luwutina mana-mapali krakani waranta

Keeping our children with us:

Report to Government and the Aboriginal Community about changes needed to the child protection system in Tasmania

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2014

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ABBREVIATIONS

HREOC	Human Rights and Equal Opportunity Commission
ICWA	Indian Child Welfare Act
OHC	Out of home care
SNAICC	Secretariat of National Aboriginal and Islander Child Care
TAC	Tasmanian Aboriginal Centre
USA	United States of America

The views in this paper are those of the author, and do not necessarily reflect the views of organisations and people involved in the project

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The Tasmanian Aboriginal Centre represents the political and community development aspirations of the Tasmanian Aboriginal community. The TAC was an Aboriginal community initiative in the early 1970s, has been funded by the federal government since 1973, and has continued to evolve to meet Aboriginal community expectations ever since.

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Unlike Canada, Australia has been reluctant to exercise its undoubted federal power to make laws for Aborigines nationally and has instead argued that Aboriginal issues should be dealt with by the State and Territory governments. This has been the response of the Australian Government to the many recommendations of the *Royal Commission into Aboriginal Deaths in Custody* and the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families*. Like Australia, the federal governments of Canada and the United States of America (USA) also have a responsibility for the first peoples of those countries, but those countries have gone further than Australia in using their powers for the benefit of First Nations.

Tasmania lags behind the other Australian jurisdictions, and indeed most other places in the world, in its lack of regard for the role of Aborigines in the welfare of Aboriginal children. Tasmanian legislation enables the involvement of Aboriginal organisations in a consultative capacity, but the administrative mechanisms needed to put that into effect have not been developed in the many years of existence of the *Children, Young Persons and Their Families Act* 1997.[1]

There are numerous examples in Australia of legislative and administrative means of involving Aborigines in child protection decisions. What is harder to find are examples of Aboriginal decision-making in child welfare matters. Canada, New Zealand and the USA all have regimes which allow for greater Aboriginal involvement than occurs in most parts of Australia, and certainly Tasmania. However, even in the USA where its Supreme Court upholds the notion of the Indian tribes being 'domestic dependent nations' the powers of the Indian courts and institutions of government have to be exercised within the confines of the dominant legal system. Laws made by an Indian nation will not be allowed to stand if they contravene, for example, provisions of the national government's Indian Child Welfare Act.

It is not unusual for child protection services to be provided by non-government agencies as shown by the Children's Protection Societies, which had that role in Victoria from 1896 until 1985[2], and the Children's Aid Societies in Canada.

Many commentators have recognised the need for a major shift in the structures of child welfare and child protection, to structures which return decision-making to the Aboriginal

[1] Although the Act was passed by Parliament in 1997, it did not become operational until 2000. The Act provides a consultative role in child protection for organisations declared by the Minister to be a "recognised Aboriginal organisation": see section 106.

[2] Chris Goddard 1988. Victoria's Protective Services: Dual Tracks or Double Standards, Australian Childhood Foundation and the National Research Centre for the Prevention of Child Abuse at Monash University, Melbourne. Adam Tomison 2001. A history of child protection: Back to the Future? *Family Matters*, No. 60 Australian Institute of Family Studies.

community.[3] Empowerment, capacity building, community development and self-determination are all notions that cannot be achieved without returning decision-making.

There is almost universal recognition that priority attention needs to be given to child abuse prevention, early intervention and family support programs.[4] These measures have been shown to result in positive outcomes for children and families and to have cost benefits.[5]

There was widespread Aboriginal community interest and involvement in the workshops organised as part of this study. Identification of problems within the State's child welfare and child protection systems was blunt, frank and fulsome. Equally, there was a critical and rigorous examination of the ability and willingness of the Aboriginal community to operate its own child protection model. This identification of potential problems has provided a 'risk assessment' which enabled us to have greater certainty in the feasibility of the study's recommendations.

[3] Janet Stanley, Adam Tomison & Julian Pocock 2003. 'Child abuse and neglect in Indigenous Australian communities' in *Child Abuse Prevention Issues*, No 19, Australian Institute of Family Studies; Chris Cunneen & Terri Libesman 2002. A Review of International Models for Indigenous Child Protection, Indigenous Law Resources; Phillip Lynch 2001. Keeping Them Home: The Best Interests of Indigenous Children and Communities in Canada and Australia, *The Sydney Law Review*, vol 23, no. 4. VACCA Response to the White Paper and draft Children Bill', www.vacca.org.au.

[4] Adam Tomison 2004. Current issues in child protection policy and practice: Informing the NT Department of Health and Community Services child protection review, National Child Protection Clearinghouse, Australian Institute of Family Services; Dorothy Scott 2006. 'Sowing the Seeds of Innovation in Child Protection', Paper presented to 10th Australasian Child Abuse and Neglect Conference, Wellington, New Zealand; Aboriginal Medical Services Alliance of Northern Territory (AMSANT) 2004. Submission to Community Welfare Act Review and Child Protection System Reform Review, AMSANT, Darwin

[5] Department of Family and Community Services, *A meta-analysis of the impact of community-based prevention and early intervention action*, Policy Research Paper No 11.www.facs.gov.au/research/prp11/exec.htm

Recommendations:

1. That the Tasmanian Government accept the wish of the Aboriginal community in Tasmania for the transfer of jurisdiction over child welfare and child protection to the Aboriginal community.

2. That the Tasmanian Government amend the *Children, Young People and Their Families Act* 1997 to enable Aborigines to opt to have their matters dealt with under Aboriginal jurisdiction rather than under the Tasmanian legislation.

3. That the Tasmanian Government fund the exercise of Aboriginal jurisdiction in forms to be negotiated and to at least the same rate as that funded for non Aboriginal children.

4. That the form in which Aboriginal jurisdiction is transferred also recognise a rebuttable presumption that the best interests of the Aboriginal child is inextricably linked to the best interests of the Aboriginal community, and the best interests of both lies in keeping Aboriginal children within that community.

5. That in both Tasmanian and Aboriginal jurisdictions, there be recognition that the initial decision to remove a child from his or her family and community is the decision of greatest consequence and should require the decision maker to be satisfied beyond reasonable doubt that the safety and well-being of the child requires it.

6. That pending implementation of the measures specified above, the Minister declare the Tasmanian Aboriginal Centre as a 'recognised Aboriginal organisation' in order to reduce the delays and technicalities currently experienced in trying to make Aboriginal voices heard in the Tasmanian child protection system.

7. That upon the Government's acceptance of this report, the Department enter into immediate negotiations with TAC for the transfer of responsibility for out of home care to the TAC, with an accompanying transfer of finances currently available for those children.

8. That the Government investigate the model adopted in Victoria of creating a statutory office for an appropriately experienced Aboriginal person of an Aboriginal Children's Commissioner to oversee the implementation of child welfare and child protection services for Aboriginal children in Tasmania.

9. That the *Family Violence Act* 2004 be amended to require some degree of actual danger to the physical safety of a child for that child to be considered an 'affected child' rather than the mere requirement of a child being a person whose psychological wellbeing or interests may be affected by violence (as defined) between partners.

10. That the Tasmanian Government take the Australian lead in reducing the administrative and operational costs involved in recording, investigating and reporting on child concerns that fail to meet threshold tests for State intervention, by abandoning mandatory notification in favour of investment in the public health model of child protection.

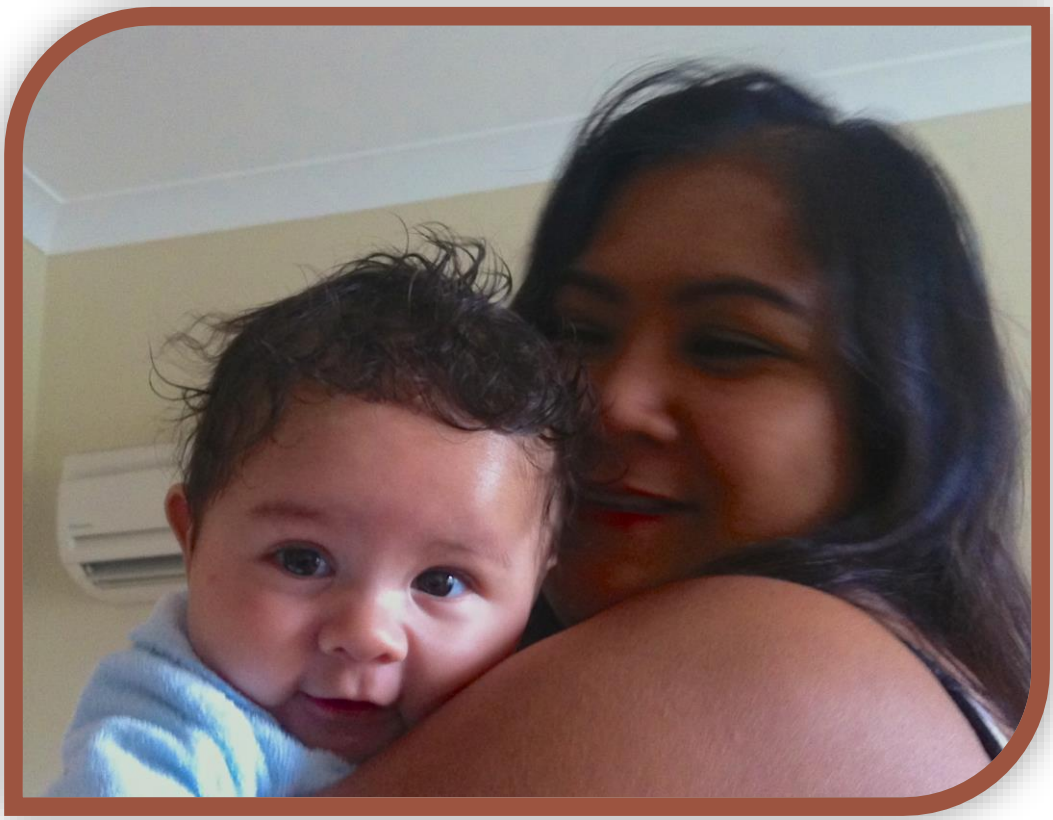
Chapter One: INTRODUCTION

Why we undertook this project

In Tasmania, Aboriginal children have been removed from their families and community since soon after the English arrived in our territory in 1803. Some children who were the casualties of armed hostilities were taken into white families but did not survive to have children of their own. The boy renamed Robert May was the first of these children taken from the Mumirimina at Risdon Cove in 1804. Later the girl Mathinna was taken by Sir John and Lady Franklin and ended up in London before she was returned to die on the streets of Hobart. John Shinall worked on a farm near Sorell in southern Tasmania and his mummified head, sent to England, was finally laid to rest in 1989 by the Aboriginal community as the first of our repatriated ancestors.

Most of the Aboriginal community remained out of the reach of white society on the Furneaux Islands during the second half of the nineteenth and the first half of the twentieth centuries. Those of mixed parentage who came into the towns had their lives documented and were the subject of curiosity until their deaths.

Tasmania found it convenient to deny the existence of an Aboriginal population after the death of Trukanini in 1876. Despite the existence of the *Cape Barren Island Reserve Act* between 1915 and 1938, Tasmanian authorities denied there was an Aboriginal population in Tasmania, although they did participate in some of the national meetings in the era between the two world wars, which discussed an evolving Aboriginal policy. This was the same process as occurred in the rest of Australia where “the Aboriginal problem” was investigated and



discussed in relation to people of full Aboriginal descent only. People with some white ancestry were assumed for many years to prefer to become part of the white population and to "die out" as Aborigines within a generation or so. When this did not happen, governments again took active steps to remove Aboriginal children from their families and community to hasten the process of assimilation. As part of this process there was an overt attempt to remove people from Cape Barren Island onto mainland Tasmania[6]

Police, courts and welfare authorities were all part of that process whereby State authorities intruded into all aspect of Aboriginal lives, a national phenomena so thoroughly documented by the *Royal Commission into Aboriginal Deaths in Custody*.

While Australia was coming to terms with the existence of stolen generations of Aboriginal children as by-products of Australian social policy, a new phenomenon was occurring as Aboriginal children were being removed in ever-increasing numbers as part of a child 'protection' policy. Differences in values and culture, combined with notions of racial superiority, have seen welfare authorities remove Aboriginal children from their families and communities and fight through the courts to maintain those children in alien environments.

It is this high-handed approach to Aboriginal children, families and community, and this seeming determination of State authorities to take over decision-making, that led to the current project.

The Tasmanian Aboriginal Centre has developed as an Aboriginal community organisation since the early 1970s, representing the social, political and cultural aspirations of the community as well as providing a wide range of services. Over time it became increasingly obvious that trying to work with government departments in reaching appropriate decisions for Aboriginal families was both philosophically unsound and a waste of resources in practice. In particular, welfare authorities have been taking an increasingly interventionist approach in Aboriginal families and largely ignoring the advice of the Aboriginal community.

In our experience, families who had "come to the attention" of the Welfare Department at any time are much more prone than other families to have their children removed on suspicion of neglect or abuse. This is part of the explanation of the inter-generational cycles experienced especially by members of the Stolen Generation. It is also very often the case that once children have been removed from their families during the 'investigation' phase of child protection proceedings, they are rarely returned to their families.

This was looking like another stolen generation. The similarities were striking. Whatever the motive for removal, the effect was the same. Aboriginal children were being removed from their families and community through decisions made outside the Aboriginal community. The then (State) Bacon Labor Government was concerned that the statistics were showing Tasmania to be the worst jurisdiction in Australia for failing to place children in accordance with the *Aboriginal Child Placement Principle*.

[6] Charles Rowley 1970. *Outcasts in White Australia*. ANU Press, Canberra

What we did

The Tasmanian Aboriginal Centre spent several years discussing the best way to tackle the removal of its children from the community. Over the years the question changed from whether or not we should confine ourselves to the legal representation of Aboriginal parents in conflict with child welfare officers to whether or not we should work with those child welfare officers as part of the structure in the *Tasmanian Children, Young Persons and Their Families Act* 1997. The underlying question was whether the best approach was to become part of the white system designed for the protection of all children, or to investigate the possibilities of re-establishing a system for Aboriginal control of the welfare and safety of Aboriginal children and families.

After several years of trying to negotiate a project with staff of the Department of Health and Human Services, we obtained a meeting with the then Minister, the Hon. David Llewelyn MHA in March 2005. The Minister restated the commitment of the then Bacon Labor Government to Aboriginal self-determination and agreed to fund a research project to determine the wishes and the capacity of the Aboriginal community to provide for the care, protection and placement of Aboriginal children. The terms of reference for the project are at Appendix 1.

The Administrator of the Tasmanian Aboriginal Centre, Heather Sculthorpe,[7] carried out the project during 2005 and 2006. The research and community consultation was undertaken during that time but the writing up of the report took much longer, the various drafts not being finalised until 2008. The Report states the situation for the most part as at April 2008 although some updating has been done to reflect the situation in 2013. Nothing has happened since that time to change the conclusions of the Report.

