

Submission to Australian Human Rights Commission: Australia's implementation of the Convention of the Rights of the Child for children and young people in out-of-home care

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Introduction

CREATE Foundation is the national peak consumer body for children and young people with an out-of-home care experience. We represent the voices of around 48,000 children and young people currently in care, and those who have transitioned from care up to and including the age of 25.

Our vision is that all children and young people with a care experience reach their full potential.

Our mission is to create a better life for children and young people in care.

To do this we:

- **CONNECT** children and young people to each other, CREATE and their community to
- **EMPOWER** children and young people to build self-confidence, self-esteem, and skills that enable them to have a voice and be heard to
- **CHANGE** the care system, in consultation with children and young people, through advocacy to improve policies, practices and services and increase community awareness.

We achieve our mission by facilitating a variety of programs and services for children and young people in care and developing policy and research to advocate for a better care system.

CREATE welcomes the opportunity to provide a submission regarding Australia's implementation of the *Convention of the Rights of the Child*. As the peak body for children and young people in care, a core function of CREATE's work is ensuring that the rights of children and young people in out-of-home care are being upheld. We achieve this by ensuring their beliefs and views are part of the discussions that directly implicate them. Consultation with children and young people in out-of-home care is a practice embedded within the work of CREATE and gives us the ability to confidently advocate on their behalf. CREATE is well known for our consultation work with children and young people which ensures the voices of young people are considered as part of larger discussions that impact them. CREATE produces submissions, discussions papers, research reports and position papers which detail the specific issues facing children and young people with an out-of-home care experience and continues to engage in advocacy work to ensure their rights are being met. The culmination of this work allows CREATE to monitor how the rights of children and young people are being upheld by contrasting these against the *National Standards for Out-of-home care* and *Charter of Rights for Children in Care*.

As a signatory to the *United Nations Convention on the Rights of the Child*, Australia recognises the need to ensure Australian children are protected and that child protection services across Australia ensure the best outcomes for children and young people in out-of-home care. This has resulted in the development of the *National Standards for Out-of-home Care* (2011), a Priority Project under the National Framework for Protecting Australia's Children 2009-2020. CREATE's Report Card *Experiencing Out-of-home Care in Australia: The views of children and young people* (McDowall, 2013) has been fundamental in measuring progress towards the National Standards for out-of-home care which it achieved by seeking the views and experiences of 1069 children and young people in out-of-home care, as they directly related to these standards. The results from this report, alongside smaller consultations with children and young people, enables CREATE to directly speak to how Australia is progressing towards implementation of a number of articles of the Convention on the Rights of the Child, as it relates to children and young people in out-of-home care.

3. General Principles

Article 12 – Respect for the views of the child

Decision making

Standard Two of The *National Standards for Out-of-home Care* (2011) recognises the importance for children and young people in out-of-home care to be involved in decisions that directly affect them, in line with Article 12 of the *United Nations Convention on the Rights of the Child*. This relates to aspects of care such as care planning, transition planning, satisfaction with family contact arrangements and how they feel they can participate in activities compared to young people who are not in care.

Respect for the views of children and young people in out-of-home care was captured in CREATE's Report Card (McDowall, 2013). When children and young people were asked to broadly consider what may improve the care system, a strong theme that emerged was children and young people wanting to be more involved in decisions about their lives and to have people listen to them.

“They need to ask me what I want. They need to listen...” (Male, 10 years)

“We get to have a say, but not a huge say. I think over 15 should have a say...” (Female, 15)

When specifically measuring participation in decision-making, less than half (46.25%) of children and young people stated they had an opportunity to have a say in relation to decisions that had an impact on their lives and that they felt like they had a say¹(McDowall, 2013). One in ten children and young people stated they had never been consulted regarding decision making. It was apparent that respecting the views of children and young people is being upheld to different degrees across Australia, with children and young people in Tasmania and Aboriginal and Torres Strait Islander children and young people, identifying they had less of a say than children and young people in other states and non-Aboriginal and Torres Strait Islander children and young people.

