

**December 2022**

## **MISSING AND MURDERED FIRST NATIONS WOMEN AND CHILDREN**

The National Aboriginal and Torres Strait Islanders Women's Alliance (NATSIWA) thank you for the opportunity to provide our submission.

On 25<sup>th</sup> November 2021, the Senate referred an inquiry into missing and murdered First Nations women and children to the Legal and Constitutional Affairs References Committee for inquiry and report by 30<sup>th</sup> June 2022. On the August 2022, the Senate re-referred this inquiry to the 47<sup>th</sup> Parliament for inquiry and report by 31<sup>st</sup> June 2023.

In Australia, a 'missing' person is anyone reported to police, whose whereabouts are unknown, and where there are fears for the safety and concern of the welfare of that person.<sup>1</sup>

### **1. Introduction**

The National Aboriginal and Torres Strait Islander Women's Alliance (NATSIWA) is the peak body for Aboriginal and Torres Strait Islander women in Australia. The leadership team of Directors are Aboriginal and Torres Strait Islander women each representing States and Territories across Australia.

### **2. Summary**

Aboriginal and Torres Strait Islander women in Australia who, have traditionally held the centre role in taking care of families and communities, are now suffering and at times are no longer able to take on this role. Aboriginal and Torres Strait Islander women interact within the legal system and policies in two major ways, as participants within it, and as women affected by it.

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<sup>1</sup> Children and Youth reported missing from out-of-home care in Australia. A report prepared for the Australian Federal Police Missing Persons Coordination Centre 2021. Kath McFarlane Consulting, Dr Kath McFarlane

Indigenous peoples are five percent of the world's population, and they experience disproportionate impacts of poverty and injustice due to intense marginalization and lack of resources and protective services. As of June 2021, there are 984,000 Aboriginal and Torres Strait Islander people representing 3.8% of the total Australian population.

Research highlights the ongoing experiences of discrimination, racism, sexism towards Aboriginal and Torres Strait Islander women today as there is little public media attention regarding any disappearance or murder of them. Though the context of 'domestic violence' or 'partner' violence is seen as an Aboriginal and Torres Strait Islander problems, and this erases the broader context of violence, race and gender. This then generalises the issues and places the responsibility on Aboriginal and Torres Strait Islander peoples and communities.

The issue of ongoing injustice of Aboriginal and Torres Strait Islander missing and murdered women across Australia has long been a concern. Since the Stolen Generation this has resulted in women, families and communities themselves having to address any disappearance or murder of their women and girls which is invisible to the Australian public.

The following submission will examine the relationship between Aboriginal and Torres Strait Islander peoples, women and girls, the government, justice system and police. It will conclude that the fiduciary principle should extend to the general duties of the government, justice system and police to act in the best interests of Aboriginal and Torres Strait Islander women and girls.

### **3. Scope of Fiduciary Principal**

A fiduciary relationship arises when 'one person' is obliged, or has undertaken, to act in relation to a particular matter in the interests of another and is entrusted with a power to affect those interests in a legal and practical sense, 'and where there is a vulnerability of those whose interests are entrusted to the power of another.'<sup>2</sup> The fiduciary relationship emerged from the Court of Chancery in earlier centuries in England. The primary aim of this equitable doctrine is to prevent those holding positions of power from abusing their authority.<sup>3</sup> In keeping with its origins in trust like relationships, the emphasis in fiduciary law has been on the notion of good faith and loyalty. The same fiduciary principles also apply in relationships such as one of doctor/patient, parent/child, client/lawyer and parent/child. These categories are deemed intrinsically to be

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<sup>2</sup> *Hospital Products Ltd v United Surgical Corporation* (1984) 156 CLR 41, cited in Bartlett, R "A fiduciary obligation respecting the delivery of services to the Aboriginal communities," Australasian Law Teachers Association, Cross currents: Internationalism, National Identity and the Law, 1995.