How we did it

The project had several stages. Desktop research to find out what had been done and said in different parts of the country and overseas took a significant amount of the time spent on the project. No visits were made to other jurisdictions and nearly all the research was done through internet sources. The project gathered a very large number of written resources as shown in the 'Sources' section of this report. They are all still available as reference materials, catalogued by name of author.

Aboriginal community meetings were held around the State and some discussions were held with individuals about their own experiences. A list of those involved in the meetings appears at Appendix 3. Workshops were held in Hobart, Launceston and Burnie in November and December 2005. People from Cape Barren Island attended the Launceston workshop. A final statewide community meeting to establish the outcomes of the project was held at Hadspen in 2006. Written materials explaining the project and outlining the issues were distributed at the community meetings. Those materials are shown at Appendix 2. Workshop formats were used to encourage community participation.

[7] The author has degrees in Arts and in Law and qualifications in management and governance. She has worked mostly at the Tasmanian Aboriginal Centre since 1972 with periods at the National Aboriginal Conference in Canberra, Commonwealth Parliamentary Library Research Service, Commonwealth Health Department in Canberra and the Law Department in Hobart.

There was an extremely high level of Aboriginal community interest in the project and over 150 people contributed to the meeting and workshop discussions.

Format of this report

The Report explains our purpose in undertaking this study, and explains how we did it. Chapter 2 outlines how the child protection system works in Australia, particularly in Tasmania, and examines the child protection statistics over recent years, exploring some possible reasons for the over-representation of Aborigines in those statistics. It documents the views of the Tasmanian Aboriginal community about reasons and possible solutions in Chapter Three. The report then takes a brief look at child protection in other Australian states in Chapter 4, and in Chapter 5 explores the approaches to child protection in other First Nations, with an emphasis on concepts most relevant to us. Chapter 6 takes a more in-depth look at some of the social and legal notions that we need to consider as we move towards greater Aboriginal community authority in the development and protection of our children. Chapter 7 concludes the report by bringing together the experiences of overseas Aboriginal peoples with the views expressed in our own consultations, and the formulation of recommendations to government.

Chapter Two: AUSTRALIA'S CHILD PROTECTION SYSTEM

Summary of State intervention in Child Abuse in Australia[8]

It is only since the 1960s that the protection of children from abuse by their parents has developed as an issue requiring professional intervention by agencies of Government. Only in the 19th century did the idea gradually develop in the Western world that females were not the property of their husbands and children the property of their parents who could treat them however they liked, short of killing them. Laws for the protection of children gradually developed out of laws for the prevention of cruelty to animals. Responsibility for protecting children was then considered to rest with charitable institutions rather than government.

Severe physical abuse was initially considered the only cause for State intervention. Abandoned or orphaned children were put to work in 'poor houses' in England during the Industrial Revolution in the 1800s and neglected children were also placed in orphanages whilst their parent was treated as an offender and imprisoned. In the modern era, the phenomenon of parents severely beating their children came to light when doctors in the United States of America in the 1960s identified 'battered child syndrome' as the cause of the injuries suffered by the children they were seeing.

Throughout the 1970s and 1980s the definitions of what constituted abuse or neglect were broadened and the focus of protection changed from young children to all young people under age 18. Sexual abuse as a specific form of physical abuse was a taboo subject until fairly recently and continues to be a largely hidden cause of damage to children.

Emotional abuse became included in the definitions in the 1970s and 1980s. This form of abuse is often hidden, but with police reports of domestic violence now being a trigger for intervention and domestic violence said to constitute emotional abuse, it has become a significant contributor to the child abuse statistics.

Psychological or emotional abuse has become as common as neglect in the hierarchy of substantiated abuse type. It can involve name-calling, blaming, rejection, neglect of emotional needs as distinct from neglect of physical needs. Witnessing, or even being in the same locality as, domestic violence has become subject to mandatory reporting in Tasmania and New South Wales and is included in notifications of emotional abuse.[9] Most cases of State intervention in Aboriginal families in Tasmania arise from police attending domestic violence calls.

Financial abuse is emerging in the USA as another form of child abuse, although in Australia financial abuse is still only gradually being recognised as a form of abuse to women deprived of adequate financial support from their husband.

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[8] This section based on various sources especially Adam Tomison 2001. A History of Child Protection. *Family Matters*, No. 60, Spring/Summer 2001, Australian Institute of Family Studies; Greg McIntosh & Janet Phillips 2002. Who's Looking after the Kids? An Overview of Child Abuse and Child Protection in Australia. Australian Parliamentary Library E-Brief Updated 16 October 2002. Available at www.aph.gov.au/library/intguide/SP/Child_Abuse.htm; Alister Lamont and Leah Bromfield 2010. History of Child Protection Services, National Child Protection Clearinghouse Resource Sheet.

[9] Same, page 5

Neglect is still sometimes referred to as being different to abuse, but in most Australian jurisdictions today, neglect is defined in law as one type of abuse. Mandatory reporting was also introduced, starting with Tasmania in 1974[10].

What is measured in Australia for child protection statistics is:

- child protection notifications, child protection investigations, child protection substantiations;
- the number and rate of children on care and protection orders; and
- the number and rate of children in out-of-home care.

The additional matters often reported on include:

- the number of re-substantiations (risk of abuse or actual abuse is confirmed after a previous investigation within the previous twelve months had not substantiated the abuse);
- risk of abuse or actual abuse occurring in out-of-home care;
- stability of out-of-home care placements with fewer placements said to result in better outcomes for the child; and
- rate of placement of Aboriginal children with Aboriginal carers.

There are considerable differences between Australian jurisdictions in how current legislative terms are defined and the procedures which apply. In some States, reports of concern about children may be classified as a 'child concern report' rather than a 'child abuse notification' and so may be referred for a family support service rather than as a child abuse notification requiring further investigation. This is the reason given for a lower rate of notifications and substantiations in Tasmania and Western Australia than for other States, especially for Victoria and South Australia where the definition of 'notification' includes many more circumstances.[11]

In recent years, more effort has been put into trying to achieve consistency between jurisdictions in what data is collected and what definitions apply. Nevertheless, the child protection system remains cyclical, moving between more State intervention to more emphasis placed upon the responsibility of family and community to protect children from all forms of abuse and neglect.

From the time the 'First Fleet' arrived in Botany Bay in 1788 with its orphans and child convicts, white Australia has fluctuated between foster care and institutional care as the preferred method of dealing with what was then regarded as delinquency. Children were 'boarded out' often as cheap or slave labour, or sent to the children's home on Norfolk Island. The Orphan School and Female Factories in Tasmania were used as holding cells where destitute women and children could be kept away from the propertied classes. It was only orphaned or abandoned children who were taken into care as there was no notion that children might need protection from their parents. As the English Court of Appeal said in 1883:[12]

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[10] Alister Lamont& Leah Bromfield 2010, same, page 3

[11] Australian Institute of Health and Welfare, Child Protection Australia 1999-2000, page 6. Available at www.aihw.gov.au/publications/cws/cpa99-00/coipdf

[12] Agar-Ellis v. Lascelles, 1883, 24 Ch. D. 317 at page 334 as cited in John Fogarty AM, 2008. Some Aspects of the Early History of Child Protection in Australia. *Family Matters* No. 78. Australian Institute of Family Studies

> This court holds this principle...that the Court should not, except in very extreme cases, interfere with the discretion of the father, but leave to him the responsibility of exercising that power which nature has given him by the birth of the child.

Gradually changing attitudes were reflected in the English *Prevention of Cruelty to and Protection of Children Act* in 1889. It became an offence for a person with the custody or control of a boy under 14 or a girl under 16 to wilfully mistreat, neglect or abandon the child and the child could be removed into the care of another. Australian law and practice generally followed this model.

The fluctuations between fostering arrangements and institutional care continued with large institutions again gaining favour in the 1920s and yet again in the 1950s. The same pattern of large-scale abuse emerged yet again leading to their closure and a return to fostering even when more professional and therapeutic care was required.[13]

It is only in the last fifty years that the rights of children have come to be recognised, at least in international law although still not generally in Australian law.

Steps in the Australian Child Protection System

This section outlines the system that applies broadly in Australia through describing the terms that apply to the child protection system. The system is based on legislation in each State and

[13] Same; and Max Liddell 2008. A Short History of Australian Child Welfare. Monash University News. Available at www.med.monash.edu.au/news/2008/child-welfare.html

Territory and is implemented mainly through government departments. As there is no agreed national approach to child abuse prevention and child protection, there are inevitably differences in how the legislation is administered between the States and Territories. This description is therefore very general and is designed to give a broad outline of the Australian approach to child protection.

Step 1: Notification

In general terms, a notification is a report to a State authority of concern about the welfare of a child. The caller indicates a child is, or may be, in need of care and protection from abuse. 'Abuse' may be physical abuse, sexual abuse, psychological abuse, or neglect. Only calls to the State notification authority are included in the statistical collection of abuse notifications. Other reports go directly to police or family support services.

Step 2: Investigation or dismissal

Many notifications will be assessed as not serious enough to warrant further investigation and so may be discontinued or referred to family support or other services. Investigations into the circumstances of the notification may include seeking information from schools or community service organisations and may include visits to the family with or without the child being present. When things go wrong, there are often calls for all notifications to be investigated and for investigations to be conducted by specialised personnel in the absence of the parents.

Step 3: Substantiation

A 'substantiated notification' or a substantiation of child abuse is a notification that has been investigated and has confirmed that a child has suffered harm or is at risk of harm as assessed by departmental child protection workers. The notification may be referred to family support or other services at this stage, may be considered not sufficiently serious to warrant further action or may be confirmed as abuse warranting State intervention. What is substantiated may be that the child has been harmed, may be at risk of harm, or is at risk of harm and the parents have failed to protect the child.

Step 4: Protection order

A protection order is an order granted by a court on the application of a State authority which enables the State authority to remove a child from danger either for the short term while investigations are conducted, or for a longer term to ensure the ongoing safety of the child. A protection order may allow for the State authority to supervise the child whilst the child continues to live at home. Generally, a protection order should only be sought after a family conference has failed to agree on arrangements for the better protection of a child.

Step 5: Out of home care (OHC)

After a protection order has been obtained from a court, an order may be made for the child to be placed in out of home care. This care may be provided by respite carers, foster carers, kinship care by relatives, or residential care provided by the State or other community services organisation. There are usually restrictions on the amount of time a child may be placed in out of home care, unless an 18 year order has been obtained from a court.

Changing Legislation, Practices, and Polices

Significant changes in the annually reported number of notifications, substantiations and other indicators of child abuse in Australian jurisdictions are known to be due more to changed law and practice than to changed parental behaviour. For example, introduction of mandatory reporting to one agency, rather than voluntary reporting to two separate agencies, resulted in a greatly increased number of notifications in Victoria in the early 1990s. A reduction of calls classified as notifications occurred in Western Australia and New South Wales from 1996 when reports were separated into 'reports of concern' or 'notifications of maltreatment'. At that time practice in New South Wales also changed so that a 'substantiation' now meant more than that information was confirmed; rather it thereafter meant there was evidence that child abuse had occurred.

Agencies involved in the child welfare system in Australia

All States and Territories have the equivalent of a 'child welfare department'. In the case of Tasmania, this is the Child and Family Services division of the Department of Health and Human Services. Within the Child and Family Services division is a child protection service which has the function of receiving notifications, investigating them, and putting in place whatever services they decide will best protect the child, which may sometimes involve obtaining an order from the court to remove the child from the family while the investigations are made. Once investigations are complete, they may decide it is safe for the child to be returned to their family with or without supports in place or they may seek a further order from the court to place the child under the guardianship of the State until the child reaches adulthood.

At the national level the Council of Australian Governments, consisting of Ministers of Federal and all State and Territory Governments, sets broad objectives and policies and indicators of performance against which all jurisdictions are expected to report. Involved in the development of indicators are further layers of committees including meetings of Federal, State and Territory Government Ministers responsible for children's services (Community and Disability Services Ministers' Council), Community Services Ministers' Advisory Council, National Community Services Information Management Group, National Community Services Data Committee, National Child Protection and Support Services Data Group.[14]

In recent years, child protection functions previously performed by State government agencies have been outsourced to Non Government Organisations, in Tasmania known as Gateway Services. It is conceivable that Australia will follow other jurisdictions in outsourcing family support and child protection functions to the private sector as has already occurred with custodial services.

Australian Child Protection Statistics

As outlined in earlier sections, 'notifications' to child protection authorities throughout Australia are the numbers of reports of concern about possible child abuse recorded by State authorities. As such the numbers are likely to be an underestimate of the occasions on which

[14] Australian Institute of Health and Welfare 2006. Child protection and out-of-home care performance indicators, at page 4

children are at risk of harm, but also an overestimate of the occasions on which the intervention of the State could possibly be required to protect children from their parents.

The table below shows the number of child protection notifications in Australian States and Territories between 2000 and 2012. The table demonstrates notifications increased nationally in each year until 2009, trended downwards, and then started an upward trend again in 2012.

Table 1: Number of child protection notifications by State, 2000 to 2012[15]

Year	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
1999-00	30,398	36,805	19,057	2,645	15,181	422	1,189	1,437	107,134
2000-01	40,937	36,966	22,069	2,851	9,988	315	794	1,551	115,471
2001-02	55,208	37,976	27,592	3,045	11,203	508	801	1,605	137,938
2002-03	109,498	37,635	31,068	2,293	13,442	741	2,124	1,554	198,355
2003-04	115,541	36,956	35,023	2,417	14,917	7,248	5,325	1,957	219,384
2004-05	133,636	37,523	40,829	3,206	17,473	10,788	7,275	2,101	252,831
2005-06	152,806	37,987	33,612	3,315	15,069	13,029	8,064	2,863	266,745
2006-07	189,928	38,675	28,511	7,700	18,434	14,498	8,710	2,992	309,448
2007-08	195,599	41,607	25,003	8,977	20,847	12,863	8,970	3,660	317,526
2008-09	213,686	42,851	23,408	10,159	23,221	10,345	9,595	6,189	339,454
2009-10	156,465	48,369	21,885	12,160	20,298	9,895	10,780	6,585	286,437
2010-11	98,845	55,718	21,655	10,976	21,145	10,689	11,712	6,533	237,273
2011-12	99,283	63,830	24,823	13,745	19,056	11,836	12,419	7,970	252,962

There are big differences between the States and Territories and within some of them in different years. In New South Wales, for example, there was a huge increase in the number of notifications between 2002 and 2003 and a large decrease between 2010 and 2011. Victoria showed a large increase from 2010 to 2012. Queensland notifications have trended downwards since 2005. In Western Australia, notifications doubled from 2006 to 2007 and have trended upwards since then. The level of 15,000 notifications in South Australia in 2000 was not reached again until 2004 and then trended upwards until 2010 before decreasing again. The low number of notifications in Tasmania increased hugely in 2004, reached a peak in 2007 and then started an inconsistent decrease. In the Australian Capital Territory, the increases started in 2003, had a large jump in 2004 and have trended upwards ever since. The steady increase in notifications in the Northern Territory had a large increase in 2009 and has continued to trend slightly upwards.

