

Submission to the Review of the Advocate for Child and Young People Act 2014 (NSW)

Jumbunna Institute of Indigenous Education and Research,
Research Unit

March 2021



By email: policy@justice.nsw.gov.au

15 March 2021

To Policy, Reform and Legislation, Department of Communities and Justice

Re: Review of the *Advocate for Children and Young People Act 2014*

The Jumbunna Institute's submission to this review is enclosed.

We appreciate the opportunity to contribute to the review of the *Advocate for Children and Young People Act 2014*.

The Research Unit at the Jumbunna Institute at the University of Technology Sydney is an interdisciplinary team of scholars and practitioners, working according toward a common principle that our work is driven by Aboriginal and Torres Strait Islander people, and contribute to their strength, self-determination, sustainability and wellbeing. Our work includes a longstanding focus on systems that continue to disproportionately remove Aboriginal and Torres Strait Islander children from their families, specifically the child protection and juvenile justice systems. This includes direct advocacy alongside Aboriginal families seeking justice in the face of systems, policies and practices that demonstrably harm our children, our families and our communities.

We are happy to provide further information regarding the matters raised within this submission.

Regards,



A/ Prof Paul Gray



Distinguished Professor Larissa Behrendt

Contents

Contents	3
Background	4
Advocating for the interests of Aboriginal children and young people	4
Recommendations	7

Background

The *Advocate for Children and Young People Act 2014* (the Act) followed a review of the *Commission for Children and Young People Act 1998*, realigning various functions of that Act. The Act establishes the role of Advocate for Children and Young People, with the aim of promoting the safety, welfare and wellbeing of children and young people in NSW (aged 0-24) and providing opportunities for young people to participate in policy discussions that affect them. The Act also establishes the Youth Advisory Council, and a joint Parliamentary Committee, known as the Committee on Children and Young People, which provides oversight of both the Advocate and the Children's Guardian.

The Act identifies three key principles guiding the work of Advocate, including that the safety, welfare and wellbeing of children and young people is to be their paramount consideration, that their views are to be given serious consideration, as well as acknowledging the important relationship between children and young people, and their families and communities. According to the Act¹, the Advocate's functions include promoting the safety, welfare and wellbeing of children and young people, their participation in decisions that affect their lives, and providing advice to government and non-government agencies on matters that affect them. The Advocate is also empowered to undertake special inquiries at the request of the Minister (either at the Advocate's recommendation or on the Minister's own initiative)², to support and monitor relevant research, and promote the provision of information to assist children and young people. Finally, the Advocate is to prepare a 3-year strategic plan for children and Young People in the state. Further, in exercising these functions, the Advocate is required to focus on systemic issues, prioritise the interests and needs of "vulnerable and disadvantaged" children and young people, and work co-operatively with children and young people themselves, the Youth Advisory Council, and other organisations and service providers.

Advocating for the interests of Aboriginal children and young people

The principles and functions of the *Advocate for Children and Young People Act 2014* continue to be important public policy settings, and should therefore continue. However, there are important refinements that could be made to strengthen how the aim of promoting the safety, welfare and wellbeing of Aboriginal children and young people can be promoted through the work of the Advocate, and other provisions within the Act.

Jumbunna understands Advocates appointed within this role to date have endeavoured to consult strongly with Aboriginal children and young people in a range of settings, and to partner with Aboriginal organisations including AbSec – NSW Child, Family and Community Peak Aboriginal Corporation (AbSec) in undertaking their role. They have supported community events and advocacy, including support for the Family Matters campaign, and undertaken focused consultations with Aboriginal children and young people, and have sought the views of young people (including Aboriginal children and young people) in a range of settings including juvenile justice, out-of-home care, and on key issues including mental health, education, violence, homelessness, and living in regional communities.³ Since commencing their role, the Advocate for Children and Young People has heard from more than 2800 Aboriginal children and young people, representing almost 10% of all engagement with children and young people. This effort is commendable, and we acknowledge the work of both the inaugural Advocate Mr Andrew Johnson, and recently appointed Advocate Zoë Robinson.