Placements and Family Contact

A significant life domain which directly affects children and young people in out-of-home care is their placement. As few as one-quarter of young people reported having a say about where they were living and 40% of young people stated they had been moved from placements they did not want to leave. Children and young people were also asked about family contact with the consensus being they wanted more contact with *all* family members (mother, father, grandparents and other relatives). The family member they wanted to see the most however was their siblings with almost two thirds saying they only have monthly contact with siblings. Comments from children and young people reflect sentiments mentioned above (McDowall, 2013):

‘Listen to kids more about where they want to live’ (Male, 9 years)

“All siblings should be able to contact each other unless there is a strong reason not to. I have brothers in care I have never seen or met” (Female, 10 years)

Involvement in formal case planning

An important forum that children and young people have for presenting and having their views considered is case planning meetings. Generally, children and young people stated they were involved in meetings ‘sometimes’²(McDowall, 2013). For the children and young people who participated at least ‘a little’³ in meetings, they felt their views were considered ‘sometimes’ to

¹ Measured by 5 or higher on 6-point scale

² Mparticipant = 3.1 on 6-point scale

³ Scoring at least 2 on 6-point scale

'reasonably'⁴ by others. Children and young people in Queensland felt their views were considered significantly less than children and young people in Victoria which again indicated that respecting the views of children and young people is being upheld to different degrees across the country. Interestingly, as children and young people got older, participation in meetings and having their views respected did increase. This indicates that, in accordance with *United Nations Convention on the Rights of the Child*, views of children and young people may be given due weight in accordance with age and maturity.

“(in the case planning meeting) I got to say what school I wanted to go to what sports I wanted to do, but I didn’t get to choose where I would live” (Male, 13 years)

“I have a special meeting coming up where I will be able to ask questions about mum and dad. I know a bit. My aunt and my new caseworker and me will be there. I want to go to ask questions and find stuff out.” (Female, 14 years)

“They (the department) listen to what I want however sometimes they don’t go through with what they say they will do. I tell them that they cannot have meetings without me being present” (Female, 17 years)

Involvement in judicial proceedings

Encompassed in Article 12 is the right for children and young people to be heard in judicial proceedings that concern them. Every child and young person in care will be involved in a judicial proceeding, as a result of them coming into care. The expectation would certainly be then that every child and young person in care would have had their views presented (either themselves or most often through a legal representative) in the legal proceeding that results in them entering care, as well as any future proceedings relating to their out-of-home care order. In a CREATE consultation (CREATE Foundation, 2014a) conducted with children and young people in the Northern Territory, over half reported they did not have a lawyer or did not know if they had a lawyer when they were taken into care. Of those who stated they did have legal representation, responses were mixed as to whether they felt they were able to have a say and have their views heard. It also highlighted that even when having legal representation, children and young people should still be consulted to ensure that in fact *their* views are being presented.

“..everyone in court could understand her (the lawyer) and so could I. She made sure my opinion was voiced/heard”

“(the lawyer did) a really bad job because they didn’t ask me information they just guessed”

A recent CREATE report on children and young people in out-of-home care interactions with the justice system (CREATE Foundation, 2018) highlights that when coming into contact with the justice system, children and young people are confused and not sure how to have their voices heard due to the complexity of the situation and the legal processes. Over half of the 48 children and young people who went to court for offences did not have or were not aware of having a lawyer to represent them, resulting in them not having their voices heard. Only one of nine young people who went through family court matters identified having a lawyer who ensured their voice was heard. The remaining young people identified having no involvement and being ‘*dumped in the waiting room*’ and ‘*I sat in another room*’ while others again referenced not knowing what was going on or *how* to have their views respected. Children and young people in out-of-home care, by virtue of being in care, are more likely to come into contact with the legal system and therefore should be given much better support to ensure their right to a voice during judicial proceedings is being met.

CREATE strives to ensure that the views of the children and young people are respected and their contributions are not tokenistic but that they are considered active participants in decision-making (McDowall, 2016a). Seeking out the voices of children and young people to inform changes shows

⁴ Mparticipant = 3.4 on 6-point scale

progress on some fronts to incorporate and respect the views of children and young people. What is evident however is that children and young people in out-of-home care are not always given the opportunity to have their voices heard and/or may feel that their opinions are not listened to or taken into consideration. As highlighted by Greenen and Powers (2007), there appears a 'frustrating paradox' whereby the decision-making for children and young people in out-of-home care is completely in the hands of child protection agencies, but once they are 18 these children and young people are expected to assume complete autonomy without having been able to develop this skill. Children and young people should be encouraged to have their opinions respected and supported in child protection and judicial decisions that directly involve them. Australia needs to continue to work towards ensuring this right is being met for children and young people in out-of-home care.