On all occasions the significant changes in the number of notifications has an explanation beyond a change in occurrences of parental child abuse or a changed willingness of the public to report concerns. New reporting systems were introduced in New South Wales in 2003 for example, and new legislation came into effect in Tasmania in 2000 with the large spike in 2004 corresponding with the introduction of the *Family Violence Act* 2004 and the 'Safe At Home' policy requiring police to notify child protection services when they are called to domestic

[15] Australian Institute of Health and Welfare 2009. Child Protection Australia 2007-08, page 23 and Child Protection Australia 2011-12, page.17.

violence incidents in families with young children. In the Northern Territory, the 'Emergency Response' legislation of 2007 started the increased surveillance and control of Aboriginal communities which resulted in the explosion of notifications in 2009 with notifications remaining over 6,000 per year thereafter.

It is to be noted also that the number of notifications is not the same as the number of children about whom notifications were made. A considerable number of children are subject to repeated notifications and the total number of children involved in notifications is not always reported in addition to the total number of notifications made.

A stand-out feature is the huge increase in Tasmania from 741 child protection notifications in 2002-03 to 7,248 notifications in 2003-04.[16] The explanation given by the State is the change from regional to one centralised intake service, the Child Protection Advice and Referral Service. From that time, every call about a child was recorded as a child protection notification whereas previously regional workers would decide if the risk reported was sufficient to constitute a real risk to a child. An example might be a toddler being yelled at in the street: under the new system a phone call to report this would be a child protection notification regardless of the circumstances of the child. This example shows how easy it can be to 'manipulate' the data in the absence of agreed national definitions and collection methods.

It seems likely that the considerable decrease in notifications in Tasmania between 2006-07 and 2007-08 (down from 14,498 to 12,863) is also a result of changed recording and reporting policies rather than a change in the number of contacts with the Department. The reason is not explained in the national reports of the Australian Institute for Health and Welfare

The different state and territory responses to the use of regulatory power has been given as the explanation for the large differences in child protection coverage.[17] Professor Dorothy Scott identifies the much higher notification rates for New South Wales as compared to Victoria to be due to the extended reach of mandatory reporting and penalties, a centralised intake system and the statutory child protection system being the main point of referral for families in need of help. In Victoria mandatory reporting is required only for physical and sexual abuse and is obligatory for a more restricted category of occupation groups. Tasmania's system is more akin to the New South Wales model.

As notification rates increased over the years in New South Wales, there was a decrease in referrals to family support services. Victoria, on the other hand, has a high rate of use of primary maternal and child health services, there are targeted services for families with special needs, regional secondary prevention family support services operated by non-government agencies, and a higher use of intensive family support services. For 2007-08 for example, nearly 5,700 children started receiving intensive family support in Victoria whereas for New South Wales the figure was a mere 285 with 439 in Canberra, 104 in the Northern Territory and 63 in Tasmania.[18]

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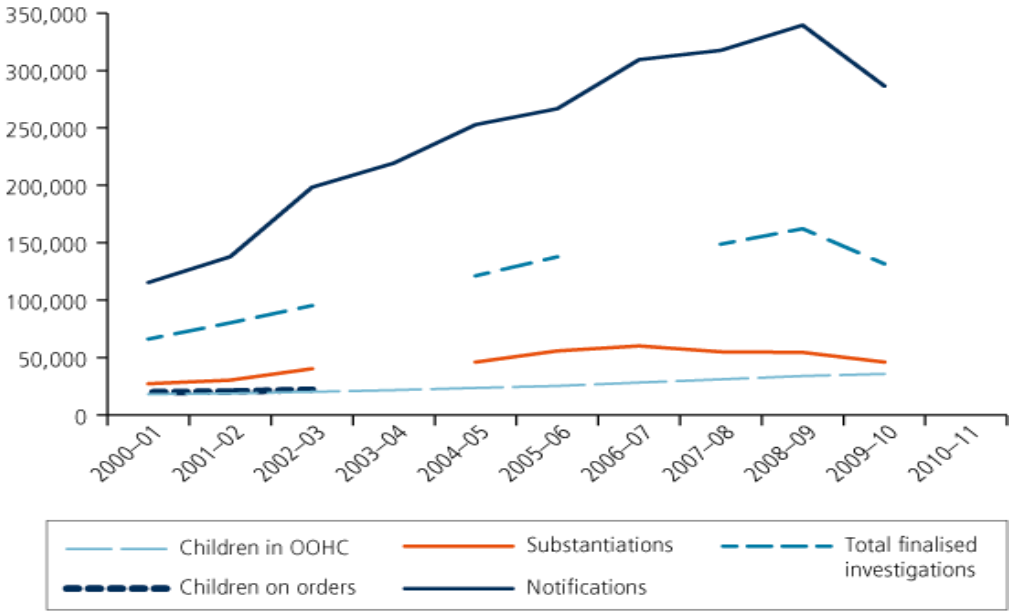
[16] Same

[17] Dorothy Scott 2009. Regulatory Principles and Reforming Possibilities in Child Protection: What Might be in the Best Interests of Children? *Communities, Children and Families Australia*

[18] Same at page 68 citing Australian Institute of Health and Welfare 2009

The nationwide trends in notifications, investigations, substantiations, orders and out of home care placements are shown in Figure 1. The numbers are shown in table form in Appendix 9. There is a vast difference between the number of notifications and the number of substantiations.

Figure 1: Total number of notifications, investigations and substantiations across Australia from 2000-01 to 2009-10, and total number of children on orders and in out-of-home care at 30 June 2000 to 2010[19]



Notification and other child protection data is made more meaningful in light of the number of children in each Australian jurisdiction. The number of children in each jurisdiction is, in turn, given more statistical meaning by examining the rate at which notifications, substantiations and interventions occur. That is, the 'rate' accounts for the widely varying number of children in each jurisdiction by showing how many children out of each 1,000 children are involved and hence makes for a 'level playing field' in the statistics. Tasmanian children continue to be over-represented in child abuse notifications and substantiations.

Aboriginal Child Protection Statistics Nationally

In 2011, there were over 239,000 Aboriginal children and young people aged under 18 in Australia. Government statistical collections show that there were 8,352 Aboriginal children and young people in Tasmania in that year, as show in the table below. Only ACT had a lower number of Aboriginal children.

Table 2: Population of children aged 0-17, by age and Aboriginal status, March 2011[20]

Age	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
0-4	21,486	4,470	21,248	8,928	3,644	2,518	595	7,953	70,842

[19] Australian Institute of Health and Welfare 2011. The gaps in the figure are due to missing data from New South Wales and Queensland for some years

[20] Child Protection Australia 2010-2011 Table A1.35, p.7

5-9	18,787	4,132	19,223	8,404	3,379	2,116	505	7,728	64,274
10-14	19,122	4,163	19,178	8,780	3,568	2,259	514	7,468	65,052
15-17	11,799	2,546	11,287	5,071	2,111	1,459	323	4,309	38,905
0-17	71,194	15,311	70,936	31,183	12,702	8,352	1,937	27,458	239,073

The national rate of Aboriginal children in the child protection system is shown in the table below. In 2012 for every one thousand Aboriginal children in Australia, 42 were involved in substantiated child abuse claims and 55 were living in out-of-home-care.

Table 3: Aboriginal children in the child protection system, 2008 to 2012, rate per 1,000 children[21]

Measure	2008	2009	2010	2011	2012
	Aboriginal children				
Children in substantiations	33.5	35.0	35.3	34.6	41.9
Children on care & protection orders	40.1	43.8	48.3	51.4	54.9
Children in out of home care	41.3	44.8	48.4	51.7	55.1
	Non-Aboriginal children				
Children in substantiations	5.2	5.1	4.6	4.5	5.4
Children on care & protection orders	4.9	5.2	5.4	5.4	5.6
Children in out of home care	4.5	4.9	5.0	5.1	5.4

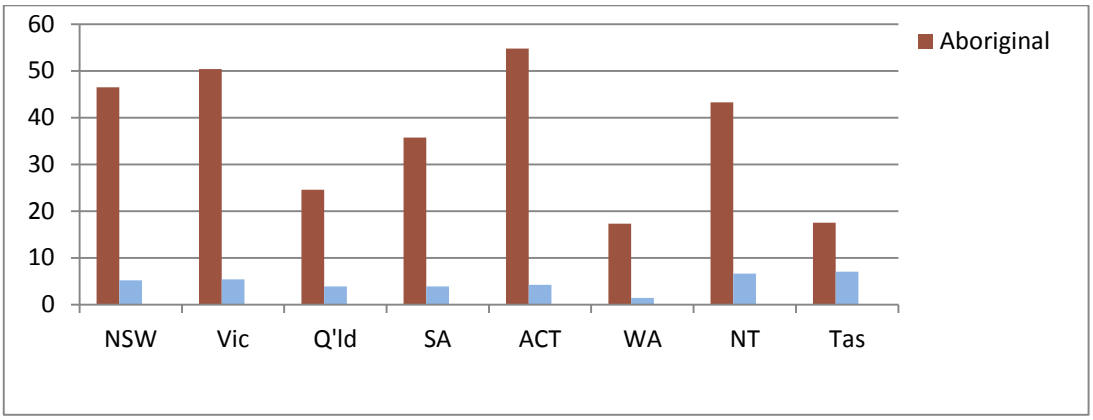
The difference between the rates of Aboriginal and non-Aboriginal children in the child protection system is vast. There are 5 in every 1,000 non-Aboriginal children in out of home care in Australia whereas the rate for Aboriginal children is 55 in every 1,000 children. On all indicators, Aboriginal children are faring far worse than other children.

There are considerable differences between the States and Territories in the rate of both Aboriginal and non-Aboriginal children in the child protection system. For substantiated notifications of child abuse, the rate for Aboriginal children in 2010-2011 varied from 17 for each 1,000 children in Western Australia and Tasmania, to over 50 in the Australian Capital Territory and Victoria. By contrast, Tasmania had the highest rate of non-Aboriginal children in substantiations at 7 in every 1,000 children, whereas Western Australia had the lowest at 1.4 in every 1,000 children. The ratio of Aboriginal children to non-Aboriginal children was highest in the Australian Capital Territory and Western Australia at around 13 and lowest in Tasmania at 2.5 as shown in the figure below.

The Aboriginal rate was higher than for non-Aboriginal children in every year, the higher rate for Aboriginal children was substantial, and the Aboriginal rate increased steadily whilst the increase of substantiated notifications for non-Aboriginal children was of much less magnitude.

[21] Child Protection Australia 2011-12 Table A30, p.86

Figure 2: Number of children subject of substantiated reports, rates per 1,000 children by Aboriginal status 2010-11[22]



Child Protection Statistics for Tasmania[23]

The following table gives an overview of the statistics relating to children in the protection system in Tasmania between 2008 and 2012. The statistics cover all children in Tasmania and include notifications, investigations, substantiations, children on orders and the number of children in out-of-home care. The table is the Tasmanian State equivalent of the picture which Figure 1 provides for the whole of Australia.

Table 4: Tasmanian children in the child protection system 2008-2012[24]

Measure	Unit of Measure	2008-2009	2009-2010	2010-2011	2011-2012
Children in child abuse notifications per 1,000 population	Rate	63.1	60.9	64.8	67.5
Child protection notifications referred for investigation	Rate	23.8	18.4	21.4	14.7
Finalised child protection investigations that were substantiated	%	57.6	60.0	63.5	68.2
Children in child abuse substantiations per 1,000 children	Rate	9.7	7.4	9.5	6.1
Children on care and protection orders per 1,000 children	%	8.6	9.7	10.5	10.4
Children in out of home care25	Number	738	848	921	1,004

The number of children involved in child abuse notifications continues to rise each year reaching around 70 in 1,000 most recently. The number of notifications referred for

[22] Australian Institute of Family Studies 2012, Child Protection and Aboriginal and Torres Strait Islander Children, Table 1. www.aifs.gov.au/cfca/pubs/factsheets

[23] Child Protection Australia 2011-12

[24] Department of Health & Human Services, Annual Report 2012, pages. 38-39

[25] Calculation of children in out of home care changed from the number of children at 30 June each year to the daily average number of children in out of home care for the year

investigation fluctuates between around 15% to less than one quarter of notifications received. Of the number referred for investigation, more than half are substantiated, with the figure reaching over 68% in 2012. Between 6 and 10 children in 1,000 are involved in child abuse substantiations and around 1,000 children are in out of home care in Tasmania each year.

In 2011-12, Tasmania had the lowest proportion of notifications referred for investigation, at 15%, whereas Queensland investigated 100% of notifications. Of the notifications that were investigated, most were made by police. In Tasmania, 68% of the finalised investigations were substantiated.[26] The most common type of substantiated abuse in Tasmania was emotional abuse followed by neglect.[27]

As in all other Australian jurisdictions, children in Tasmania aged under one year were most likely to be the subject of substantiated notifications, at a rate of 12 for each 1,000 children.[28] Of the genders involved in abuse types, girls in Tasmania were more likely than boys to be the subject of substantiations of sexual abuse, as in all Australian jurisdictions.

State records reveal that of the 939 children who were the subject of substantiated reports in 2011-12, one hundred and thirty six were Aboriginal children. That equates to a rate of 16.2 for each 1,000 Aboriginal children compared to 6 for each 1,000 white children, an overall rate ratio of 2.7 which is by far the lowest of any Australian jurisdiction.[29]

For Aboriginal children in Tasmania, the most common substantiated abuse type was emotional abuse followed by neglect. The pattern was the same for girls and boys. This represented 47% emotional abuse substantiated notifications compared to 33% neglect, 16% physical abuse and 4% sexual abuse.[30]

Children in Out of Home Care in Tasmania

The Ombudsman has summarised the history of child welfare legislation and practice in Tasmania and provided a useful summary of the number of children in State care over the decades.[31] Tasmania has had legislation since 1873 enabling State intervention to provide for children in need of care through reasons of neglect or poverty.[32] As shown in the following table, there was a peak in the numbers of children in care in the 1960s and 1970s perhaps reflecting the Australian recognition of the 'battered baby syndrome' identified in the USA in the 1950s.

[26] The national figure was 45% substantiated with a low of 31% in Western Australia

[27] Nationally emotional abuse was the most common abuse type at 36% of substantiated notifications followed by neglect at 31%. Of the individual jurisdictions, only Tasmania, Western Australia and Victoria had a higher proportion of emotional abuse substantiations than of neglect.