In their report, *What Aboriginal children and young people have to say*, the Advocate identifies key themes arising from their engagements with Aboriginal children and young people. Recommendations related to areas including connection to culture, racism and discrimination, education, accessible activities and programs, supportive workers and services, and justice.

¹ See section 15, *Advocate for Children and Young People Act 2014*

² See section 24, *Advocate for Children and Young People Act 2014*

³ Advocate for Children and Young People (2019) *What Aboriginal children and young people have to say*, NSW Government.

The importance of Aboriginal-led processes in promoting the interests of Aboriginal children and young people was a clear priority, with the first recommendation presented in the report stating “that services targeting Aboriginal children and young people are designed, managed and delivered by Aboriginal people and through Aboriginal owned and controlled organisations.”⁴ This recommendation, arising from consultations with Aboriginal children and young people, matches the aspirations of Aboriginal communities more generally, and particularly ongoing advocacy regarding greater recognition of the right to self-determination for Aboriginal peoples. Doing so enables approaches that are culturally embedded and tailored to the specific needs of Aboriginal children and young people, their families and communities, recognising the important role of families and communities in promoting the rights and interests of their children. Centring Aboriginal culture, and important connections to family, community and Country, similarly reflects Aboriginal social and emotional wellbeing models.⁵ Put simply, elevating and advocating for the rights and interests of Aboriginal children, as the current legislation specifically emphasises as a key function, must respect Aboriginal peoples right to self-determination – to freely determine their political status and pursue their economic, social and cultural development.

These themes emphasise that securing the rights and interests of Aboriginal children and young people must be grounded in Aboriginal communities, through Aboriginal-led processes. This is consistent with human rights frameworks, including both the Convention on the Rights of the Child, and the Declaration on the Rights of Indigenous Peoples. In particular, the UN Committee on the Rights of the Child has noted that

“The application of the principle of the best interests of the child to indigenous children requires particular attention. The Committee notes that the best interests of the child is conceived both as a collective and individual right, and that the application of this right to indigenous children as a group requires consideration of how the right relates to collective cultural rights. Indigenous children have not always received the distinct consideration they deserve.”⁶

This is certainly the case with respect to Aboriginal children and young people in NSW, and in Australia more broadly. The history of government intervention in the lives of Aboriginal children and young people has continued on the premise that non-Indigenous authorities are best placed to safeguard their rights and secure their futures. The evidence however demonstrates the enduring harm caused by this assumption, a point acknowledged by the Prime Minister Scott Morrison in remarks regarding the anniversary of the Apology to the Stolen Generations.⁷ Excising this assumption from public policy requires significant structural change that explicitly recognises and respects the rights of Aboriginal peoples to self-determination, and enables the exercise of this right, particularly with respect to the interests and wellbeing of our children, individually and collectively.

Mechanisms such as the Advocate for Children and Young People, established by this Act, are focused explicitly on the collective rights of children and young people in NSW. This is reflected both in the functions outlined in section 9, and in section 19 which emphasises that “the Advocate does not have the function of dealing directly with the complaints or concerns of particular children or young people.” Following the advice of the Committee on the Rights of Child, the collective, cultural rights of Aboriginal children deserve particular attention, and this should be clearly articulated in the Act. Specifically, the *Advocate for Children and Young People Act 2014* could be strengthened by considering the implications of Aboriginal peoples right to self-

⁴ Advocate for Children and Young People (2019) *What Aboriginal children and young people have to say*, NSW Government. Page 6

⁵ Gee, G., Dudgeon, P., Schulz, C., Hart, A., and Kelly, K. (2014) ‘Aboriginal and Torres Strait Islander Social and Emotional Wellbeing’, in Dudgeon, P., Walker, R., and Milroy, H. (2014) *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice*; Brockman and Dudgeon (2020) ‘Indigenous Clinical Psychology in Australia: A Decolonising Social-Emotional Well-Being Approach’ in Rhodes, P. (2020) *Beyond the Psychology Industry*.