<sup>3</sup> Honourable Justice Owen "The State of Fiduciary" 1966 Law Society of WA (Inc) Seminar on the Recent Developments in the Law of Fiduciary Obligations, Law Society of Western Australia (Inc), Perth.

fiduciary as opposed to fact based fiduciary relations, which as the name implies, arises depending on consideration of the facts and the application of equitable fiduciary principles.<sup>4</sup> In *Breen v Williams*<sup>5</sup>, said a fiduciary relationship can exist where there is a particular type of relationship and there is a relationship of ascendancy or influence by one party over another, or dependence or trust on the part of that other.<sup>6</sup>

#### 4. Stolen Generation

Since first contact, there has been a subsequent generation of violence and assimilation resulting in significant intergeneration trauma that most Aboriginal and Torres Strait Islander women are victims of violence in some form or another in their lives, especially those who have been removed from their communities, families or their whereabouts unknown. Before the first contact of white settlers, rape was rare and family and domestic violence infrequent. Violence is a direct product of the colonial state and remains one of the lasting legacies of contact for many Aboriginal and Torres Strait Islander communities.

States and Governments across Australia in the late 1800 and 1900's enacted legislations known as the Protection Act. The legislation declared that all Aboriginals were considered to be wards of the States and were under the care and responsibility of a Chief Protector or a Protector Board. It was under this legislation that the removal of Aboriginal children was authorised and the Protector or board became the legal guardian of Aboriginal children who were ward of the States. For about a century the thousands of Aboriginal children who were forcibly removed were raised in harsh and inadequate facilities with the absence of parents and at times abusive caretakers who severed the vital transmission of parenting skills between generations.

These children are known as the Stolen Generation, there are currently 17,000 survivors in Australia.<sup>7</sup> Chief Protectors, Protection and Welfare Boards and State welfare officers frequently failed to protect them from abuse in placements they had organised.<sup>8</sup>

The practice of removal became a systematic part of the policy of assimilation adopted by all Australian governments in the 20<sup>th</sup> century, the number of children forcibly removed under this

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<sup>4</sup> Flannigan R, "The Fiduciary Obligation" (1989) 9 Oxford J Legal Stud 285, 301.

<sup>5</sup> (1996) 186 CLR 71.

<sup>6</sup> Ibid at 82.

<sup>7</sup> Who are the Stolen Generations? | The Healing Foundation

<sup>8</sup> Bringing them home, National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families. Commonwealth of Australia 1997

policy is not known.<sup>9</sup> The lack of justice for families and survivors has always been concerning and there has never been a special formula for how to support families and survivors. Every family and survivor are at a different place in their journey to justice or healing, and this is why Aboriginal and Torres Strait Islander peoples/women and children need something different. Many are still searching for their parents and siblings, and for their parents, their children have remained missing.

In May 1997, the Bringing Them Home report was released after an extensive National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their families. This report documented the truths, abuses and physical, mental and cultural harms of the racist and discriminatory policies of the forced removal of Aboriginal and Torres Strait Islander children.

Statement of confidential evidence 821, Western Australia: child brought up traditionally by her Aboriginal parents, but captured at 12 years in the 1930's;

*The police came one day from Halls Creek when they were going on patrol to L.[pastoral station] and found me, a half-caste kid. They told the manager to take me to Fitzroy Crossing to wait for the mail truck from Derby to take me to Moola Bulla [government station]. When the manager's wife told my Mum and [step] Dad that they were taking me to the Fitzroy Crossing for a trip, they told her, "you make sure you bring her back". But little did they know I would never see them again.<sup>10</sup>*

The treatment of children while under 'protective' guardianship, or in the care and custody of a Protector or Protection Board was often officially recognised at the time as intolerable.<sup>11</sup> Many children suffered greatly while in the 'care' of the State. Supervision of their placement in institutions of foster care was inadequate to protect them from brutal treatment and often abuse. Yet these 'carers' were placed by law in a position – a 'fiduciary relationship' in which they owed legal obligations of care and protection to the children. The fiduciary duty was 'to care for, protect and rear' the ward.<sup>12</sup>

The impact of violence and sexual abuse on victims of Aboriginal and Torres Strait Islander women and men who were part of the Stolen Generation is still being felt today. On 13<sup>th</sup> February

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<sup>9</sup> Bringing-Them-Home-20-years-on-FINAL-SCREEN-1.pdf (healingfoundation.org.au)-Bringing them home 20 years on: an action plan for healing-Aboriginal and Torres Strait Islander Healing Foundation

<sup>10</sup> ibid

<sup>11</sup> Bringing the Home-Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families-April 1997- Bringing them Home Report (1997) | Australian Human Rights Commission