[28] The national rate was 13.2 per 1,000 children with a range from 7.3 in Western Australia to 53.1 per 1,000 children in the Northern Territory.

[29] Child Protection Australia 2011-12 page 17

[30] Same page 61

[31] Ombudsman Tasmania 2004. Listen To The Children: Review of Claims of Abuse from Adults in State Care as Children, Tasmanian Government Appendix 4 in particular

[32] Public Charities Act 1873

The Ombudsman's table of average number of Tasmanian children in care over nearly eight decades is shown below. It shows the 1970s as the decade with the highest rate of children in out of home care before the mid-2000s.

Table 5 Numbers of children in care in Tasmania since the late 1930s[33]

Period	Average number of children in care
1938/39	585
1940s	472
1950s	460
1960s	724
1970s	834
1980s	519
1990s	579
2000 - 2003	496

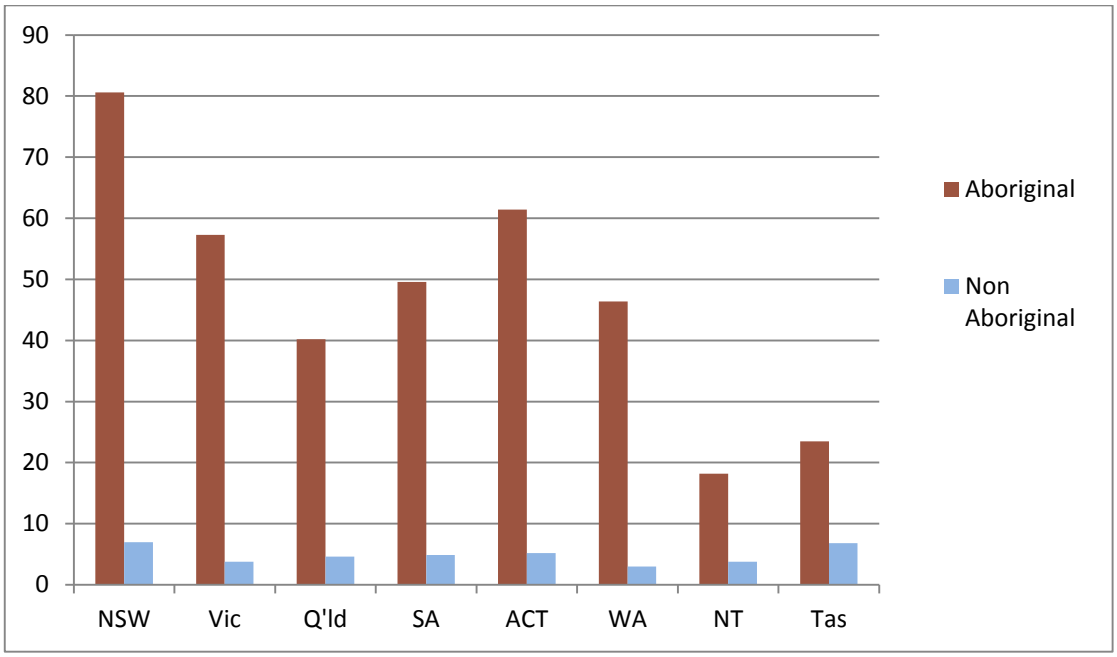
Since the Ombudsman reported, the number of children in care in Tasmania has soared to stand presently at around one thousand children.

The Ombudsman did not report separate figures for Aboriginal children in care. However, there was a large over-representation of Aborigines amongst those awarded compensation for their abuse whilst in State care as children with 16% of claimants identifying as Aboriginal.[34] We may conclude that the over-representation of Aborigines in State care has existed for many decades.

The figure below shows a comparison between Aboriginal and non-Aboriginal children in out of home care in all the Australian States and Territories in 2011. Tasmania is second only to the Northern Territory with the least number of Aboriginal children in out-of-home-care but the rate is still much higher than for non-Aboriginal children.

[33] Ombudsman Tasmania page 48
[34] Same

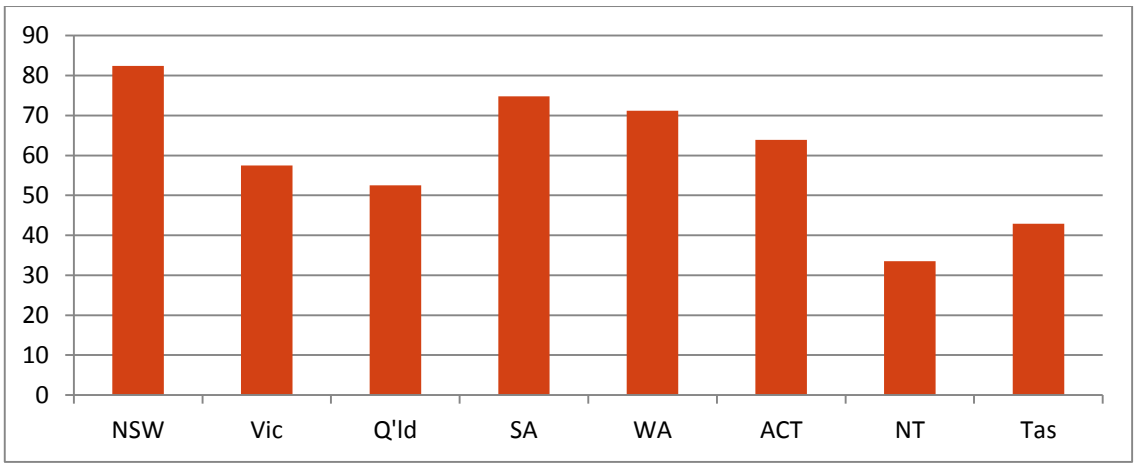
Figure 3 State and Territory data comparing rates of Aboriginal children in out of home care to other children. To 30 June 2011, rates per 1,000 children[35]



Aboriginal Child Placement Principle

Tasmania had the second lowest proportion of Aboriginal children placed in accordance with the Aboriginal Child Placement Principle in 2011.[36] In 2005 Tasmania was the worst performing State.[37]

Figure 4: Percentage of placements in accordance with the Aboriginal Child Placement Principle by States in 2010-2011[38]



[35] Australian Institute of Family Studies June 2012. Child protection and Aboriginal and Torres Strait Islander Children. Table 2

[36] Australian Institute of Family Studies 2012. Child protection and Aboriginal and Torres Strait Islander Children, Table 4

[37] Same at page 214

[38] Australian Institute of Family Studies 2012. Child protection and Aboriginal and Torres Strait Islander Children, Table 4

Only Tasmania and the Northern Territory had less than half of Aboriginal children placed in accordance with the Aboriginal Child Placement Principle, with Northern Territory at only 34% and Tasmania at 43%. The best performing States were New South Wales at 82% (4,707 children), South Australia at 75% (454 children) and Western Australia at 71% (1,029 children). This continues the historically poor performance of Tasmania in complying with the Aboriginal Child Placement Principle.

The report card was similar for 2008 when Tasmania had the lowest rate of compliance with the Principle (35%) and New South Wales had the highest (85%).[39] In 2005 the rates were 27% compliance in Tasmania and 87% compliance in New South Wales.[40]

These statistics deal only with the placement hierarchy for out of home care rather than the underlying principles on which the hierarchy is based.

Interpreting the Statistics

The Human Rights and Equal Opportunity Commission observed in 1997 that Aborigines are over-represented at all stages of the child protection system and that the rate of over-representation increases further up the scale of state intervention. Hence, Aboriginal children are particularly over-represented in long-term foster care and a high percentage live with non Aboriginal carers.[41] Aboriginal children are much more likely than other children to be notified to child protection authorities and to be removed from their families on the ground of "neglect" rather than "abuse."[42]

The number of children in out of home care shows a trend upwards but the large gap between that figure and the number of notifications shows a great deal of 'wasted effort' in keeping children safe under this system of child protection.

Detailed data has been collected and published for many years about the number of children in the protection system. There have been so many problems with the collection of the data that it often seems to confuse rather than inform, and for a variety of reasons most people seem not to consider the information to be very reliable. Nevertheless, the material continues to be published and used for research and information purposes and in the absence of any more reliable, data that precedent will be followed in this report. The type of information generally collected by State agencies and collated and analysed by the Australian Institute of Health and Welfare is outlined above.

There has sometimes been a tendency to conclude that low rates of Aboriginal notifications indicate not low levels of child maltreatment but simply a failure to report.[43] Conversely, high rates of substantiations are said to indicate not comparatively high levels of child maltreatment but a broad definition of 'notification' such as in Victoria where contacts were at that time included as notifications that were not counted as such in other States,[44] of better

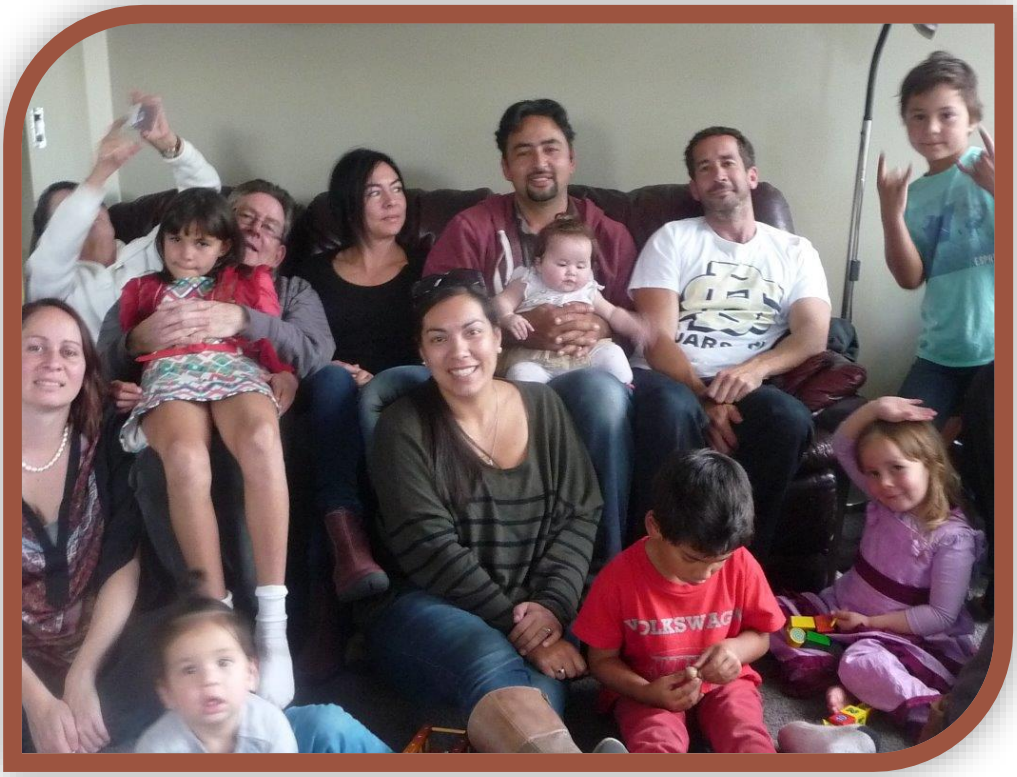
[39] Australian Institute of Health and Welfare 2009. Child Protection Australia 2007-08, Table 4.9
[40] Australian Institute of Health and Welfare 2006. Child Protection Australia 2004-05, Table 4.9
[41] Bringing Them Home Report, page 429
[42] Bringing Them Home Report, page 431 - 432
[43] See for example, Julian Pocock 2003. *A State of Denial*.
[44] Child Protection Australia 2005-06 at page 5

awareness of child protection concerns resulting in a higher level of reporting,[45] or of increased trust and willingness to report concerns to child protection authorities as claimed for Aboriginal notifications in Victoria.

Knowing about the extent of child abuse is impossible at a national level in particular: at best the figures are estimates and will vary according to what is considered to be 'abuse' at any particular time and on what is being measured. The child labour accepted as normal in England in the latter part of the nineteenth century is now condemned by Western countries and the harsh physical punishments suffered by children in Western countries in the 1940s and 1950s in the interests of 'discipline' would be notifiable as child abuse today. Much of what is now considered as 'child abuse' was not 'abuse' at other times and in different societies. As demonstrated by the increasing number of children in the child protection system, the net of State child protection in Australia continues to expand.

Despite all the published statistics, it is well accepted that they do not measure the degree of child abuse that occurs in the community. This is because not all abuse is notified and not all that is notified is abuse. This phenomenon is explained in more detail below.

The sensationalist media reporting of child abuse which occurs so often usually concentrates either on the number of child protection notifications or on those rare incidents of child death which so appal us all. In fact, the number of notifications is not an indicator of child abuse and even the number of substantiated notifications says nothing about any harm caused to a child



[45] Same at page 21

nor about how many children spend time away from their families because of protection concerns – it is only the number of children in out-of-home care that does that.

Children may be placed on supervision orders by the courts but remain at home. Child protection workers are then tasked with ensuring that the risk of harm to the child is reduced, by requiring changed parental behaviour or the removal of a source of danger to the child.

Many studies have noted the impossibility of making reliable statistical comparisons between child protection outcomes in the different Australian States and Territories, largely because of the different definitions used and the different methods employed in gathering the statistics.[46] The government publication of such figures is usually accompanied by warnings of the unreliability of data for small populations such as the number of Aborigines and of notifications in Tasmania and the ACT, the dangers of comparing recent figures with those published earlier and the difficulties of "identifying and recording Indigenous status."[47] Tasmanian child protection figures, including the number of children made wards of state under successive Acts of Parliament, seem to have become less accessible over the years despite a general trend at improving statistical collection and publication.[48]

Some Reasons for Aboriginal Over-representation in the Statistics

It is well accepted that socio-economic and historical factors must be considered when examining the bare statistics relating to Aboriginal child welfare. Those factors include:

- Cultural difference from the dominant child welfare authorities
- Dispossession from land and culture
- Marginalisation in the dominant society

Dispossession and marginalisation result in poverty, ill-health, poor education, high unemployment, homelessness and addictions. Cultural difference of the decision-makers can see Aboriginal practices treated as abnormal or pathological and hence subject to intervention by welfare authorities, police and courts. Adhering to the dominant values to avoid these results may lead to assimilation. All of this has been recognised by the major inquiries into Aboriginal affairs in Australia.[49] No government has recognised these conclusions in a practical way and hence the findings have not been translated into effective changes to policy and practice in any Australian jurisdiction.