4. Civil Rights and Freedoms

Article 8 – Preservation of identity

The *National Standards for Out-of-home care* (2011) recognises the importance of children and young people in out-of-home care having their identities preserved and supported, particularly for Aboriginal and Torres Strait Islander children and young people. This is formally reflected in Standards 3, 9 and 10 of the *National Standards for Out-of-home care* (2011). These standards support preservation of identity by recognising children and young people should remain connected with their relatives, kin and communities by being placed with them and/or being supported to maintain relationships. For Aboriginal and Torres Strait Islander children and young people in out-of-home care, the *Aboriginal and Torres Strait Islander Child Placement Principle* is a practice mechanism that further supports these standards by ensuring that they are placed with kin, in or close to their community or within Aboriginal and Torres Strait Islander residential facilities. This principle also relates to Article 20 of the *United Nations Convention for the Rights of the Child* regarding the placement of children in households that respect continuity in upbringing and respect the child's ethnic, religious, cultural and linguistic background.

Knowledge of personal history

How much children and young people know about *why* they were placed in care is a significant factor in shaping identity. In CREATE's Report Card (McDowall, 2013) 14% knew 'a little' or 'nothing' about why they were in care, while just over half (51.8%) reported knowing 'everything' or 'a lot'. A concerning finding was that Aboriginal and Torres Strait Islander children and young people knew the least about why they were in care, while, on the other hand, children and young people in 'Other' cultural groups knew the most about why they were in care.

Family history also shapes identity but can be particularly hard to learn about when children and young people are sometimes separated from all other family members. Almost one in five young people (23.1%) knew 'a little' or 'nothing' about their family history. A positive to see however was that again children and young people in 'Other' cultural groups knew the most; these children and young people appear to have their identity fostered better than Anglo-Australians and Aboriginal and Torres Strait Islander children and young people.

The CREATE Report Card (McDowall, 2013) highlighted the important role family members play in contextualising family stories for children and young people in out-of-home care. The majority of children and young people learnt about their history from family members not living with them or from kinship carers (McDowall, 2013). What is alarming though is the number of children and young people in out-of-home care who indicated they had no one to teach them about their history which, in some states, was as high as 30%. This reinforces the importance that maintaining family contact has in regards to shaping children and young people's identity. Despite this, a recent CREATE report (McDowall, 2015) indicated that almost one-third (32.5%) of children and young people had no contact with fathers and 19.4% had no contact with mothers. McDowall (2016b) identified that for Aboriginal and Torres Strait Islander children and young people in out-of-home care particularly, contact with fathers is a significant predictor of feeling closer to cultural community as well as identity preservation. More importance needs to be placed on facilitating meaningful family contact in an effort to better preserve identity.

“Without your culture you don't know who you are”

“Culture is important, it tells you who your family are and who you are”

Culture and Aboriginal and Torres Strait Islander young people

Preservation of identity in relation to culture is a significant issue in relation to Aboriginal and Torres Strait Islander children and young people, who are significantly overrepresented within the child protection system. These children and young people face increased risks of cultural erosion due to removal from family and their communities. A recent report by CREATE (McDowall, 2016b) found that for Aboriginal and Torres Strait Islander children and young people, knowledge of family story

was the strongest predictor of connection to culture, however 17.9% did not have anyone to tell them about their family story. Almost one-third (30.7%) of Aboriginal and Torres Strait Islander children and young people also felt 'little' or 'no' connection with culture.

A specific mechanism by which cultural identity is supported for Aboriginal and Torres Strait Islander children and young people is through the implementation of a cultural support plan, reflected in Standard 10 of the *National Standards for Out-of-home care* (2011). Less than one-quarter (22.5%) of Aboriginal and Torres Strait Islander children and young people identify having a cultural support plan, despite this being a crucial component to preserving cultural identity (McDowall, 2016b). Furthermore, the most recent AIHW report (2018) indicates that approximately 1 in 3 Aboriginal and Torres Strait Islander children and young people are *not* placed according to the Aboriginal and Torres Strait Islander Child Placement Principle. The significant lack of awareness of cultural support plans and the large number of children not being placed in culturally appropriate ways suggests that there needs to be significant improvements in ensuring that Aboriginal and Torres Strait Islander children and young people in out-of-home care are having their identity preserved. Children and young people should be encouraged to have identity preserved. Australia needs to continue to work towards ensuring this right is being met for children and young people in out-of-home care and particularly for Aboriginal and Torres Strait Islander young people.

Article 13 – Right to seek, receive and impart information

Case planning

The right to seek, receive and impart information has also been touched on in response to Article 12, respecting the views of children and young people in out-of-home care. As was identified, children and young people in out-of-home care can lack opportunity and knowledge of how to seek, receive and impart information (McDowall, 2013). A considerable number of young people did not know about case plans or transition from care plans indicating that a) they had not received information about these plans and b) they may not have been consulted and given the opportunity to impart information. The CREATE Report Card (McDowall, 2013) identified children and young people knowing 'a little' or 'nothing' about why they came into care and almost one in five (24.3%) being given 'a little' or 'no' information about what to expect while being in care. A considerable number of children and young people are not receiving extremely important information relating to their care experience.

