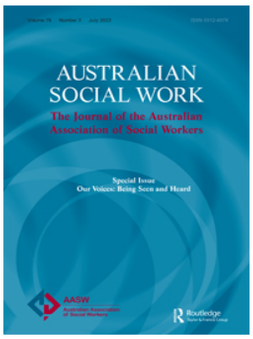

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First Nations Children and Families and Permanency Planning Reform: The Evidence Counts

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ABSTRACT

Major permanency planning-based reforms transformed the New South Wales (NSW) out-of-home care (care) system between 2012 and 2022, in the face of strong, sustained opposition from First Peoples. Permanency, attachment and related notions, including the best interests of the child are all constructs central to permanency planning and crucial factors in judicial decision-making about children's permanent care arrangements. Doctoral research conducted by the author, a Wiradjuri legal scholar, explored Aboriginal community member understandings of these concepts. With a focus on restoration, this article provides a critical commentary on aspects of the legislative changes implemented in NSW. Outlining literature relating to the reforms, the author notes the substantial lack of evidence from First Nations' perspectives in support of the legislative changes made. Implications for both First Peoples and for social work are discussed. The article seeks to prompt reflection by social workers on how such evidence vacuums can cause harm to First Nations children and young people in statutory care. Social work spheres within child welfare and associated scholarship must centre First Peoples' knowledge and experiences. If not, crucial conceptual and practice-related issues will remain poorly understood and profound child welfare system-related trauma caused to First Nations children and families will be perpetuated.

IMPLICATIONS

- System reform relating to permanent care arrangements of First Nations children and young people must be grounded in First Nations-led evidence, including on permanency and attachment, and it must centre First Peoples' perspectives and lived experience.
- Understanding and taking into account the perspectives of First Peoples is an important action social workers and other practitioners from non-Indigenous backgrounds must take in supporting First Nations children and families involved in care matters. Hence, there is a need for critical reflection in the social work sphere, about how child protection policies and legislation may benefit, or create harm to, First Nations communities.
- Advocacy for systems change is an important action social workers can take, when governments propose policies that First Peoples view as detrimental to support the long-term wellbeing of First Nations children.

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First Nations children and young people involved in out-of-home care (OOHC) systems confront a range of hardships, from dealing with the issues that led to their removal from their parents, to contending with a sense of disconnection and trauma stemming from their separation from family, and the effects of colonisation more broadly. As a result, a range of social and emotional issues impact children's wellbeing (Family Violence Prevention Legal Services, 2018). A systems-related adversity emphasised over decades in the statutory care landscape relates to the impact of "drift in care" (Fein et al., 1983). Drift in care, or "placement instability," involves placement breakdowns or multiple placements, and a resultant sense of ongoing uncertainty for children (Cushing & Greenblatt, 2009, p. 694). First Nations children are significantly over-represented in contemporary care systems, both nationally and in New South Wales (NSW), and publicly accessible data regarding placement breakdown is scarce (Australian Institute of Health and Welfare [AIHW], 2022). However, we do know that placement instability remains a major issue for First Nations children and young people in NSW (Davis, 2019).

In attempts to address placement drift, both internationally and across Australian state and territory care jurisdictions, governments have implemented major permanency planning-related legislative reforms (AIHW, 2016; Tilbury & Osmond, 2006). Originating in the United States (US), permanency planning is an approach to child welfare intended to help children attain stability in their care arrangements (Maluccio et al., 1980). Permanency planning entails a range of casework interventions aimed at achieving permanency and forms the basis of a framework for making decisions about the placement of children in care (Tilbury & Osmond, 2006). Permanency planning in the contemporary NSW care system, now referred to as "permanency support planning", prioritises legally permanent placements above others such as foster care, relative, or kinship care, except for Aboriginal children, for whom adoption is the least preferred option (New South Wales Department of Communities and Justice (DCJ), 2019), as explained in the following section.