The background factors arising from colonisation and dispossession are analysed as "structural inequalities" by some commentators.[50] In Australia, the Secretariat of National Aboriginal and Islander Child Care (SNAICC) and the Victorian Aboriginal Child Care Agency have argued extensively that culturally based programs and service standards are required in order to create a viable and effective Aboriginal alternative to, or partnerships with, mainstream and

[46] For example, Bringing Them Home Report, page 460
[47] Same at pages 62 - 63
[48] Ombudsman Tasmania, above, Appendix 3 in particular
[49] In particular, the Royal Commission into Aboriginal Deaths in Custody National Report and the Human Rights and Equal Opportunity Commission 'Bringing Them Home' Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families
[50] Cindy Blackstock, Trocme, N and Bennett, M 2004. Child maltreatment investigations among aboriginal and non-aboriginal families in Canada. *Violence against Women*, Vol 10, page 901

government services.[51] Indeed, some have described the 2006 legislative changes in Victoria as "the first real attempt in Australia at creating a culturally competent service system premised on the principles of self-determination for Indigenous communities."[52]

In the Australian context, a culturally competent service system has been defined as one which:

- Focuses on the underlying socio-economic issues that lead to child neglect;
- Focuses on Aboriginal children's right to culture;
- Views culture as a source of resilience;
- Responds holistically to child abuse and neglect recognising that Aboriginal and Islander cultures view the whole child in the context of the whole family and community;
- Focuses on child well-being and early childhood development, including cultural wellbeing; and
- Expands community-based Early Childhood Services and Aboriginal and Torres Strait Islander Child and Family Welfare Agencies and Services.[53]

The requirements of a culturally competent child welfare system are explored further in Chapter Six of this report.

HREOC recognised that the Australian States had made some changes to their welfare practice to be more inclusive of Aborigines through measures such as:

- Aboriginal Units within their departments,
- employing more Aborigines to work with other Aborigines,
- running cross-cultural awareness training for departmental staff.

However they also recognised that even in their implementation of the Aboriginal Child Placement Principle the States and Territories had fallen well short of the practice of Aboriginal self-determination. The reasons for this inadequacy included:

- inadequate legislative recognition of the principle
- inadequate consultation with Aborigines
- inadequate funding of the Aboriginal organisations involved in the process
- inappropriate evaluation of prospective foster carers.[54]

HREOC's summary of the situation applies to Tasmania as well as the rest of Australia:

'Partnerships' between Indigenous children's agencies and government departments, where they exist, are unequal partnerships. Departments retain full executive decision-making power and the power to allocate resources affecting Indigenous children's welfare. Judicial decision-making occurs within non-Indigenous courts. In no jurisdiction are Indigenous child care agencies permitted to be involved in the investigation of an allegation of neglect or abuse. The

[51] Muriel Bamblett and Peter Lewis 2007. Detoxifying the Child and Family Welfare System for Australian Indigenous Peoples: Self-determination, Rights and Culture as Critical Tools. *First Peoples Child and Family Review* Vol 3, No. 3, page 43

[52] Same

[53] Same, page 49

[54] See especially Bringing Them Home Report , pages 447 - 450

difference between being allowed to participate and having the right to make decisions is evident in Indigenous communities' experiences of child welfare systems.[55]

Cultural difference, particularly different family structures, can lead to adverse decisions by juvenile justice, welfare and other agencies, particularly where cultural difference is not understood or does not inform policy development and implementation. At its worst, cultural difference can be treated as a type of abnormality or pathology because it differs from a perceived dominant cultural norm. In other words, if Indigenous child-rearing is seen as pathological or abnormal, Indigenous families will be more liable to intervention by social workers, police and courts. Assimilation can become an implicit result as the values of the dominant group are imposed on Indigenous people[56]

Some of the reasons for the over-representation of Aboriginal children in child protection statistics include the much higher proportion of young Aborigines in the Aboriginal population overall and cultural differences in child-rearing practices which often see Aboriginal children having a much greater degree of independence than their white counterparts.

[55] Bringing Them Home Report, page 449
[56] Bringing Them Home Report, page 545

Some of the differences in family structure noted between Aborigines and white families include:

- More Aboriginal youth aged from 15 to 24 live independently of their parents
- More Aboriginal youth of that age live as partners in relationships, are lone parents or live with other relatives
- More Aboriginal children aged from 10 to 15 live in single parent families
- More Aboriginal children in that age group live in an extended family unit and the typical size of those households was much larger than white households[57]

All of these elements can be relevant to decisions about whether protective factors exist.

HREOC highlighted the systemic inequalities which exist in child welfare practice:

Welfare departments in all jurisdictions continue to fail Indigenous children. Although they recognise the Aboriginal Child Placement Principle, they fail to consult adequately, if at all, with Indigenous families and communities and their organisations. Welfare departments frequently fail to acknowledge anything of value which Indigenous families could offer children and fail to address children's well-being on Indigenous terms.[58]

Evidence has emerged in the mainstream literature that child protection systems have overextended themselves and have intruded unnecessarily into the lives of families, most of whose lives are beset with social and economic inequality. Professor Dorothy Scott , Director of the Australian Centre for Child Protection at the University of South Australia, observes that only one in five notifications of child maltreatment in Australia in 2004 was confirmed and warns of the dangers of an overloaded child protection service:

It is illusory to think we protect children by extending the reach of the statutory child protection system yet in the wake of child abuse tragedies that is exactly what tends to happen – a vicious negative feedback loop is established.[59]

Professor Scott argues for an end to mandatory reporting and a change from an individualised casework approach to child protection to a population-based public health approach. Indeed Professor Scott says that as not all child abuse cases are reported and not all reports are child abuse cases the data on child abuse reports (or notifications) says more about reporting behaviour than about the well-being of children.

This means that strategies for the prevention of child maltreatment need to be part of much broader strategies aimed at addressing social disadvantage. Thus a whole of government approach is required, with strong inter-sectoral collaboration across health, education, housing, employment and social services.[60]

Professor Scott recognises the value of services such as the multi-functional Aboriginal Children's Centre which operates in Hobart. She describes such early childhood education and

[57] Bringing Them Home Report, page 545 referring to 1991 Census figures
[58] Bringing Them Home Report, page 453
[59] Dorothy Scott 2006, Towards a public health model of child protection in Australia, Research article 1, *Communities, Families and Children Australia*, Vol 1, No. 1, Australian College for Child and Family Protection Practitioners Inc.
[60] Same at page 8

parenting centres as a “new service hybrid.”[61] This is the model later made available to the general population in the form of child and family centres, ironically long after Multi Purpose Aboriginal Children’s Centres had been defunded.

The public health model of child protection as compared to the forensic or legalistic model is discussed further in Chapter Six of this report.

These developments are in keeping with recent analysis of the Aboriginal Child Placement Principle which emphasise its primary purpose of keeping Aboriginal children at home rather

[61] Same at page 10

than being concerned solely with the order of priority for out of home care placements.[62] SNAICC identifies the aims of the Principle as three-fold:

1. Recognise and protect the rights of Aboriginal children, family members and communities, which include:

- Children's rights to care and protection; to have family connections; to have their culture respected, and as far as possible, to be cared for by their parents
- Rights of parents, family members and communities to make decision about the care and protection of their own children
- Rights of children in care to have their protection, wellbeing, developmental and cultural needs met in a quality care system
- Rights of children, family members and community organisations to participate in decision-making and have their perspectives respected when determining what is in the best interests of Aboriginal children
- Recognising that the best interests of Aboriginal children include consideration of whole of life wellbeing (including health, development, culture, identify and educational domains)

2. Increase the level of self-determination for Aboriginal people in child welfare matters which includes:

- Providing recognition and support for Aboriginal child protection and family support agencies
- Promoting a partnership approach to Aboriginal child protection, based upon agreements regarding jurisdiction, authority, and service delivery

3. Reduce the disproportionate representation of Aboriginal children in the child protection system which includes:

- Providing supports and programs that strengthen family and community capacity to care for their children, making a child's removal from parental care the option of last resort
- Ensuring that if a child is in care, efforts are directed towards ongoing family contact and timely and safe family reunification.

[62] SNAICC & Griffith University 2013, Aboriginal & Torres Strait Islander Child Placement Principle: Aims & Core Elements, SNAICC

SNAICC closely defines the elements that make up the Aboriginal Child Placement Principle (see box below) and identifies in detail the legislation, policy and practice, resources, and accountability changes required to properly implement those elements. The elements which stand out because of non-compliance include independent review and evaluation and genuine Aboriginal participation, extending beyond consultation, in decision-making.

1. Each Aboriginal child has the right to be brought up within their own family and community.

2. The participation of Aboriginal community representatives, external to the statutory agency, is required in all child protection decision-making, including intake, assessment, intervention, placement and care, including judicial decision-making processes.

3. Placement of an Aboriginal child in out of home care is prioritised in the following way:

(a) with Aboriginal relatives or extended family members, or other relatives or extended family members; or

(b) with Aboriginal family-based carers.

If the preferred options are not available, the child may be placed with a non-Indigenous carer or in a residential setting. If the child is not placed with their extended Aboriginal family, the placement must be within close geographic proximity to the child's family.

4. Aboriginal children, parents and family members are entitled to participate in all child protection decisions affecting them regarding intervention, placement and care, including judicial decisions.

5. Aboriginal children in out of home care are supported to maintain connection to their family, community and culture, especially children placed with non-Indigenous carers.

State officials have shown a lack of understanding of the realities of Aboriginal child welfare in Tasmania. A Tasmanian Commissioner for Children has reported that it was a thing of the past for children to be removed from their families because their parents were having trouble taking care of them.[63] That it is the past is not a perception shared by the Aboriginal community in Tasmania and is not the experience of the Tasmanian Aboriginal Centre which has consistently argued against state authorities to keep Aboriginal families intact.

Another State official has shown a similar lack of knowledge about the way official systems work for Aborigines in Tasmania. The Ombudsman's review of claims of abuse from adults in State care as children included 40 people who said they were Aborigines, a figure which represented 16% of the claimants. The Ombudsman's report observed that,

[63] Commissioner for Children (Tasmania) 2005. Annual Report 2004-05 at page 5

> Many of the claimants have linked their claims to past practices associated with the 'stolen generation' and lament what they regard as the deliberate alienation from their Aboriginal heritage. File records show that in each case the children were taken into care for stated reasons of 'neglect' rather than for reasons associated with the precepts underpinning the stolen generation movement.[64]

This statement ignores the findings of the Bringing Them Home Report that cultural difference resulted in inappropriate views about the neglect of Aboriginal children and the assimilationist drive to incorporate 'mixed race' children into white Australian society.

In Tasmania we have the additional problems of living in a State with some of the worst socio-economic statistics in Australia and of having a system of public administration which is far less transparent than in other jurisdictions. Most other States seem to publish the outcomes of their enquiries into child deaths and have had extensive reviews into their child protection systems which have allowed the public an insight into the operations of government agencies.

[64] Ombudsman, above at page 38

Chapter Three: TASMANIAN ABORIGINAL VIEWS OF THE CURRENT CHILD PROTECTION SYSTEM

Services Already Provided within the Community

The Tasmanian Aboriginal Centre (TAC) has operated family and child welfare services since the early 1970s when it was first funded for an Aboriginal Homemaker Service. That service employed Aboriginal women as what would now be known as 'peer educators' to advise and assist other Aboriginal women having problems with issues like household budgeting and parenting. Inevitably the workers encountered a whole range of issues impacting on Aboriginal family life including poverty, racism, domestic violence, alcohol abuse and loss of culture.

The Aboriginal Homemaker Service was the first State government funding received by the TAC, then and until the 1990s the only Aboriginal organisation on mainland Tasmania. The 'Welfare Department' changed the nature of its social work practice and the Homemaker Service was replaced by an Aboriginal Family Support program. That program has continued until today.

The Family Support Program is funded to provide services to families at risk of coming into contact with the child protection system. As such it is a 'secondary service' in the public health model of child abuse prevention, lying between the primary, universal preventive services model and the tertiary services provided by child protection systems, including out-of-home-care and reunification services.

The range of services the TAC provides for Aboriginal families and children is far wider than the small program funded by the State Government. A whole range of allied family and community services is funded by the Commonwealth government and, to the extent possible within the restraints imposed by funding conditions, are provided in a seamless holistic manner.

Funding provided by what is now the State Department of Health and Human Services to the TAC for family support services is just under $200,000 per year to provide a Statewide service from the three main geographic centres. There is no additional funding for the advisory, consultative, and advocacy services provided to families within the child protection system, nor for services to children in out-of-home-care. This lack of appropriate and adequate funding has inhibited the effectiveness of Aboriginal support services.

Outcomes of Aboriginal Community Workshops

There is a widespread view that "we couldn't possibly do it any worse than they do now". Problems in child protection systems have been well documented. They include lack of co-ordination between different parts of the system; under-funding; caseloads too high; staff shortages; under-trained staff; lack of staff supervision; inconsistent decision-making; structural change within departments in order to be 'seen to be doing something', a culture

of blame and cover-up, as well as the more general issues of lack of consensus about the ideals of family preservation as against the safety of the child.[65]

The child protection system was universally criticised by all the Aborigines consulted during this project. The main criticisms made were as follows:

- They don't know all the circumstances before they intervene in families
- The information they take notice of is not always correct
- They don't give Aborigines any say in where children are placed
- Adequate access to children in care is not always given to families
- Children in care are denied the right to cultural activities through departmental red tape and so are in danger of losing their Aboriginal identity
- Families who come to departmental attention are often subject to unnecessary scrutiny and harassment while other children are left in unsafe situations
- They ignore requests from families for help and advice with child rearing but then swoop in and take children
- Aborigines have become too scared to ask for departmental help because of the fear that their children will be removed
- They don't help families deal with the issues that led to the removal of their children
- Children are left feeling guilty and blaming themselves for their removal
- There is too big a gap between the lifestyles of the families where children are placed and the children's own families when they return or visit
- No adequate resources such as counselling for children when in care
- There is not enough follow-up to make sure children are not being abused while they are in care
- The department does not have enough Aboriginal respite and foster carers
- They don't put enough effort into getting other family members to care for children in need of alternative care
- They don't explain properly to parents and children what will happen within the system

The Hobart workshops were asked to talk about what we could do better or differently to keep Aboriginal families together. Different workshops had a variety of responses to that question. The responses included:

- Respite care for families and children
- Follow up support
- Care for carers and families
- Have child protection workers within the department
- Have an advisory group possibly moving toward an Aboriginal Board
- Have specialised teams
- Broader family support program
- Changes would need a lot of money
- More resources and support for family support program

[65] Child and Family Services, 'Consultation with Staff', Department of Health and Human Services, Tasmania June 2005, www.dhhs.tas.gov.au