Lack of understanding

As was also identified in response to Article 12, children and young people said they were confused about judicial proceedings and their role/rights; children and young people may face an inability to carry out the right to seek, receive and impart information because they do not have the knowledge on how to do so (CREATE Foundation, 2018). Children and young people, as part of this report, specifically identified that they wanted to receive more information to help guide them through the confusing legal processes they found themselves involved in. What also became apparent was that children and young people in out-of-home care felt they needed more opportunities to be heard and believed when imparting information relating to crimes and that the antagonism and lack of empathy from adults impacted or took away their ability to impart information.

“If telling my story helps just one kid then it's worth telling, we need to be believed no matter if we are in care, if we come from a poor family, if we were intoxicated or on drugs we need to be believed. When we are not believed it lets abuses target kids like me because they now that they can get away with anything.”

“I feel like the police and courts put all kids in care in the same box and judge them before they even hear the kid's side of the story. In my personal experience I feel like I was treated like dirt and not listened to. I was scared and freaking out and I was left alone in a cell not knowing what was going to happen because no one told me. I felt like no one listened to me”

Ability to impart information – power imbalances

Consideration also needs to be given to the power imbalance between adults and children in out-of-home care when looking at children's ability to impart information (Royal Commission into Institutional Responses to Child Sexual Abuse, 2016). The recent Royal Commission into Institutional Responses to Child Sexual Abuse highlighted that this power imbalance and dynamics of the relationships children and young people in out-of-home care may have with adults, may restrict children and young people's freedom and ability to speak out. The recent Youth Justice Report (CREATE, 2018) highlighted this power imbalance when adults (e.g. foster carers, caseworkers, and police): a) knowingly tried to convince other adults that the young person was lying or b) made assumptions that the young people were lying, when disclosing information.

Making complaints

In the CREATE Report Card (2013) children and young people were asked if they knew how to make a complaint about their life-in-care and if they had ever wanted to but decided against it.

Approximately 50% of children and young people knew how to make a complaint and almost one in five (23.9%) children and young people wanted to make a complaint but decided not to. Almost three in ten stated they were too scared or were concerned about repercussions and 10.3% were advised by someone else not to make the complaint and so their right to impart information was obstructed. Highlighted here is the vulnerability of children and young people in out-of-home care and a significant barrier that exists, in the form of a power imbalance that impedes on their right to impart information. Processes need to better reflect their vulnerability if this right to impart information is to be upheld to a greater degree.

Access to records

Finally, a significant way the right to seek and receive information is put into practice for children and young people in out-of-home care is an ability for care leavers to seek and receive access to their files from their time in care. Access to these files for children and young people in out-of-home care is about accessing their own histories, gaining understanding of their childhood and care experience and is a powerful mechanism that can impact and shape their self-perception and identity (CREATE Foundation, 2016). CREATE's experience has seen children and young people be cut off, hindered and redirected away from information however what has been more impactful and devastating for children and young people has been receiving files with vast amounts of redacted material and insensitive or inaccurate recounts (CREATE Foundation, 2016).

Children and young people have told CREATE they would like support in perusing the contents of the files and also identified that reading their histories was a crucial point in their healing process. Furthermore, while CREATE recognises that often records are not written with the young person people in mind, organisations needs to place greater focus on the need for sensitivity in record keeping. Children and young people should be encouraged to seek, receive and impart information. Australia needs to continue to work towards ensuring this right is being met for children and young people in out-of-home care by ensuring they have the knowledge necessary to carry out this right.

5. Violence Against Children

Article 19 – Abuse and neglect, including physical and psychological recovery and social reintegration

Ensuring safe placements

In our responses to the Royal Commission into Institutional Responses to Child Sexual Abuse, CREATE highlighted the need for child safety organisations to be those in which children and young people are aware of the standards of treatment they are entitled to and are empowered to speak up on issues of concern (CREATE Foundation, 2013). As identified in CREATE's Report Card (McDowall, 2013), only 17.8% of children and young people knew about their Charter of Rights for their state or territory. As previously mentioned in response to Article 13, a considerable number of children and young people identified: 1) not knowing how to make a complaint about their life in care and 2) wanting to make a complaint but deciding not to. Children and young people in out-of-home care remain a significantly vulnerable group. Child protection systems need to ensure that everything possible is done to place children in safe home environments and that should this not be the case, they are given sufficient and appropriate ways to speak out.