The former NSW Government first proposed permanency planning-related legislative amendments in 2012 (New South Wales Department of Family and Community Services (NSW FaCS), 2012), which resulted in the implementation of significant changes to the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (the "*Care Act*"). Major reforms introduced in 2018 aimed at ensuring permanency for children, some of which are briefly outlined in this article, included measures further streamlining the process of adoption from care (Community Legal Centres NSW & Hamilton, [CLC NSW], 2018). Of all the proposed reforms, the 2018 legislative amendments were the subject of the strongest opposition from First Nations community and peak organisations. Opponents argued that the amendments harkened back to historical Aboriginal child welfare policies and practices known as the Stolen Generations (Allam, 2018), in which multiple generations of Aboriginal and Torres Strait Islander children were systematically removed from parents, family, community, and culture (Human Rights and Equal Opportunity Commission [HREOC] & Wilson, 1997).

This article provides a critical commentary on the permanency reforms that took place in NSW between 2012 and 2022, and their impact on First Nations children and young people in OOHC in NSW. Informed by a critical synthesis of the literature, this article seeks to prompt reflection by social workers on how policy and legislative reform that takes place without the proper involvement of First Nations peoples can cause harm to First Nations children and young people. For social workers, this reflective opportunity should be used

to identify when advocacy is needed from within and outside of organisational contexts to disrupt the status quo. The article is divided into four sections. The first section, "Contemporary NSW Child Welfare Reforms", outlines the lack of evidence-base regarding permanency planning and First Nations children and families, and related notions from Aboriginal perspectives. The second, "Permanency Planning: Supporting Permanency for First Nations Children and Young People?", relates to the assumptions underpinning NSW permanency policy. The implications of the dearth of evidence for First Nations children and families and for social work are then discussed. The author concludes that a strong First Nations-led evidence-base that centres the perspectives of First Peoples is crucial to informing system change and to rectifying historically ineffectual and damaging care systems.

Research Method

The author is a Wiradjuri legal scholar and former Link-Up Aboriginal Corporation (NSW) caseworker with lived experience of historical Aboriginal child removal policies and practices. This article forms part of Doctoral research completed in 2021, examining Aboriginal understandings of the "best interests of the child", "permanency", and related notions central to judicial care decision-making in relation to First Nations children and young people in NSW. The research included qualitative data collection and analysis, but only aspects of the critical review of some of the permanency planning-related literature are reported here. This review was undertaken by systematically searching databases at different time points using keywords, including searching Scopus, Google Scholar, ProQuest, and EBSCO, to identify relevant peer-reviewed literature, as well as hand searching and snowballing techniques to identify relevant grey literature. This phased approach allowed a thorough capture of the limited material available, some of which is referred to in this article. The author conducted her research with Faculty of Law, University of Technology, Sydney and has since become affiliated with the University of Melbourne.

The terms "First Nations" and "First Peoples" are used interchangeably throughout this article to refer to Indigenous peoples both internationally and nationally, with regard to Aboriginal and Torres Strait Islander peoples and cultures from across Australia. Note that in some cases when referring to beliefs around the unsuitability of adoption, the term "Aboriginal" is used, to distinguish the standpoint of Aboriginal peoples from that of Torres Strait Islander peoples, who practise customary adoption.

Contemporary NSW Child Welfare Reforms

First Peoples community and advocacy groups, peak organisations, and other experts have continually asserted First Nations' children and young people's rights to maintain connection to culture, as established in national policy and international law (Bamblett & Lewis, 2007; Krakouer et al., 2018, 2022; Libesman, 2011; Link-Up (NSW) Aboriginal Corporation & Wilson, 1996; United Nations, 1989; United Nations, 2007). It is important to note that historically, statutory child protection policies and practices in countries such as Australia, Canada, and Aotearoa New Zealand, have contributed to significant racial disproportionalities in the numbers of Indigenous children in care, inflicting widespread harms across multiple generations (Blackstock et al., 2004; HREOC & Wilson, 1997; Keddell & Hyslop, 2019; O'Donnell et al., 2019). Historical child removal practices

severing ties between First Nations children and familial and cultural networks, have led to profound inter-generational trauma and other major effects on the social and emotional wellbeing of children and young people (Burge, 2022; HREOC, 1997; Krakouer et al., 2022).