- More training and support for Aboriginal respite and foster carers
- More resources for in home care support and parenting support
- Promoting positive images of Aboriginal foster carers, so placement with Aboriginal families is the preferred choice
- More intensive family support service delivery
- More awareness and training for staff and community about drugs, alcohol, gambling
- More recognition of others involved in the process; eg. Education Department workers
- Building partnerships and making them part of the TAC process
- Cultural awareness for department Child Protection staff
- Need to develop our own Aboriginal community standards for 'good enough' parenting
- Policy has to ensure children are put first
- Increased family contact with children in out of home care
- Aboriginal staff in the Department and identified positions within the department for liaison with the Aboriginal community
- Priority importance to the initial placement of children in out of home care
- Importance of keeping larger families together through placing them with Aboriginal foster carers
- More skilled carers
- Need more emphasis on our own history and our own stories, giving children tools for learning, building community strength through telling of history and culture
- Keeping our children safe within the white welfare system
- Support for workers to support families in care
- More family days for community and family to be together with kids, parents, grandchildren

What Can Be Done to Improve Things for Young Aborigines

Workshops contributed the following suggestions:

- Child care; cultural care/knowledge; after school care etc: structured for prevention
- Parental and child support – in home and external
- Strengthening culture
- Aboriginal schools
- Strengthening independence of youth – to develop confidence
- Respite care
- Cultural camps – facilitated – for kids to talk
- Justice panels – elders & other age groups: broad cross-section of ages to be on the panel
- Election of panel – similar to AGM election process
- To start from scratch – from pregnancy to childhood
- To be strong – knowledge, cultural foundation for families and children
- We need a cultural version of Project Hahn

- Comprehensive parenting group
- Support in the home
- Developing and/or employing a super nanny
- Intense support prior to action
- Independent facility – use our land
- A hot line: 1800 directed to people for support & advice; a life line – counsellors
- Educate our parents and kids – through workshops – about good parenting skills: become the solution
- Child services – run a few programs to give young children a voice and help in the solution

Issues with Different Points of Involvement in the Child Protection System

Workshop groups discussed the issues arising from Aboriginal involvement at various points of the child protection system. Discussion about involvement in the notification processes of child protection included:

- Need a system to determine if the child is actually Aboriginal
- Having the resources to provide a 24 hour service
- Indeterminate number of notifications – might be easily handled or not
- 24 hour service could be modelled on current police call-out system for legal aid

- If calls received locally, problems of confidentiality as voices could be recognised
- Possibility of conflicts of interest as person receiving notifications could be related to people being complained about

The issues of confidentiality and conflict of interest were considered manageable through having one centralised intake point for notifications. The work of examining the nature and extent of risks to a child would then be referred to the relevant region. Alternatively, participants considered the intake function could remain with the department which would then refer to an Aboriginal agency for the investigation phase. The option of having Aboriginal workers within the Department was also canvassed, and it was recognised that problems would arise about the selection and management of sole workers. It was agreed that a system of cross-referral with the Department would be required.

The role of cultural awareness training was discussed with some advocating more TAC training for departmental workers and others being strenuously opposed.

Community Views on Our Capacity to Do It Ourselves

This section identifies the problems that have occurred and some that are anticipated in the process of Aboriginal community control of Aboriginal child protection. Workshop participants were asked to identify the dangers inherent in an Aboriginal controlled system and hence problems that need to be foreseen in our program design. A summary of pitfalls identified by the workshop participants is:

- Denial of issues within the family unit
- Lack of qualified Aboriginal workers
- Lack of support services for families
- Lack of confidentiality and trust
- Lack of parenting skills
- Lack of financial support
- Lack of respite carers in the Aboriginal community
- Community unity put at risk
- Substance abuse – parents and children
- Education
- Peer pressure
- Knowing how to access support services
- Mandatory reporting
- Aboriginal against Aboriginal (conflict)
- Trust may be lost
- Skilled support
- TAC vs community
- Respite for different age groups
- Financial support for respite
- We don't have safe houses
- Current children in care
- Afraid to speak out
- Ashamed to get help
- Protecting perpetrators
- Educating parents
- Community or committee decision-making
- Family breakdown
- Who will receive reports of abuse and neglect?
- Who will remove children?
- Who will investigate?
- How will it be investigated?

Project participants were forthright in their comments in the workshops around the State and in the individual interviews. A wide variety of perspectives were expressed, ranging from the view that too many Aboriginal parents are desperate to keep their children because they provide a source of drug money in the form of government benefits, through to the view that kinship carers' first priority is the money rather than the children, to the view that the State child protection system has caused all current problems. Further comments included:

- They are part of my family and I don't want to break up the family
- I make sure it's not that bad for the kids by visiting them when I can
- My parents would never forgive me if I put the family into Welfare
- We have to try to keep them out of the system because it brings so much shame on families when children are removed
- I wouldn't interfere in that family – they'd kill me

- I really want to do something, but I just don't know what to do
- I tried before, but Child Protection didn't do anything
- I keep hoping they'll get off the drugs and do the right thing by the kids
- Child Protection told the family what the child had said, they denied it, the child got really badly beaten for telling, and the child never talked to me again
- I think the children are being abused but I haven't seen it for myself, so if you go around saying it these days, you're likely to get sued
- They think they are doing the right thing because they feed and clothe the kids, but they don't realise kids need supervision and love and affection as much or even more than they need the basics
- The parents are so tied up with drinking and drugging that they can't be bothered with their children, but they wouldn't thank me if I reported it
- Taking kids off their parents just to have the kids getting abused in State care is no solution at all; better to leave them where they are
- I'm sick of seeing everything being done for the parents when they've done the wrong thing by their kids: the kids would be better off without their bad parents but there's nothing I can do about it
- Some of the parents were treated so badly themselves when they were young, that they just can't relate properly to their own children

- You can't expect to stop all abuse of children in the Aboriginal community; there will always be a few, but there's so many families out there who look to be doing well and no-one notices them – but that's where the real trouble is
- It's about different standards; we were always hungry when we were kids but we all turned out OK and I'm just so grateful we stayed together as a family
- I was just so useless and hopeless as a young parent, but I eventually grew up and got better and my oldest child doesn't seem to have suffered
- We all got belted when we were kids, but it didn't do us any harm; in fact it made us better people. Now the parents aren't allowed to discipline their kids at all – that's where the problems start.

Some of the participant comments indicated pathways to improved ways forward, even though many comments indicated weariness with situations as they now exist for many in the Aboriginal community. There are numerous hints and suggestions about how the Aboriginal community could do things differently, and better. Comments of this nature included:

- It's just a matter of organisations helping keep the children alive until they're old enough to look after themselves a bit
- We could do a lot more to help the kids have good lives if only their parents wouldn't pretend there's nothing wrong
- There's no way you can prove sexual abuse of children while it's still going on; you can only try to help pick up the pieces 20 or 30 years later when the person is ready to tell someone what happened to them
- I just want to be encouraged and protected to expose all those Aboriginal men who've sexually abused kids over the years; I don't care if they're dead or not, they have to be exposed for the damage they've done
- The mothers are never going to change; you've just got to wait till the older children are ready to look after the younger ones
- If we had a place where mothers could go with their children while they got off the drugs and dried out, then they could come back to town and look after their children properly
- You can't expect kids to turn out alright when there's nowhere they can go to get away from seeing domestic violence all the time
- A lot of the older people run down the younger ones for not looking after their children because they're on drugs but they've forgotten what they did on the drink years ago
- The kids just want someone to be there for them; to have some stability and certainty in their lives and to know that someone loves them
- I really think the parents want to do better with their kids, but they've never been taught how
- I'd take the kids myself if I could, but nowadays with most people out working it's too hard to find the time to look after other people's kids
- I can't remember a time when the Aboriginal community sorted out the protection of Aboriginal children without white involvement: maybe on Cape Barren when the

grandmothers took in the kids, but nowhere else. Even then there were still men who did the wrong thing

- There should be no tolerance at all of any kind of harm to Aboriginal children
- The kids need a place where they can run wild and get rid of all the hurt they feel and where they can learn properly about their Aboriginal culture
- We need Aborigines who we pick to become university educated professionals to help our kids.
- There was considerable pessimism about prospects for improvement under a child protection system involving Aboriginal community control. Participant comments included:
- I am just so sad that I never knew my Aboriginal family properly, but I reckon I'd be worse off than I am now if I'd grown up with them
- People say we've got to keep Aboriginal kids with their families, but for a lot of the kids I know I reckon that's the worst thing that could happen; they'd be better off growing up white
- Some people might not mind someone fronting up and telling them they're not doing the right thing by their kids, but others would just go ape
- I was dragged into the Centre once to explain myself when someone had complained I was neglecting my child. I was just so furious with the way they went about it
- They reckon I wasn't looking after my kids properly but it's just that people dob you in for any little thing you do
- I can never forgive my community for not stopping them taking me away

- The courts and the welfare give too many chances to the parents; they just move around to different areas and get help all over again when we should know by now that they aren't going to change anything in their lives to get their kids back
- It would be really hard for us to take charge of Aboriginal child protection because most people are just too gutless to make the hard decisions; they're too scared to front up and say I'm taking these kids until you sort yourself out and start looking after them properly
- If women have kids, then they've got to look after them. It's no use them changing their mind after they've had four or five kids – no-one else should have to do their job for them
- On the other hand, participants also identified ways that the current system could be improved under an Aboriginal community system building on the knowledge already gained. As with all the workshops in the project, there was a wide variety of views:
- Child Protection only listens to the white foster carers; they don't do anything to help Aboriginal parents get their kids back
- It's no use reporting to Child Protection; they never get around to checking out the reports and even when they do, they don't have anything better to offer the kids. Some of those homes are worse than prisons
- People don't realise how important it is to report concerns to Child Protection. They get all the reports so they can see if a lot of other people also have concerns about that particular child. We can't know all that by ourselves
- Child Protection has no respect for our knowledge and expertise. They think they can get the full picture without even talking to Aborigines who know the child best
- It's not safe to tell Child Protection anything. They misinterpret what you say; they only hear the bad things; and they don't stick to their own rules about not disclosing the names of people who notify them of concerns
- Just because kids can't live with their parents shouldn't mean the parents have no say at all about what happens with the child or who the child should live with. It's just another case of the white system taking over all control from Aborigines
- We've got to make it more acceptable for Aboriginal women to say, "Sorry, I made a mistake; I shouldn't have had these kids, I can't look after them. So find someone else who'll do a better job of bringing them up"
- I was brought up in group homes. I don't blame my mother for clearing off; she just couldn't cope. I was able to get close to her after I'd become an adult. The worst part of it all was that Welfare would never let me settle anywhere: they kept moving me from home to home, away from school and friends. I never knew where I'd be going next.

Views on Organisational Involvement

The concerns expressed reflect the problems highlighted in TAC policy discussions over the years. Foremost amongst these has been the dichotomy between the TAC as a community organisation providing political leadership and community services and the TAC as a potential arm of government policy and welfare practice which has historically disrupted the Aboriginal

community through the removal of its children. Workshops discussed these dilemmas and articulated reasons for and against organisational involvement as shown below.

Reasons For Involvement	Reasons Against Involvement
Cultural sensitivity	Shame
One stop shop for services	Worries about confidentiality
Comfort factor for kids & families as they would know the staff involved	Conflict of interest of friends and family employed on the program
Avoids families being ambushed at home	Concern about false reports
Better & friendlier investigations	Other community people seeing families using the service
Families or kids need tell their story once only	Staff with a past of neglect becoming tolerant of neglect in others
Easier communication between staff	Fewer skills in investigation & likely to require shared responsibility
More likely to keep kids in community	Lack of Aboriginal carers
Staff more likely to understand the problems	Better to have 'Welfare' take the flack for removal decisions
More opportunity for disclosures as less fear of repercussions	Child removal function incompatible with community support & advocacy function
Confidence that removed kids would be kept together	Build up of tolerance to bad behaviour which could allow parents off the hook
Reunification a greater possibility	
Services available immediately	
Earlier intervention and prevention	
Considers the whole family	
Better use of extended family	
More likely to decide it is safe for children to return to their family.	

Staff now working within the TAC in the area of family and child welfare view a changed role for themselves with considerable apprehension. They are familiar with working in an environment of tension between protecting the interests of children and maintaining the trust and co-operation of parents, but that environment has the Department as the decision-maker in matters of child removal. Maintaining their credibility as workers committed to keeping Aboriginal families together at the same time as ensuring the safety of children would take on new dimensions if they were also to be part of a decision-making structure that might decide on the removal of the children.

The repercussions for any worker who proposed the removal of an Aboriginal child were also of concern to workers. Some workers have already experienced persecution and victimisation from family members who suspected the worker was involved in the removal of their child, even when that was not the case. This fear of retribution is often cited as a reason for decision-making to remain outside the Aboriginal community. In Tasmania at least this problem is

minimal in terms of frequency if not in terms of the seriousness of the aftermath. Although agreement will never be universal, the number and diversity of those eager to be involved in the current community consultation suggests widespread agreement to be bound by community outcomes.

There was a variety of views about how the Aboriginal community should be involved in child protection issues. Some thought the TAC should be responsible for all stages of the project; no-one thought the current departmental system was the best option; and some felt there should be a combined approach between the Department and an Aboriginal agency. The majority view was that a new Aboriginal community child protection system would be best for the Aboriginal community, for Aboriginal families and for Aboriginal children.

Priorities and Changes Required

Community members and TAC staff discussed programs, events and activities that should be continued, improved or initiated to enhance life experiences for Aboriginal children and families.

There is a wide range of services already provided to families and children within the Aboriginal community around the State. The services are provided in or from the main cities of Hobart, Launceston and Burnie; mostly by the Tasmanian Aboriginal Centre but also some specialised services by smaller organisations. Some of the suggestions included:

- Continue protective behaviour and family violence sessions
- Targeted group sessions for ADHD and other concerns including anger management, social skills, self esteem
- Incorporate 'Taking Control' program
- One to one Project Hahn
- Introducing Project Hahn to new participants
- Increase number of camps for youth
- More involvement of out of home care kids in community activities
- Reducing rate of unplanned pregnancies amongst teenage mothers
- Birthday cards from TAC for all children under 13 to show their value
- Mail out information addressed to the child
- Put community outing photos into albums for families
- Open days of our facilities
- TV free week - determine preferred week and provide supporting plan and information
- Use SMS for getting messages to young parents
- Themed Aboriginal families week
- Celebrate National Aboriginal Children's Day 4th August
- Promote National Child Protection Week
- Hearing checks for children
- Health day for children
- Give up smoking campaign

Chapter Four: CHILD PROTECTION IN OTHER AUSTRALIAN STATES

This chapter gives an overview of child protection in the other Australian States and Territories and looks briefly at their distinguishing features. In the last decade there have been very rapid changes in governmental structures for dealing with child welfare. Accounts of these changes can be found in the annual reports of Child Protection Australia and in the progress reports to the Council of Australian Governments on its National Framework for Protecting Australia's Children.

All Australian States and Territories have similar approaches to the protection of children from abuse and neglect. The systems are all based on notifications of suspected abuse, investigation of the allegations, and court orders for the protection of the child when abuse is confirmed. There are variations in detail between the jurisdictions but the basic approach remains the same.