<sup>12</sup> ibid

2008, the Prime Minister of the Day, Kevin Rudd made a formal apology to members of the Stolen Generations on behalf of the Australian Parliament. A class action was filed in the Federal Court of Australia in Sydney by members of the Northern Territory Stolen Generation through the race-based policies set up by both State and Federal Governments from 1910 to the 1970s. A landmark court settlement on the 31<sup>st</sup> August 2022, the Commonwealth Government agreed to pay millions in compensation to the descendants and families of members of the Northern Territory Stolen Generation. The main plaintiff for the case Eileen Cummings, stated in an article in the NITV-SBS news;

*“the settlement reflected the generational trauma caused by the Commonwealth’s decades of removing First Nations peoples from their families, nothing will ever give us back the connections which were broken as a result of the Stolen Generations, but this is an important step forward in the healing process.”*

In Queensland and Western Australia, the Chief Protector forced all Aboriginal and Torres Strait Islander peoples onto government settlements and missions. Children were then removed from their mothers at the age of four years of age and placed in dormitories away from their families.

Christian churches were at the forefront of this practice, in the late 1940s, some 50 missions operated throughout Australia. Similar patterns of behaviour of sexual abuse and violence from these churches emerged to those children of the Stolen Generations.

## **5. Out of Home Care and Foster Care**

Aboriginal children are now being removed at a greater rate than the Stolen Generation. The Department of Family Services system has marginalised and continue to marginalise the role of Aboriginal women. This is due to the fact that family and parenting practices specific to Aboriginal and Torres Strait Islander culture is misunderstood or misconstrued by non-Indigenous caseworkers. Aboriginal and Torres Strait Islander parents are at times judged more harshly and more frequently perceived as being unfit to take care of their children.

A most recent Australian research, Children and Youth Reported Missing from Out of Home Care in Australia by the National Missing Person Coordination Centre focused on the vulnerable group of youth who go missing, predominately from out of home care. This report was released by the Australian Federal Police in March 2021 and demonstrates that young people living in out-of-home care are at the highest risk of going missing and being exposed to harm, exploitation and crime. The report also identified cases of under-age girls being returned to care homes by

unknown adult men and associating with older youth known to police. This report demonstrates the heightened vulnerable status of young people in out-of-home care and the need for greater preventative action. The scope of the report presents the result of the analysis of data supplied by Australian State and Territory police services regarding 1171 individuals and 3009 episodes involving children and young people reported missing during a 30-day period in 2019. Over half the youth reported missing from the study were females.

There are about 44,900 people under 18 years of age living in out-of-home care in Australia, which equates to under one percent of all young people.<sup>13</sup> Young people in out-of-home care made up of 53 per cent of all young people reported missing and were responsible for 77 per cent of missing episodes.<sup>14</sup> Almost 40 per cent of children reported missing were just 12 years of age. Indigenous children comprised over a quarter of missing children, and 18 per cent of missing youth, 34.2 per cent of youth missing from out-of-home care were Indigenous compared to nine per cent of missing youth not in care.<sup>15</sup>

Though all children and youth people were located alive and most young people were located within 1-3 days, the study indicated that some youth went missing from out-of-home-care to seek safety and protection from an abusive or unsatisfactory placement. They complained they had been bullied or intimidated by carers, staff and other residents; some went missing in circumstance that suggested they were attempting to avoid exploitation.<sup>16</sup>

Since the 1800's legislations have been brought in to remove Aboriginal and Torres Strait Islander children and children are still being removed at a large number today and it is a continuation of the protection acts. There is no justification, it is a form of indirect discrimination, the system is made in such a way that it treats Aboriginal and Torres Strait Islander people and children unfairly. The law states that The Department of Family Services is supposed to:

1. Firstly, take the least intrusive action as possible, the Department should not come in and remove children straight away
2. Secondly, they are to work with the families and support them,

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<sup>13</sup> Children and Youth reported missing from out-of-home care in Australia. A report prepared for the Australian Federal Police Missing Persons Coordination Centre 2021. Kath McFarlane Consulting, Dr Kath McFarlane

<sup>14</sup> ibid

<sup>15</sup> ibid

<sup>16</sup> ibid

3. Thirdly, the Department is to then place children accordingly under the Aboriginal Child Placement Principal.

## 6. Homicide victims

From 1<sup>st</sup> July 2019-30 June 2020, forty-eight homicide victims (17% of all victims) identified as Aboriginal, Torres Strait Islander or both. Fifty-four percent of Indigenous victims were male and forty-six percent were female. Of the 219 victims recorded as non-indigenous, sixty-eight percent were male and thirty-two percent female.<sup>17</sup> Eleven victims whose Indigenous status was not stated or unknown.