Permanency planning-based legislative changes, including those outlined below, aimed to reduce the numbers of children entering care and achieve permanency for those in care (NSW FaCS, 2012), transformed the NSW care system, with permanency planning-related approaches now predominating in casework policy and practice framework in NSW. Early in the development of the permanency planning movement, permanency planning was defined as a system for placement decision-making focused on prevention and undertaken in a set, short period of time. Casework was intended to ensure the safe placement of children in "families that offer them a sense of belonging and legal, lifetime family ties" (Maluccio et al., 1980, p. 515).

When family preservation was not possible, casework efforts were aimed at ensuring a permanent placement for a child, rather than achieving a particular *type* of placement (Cashmore, 2000; Lahti, 1982). Decisions then needed to be made about suitable placements according to a hierarchy of preferred placement options, the first of which was restoration. Where restoration was not possible, other legally permanent care arrangements, that is, "an adoption home as the second priority, or, if necessary, to another permanent alternative such as a family with legal guardianship" (Maluccio et al., 1980, p. 519). The attachment theory-based presumption underpinning permanency planning (Tilbury & Osmond, 2006), and underlying the then NSW Government's reforms, was that legally permanent placements would provide greater certainty for children in care and facilitate stronger bonding between children and caregivers. Attachment theory, a widely-applied child development theory in the care and protection landscape, is based largely on the premise that healthy infant-maternal bonds are key to healthy development and relationships for children later in life (Bowlby, 1969; Bretherton, 1992; Gauthier et al., 2004).

The Permanent Placement Principles (s 10A), introduced in 2014 amendments to the *Care Act* (1998), were a key legislative mechanism for implementation of the NSW reforms. This provision guided judicial decision-making about children's care arrangements; by law, legally permanent care arrangements became the preferred form of placement for children involved in care matters. Section 10A(3) set out a hierarchy of preferred permanent placement options for children in care as follows:

1. Family preservation or restoration to parents.
2. Guardianship or third-party orders by kin, relatives, or other "suitable persons."
3. Adoption (for non-Aboriginal children).
4. Parental responsibility to the Minister (foster, kinship, or residential care)
5. The least preferred option for Aboriginal children was adoption.

These measures were meant to streamline judicial decision-making processes and limit time spent by children in care to set periods (NSW FaCS, 2012). In making the case for permanency planning-based reform, the then NSW Government pointed to rising rates of children entering care, increasing placement breakdowns, and disproportionately high numbers of First Nations children in care (NSW FaCS, 2012). The permanency planning-related reforms introduced in NSW in 2018 were highly controversial

(Davis, 2019), resulting, for example, in legislated timeframes for restoration and the effective reduction of judicial discretion to make orders according to the individual circumstances of a family. It became more difficult for parents to make applications to the Children's Court of NSW to vary or dismiss care and protection orders. Opponents have argued these changes in particular, would impact the chances of First Nations children for safe restoration to families (CLC NSW & Hamilton, 2018; Secretariat National Aboriginal and Islander Child Care (SNAICC), 2021).

A concerning amendment to the *Adoption Act 2000* (NSW) allowed the Supreme Court increased powers to dispense with parental consent for adoption by guardians (CLC NSW & Hamilton, 2018). This measure aligned NSW approaches to child welfare more closely with US approaches to permanency planning in the 1990s, which expedited decision-making and the termination of parental rights. Garrison (1996) contended such constructs pitted the rights and needs of children against those of parents, who were "typically seen as a threat to the child's relationship with her foster parent or her opportunity to obtain adoptive parents" (pp. 373-374).

Similarly, tabloid media narratives that played out over the course of the reforms also underscored the need to speed up adoption processes from care. Initially, the then State Government recognised adoption as irreconcilable with Aboriginal family life and culture, even for children who could not be safely restored to parents (NSW FaCS, 2012, p. 4). However, a pro-adoption lobbyist campaign to include Aboriginal children in the pool of children available for adoption from care gathered momentum across 2018 (Brennan, 2018), with narratives closely following State Government messaging. Measures such as expediting guardianship and adoption from care, and dispensing with parental consent for adoption in favour of guardians was, according to proponents of the reforms, in the best interests of children who apparently could not be restored to family; failing to do so was effectively a denial of the right of children in care to be adopted and to have a fresh start with a new and worthy family (Conley Wright & Cashmore, 2018; Goward, 2018). Those opposed to such ideals were charged by the then Minister with failing to prioritise the safety of children in care (Goward, 2018). Ultimately the previous public position of the NSW Government on the adoption of Aboriginal children was reversed; it was, at the time of writing, that "Where it is preferable to any other order, including parental responsibility to the Minister, open adoption is a permanency option for Aboriginal children in out-of-home care" (New South Wales DCJ, 2019).