Most of the extensive reviews of the child protection systems in various Australian jurisdictions held in recent years have resulted from publicity given to mistakes within the system that have exposed children to harm. However, many of the inquiries which have made findings about ways to improve child welfare and child protection processes have not had their recommendations implemented and hence there is a cycle of inquiries at considerable cost but with fewer outcomes. At the same time, some inquiries have had all their recommendations implemented with disastrous consequences.

Lessons learnt in one State are seldom transferred to other States. It appears likely, for example, that if the findings of the child death inquiries in Victoria[66] had been heeded, at least one later child death in Queensland (where there was a lack of integration between hospital maternal services and child welfare services) might have been avoided. Similarly, the public availability of child death inquiry reports in overseas jurisdictions also holds lessons for child protection practice in Australia but they have not always been heeded.[67]

All the enquiries recommended increased attention to early intervention and prevention strategies and programs. They all also involved government commitment to increased expenditure on child protection with Queensland in 2006 promising $117 million over three years for out-of-home-care in the community sector alone; [68] Northern Territory committing $50 million over five years for the reform of its child protection system[69] and Western Australia

[66] Child Death Review Panel, Who's Holding the Baby? Improving the Intersectoral Relationship Between Maternity and Child Protection Services: An Analysis of Child Protection Infant Deaths 1995-1999, Department of Human Services (Vic); Child Death Inquiries Unit (Vic) Child Death Analysis Report: Protective Issues for Newborn Siblings of Children Previously Taken Into Care, Department of Human Services Victoria

[67] The Canadian inquiry into the death of 20 month old Karen Quill made many of the same recommendations about out-of-home care as later Australian inquiries for example; Department of Community Resources and Employment (Saskatchewan) 1999. 'Response to the Children's Advocate's Report on the Death of Karen Quill', www.dcre.gov.sk.ca/publications/quillreport.html

[68] Premier of Queensland and Minister for Child Safety Joint Statement 2006. 'State Injects Record $117M to Help Abused Children', www.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=44497

[69] Marion Scrymgour, Minister for Family and Community Services (NT) 2004. Ministerial Statement – Looking After Territory Kids.

announcing the expenditure of an additional $66 million.[70] Nevertheless, the commitment of funds to child protection does not necessarily ensure better outcomes for children.

New South Wales

The New South Wales legislation stipulates the administrative principle that "Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young persons with as much self-determination as is possible" and to that end the relevant Minister may "negotiate and agree" to the "implementation of programs and strategies that promote self-determination."[71] However, the notion of "self-determination" contained in the legislation is confined to whatever the relevant Government Minister agrees and to mere "participation" in decisions:

> 12. Aboriginal and Torres Strait Islander participation in decision-making
>
> Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Minister, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under this Act that concern their children and young persons

[70] Government of Western Australia 2002. Putting People First: The Western Australian State Government's Action Plan for Addressing Family Violence and Child Abuse in Aboriginal Communities, Western Australian Government

[71] Children and Young Persons (Care and Protection) Act 1998 (NSW) section 11, www.austlii.edu.au/au/legis/nsw/consol_act/caypapa1998442/s11.html

There are also very detailed instructions in section 13 of the Act about how the Aboriginal Child Placement Principles are to be applied. In addition to the usual placement guidelines, section 13 requires the Director General to consult with the relevant community and organisation before an Aboriginal child is placed with a non-Aboriginal family, requires the child to be placed near to the child's previous place of residence, requires continuing contact with the child's Aboriginal and non-Aboriginal family or community and deals with situations of a child having multi-community inheritance or connection. Family reunification remains an objective in placement decisions. The child's self-identification as an Aboriginal person and the expressed wishes of the child are fundamental criteria in determining out of home placements.[72]

The Wood Inquiry in 2008[73] made recommendations going beyond mere refinements to the top down child protection system which resulted in *Keep Them Safe* reforms and changes to legislation proclaimed in January 2010. The recommendations attempted to reorient the system to a more public health approach. The changes included raising the reporting threshold from "risk of harm" to "risk of significant harm." The first year of reporting under these changes in 2010-2011 as shown in Table 1 of this report resulted in dramatic reductions in notifications, whilst other States continued to have increased notifications.

Victoria

Like most other Australian jurisdictions, Victoria has made major amendments to its child protection legislation in the last decade. The Victorian Department of Human Services published a large number of fact sheets, comprehensive discussion papers, large exposure drafts of the legislation and conducted lengthy public consultations about the proposed new provisions before the enactment of the Child, Youth and Families Act in 2005.

There has been a protocol between the Victorian Aboriginal Child Care Agency (VACCA) and the Victorian Department of Human Services for many years. The protocol was amended in 2002 as the basis for the development of an Aboriginal Child Specialist Advice and Support Service (ACSASS).The service is known as Lakidjeka ACSASS and is a service of VACCA covering the whole of the State of Victoria except for the Mildura Local Government Area. The protocol requires the department to involve an ACSASS worker whenever they receive a notification about an Aboriginal child and the ACSASS service should then be involved in all decision-making about that child or young person.

The 2002 protocol between VACCA and the Department of Human Services Child Protection Service has as an underlying principle that an Aboriginal child has the right "to have his or her cultural needs considered" and agree that culturally relevant services are necessary to achieve that principle. Child Protection undertakes to "actively consider cultural issues and extended family information in all decisions concerning Aboriginal children."[74] Child Protection is therefore to consult with and seek advice from VACCA "on all Aboriginal notifications and

[72] Same, section 13 (2)

[73] Wood Report 2008. Special Commission of Inquiry into Child Protection Services in New South Wales. Department of Premier and Cabinet, Sydney

[74] Protocol between Child Protection (DHS) and Victorian Aboriginal Child Care Agency, 2002, section 1.4, www.office-for-children.vic.gov.au/commcare/ccdnav.nsf/LinkView/4F9BF029

investigation decisions, including notifications that do not proceed to direct investigation". The protocol then sets out in seven detailed steps exactly what this is to mean in practice.[75]

The *Children and Young Persons Act* 1989 (Vic) required the court to consider a report from an Aboriginal agency before making a permanent care order. The proposed changes to the Act were described by the government as going "significantly further in protecting the links between Aboriginal children and young people and their culture and communities, promoting culturally sensitive and responsive service provision, and restoring greater control by Aboriginal communities over decision-making."[76] The Department would be enabled to assign the management of court orders about children to an approved Aboriginal agency and quality assurance mechanisms would provide for monitoring that the child protection functions are being exercised "appropriately":

The aim is to work with communities to plan and manage the transfer of decision-making about Aboriginal children and young people. This approach will be supported by training, capacity building of Aboriginal services, and community education.[77]

Despite the VACCA literature and departmental protocols, the 2005 legislation did not made it compulsory for the assessment of a child to include consultation with ACSASS for advice, assessment of risk and determination of the services required.

The Victorian legislation enables the Government to declare (by Gazette notice) an organisation to be an Aboriginal agency if it is a registered community service managed by and for Aborigines.[78] Section 175 of the Act makes it compulsory for a cultural care plan to be prepared. VACCA is now funded to provide and manage out-of-home care for Aboriginal children who cannot live with their families and there is a program to move placements to the management of Aboriginal organisations.

In 2012, the Victorian Government made its child protection manuals available on the internet in its Department of Human Services web site. VACCA started a trial project of being the Guardian for Aboriginal children in care, taking over decision-making responsibilities from the Secretary of the Department under the *Child, Youth and Families Act* 2005 (Vic).

[75] Same, section 2.2

[76] Office for Children (Vic), Protecting Children Review and Reform Fact sheet 6 – Aboriginal children and young people reforms. Available at www.office-for-children.vic.gov.au/commcare/ccdnav.nsf

[77] Same at page 4

[78] Same section 6

Queensland

In Queensland the child protection system has been under intense scrutiny since 1998 with the establishment of the Commission of Inquiry into Abuse of Children in Queensland Institutions (the 'Forde Inquiry') in 1998. One outcome was a joint formal statement of apology from the Queensland Government and religious institutions.[79] There was a new *Child Protection Act* 1999[80] and reform strategies as provided in *Putting Families First* in 2001 and *Queensland Families, Future Directions* in 2002.[81]

The Queensland Crime and Misconduct Commission investigated the State's Families Department after allegations that one foster care family had abused more than fifty children in their care over a twenty year period. The same incidents gave rise to four separate enquiries: an external review of the particular allegations;[82] an external audit of any foster

[79] Find & Connect web site at www.findandconnect.gov.au/guide/qld/QE00269

[80] Available at www.austlii.edu.au/au/legis/qld/consol_act/cpa1999177

[81] Queensland Government Submission to the Crime and Misconduct Commission Inquiry into the Abuse of Children in Foster Care in Queensland, Queensland Governrnent, 2003 at pages 12-14.

[82] 'Operation Zellow' identified 9 "flashpoints" that should have raised departmental concern but were not adequately addressed (including claims that the gonorrhea found in some of the foster children was contracted from an infected facewasher; and findings that the foster carers were considered to be Aboriginal merely because the woman's own children may have had an Aboriginal father and thereafter the department classified all children placed with that family as Aboriginal). See Crime and Misconduct Commission of Queensland, *Protecting Children: An Inquiry Into Abuse of Children in Foster Care,* Queensland Government, January 2004. Available at www.childsafety.qld.gov.au

carers with abuse notifications made against them;[83] an Official Misconduct Investigation by the Crime and Misconduct Commission after a reference to them from the Queensland Premier; and a Crime and Misconduct Commission Public Inquiry into the Abuse of children in foster care.[84] Thereafter an implementation committee was established to develop a 'blueprint for reform' including overseeing the creation of a new Department of Child Safety.

The Department's Annual Report catalogued a litany of change and expenditures including new work practices to screen and assess reported abuses, training of 800 staff, introduction of the 'structured decision-making model' of risk and safety assessment tools developed in the United States, development of Stage 3 of the Child Safety Practice Manual designed to promote consistency in practice standards and decision-making, a Critical Incident Reporting Management System, promotion of inter-agency collaboration through revamped Suspected Child Abuse and Neglect (SCAN) teams including departmental officers from Education and the Arts, Queensland Health and Queensland Police Service, and an increase from fifty six to sixty seven per cent of Aboriginal and Torres Strait Islander children in out-of-home care placed with Indigenous carers achieved through a Foster Carer Recruitment Campaign.[85]

A major objective of the *Child Safety Legislation Amendment Bill* 2005 was an improvement in the way Queensland law deals with Aboriginal children and Aboriginal organisations involved in the child protection system. The *Child Protection Act* 1999 (Qld) was amended to involve "recognised entities" in departmental decision-making. The 'entities' are Aboriginal and Torres Strait Islander organisations or individuals approved and funded by the new Department of Child Safety to provide cultural and family advice in significant child protection decisions. The legislative changes also placed foster carers under more stringent departmental control, required the department to provide appropriate contact between a removed child and the child's community, gave preference in out of home placements to kin and siblings, and required written case plans to be made at family group meetings.[86]

Some of the interventions and targets in this flurry of departmental activity seem misplaced, particularly the target of increasing Aboriginal foster carers to the same percentage as Aboriginal children in foster care (22% of children in care are Aboriginal but only 17% of foster carers are Aboriginal). Then to address the over-representation of Aboriginal children in care and ensure culturally appropriate child protection services the Department of Child Safety created an Indigenous Support and Development Branch in Cairns to service north Queensland where sixty per cent of the children in care are Aboriginal. A major function of the Branch was announced to be to "enhance the capacity of Indigenous organisations working in the child

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[83] Gwenn Murray, Final Report on Phase One of the Audit of Foster Carers subject to Child Protection Notifications: Towards Child-focussed Safe and Stable Foster Care December 2003. The Audit found that assessments of risk were inadequate in over half the cases audited and made recommendations for change in 18 areas of child protection work. www.communities.qld.gov.au/resources/foster-carer-audit-2003-pdf

[84] Queensland Department of Communities press releases at www.communities.qld.gov.au/department/cpreview

[85] Annual Report available at www.childsafety.qld.gov.au

[86] Child Safety Legislation Amendment Bill 2005 (Qld), www.legislation.qld.gov.au/Bills/51PDF/2005/ChildSafLegABO[sic]5Exp.pdf. For an account of all the legislative amendments in Stages One, Two and Three of the Queensland child protection reforms see www.childsafety.qld.gov.au/department/legislation/updates. See now Child Protection Act 1999 (Qld) sections 5B, 5C, 51B, 51C, 88

protection sector" through training, funding and policy development.[87] One week later the Minister for Child Safety announced a grant of $111,000 per year for three years to the Cooktown District Community Centre (an organisation in the south-east of the Cape York region) to employ an intensive family support worker to promote the safe reunification of families with children in care. The Member for Cook in the Queensland Parliament warmly welcomed the announcement.[88] A mere three days later the Minister for Child Safety released figures showing the implementation of the Crime and Misconduct Commission recommendations were working with average caseloads for Child Safety Officers having reduced from 32 cases per worker to 23 cases per worker. The Beattie Government was said to have increased the child protection budget from $65 million when it came to office in 1998 to $400 million in 2005.[89] On 14 February 2006 just one of the new measures announced was funding for 83 new child welfare services.

The overtly political campaigning nature of public relations work such as this does have the side benefit of increasing public access to information about child welfare and child protection issues and resources. Compare, for example, the information available about these matters on the web site of the Tasmanian Department of Health and Human Services and the Queensland Department of Child Safety.[90] In Queensland, even the department's practice manual and assessments tools were available on their web site at a time when the Tasmanian Department would not make the practice manual available even for the purpose of this report.

Despite widespread analysis of the 'Aboriginal Child Placement Principle' since the 1980s the Queensland amendments in 2005 aim to insert a "new principle" that when making decisions about removing a child from their parents, placement with the child's kin in preference to other options must be considered. The new principle for Aboriginal children is that the 'recognised entity' for Aboriginal children must be given the "opportunity to participate" in significant decisions about Aboriginal children. A more enlightened provision is the requirement for the department to ensure any non-Aboriginal carer is committed to ensuring an Aboriginal child's identity and cultural needs: this applies to non-Aboriginal family of an Aboriginal child as well as to foster carers and the willingness to have cultural competency training is a relevant consideration. The Bill also has stringent provisions for people applying to become, or remain, a foster or kinship carer.[91]

The problems the new legislation aimed to overcome were said to arise from a lack of resources, understaffing, inexperienced staff and departmental cultures.[92] This was at a time when earlier investigations had already revealed substantial problems and the Government

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[87] Minister for Child Safety (Q'ld) Ministerial Media Statement, 'Indigenous Branch in Cairns to drive child protection reform', http://statements.cabinet.qld.gov.au/cgi-bin/display-statement.pl?id=9510&db=media

[88] Same at id=9607

[89] Same at id=9629

[90] www.dhhs.tas.gov.au and www.childsafety.qld.gov.au

[91] Presumably reflecting the origins of the Crime and Misconduct Commission Enquiry as a complaint against long-term abusive foster carers. It is difficult to resist the conclusion that this degree of regulation is an over-reaction; a more effective approach would be to heed the concerns of children and parents involved in the protective system and to reduce the number of children taken into care.