Though a Four Corners document revealed at least 315 Aboriginal and Torres Strait Islander women have either gone missing, been murdered or killed in suspicious circumstances since 2000. Discussed below are only 3 cases of Aboriginal and Torres Strait Islander women and children who have been missing and no arrest have been made, like the numerous other numbers of cases involving murdered and missing Aboriginal and Torres Strait Islander women and children in Australia.

### Cases

#### Kieffen Raggett

Police treated as non-suspicious the death of an eight-year-old Aboriginal boy whose body was found weighted with rocks and head injuries in a water hole near a remote Northern Territory community.<sup>18</sup> For almost three years, police failed to investigate this case at Borroloora.<sup>19</sup> Serious police bungles made during the investigate into the death of the boy Kieffen Raggett went unnoticed until Northern Territory Coroner Greg Cavanagh reopened an investigation almost three years after police had inexplicably classified the death in October 2007 as accidental drowning.<sup>20</sup> The police eventually recognised their mistake and conducted an internal review, a number of officers were called to explain their actions to the coroner.<sup>21</sup> Superintendent Kristopher

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<sup>17</sup> *ibid*

<sup>18</sup> Police bungled inquiry into boy's death: NT Coroner (smh.com.au)

<sup>19</sup> *ibid*

<sup>20</sup> *ibid*

<sup>21</sup> 'Eerily similar' suspected Indigenous murder cases go cold as police explain away the truth - ABC News

Evan who conducted the review apologised to the Raggett family in court.<sup>22</sup> Ten years later, Adrienne Raggett is still in no mood for police apologies.

*“I accept no apology, why should I? They shat on us,’ she said. Wonder why they police haven’t done their job. Why? They should have done their job. It’s their job, they protect us. “If we were white people, if he was a white child, they would have done their job properly. Search properly, found other evidence.”<sup>23</sup>*

Sasha Green – Kwementyaye Green

Sasha Green at the request of her family and for the cultural reasons in the inquest the deceased will be referred Kwementyaye or Kwementyaye Green. Though she is named in media and other reading materials with permission from her family.

Kwementyaya Green died in Tennant Creek in 2013 from a stab wound to her thigh. Her partner was found lying next to her. Police sent an inexperienced detective, who followed a theory that she had inflicted the fatal wound on herself.<sup>24</sup> The detective wasn’t supervised properly, proper crime scenes weren’t set up, the partner was let go from police custody. The police took forensic samples from the dead woman, and then somehow destroyed them before they were examined. Once again, police did not submit a file to the coroner for years, and not until his office started asking questions.<sup>25</sup> Coroner Greg Cavanagh, said the police mistakes were ‘eerily similar’ to the Raggett case.

The Northern Territory Assistant Commissioner Michael Murphy, apologised to the family and friends for the delay in the investigation and prosecution to the matter, though it is noted that Coroner Greg Cavanagh wrote, ‘there is a time when apologies are no longer sufficient’.

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<sup>22</sup> ibid

<sup>23</sup> ibid

<sup>24</sup> ibid

<sup>25</sup> ibid



Ms Raggett was devastated that another Indigenous family has been denied justice due to the failing of the NT police;

*‘It’s Aboriginal people again, they won’t do nothing, they won’t carry on the investigation,’ she said. “It’s pathetic because we’re black people they didn’t want to keep going with their investigation. They treat us like dirt. We ask them nicely to help us but they didn’t”<sup>26</sup>*

Monique Clubb

Monique Clubb went missing from a park in Beenleigh, south of Brisbane in June 2013. Deputy state coroner Jane Bentley found the 24-year-old died soon after leaving the park. In the findings from the coroner, handed down in January 2022, Ms Bentley was highly critical of the police investigation,