Because of the high numbers of First Nations children and young people in care, permanency planning approaches have significant impacts on the lives of First Nations children, families, and communities. From the earliest stages, First Nations community groups, peak organisations, child protection experts, advocates, and supporters have consistently called out a lack of imprimatur for the reforms, with regard to First Nations children and families (Aboriginal Child, Family and Community Care State Secretariat (NSW) (AbSec), 2013). In particular, the then NSW Government did not consult with First Peoples or other advocates regarding reforms contained in the *Children and Young Persons (Care and Protection) Amendment Bill 2018* (NSW). It presented little to no evidence supporting its legislative changes, written from or focused on First Peoples' perspectives or experience (NSW FaCS, 2017, 2012). No evidence was presented, for example, in support of attachment theory as relevant to Aboriginal worldviews and child-rearing practices (NSW FaCS, 2012). Indeed, other authors have found support

for this theory expressly lacking amongst First Peoples and drawn conclusions about its unsuitability for Indigenous families (Choate et al., 2020; Featherstone, 2017; Neckoway et al., 2007; Rothbaum et al., 2000; Ryan, 2011, p. 185).

Permanency Planning

Supporting Permanency for First Nations Children and Young People?

Two key presumptions underlying the system reforms were that streamlining care decision-making would give children the best chance of achieving permanency and that legally permanent care arrangements would promote a safer, more stable home, allowing children to more quickly form attachments to a family (NSW FaCS, 2012). However, independent reviews of the NSW care system revealed a system plagued with concerns, including issues compromising child placement processes. A key example concerns restoration.

The landmark *Family is Culture* review revealed that although restoration is the first legally permanent placement option, "the majority of Aboriginal children who are removed never return home to live with their parents" (Davis, 2019, p. 344.). It is important to note that Davis emphasised, as have First Nations community members and other experts, including community peak organisations like SNAICC, that children's safety is unquestionably the priority above all else in care decision-making (Chamberlain et al., 2022; Davis, 2019; SNAICC, 2021). However, adequate supports are needed to set families up for safe restoration of First Nations children, via "clear, achievable and strengths-based goals, accompanied by culturally sensitive and holistic casework" (Davis, 2019, p. 349).

The placement options set out in s 10A(3) assume families' basic access to services and certain standards of service provision. However, the stark reality is that First Peoples in contact with the care system have generally not engaged with statutory authorities on a level playing field. Families have encountered issues with casework quality, consistency, and cultural security, which, according to Davis (2019) "demonstrate[d] concrete examples of institutional racism that render[ed] our people voiceless and powerless" (p. XVI).

The *Family Is Culture* review detailed system breakdowns, including a failure to instigate prevention and early intervention-focused casework measures, or to consult and support family members about children's permanency or cultural plans (Davis, 2019). The Department of Family and Community Services (now known as the Department of Communities and Justice) policy position of providing support for prevention and early intervention measures was found to have been undermined by its application of legislation and policy in practice. Further, the review contained testimony about inadequate efforts for supporting families to remain connected with support services. Impediments to engagement included caseworker attitude, shame experienced by parents and power imbalances in casework interactions. Consequently, early intervention and prevention-related support plans developed under these circumstances could leave parents "with a fear that such plans [would] result in the removal of children" (Davis, 2019, p. 158). Additionally, the review detailed evidence of parental withdrawal from restoration attempts due to "inconsistent and minimal casework support … or failure to follow through" (p. 354).