⁶ Committee on the Rights of the Child (2009) *General Comment No. 11, Indigenous children and their rights under the Convention*. At 30. Available: <https://www.refworld.org/docid/49f6bd922.html>

⁷ The Hon. Scott Morrison MP, Prime Minister of Australia, *Statement on the Anniversary of the National Apology to the Stolen Generations*, 15 February 2021. Available: <https://www.pm.gov.au/media/statement-anniversary-national-apology-stolen-generations>

determination and taking explicit steps to promote the collective cultural rights of Aboriginal children. This could include establishing a role of Advocate for Aboriginal Children and Young People, appointed in partnership with Aboriginal communities, and focused on the distinct status of Aboriginal children and young people, the importance of their cultural rights in safeguarding their best interests and lifelong wellbeing, and redressing the enduring impact of their historic marginalisation by governments. Indeed, the Advocate for Children and Young People recommended “that a NSW Commissioner for Aboriginal Children and Young People be set up independently to the Advocate for Children and Young People.”⁸ Consistent with the rationale provided for the appointment of similar Aboriginal statutory officers, an identified Advocate for Aboriginal Children and Young People would complement existing mechanisms and provide a clear focus on the distinct needs and interests of Aboriginal children and young people, and contribute to efforts (alongside other statutory officers, and Aboriginal community-controlled organisations and peak bodies) to address persistent disparities through transformative legislative and policy reforms. This could be complemented by the development of a state strategy for Aboriginal children and young people, developed and implemented in full partnership with Aboriginal communities, their organisations and peak bodies.

We have argued elsewhere⁹ that simply appointing an Aboriginal person into a senior position is not sufficient to address the persistent structural challenges that Aboriginal communities face. A single statutory officer generally lacks the powers or resources to drive systemic change, but comes to shoulder significant responsibility, particularly to the community they serve. However, while such appointments are not sufficient, they nevertheless represent an important mechanism for increasing accountability of government efforts to address social justice issues affecting Aboriginal people. It is noteworthy that a growing number of jurisdictions are appointing statutory officers focused on safeguarding and promoting the rights and interests of Aboriginal children and young people, although focused in various ways¹⁰. As such roles become established, their benefits in promoting the interests of Aboriginal children and young people become clear. For example, the longest standing role, the Victorian Commissioner for Aboriginal Children and Young People, has led multiple inquiries identifying key areas of concern, particularly within child protection and juvenile justice systems.

In the NSW context, oversight and accountability mechanisms regarding key systems affecting children, and disproportionately Aboriginal children, have been found to be inadequate.¹¹ In particular, the Family Is Culture review strongly urged the NSW Government establish an independent and comprehensive statutory body, the NSW Child Protection Commission, to provide focused oversight and monitoring of the child protection system. The proposal included both “at least one Aboriginal Commissioner and an Aboriginal Advisory Board (appointed in consultation with the Aboriginal community)”¹². This recommendation further reinforces the importance of a distinct focus on the rights and interests of Aboriginal children. While the Government’s response to the Family Is Culture review has so far been disappointing, and the recent appointment of an Aboriginal Deputy Guardian fails to fully reflect the important vision of reform provided by the Review, it nevertheless represents one small step towards developing a comprehensive mechanism to promote and safeguard the rights of Aboriginal children and young people. As part of this broader system of accountability, an Advocate for Aboriginal

⁸ Advocate for Children and Young People (2019) *What Aboriginal children and young people have to say*, NSW Government. Page 6. Note: It is unclear if this recommendation is intended to refer to an independent Aboriginal statutory officer with similar functions as that of the existing Advocate, or if it is a reflection of the recommendation in the Family Is Culture report, which called for an Aboriginal Commissioner as part of a NSW Child Protection Commission, providing oversight of the child protection system. Given the recommendation notes independence from the existing Advocate, and does not include a footnote linking to the Family Is Culture report (as the two previous recommendations do), it is understood as calling for the appointment of an Aboriginal statutory officer with similar functions to that of the Advocate. Further, the functions of both roles are important, and together would exercise distinct but complementary functions.