*“There was obvious confusion to which police officer from which unit was the lead investigator which resulted in a lack of critical review and tactical decision making-leading to gaps in the investigation,” Ms Bentley said. “The investigation was discontinued at a time when it may have been possible to obtain further evidence.”*

## 7. Inquest

An inquest is not a trial between opposing parties but an inquiry into a death. The scope of an inquest goes beyond merely establishing the cause of death. The focus is on discovering what happened’ not on ascribing guilt attributing blame or apportioning liability. The purpose is to inform family and the public of how the death occurred and, in appropriate cases with a view of reducing the likelihood of similar deaths.<sup>27</sup> As a result, a coroner can make a preventative recommendation concerning public health or safety, the administration of justice or ways to prevent deaths from happening in similar circumstances in future. A coroner must not include in the findings or any comments or recommendations, statement that a person is or may be guilty of an offence or is or maybe civilly liable.<sup>28</sup>

Proceedings in a coroner’s court are not bound by the rules of evidence. That does not mean that any and every piece of information however unreliable will be admitted into evidence and acted upon. However, it does give a coroner greater scope to receive information that may not be

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<sup>26</sup> ibid

<sup>27</sup> Coroners Court of Queensland, Findings of Inquest, Inquest into the suspect death of Monique Irene Clubb

<sup>28</sup> ibid

admissible in other proceedings and to have regard to its origin or source when determining what weight should be given to the information.<sup>29</sup>

A coroner should apply the civil standard of proof, namely the balance of probabilities. However, the more significant the issue to be determined, the more serious allegation of the more inherently unlikely an occurrence, then the clearer and more persuasive the evidence needs to be for a coroner to be sufficiently satisfied it has been proven.<sup>30</sup> If, information obtained at an inquest or during the investigation, a coroner reasonably suspects a person has committed an offence, the coroner must give the information to the Director of Public Prosecutions in the case of an indictable offence and, in the case of any other offence, the relevant department. A coroner may also refer a matter to the Criminal Misconduct Commission or a relevant disciplinary body.<sup>31</sup>

The disappointing process of a coroner's inquest is that coroners are commonly asked to issue suppression or non-publication orders for sensitive material, including identities of person of interest and suicide methods.

Some coroners are reluctant to directly apportion blame for a death or address issues of systemic racism as they fail to recommend legal proceedings or investigations against any of the officials, such as police investigations and their conduct, instead they conclude that any necessary measures to address the failing in their actions had already been undertaken internally by the agencies concerned, without any disciplinary outcomes.

These are just only 3 cases of investigations on murdered and missing Aboriginal and Torres Strait Islander women and children, through the process of an inquest, there will never be real change or real justice until real change is made, through a limited coroner's ability to make an accountability finding.

## **8. Police**

The role of the police is to protect the public from crime and harm. They keep peace, prevent and investigate crime, protect property and enforce the law. Police are equipped with many powers to help them enforce the law and protect the public. Police powers are set out under the legislations.

The failure of the police to deal effectively with missing and murdered Aboriginal and Torres Strait Islander women and children in Australia is just one element of the dysfunctional

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<sup>29</sup> *ibid*

<sup>30</sup> *ibid*

<sup>31</sup> *ibid*

relationship between the police and the Aboriginal and Torres Strait Islander peoples. Incidents between Aboriginal and Torres Strait Islander women, men and children are compounded by the widely perceived failure of the police to protect women and girls from violence as well as injustice. Aboriginal and Torres Strait Islander women/girls/peoples have little faith that the police can offer them protection.

Police Officers are to ensure, where appropriate while conducting an investigation that they are conversant with the safeguards and powers contained within the Police Powers and Responsibilities Act, the responsibilities and procedures prescribed in the Police Powers and Responsibilities Regulation which contain the Police Responsibilities Code, and any other applicable legislation as well as the contents of the manual.<sup>32</sup>

Clearly there are problems with the police investigation from the start, though each case is different. For the families of Aboriginal and Torres Strait Islander women and children who are missing or murdered the unsupportive attitudes from Government, churches or the police contribute to the distressing situations. Policies and police procedures need to be changed.