Findings from *Family is Culture* supported those in the Tune Report, a major State Government commissioned review, which concluded that care and protection funding overwhelmingly targeted tertiary interventions rather than prevention and family preservation; that is, interventions that occurred after abuse or neglect happened. Indeed, restorations significantly declined from 30 June 2010 to 1 July 2014 for both non-Aboriginal and Aboriginal children in care, resulting in a 22% rise in children's average length of stay in care (Tune, 2016). More recent analyses suggested that Aboriginal children and young people on final orders (i.e., final care and protection orders) in the Children's Court of NSW were "highly unlikely" to be restored to the care of their parents (Newton et al., 2023, p. 10).

Additionally, a litany of compliance-related problems has been brought to light with regard to the implementation of important principles in the *Care Act* (1998) intended to support self-determination, such as the Aboriginal and Torres Strait Islander Child Placement Principle (the "Placement Principle"). The Placement Principle, along with other self-determination-based principles in the *Act*, was intended to embed the right of First Nations families, communities, and community organisations to participate in child protection decision-making (Libesman et al., 2023; Libesman & Cripps, 2017). It set out an order for the placement of Aboriginal children in need of care, prioritising placement within extended family members (s 13(1)). The Placement Principle signified government recognition of the harms caused to multiple generations of First Peoples, known as the Stolen Generations (HREOC & Wilson, 1997). Its overall purpose was to reinforce the importance of retaining children's ties to family, community, culture, and Country (Ban, 2005).

Hunter et al. (2020) described a substantial drop in the numbers of Aboriginal children placed with Aboriginal family members and Aboriginal carers (excluding non-Indigenous family and kin) from 2006 to 2019, attributing the "deeply concerning" drop to a number of factors, including systemic bias (pp. 17, 24). Other compliance-related issues have been identified as serving to compromise permanency planning processes for Aboriginal children and young people and consequently, opportunities for remaining safely within extended family and culture. The problems included the interpretation of Aboriginal children's best interests in judicial decision-making (Hermeston, 2022), "counting rules", or care arrangements counted as complying with the Placement Principle, and determinations about who should be considered kin (Beaufils, 2022; Krakouer et al., 2018; Krakouer et al., 2022; SNAICC, 2017; Tilbury et al., 2013).

The decrease in restorations is gravely concerning because, as identified by SNAICC, the national peak organisation for Aboriginal and Torres Strait Islander children, permanency for Aboriginal children relied on retaining crucial familial and cultural connections. Permanency was "identified by a broader communal sense of belonging; a stable sense of identity, where [children were] from, and their place in relation to family, mob, community, land and culture" (SNAICC, 2016, p.7). It should be noted, the former State Government attempted to address some of these shortcomings via legislative amendments to the *Care Act* (1998) passed in the *Children and Young Persons (Care and Protection) Amendment (Family is Culture) Bill 2022* (NSW) on 10 November 2022. While promising, these changes were criticised as manifestly inadequate (Aboriginal Legal Service (NSW/ACT) Limited & AbSec, 2022). Given well-established understandings around the importance to child wellbeing of retaining extensive, meaningful familial

and cultural ties (Beaufils, 2022; Cripps & Laurens, 2015; Hermeston, 2022; Krakouer et al., 2018; Krakouer et al., 2022), the issues with poor compliance around the Placement Principle remain a major concern.

Implications for First Peoples

The evidence-vacuum, along with the systemic issues highlighted above, have opened up the notion and practice of permanent placement, and of restoration in particular, to racialised and highly politically-charged rhetoric. Restoration has been a political football in which safety has been repeatedly pitted against culture, branded as an inherently unsafe option that fails First Nations children (Brennan, 2018; Goward, 2018). This narrative, which operates from a deficits, rather than strengths-based approach, has dominated populist debate in relation to Aboriginal child welfare in NSW (Dunstan et al., 2020). The concurrent absence, and even silencing, of First Peoples' voices in this context unfortunately contributes to an over-simplification of complex First Nations child welfare issues.