In CREATE's Report Card (2013), children and young people were openly asked what made placements 'not good'. Alarming, statements about 'bad people' who 'didn't treat them well' accounted for approximately half of the comments. Concerns about violence and abuse were also a predominant feature. The Annual Report on Efficiency and Effectiveness of Child Protection Services from the Productivity Commission (2017) puts rates of substantiated abuse towards children and young people in out-of-home care, from people living in the out-of-home care household, as high 2.8%. However, half of the states and territories have no data recorded about suspected or substantiated child abuse from out-of-home care providers towards children and young people in their care, meaning this may be higher.

This begs the question, are appropriate forms of prevention, identification and follow-up currently in place for children currently living in out-of-home care?

Preventative measures - Working with Children Checks

The Royal Commission into Institutional Responses to Child Sexual Abuse (2015) recognised Working with Children Checks (WWCCs) as a procedure by which organisations currently prevent and identify potential maltreatment. While a necessary measure, evident are a number of flaws within the current system. For example, the overreliance on WWCCs can create complacency and the checks only identify individuals who have *previously* come to the attention of authorities in the particular state of application. An array of issues arise simply due to WWCCs being state and territory based. For example information sharing barriers in states and territories can result in disqualifying behaviour not being brought to the attention of out-of-home care service providers soon enough and children being placed at risk.

CREATE supports the notion of a national WWCC and better information sharing to further mitigate risk for children and young people in out-of-home care (CREATE Foundation, 2013).

6. Family Environment and Alternative Care

Article 9 – Separation from parents

As of 30 June 2017 there were 47,915 children and young people in out-of-home care (Australian Institute of Health and Welfare (AIHW), 2018). This trend was also reflected in Aboriginal and Torres Strait Islander children and young people which account for 17, 664 children and young people in out-of-home care, up from 16, 846. Forty-one percent of children and young people had been in out-of-home care for more than five years compared to 17% who had been in care less than one year. While it is noted that reunification (or safe return home) is considered a priority amongst all states and territories, there exists no current data on the number of children who were successfully reunified in the last year. In many states and territories, reunification is seen as the goal however we are starting to see a shift towards permanency planning becoming a priority, particularly for children and young people who have been in out-of-home care for two years or more. While stability for children and young people is important, given that there is no data on reunification it is unclear whether two years is an appropriate timeframe; do families need more than two years for successful reunification and shouldn't this remain the focus?

While they are in out-of-home care, it is important to maintain family relationships and have regular contact with birth parents as reflected in Standard 9 of the National Standards: *Children and young people are supported to safely and appropriately maintain connection with family, be they birth parents, siblings or other family members*. The CREATE Report Card (McDowall, 2013) indicated that on average children and young people had contact with their mother between once three to six months, whereas the average contact with biological fathers was between once every six months to once per year. In all jurisdictions children and young people expressed wanting to have more contact with biological mothers and fathers. A CREATE consultation with children and young people regarding experiences with family contact (CREATE Foundation, 2014b) reinforced the notion of children and young people wanting to be able to have more contact, in a way that was more influenced by them e.g. more than an hour, in a more 'normal' setting and on important occasions. Being able to keep connected and to create memories with biological parents is important for children and young people who are in out-of-home care. While contact appears to be facilitated by departments, many children and young people indicate that it may not fit with their definition of regular and could require further improvement.

“(contact is important) for knowing who your family is, and where you come from” (young person, 16 years)

“(I'd like my) contact around holidays and special occasions. Weekends would be great too.” (young person, 12 years)

“Why can't they (my parents) come to things like my graduations and achievements?” (young person, 17 years)

Article 25 – Periodic review of placement

Placement reviews are currently conducted as part of regular case planning with each child and young person in out-of-home care expected to have a current case plan which is reviewed and approved every 12 months (at minimum) (AIHW, 2018). The recent Report on Government Services (RoGS) data (Productivity Commissioner, 2018) identified that nationally, 85.3% of children and young people had a current case plan (with the exception of SA who did not provide data). As previously indicated however, two-thirds of young people were not aware of whether they had a current case plan and some didn't know what a case plan was (McDowall, 2013). Furthermore, half of children and young people were not aware of how to make a complaint. This begs the question of whether all relevant circumstances, such as the children and young people's views, wishes or concerns, are being fully considered in relation to placement reviews and the placement review process.

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