Australian's mechanisms to investigate police do not meet the international human rights standards. In the case of *Horvath v Australia*, the United Nations Human Rights Committee held that, as signatory to the International Covenant on Civil and Political Rights (ICCPR), Australia was under an obligation to ensure that perpetrators of human rights violations, and specifically those perpetrated by the police authorities are adequately held to account through an independent, effective and impartial investigation into their conduct.<sup>33</sup> Substandard complaints investigations disguise the serious and widespread problems of police misconduct and leave police immune from sanction. The overwhelming majority of complaints by the public are sent back to the police for investigation or 'management'.<sup>34</sup> What this means is that the police investigate themselves. Human Rights standard demands that the investigation of human rights abuses is conducted by a body that is:

- a) Independent of the police (that is hierarchically, institutionally and practically),
- b) Capable of conducting an adequate investigation (that is, able to ascertain whether the action of the police breach legal or disciplinary standards and whether police practices are in compliance with human rights),

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<sup>32</sup> OPM-ch.2-Investigative-Process.pdf (police.qld.gov.au)

<sup>33</sup> Police accountability in Australia: Complaint mechanisms - Australian Lawyers Alliance

<sup>34</sup> Independent Investigations – Police Accountability Project

- c) Prompt,
- d) Open to public scrutiny,
- e) Victim-centred and enable the victim to fully participate in the investigation and
- f) State initiated.

These standards are mandated under international law and in Victoria and the ACT, through their human rights charters.<sup>35</sup> For the families of Aboriginal and Torres Strait Islander women and children who are missing or murdered the unsupportive attitudes from Government, churches or the police contribute to the distressing situations. Policies and police procedures need to be changed.

## 9. Media

There has been little media attention or public interest when it comes to the history of Aboriginal and Torres Strait Islander women. Research conducted before the Truth and Reconciliation in Canada recommendation the National Inquiry into Murdered and Missing women and girls for that the media framing of Missing and Murdered Indigenous Women and girls is different from non-Indigenous women in its coverage, tone and content. Missing and Murdered Indigenous Women and girls in Canada receive disproportionately less media coverage than non-Indigenous women in number of and details in new media stories. In addition, the media frames non-Indigenous women in number of and details in news media stories. In addition, the media frames non-Indigenous women as valued family and community members, whereas Indigenous women are framed as victims, criminals and 'others'. It can be argued that this is the same behaviour from the media in Australia towards Aboriginal and Torres Strait Islander women and girls who are murdered or go missing.

The media determines which Aboriginal and Torres Strait Islander woman is newsworthy in the media, the media is the gatekeeper, and stories are often through a narrow lens. In addition to the narrow lens, Aboriginal and Torres Strait Islander women receive disproportionately less media coverage than non-Indigenous women and non-Indigenous women also receive more prominent place in the news.

For the majority of Aboriginal and Torres Strait Islander women who have gone missing or murdered, there is little media conference, no police press release or public call for witnesses.

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<sup>35</sup> *ibid*

Because of the poorly placed media articles this signals to readers that the stories of missing and murdered Aboriginal women and girls lacks urgency and social importance.

## **10.Data**

There is a need for national attention to collect data on gender and sexual violence against Aboriginal and Torres Strait Islander women and girls, though it will take a multidisciplinary, collaborative approach to fully capture and mobilize the data to prevent future violence, missing or death of Aboriginal and Torres Strait Islander women and girls.

Data needs to be accurate as this is empowering for Aboriginal and Torres Strait Islander peoples and communities to address issues meaningfully. Aboriginal and Torres Strait Islander people have been systematically exploited, erased and misrepresented through data since colonisation continuing to this day. Therefore, data is limited due to underreporting and lack of investment in data collection to provide accurate information on the number of missing and murdered Aboriginal and Torres Strait Islander women and children in Australia. This shows the gaps and weakness in monitoring are compounded by systemic weakness in national data collection systems in relation to understand Aboriginal and Torres Strait Islander women.

Specific information on human rights violations, including those perpetrated against women and children is not always available. That has impeded understanding and comparison of situations of Aboriginal and Torres Strait Islander women and children, as well as the development of clear accountability structures. Deficiencies in understanding and accountability are powerful barriers to effective strategies for combatting violations of Aboriginal and Torres Strait Islander women and children's rights.