However, since the last of the former State Government's major permanency reforms, the emergence of a critical mass of First Peoples' scholarship on First Nations child welfare in Australia has been one positive development. For example, First Peoples' designed and led research has focused on First Peoples' understandings and beliefs in relation to child-rearing, cultural connection, and child welfare more broadly (Beaufils, 2022; Dunstan et al., 2020; Hermeston, 2022; Krakouer et al., 2018; Krakouer et al., 2022; Newton, 2020; Turnbull-Roberts et al., 2021). It is essential that this scholarship is supported to ensure future reforms and subsequent practice are no longer shaped by generalisations and non-Indigenous perspectives on matters and concepts that disproportionately impact First Peoples. Should these voices remain unheeded at critical times in child welfare reforms process, it is unavoidable that crucial underpinning notions, such as permanency, will remain rooted in "mainstream", rather than First Peoples', understandings.

Implications for Social Workers

Given the substantial racial disproportionalities in the numbers of First Nations children and young people in care, the discipline of social work has a profound responsibility to listen and learn from the voices of First Peoples with regard to system reform. Social work is well-positioned to meaningfully engage and ensure a response to these voices in social work education, policy, research, and service provision. A first step is hearing the voices of First Nations experts within its own sphere (Bennett & Zubrzycki, 2003). Community groups, Elders, individual community members with lived experience in the system, the crucial voices of care leavers, and First Nations peak legal and care organisations and other First Nations experts can all provide important and constructive knowledge about how to address expertise and practice gaps.

At a practice level, social workers, at least those who do not already do so, need to critically reflect on how the policies and legislation influencing social work potentially benefit, or cause harm to, First Nations communities. Advocacy for systems change from within may be necessary, especially when governments propose, or double-down

on policies that First Peoples regard as detrimental to the long-term wellbeing of First Nations children. This is where social workers can play an important role in speaking out.

Advocacy first requires critical reflection. A second important step is to not only carry out good casework practice in good faith, but to critically question the impact of legislative reforms on the ability of social workers and others working in the care system to freely carry out their roles in supporting First Nations children and families. For example, certain permanency reforms in NSW prioritised adoption from care. However, the reality is such reforms put at risk the rights of First Nations children to remain legally connected to First Nations family and cultural identity. Additionally, as described above, some of the reforms were found to create or compound existing barriers to restoration and long-term cultural connections between children and First Nations family, community, and kin. Advocacy in this case starts with critically interrogating fundamental conceptual issues, such as the seemingly benign labels ascribed to permanency, such as "open adoption", "simple adoption", or "forever family," which are assumed to be universal, yet do not reflect Aboriginal perspectives.

Conclusion

Against the objections of First Peoples, and despite the literature pointing to a lack of evidence supporting their implementation in relation to First Peoples, major permanency planning-related legislative amendments were implemented in NSW. The reforms relied on evidence regarding permanency planning, attachment, and other notions central to care decision-making that was not specific to First Peoples, and which did not come from First Peoples' perspectives. Permanency was constructed throughout the reforms as universal and legalistic. The legal status of children became of overriding importance, a harmful position when considered against the background of systemic issues. It hindered First Nations children's chances of restoration to family, and went against findings from doctoral research undertaken by the author that aimed at centring care decision-making within First Nations perspectives about crucial notions such as permanency.

The omission of First Peoples' perspectives makes plain the role of institutions in a cycle in which First Nations families are fractured over and over again. Rather than embedding permanency for First Nations children, the State Government reforms were founded on reasoning deficient in First Nations family foundations and values, which instead risked the perpetuation of cycles of removal and instability over the long-term. Child protection systems need to be challenged in order to head in a far better direction for preventing the ongoing removal of First Nations children from their cultural and kinship networks. The social work sphere is well-situated to properly engage with First Nations voices and ensure meaningful responses across social work education, policy, research, and service provision.

With First Nations children in care in such disproportionately high numbers, a strong First Nations-led advocacy and evidence-base is essential in order to help turn around over-representation, and for calling out historically ineffective and harmful systems. Moreover, the recent groundswell of First Nations-led scholarship represents an opportunity to contribute to breaking damaging cycles, by bridging the gap in knowledge shared from and about First Peoples' standpoints. There can now be no excuse: To

prevent the recurrence of harmful past policies, First Peoples' understandings, world-views, and experiences must be front and centre in the child welfare discourse, especially during reforms processes.

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