *Wiyi Yani U Thangani* report recommended all state and territory governments, with the

support of the Australian Government, urgently invest in prevention and early intervention supports, to address systemic issues of harm and trauma which would reduce unacceptably high rates of Aboriginal and Torres Strait Islander children entering the child protection system and youth detention.²¹

The *Wiyi Yani U Thangani* report sets out a range of pathways forward to reduce the high rates of Aboriginal and Torres Strait Islander children entering the child protection system and youth detention.²² These include investing in diversionary pathways away from the criminal justice system and child protection through actions such as:

- ensuring sufficient provision of Aboriginal and Torres Strait Islander designed and managed safe houses, transitional housing and safe and affordable long-term housing across urban, regional and remote areas
- ensuring sufficient access for Aboriginal and Torres Strait Islander women and their children to drug and alcohol detox and rehabilitation facilities, specific to women and children's needs and aimed at empowerment and recovery
- developing safe house and drug and alcohol rehabilitation models as hubs to act as a 'one stop shop' in the provision of holistic supports
- ensuring alternatives to remand, imprisonment for fine defaults and over-policing of minor offences
- expand the use of Aboriginal and Torres Strait Islander sentencing courts, including specialist family violence and trauma-informed courts, while simultaneously ensuring the cultural competency of mainstream court processes
- ensuring women and children have culturally safe, trauma-informed and family violence aware representation within the family law system.²³

The report also recommends implementing mechanisms to keep women and children safe, and families together.²⁴ These mechanisms include:

- All state and territory governments should implement a Child Protection Notification Referral System (like the Custody Notification system), to refer women and families engaged with the child protection system to culturally safe and preventative legal advice and assistance to reduce matters reaching court and children being apprehended.
- All jurisdictions to replace the legal orders for permanent adoption for Aboriginal and Torres Strait Islander children, with a focus on supporting the permanence of their identity in connection with their kin and culture, and to invest in community-controlled reunification services.

Submission to the Office of the United Nations High Commissioner for Human Rights October 2021

- All jurisdictions to invest in mechanisms that increase the capacity and confidence of victims to disclose violence and abuse, particularly for children who have experienced sexual abuse, limiting the risk of re-traumatisation and to establish crisis support options for children and women and others impacted by child sexual abuse.
- The Australian Government support all jurisdictions to improve access across Australia to, and increase investment year on year, commensurate with need and indexed, to Family Violence and Prevention Legal Services (FVPLS) and to Aboriginal Legal Services (ALS) as culturally safe, trauma-informed specialist supports and legal representation.
- The Australian Government and all jurisdictions support expanding the role of Aboriginal and Torres Strait Islander peak bodies advocating for the safety and protection of women and children.²⁵

¹ Human Rights Law Centre, *Together in Safety: A report on the Australian Government's separation of families seeking safety* (April 2021) 4
<https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/6082667935d08840b1a8bae8/1619158657519/HRLC_Together_in_Safety_REPORT.pdf>.

² Australian Human Rights Commission, *Lives on Hold: Refugees and asylum seekers in the 'Legacy Caseload'* (2019) 83 <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy>>.

³ Australian Human Rights Commission, *Lives on Hold: Refugees and asylum seekers in the 'Legacy Caseload'* (2019) 83 <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy>>.

⁴ Australian Human Rights Commission, *Lives on Hold: Refugees and asylum seekers in the 'Legacy Caseload'* (2019) 83 <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy>>.

⁵ Australian Human Rights Commission, *Lives on Hold: Refugees and asylum seekers in the 'Legacy Caseload'* (2019) 83 <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy>>.

⁶ Australian Human Rights Commission, *Lives on Hold: Refugees and asylum seekers in the 'Legacy Caseload'* (2019) 84 <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy>>.

⁷ Australian Human Rights Commission, *Lives on Hold: Refugees and asylum seekers in the 'Legacy Caseload'* (2019) 86 <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy>>.

⁸ Human Rights Law Centre, *Together in Safety: A report on the Australian Government's separation of families seeking safety* (April 2021) 20
https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/6082667935d08840b1a8bae8/1619158657519/HRLC_Together_in_Safety_REPORT.pdf; Australian Human Rights Commission, *Lives on Hold: Refugees and asylum seekers in the 'Legacy Caseload'* (2019) 89

<<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy>>.

- ⁹ Australian Human Rights Commission, *Lives on Hold: Refugees and asylum seekers in the 'Legacy Caseload'* (2019) 88 <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy>>.
- ¹⁰ 'Child Protection Australia 2019-20', *Australian Institute of Health and Welfare* (Child Welfare Series No 74, 18 May 2021) 21 <<https://www.aihw.gov.au/reports/child-protection/child-protection-australia-2019-20/summary>>.
- ¹¹ 'Child Protection Australia 2019-20', *Australian Institute of Health and Welfare* (Child Welfare Series No 74, 18 May 2021) 51, 57 <<https://www.aihw.gov.au/reports/child-protection/child-protection-australia-2019-20/summary>>.
- ¹² Commission for Children and Young People (Vic), *In Our Own Words: Systemic Inquiry into the Lived Experience of Children and Young People in the Victorian Out-of-Home Care System* (Report, November 2019) 184 <<https://ccyp.vic.gov.au/assets/Publications-inquiries/CCYP-In-Our-Own-Words.pdf>>.
- ¹³ Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future Report* (Report, 2020) 212 <<https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/wiyi-yanu-thangani>>.
- ¹⁴ 'The Aboriginal and Torres Strait Islander Child Placement Principle Indicators 2018-19: Measuring progress', *Australian Institute of Health and Welfare* (Child Welfare Series No 77, 2020) 6 <<https://www.aihw.gov.au/getmedia/e8b4a2b9-38b8-45d6-a43d-baec2e98e096/aihw-cws-77.pdf.aspx?inline=true>>.
- ¹⁵ Australian Human Rights Commission, Submission to the Standing Committee on Social Policy and Legal Affairs, *Inquiry into local adoption* (12 June 2018) 19 <<https://humanrights.gov.au/sites/default/files/18.06.08%20AHRC%20submission%20-%20Inquiry%20into%20local%20adoption%20FINAL%20version%20.pdf>>.
- ¹⁶ Australian Human Rights Commission, Submission to the Standing Committee on Social Policy and Legal Affairs, *Inquiry into local adoption* (12 June 2018) 19 <<https://humanrights.gov.au/sites/default/files/18.06.08%20AHRC%20submission%20-%20Inquiry%20into%20local%20adoption%20FINAL%20version%20.pdf>>.
- ¹⁷ Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future Report* (Report, 2020) 211 <<https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/wiyi-yanu-thangani>>.
- ¹⁸ 'The Aboriginal and Torres Strait Islander Child Placement Principle Indicators 2018-19: Measuring progress', *Australian Institute of Health and Welfare* (Child Welfare Series No 77, 2020) 14 <<https://www.aihw.gov.au/getmedia/e8b4a2b9-38b8-45d6-a43d-baec2e98e096/aihw-cws-77.pdf.aspx?inline=true>>.
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