The data gaps are prevalent and unacceptable, accurate data and reporting is an essential part to bring justice for Aboriginal and Torres Strait murder and missing women, children and communities. It is not only just about numbers or statistics, but also truth telling for families to share as a collective, as well as a space for love ones to have a space directly for those who are missing, instead of being silent and invisible.

## **11.Duty of Care**

On December 8, 2015, the Government of Canada announced its plan for a national inquiry into murdered and missing Indigenous women and girls, in response to a specific call to action from the Truth and Reconciliation Commission. On January 5, 2016, a pre-inquiry online survey was

launched to ‘allow stakeholders an opportunity to provide input into who should conduct the inquiry, who should be heard as part of the inquiry process, and what issues should be considered.’<sup>36</sup>The inquiry was to seek testimony from survivors, family members, loved one of the victims and law enforcement agencies, though it stated that it should avoid diagnosing the problem merely as a failure of law enforcements.

The Australian Government who are the duty bearers to its agencies and the police service need to revisit their duty to respect, protect and fulfil its obligation to Aboriginal and Torres Strait Islander women, children and people in a human rights-based approach. Under international law, the State (Australia) is the principal duty bearer with the respect to the human rights of the people living within its jurisdiction. Actions based on a human rights-based approach are based on legal and moral obligations to carry out a duty permits a subject to enjoy her or his rights. Our Constitution does not have fundamental rights, especially for Aboriginal and Torres Strait Islander peoples in seeking protection and there are also the historical racial discriminatory policies such as the removal of Aboriginal and Torres Strait Islander children and their families.

The development of case law in Canada provides a useful reference point which the courts found the fiduciary obligation owed by the Crown to Indigenous peoples. Australian needs to assert the doctrine of fiduciary obligations in a holistic attempt to protect Aboriginal and Torres Strait Islander women and girls/children and peoples, by extending greater accountability, though no common law duty has emerged in Australia. Unlike New Zealand and Canada’s Crowns are guided in their dealings with Indigenous peoples by common law, both counties’ duties have evolved into the constitutional principles of the ‘honour the Crown’ which requires Governments to consult with Indigenous peoples when contemplating legislative and executive actions affecting their distinctive interests and to accommodate those interests appropriately.<sup>37</sup>

## **Conclusion**

The real number of Aboriginal and Torres Strait Islander women and children who are murdered and missing in Australia will never be known.

Aboriginal and Torres Strait Islander women and children have a right to be free from violence and to be safe, and when they are not offered an adequate level of protection, their rights are being violated. There has been a failure to allocate the necessary resources and muster the necessary

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<sup>36</sup> Not just justice: inquiry into missing and murdered Aboriginal women needs public health input from the start - PMC (nih.gov)

<sup>37</sup> Gover,Kirsty, “The Honour of the Crowns:State-Indigenous Fiduciary Relationship and Australian Exceptionalism”[2016] SydLawRw16;{2016}38(3)Sydney Law Review 339

commitment to address and prevent the tragedy of murdered and missing Aboriginal and Torres Strait Islander women and children. It not only demeans the dignity and humanity of each one who goes missing or is murdered, it sends pain and trauma through the Aboriginal and Torres Strait Islander communities.

There needs to be an end to this and Government, police, the justice system, Department of Family Services must collaborate, show support and fully commit to working with Aboriginal and Torres Strait Islander peoples in addressing murdered and missing women and girls. There must be an increased coordination to investigate and resolve cases of those who have been missing and murdered since the Stolen Generation to ensure transparency and accountability.

There must be a response plan for how the police, State Governments and the Federal Government can respond as well as resolving the gaps in order to resolve issues that have arisen from the lack of support and visibility in showing action and supporting murdered and missing Aboriginal and Torres Strait Islander women and children. There has been a long history of broken promises and trauma, trust needs to be built in the systems that are supposed to be designed to support and protect Aboriginal and Torres Strait Islander peoples and especially for women and children.

In Policymaking, research is ultimately overseen by politicians and government bureaucrats, who are usually non-Indigenous, the principal of Fiduciary is inappropriate, because there is inequality, and this has failed for Aboriginal and Torres Strait Islander women and girls. There is a need to explore the examples of breaches in its duty towards Aboriginal and Torres Strait Islander women and children, as system has failed to act, and Governments have failed to act.

Thank you for your consideration. Please contact the CEO below if you have any questions or require further information.

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