⁹ Report on Proceedings before the Select Committee on the high level of First Nations people in custody and oversight and review of deaths in Custody, Tuesday 27 October 2020. See: <https://www.parliament.nsw.gov.au/lcdocs/transcripts/2440/Transcript%20-%2027%20October%202020%20-%20CORRECTED.pdf>

¹⁰ See for example the Victorian Commission for Children and Young People, which includes a Commissioner for Aboriginal Children and Young People (currently Mr Justin Mohamed), the Queensland Family and Child Commission, and the recent *Children and Young People (Oversight and Advocacy Bodies) (Commissioner for Aboriginal Children and Young People) Amendment Bill*, introduced in December 2020.

¹¹ Davis, M, (2019) *Family Is Culture Review Report – Independent Review of Aboriginal Children and Young People in OOHC*, Family Is Culture.

¹² Davis, M, (2019) *Family Is Culture Review Report – Independent Review of Aboriginal Children and Young People in OOHC*, Family Is Culture, pp. 127

Children and Young People, supported by an Aboriginal Youth Advisory Council, could undertake important and complementary functions to safeguard and promote the interests of Aboriginal children and young people across all policy areas. However, these key mechanisms for independent oversight and accountability must be matched by urgent structural change, particularly to child protection and justice systems, which disproportionately harm Aboriginal children and young people. It is disappointing that the NSW Government has not committed to implementing recommendations regarding necessary reforms identified through other reviews and processes.

We have also argued elsewhere¹³ for the need to develop processes for ongoing dialogue between Aboriginal communities and the NSW Parliament, including the Parliamentary Committee on Children and Young People, established under this Act. Our intent is to promote improved relationships and accountability between Parliament and Aboriginal communities regarding legislation, policies and practices that affect our children, and interrupt the ritual of inquiries and reviews that have consistently failed to be followed by decisive action. The Family is Culture Review clearly articulates this history, and the government's response has so far continued that disappointing tradition. This may require a specific expansion in the defined functions of the Committee. However, such changes should be negotiated directly with Aboriginal communities, their organisations and peak bodies, through a specific process for that purpose.

Consistent with a partnership approach, we further urge that the current review process includes direct consultation with Aboriginal communities and their organisations, in partnership with relevant peak bodies. Direct engagement with Aboriginal communities, in recognition of the urgent need to address growing disparities and promote the distinct rights and interests of Aboriginal children, might particularly explore the specific powers or functions necessary for an Advocate for Aboriginal Children and Young People, as part of a robust and multifaceted system of oversight and accountability regarding the rights and interests of Aboriginal children, and the impact of legislation and policy on the enjoyment of their rights and their lifelong wellbeing, as well as participatory processes for the appointment of the Advocate for Aboriginal Children and Young People that actively includes Aboriginal communities. These two elements are critical to further building the trust and confidence of Aboriginal communities, and therefore the effectiveness of the role.

Recommendations

1. Amend the *Advocate for Children and Young People Act 2014* to include the appointment of an Advocate for Aboriginal Children and Young People. This should be an Aboriginal person, appointed through a participatory process involving Aboriginal communities, and focused on advocating for the safety, welfare and wellbeing of Aboriginal children, grounded in their cultural rights, in partnership with Aboriginal communities.
2. Partner with Aboriginal peak bodies regarding direct engagement with Aboriginal communities to negotiate any specific functions the Advocate for Aboriginal Children and Young People may require as part of a robust system of oversight and accountability to promote the rights and interests of Aboriginal children and young people, and the process by which they might be appointed.
3. Negotiate with Aboriginal communities regarding the process of ongoing dialogue regarding key structural reforms through legislation, policies and practices that impact on Aboriginal children and young people, whether the Committee on Children and Young People established under this Act might fulfil this role in whole or in part, and what changes if any to the Committee's functions under the Act might be required.

¹³ Jumbunna Institute for Indigenous Education and Research, Research Unit (2020) *Submission to the Committee on Children and Young People regarding the inquiry into the child protection and social services system.*