[92] ABC Online, PM – 'Systemic problems in Qld Families Department' Monday 13 October 2003

had responded with more money for initiatives such as 80 new staff, new record management systems, more quality assurance staff and senior practitioners.

Also in 2003 there was an investigation by the Queensland Ombudsman into the death of a 10 week old baby.[93] Again the result was a raft of recommendations about changes to departmental procedures and publicity surrounding the tabling of the report in Parliament.

The outcomes of the Queensland initiatives included the recruitment of 55 Aboriginal and Torres Strait Islanders to positions of child safety support officer, team leader, manager, and trainers for the indigenous cultural competence curriculum for child protection staff. The Department also developed an "Indigenous recognised entity service delivery model" which specifies the outputs required of such entities in relation to intake, initial assessment and investigation, court matters, case planning, placement, specialist external corporate support, quality assurance and training support.[94]

With child protection ever an election issue, there was a commitment by the incoming Queensland Government in 2012 to establish a 'new Forde Inquiry'. The Carmody Child Protection Commission of Inquiry reviewed the whole child protection system to 'chart a roadmap' for the next decade. It found the system was failing despite the budget increase

from $182.3 million in 2003-04 to $773 million in 2012-13 and made 121 recommendations

[93] Queensland Ombudsman, Report of an investigation into the adequacy of the actions of certain government agencies in relation to the safety, well being and care of the late baby Kate, who died aged 10 weeks, October 2003

[94] Department of Child Safety (Queensland), Annual Report 2004-05 at page 42

for the 'reform roadmap'.[95] The extensive reforms accepted by the Government[96] included a reversal of structural changes made a few years earlier at great cost.

Western Australia

The major inquiry into child protection in Western Australia, the 'Gordon Report'[97] was also prompted by a public outcry following the suicide of a teenage girl said to have connections with the Swan Valley Nyoongar Community. The Western Australian Government responded with the establishment of many new programs, structures, legislative reforms and the injection of new funding.[98]

South Australia

In South Australia the 2003 'Layton Report'[99] developed a new framework for child protection in that State emphasising inter-agency collaboration and the ability to implement the policies and plans known to be best practice.

South Australia has a centralised one stop child abuse report line within Families SA, Department for Families and Communities, formerly Department of Human Services. The Unit includes Yaitya Tirramangkotti, an Aboriginal Unit designed to advise and assist in cases involving Aboriginal children. There are also Aboriginal Cultural Consultants available at Child and Family Health Centres throughout South Australia.[100]

Serious abuse or neglect notifications are referred to a Families SA District Centre for investigation by social workers. Police and hospitals may be involved for children considered to be in immediate danger. In less serious cases, families will be invited to a meeting at a District Centre to discuss the concerns and possible assistance available.[101] This decentralised approach appears to be moving towards a public health model of children protection as discussed later.

South Australia has separate structures to avoid potential conflicts of interest when notifications are made about possible abuse or neglect of children in family based care or residential facilities.[102] A Care Concern Investigations Unit (CCIU) is part of the Department for Education and Child Development rather than of Families SA. Depending on the nature of the

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[95] Queensland Child Protection Commission of Inquiry (Carmody Inquiry) 2013 *Taking Responsibility: A Road Map for Queensland Child Protection*. Available at www.justice.qld.gov.au

[96] Queensland Government response to the Queensland Child Protection Commission of Inquiry Final Report: Taking Responsibility: A Roadmap for Queensland Child Protection. December 2013

[97] Sue Gordon, Kay Hallahan & Darrell Henry 2002. Putting the picture together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities, Government of Western Australia

[98] See Gordon Inquiry Response Progress Updates, Newsletters and Press Releases at www.gordonresponse.dpc.wa.gov.au

[99] Robyn Layton 2003. Our Best Investment: A State Plan to Protect and Advance the Interests of Children. Government of South Australia

[100] Women's and Children's Health Network, *Parenting and Child Health*, Government of South Australia. Online

[101] Families SA, *There is No Excuse for Child Abuse*, Department for Families and Communities.

[102] Department for Education and Child Development, Care Concern Investigations Unit, Government of South Australia

concern made to the Child Abuse Report Line, it may be referred to Families SA or may be subject to a Serious Care Concern Investigation conducted by the CCIU. In cases of serious allegations, the children in care may be removed pending the outcome of the investigation with any removal decision made by Families SA. Allegations of criminal conduct by a carer are referred to police.

Northern Territory

The Northern Territory's 2004 child protection reform agenda, Caring for our Children, included new legislation and reform of policy and administrative processes as well as a trebling of expenditure on child protection services.[103] The reforms arose from research showing severe under-reporting of child abuse and neglect in Aboriginal communities and highlighting the lack of effective child protection systems.[104]

Implementation of the reform agenda was overtaken by publication of the *Little Children Are Sacred*[105] report and the Howard Government's 'Emergency Response' measures.[106] This saw an increase in the Northern Territory Government's expenditure on child protection measures to $286 million over five years and Australian Government expenditure on its 'emergency response' of over $1,254,000,000 (over $1.25 billion).[107]

The 'Emergency Response' saw a welcome injection of vast amounts of Commonwealth money into the Northern Territory, much of which was spent on white managers and duplication of services. The number of substantiated child abuse notifications increased. The breach of human rights of individuals, families and communities was so severe that it required a suspension of the *Racial Discrimination Act*. It seems undoubted that the measures have enabled Aboriginal women and concerned men to take back some measure of control over the destiny of their communities but whether the problems have merely been moved to other communities is yet to be tested thoroughly. Meanwhile the long term changes to the health and wellbeing of Aboriginal children and the viability of their communities remains to be seen.

[103] Marion Scrymgour 2004. Minister for Family and Community Services (NT), Ministerial Statement – Looking After Territory Kids

[104] Julian Pocock 2003. State of Denial: The Neglect and Abuse of Indigenous Children in the Northern Territory. SNAICC.

[105] Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Ampe Akelyernemane Meke Mekarle "Little Children are Sacred" 2007. Northern Territory Government

[106] Northern Territory Emergency Response Taskforce, Final Report to Government, June 2008, Government of Australia

[107] Northern Territory Emergency Response Taskforce, Final Report to Government, June 2008, Government of Australia at pages 11 & 14

Chapter Five: CHILD PROTECTION IN OTHER FIRST NATIONS

United States of America

There are similarities in the ways the original peoples of what is now Australia and the United States of America (USA) were deprived of their lands and government structures, and there are differences in the way English laws were interpreted to take account of original Aboriginal sovereignty.

In a series of cases beginning in 1823[108] the USA Supreme Court decided that conquest of the Indian nations by the European powers resulted in a limited form of sovereignty which they termed 'domestic dependent nationhood'. In Australia it was assumed and later decided by the High Court of Australia that the continent was settled rather than invaded and conquered and hence was 'terra nullius' with no legal system other than that established by the English.[109]

The USA Supreme Court decided that the Indian tribes living on lands allocated to them after their original dispossession retained decision-making powers over matters relating to the internal organisation of the tribes including family and child welfare.

The legislation under which some tribes exercise jurisdiction over their peoples is that enacted by white American legislatures as determined to be within their competence by white American courts.[110] The USA courts restricted those powers in many ways including:

- The jurisdiction of the tribes would be only that allowed by the superior courts of the newly created USA
- The model rules for the many different Indian nations were adopted without much variation by the tribes and those Indian nations which have sought to adopt specifically "Indian" rules have included some of the most conservative elements in social life in the USA
- The allowed jurisdiction would be confined to the territory of the Indian reservations set aside by white America as a measure to contain the original jurisdiction of the various Indian nations over the entire country
- Indian jurisdiction is confined to the people living on the reserves and does not extend to members of Indian nations living off the reserves
- National legislation set broad guidelines which could be over-ridden by the detail set by the numerous State laws.

As in Canada and Australia, the USA has a history of forcible removal of Indian children from their families and communities. From 1850 until the 1960s the United States systematically removed Indian children to reformatory schools where they were forbidden to speak their

[108] Johnson v McIntosh 1823; Cherokee Nation v Georgia 1831; Worcester v Georgia 1832

[109] The cases are analysed by Justice Brennan in Mabo v Queensland No. 2 (1992) 175 CLR 1

[110] One of the few examples in the literature of Aboriginal peoples practising law methods quite outside the jurisdiction of the colonial legal system is the 'restorative justice' methods of the Onkwehonwe in Canada described in Haslip Susan, The (Re) Introduction of Restorative Justice in Kahnawake: "Beyond Indigenization", in Murdoch University Electronic Journal of Law Vol 9 No 1 March 2002; www.murdoch.edu.au/elaw/issues/v9n1/haslip91

languages and practice their various cultures.[111] Like Australia, this was done in the name of the government policy of assimilation and was said to be necessary in the best interests of the Indian children. The outcome was the near annihilation of many Indian tribes who had survived the initial invasion of their lands.

The USA, Canada and Australia have all held extensive commissions of enquiry into the removal of Aboriginal children from their families and communities. The United States Congress Commission into American Indian policy estimated that up to 35% of all Indian children were raised at some time by non-Indian families or institutions whether arising from adoption or child welfare proceedings.

Indian Reorganisation Act 1934

The *Indian Reorganisation Act* 1934 is national legislation designed to "encourage the tribes to revitalise their self-government."[112] Indian nations were permitted and then encouraged to develop written constitutions, legal and court systems and then codes of child welfare laws.

Despite the seemingly progressive nature of these measures, the *Indian Reorganisation Act* has been described as a denigration of Indian treaty rights. The Act abandoned assimilation by land confiscation (one of the many permutations of US Indian policy reflected in Australian practice) but established institutions such as tribal courts and tribal governments which were essentially American in nature.[113] Hence it has been called part of "the great lie" of United States Indian law and policy:

> [The Indian Reorganization Act of 1934 was] designed effectively to replace any vestige of the original indigenous governments with governments to be designed and implemented by the United States itself. These governments would be recognized by Congress as the legitimate governments over indigenous territories. The constitutions for the American-made indigenous governments placed all of the political authority of government under the control of an appointed bureaucrat, the secretary of the Interior, and the legislative power in the U.S. Congress. These tribal governments were granted limited powers to enact laws, but they were granted substantial powers to regulate and control tribal people on behalf of the United States. In a very real way, these tribal governments became direct extensions of the United States government, operating under U.S. laws and policies. These tribal governments in effect became colonial governments. The rules under which these colonial tribal governments operated ensured U.S. access to and control over indigenous peoples, lands and natural resources.[114]

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[111] For a popular account of this practice, listen to Johnny Cash, The Ballad of Ira Hayes, on Ballads of the American Indian/Their Thoughts and Feelings The Battle of Wounded Knee. Music for Pleasure & Summit Records Australia

[112] 424 U.S. 382; for background information on Indian Tribal Courts see National Tribal Justice Resource Center, Tribal Court History, at www.tribalresourcecenter.org/tribalcourts/history.asp

[113] Garth Nettheim G 2002, 'Tribal Courts in the USA: Some Glimpses', Indigenous Law Bulletin [2002] ILB 34; available at www.austlii.edu.au/au/journals/ILB/2002/34.html

[114] Rudolph Ryser, 'Nation-States, Indigenous Nations, and the Great Lie' in Leroy Little Bear, Menno Boldt &Anthony Long (eds) 1984. *Pathways to Self-Determination*, University of Toronto Press, at pages 29-30.

Approximately 275 Indian nations and Alaska Native villages have established formal tribal court systems.[115] The ways in which the Indian tribes have organised the administration of their laws and their justice systems have varied markedly. Some of those laws and procedures are barely distinguishable from the mainstream (although perhaps a little briefer and expressed in plainer language)[116] whilst others use their traditional means of dispute resolution through peacemaking procedures and the use of elders' councils and sentencing circles.[117]

Indian Child Welfare Act (ICWA)[118]

[115] National Tribal Resource Centre, above

[116] See for example, the Crow Tribal Code Rules of Appellate Procedure in the Crow Court of Appeals; the Constitution of the Comanche Indian Tribe of Oklahoma (except its preamble with its reference to "faith in the purposes of our Supreme Being, with abounding pride in our ancient racial heritage" etc); the White Mountain Apache Health and Safety Code (which seems more draconian than most mainstream regimes);these are among over 50 constitutions and codes of Indian tribes available at www.tribalresourcecenter.org/tribalcourts/codes/codesdirectory.asp

[117] National Tribal Justice Resource Center above; Constitution of the Iroquois Nations: The Great Binding Law, Gayanashagowa

[118] Public Law 95-608, 1978

Chapter 21 of United States Code 25[119] is known as the *Indian Child Welfare Act*. Its purpose is stated to be:

> to protect the best interests of Indian children and to promote the stability and security of the Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.[120]

It may be noted that the idea of federal legislation setting minimum standards to be followed by the States also applies to some topics in Australian law and has been suggested as the correct approach in relation to Aboriginal child welfare.

The Indian Child Welfare Act has been studied extensively and is often propounded as a model for other systems of Aboriginal child welfare. Indeed some commentators have described this system as "an example of a complete autonomy model with recognition of Indian tribal jurisdiction over legislative, judicial and administrative matters pertaining to indigenous children."[121] In reality, the jurisdiction of the Indian tribes is far from complete autonomy.

Despite its limitations however the Act has often been challenged and attempts made to restrict its applicability especially in cases where the child does not live on the reservation.[122]

In the 1976 case of *Fisher v District Court of Rosebud County*[123] the United States Supreme Court affirmed the right of the Northern Cheyenne tribe to make child placement decisions where the parties were members of the tribe and lived on the tribal reservation. Denying a plaintiff access to State Courts in those circumstances was not racially discriminatory because the jurisdiction of the Tribal Court arose from the "quasi-sovereign status of the Northern Cheyenne Tribe under federal law."

Having provided for tribal jurisdiction over Indian children living on reserves, the *Indian Child Welfare Act* recognizes shared jurisdiction between Indian tribal courts and State courts where the child does not live on the reserve. A case has to be transferred to the tribal court if requested by a parent or by the tribe unless there is "good cause" not to transfer the proceedings. Either parent can veto the transfer of proceedings to the tribal court and the tribal court may decline to accept the transfer of proceedings. In matters concerning Indian children in State courts, not only do the parents have standing before the court (and so can

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[119] www.law.cornell.edu/uscode/html/uscode25

[120] U.S.Code 25, Chapter 21, section 1902

[121] Chris Cuneen & Terri Liebesman 2002.A Review of International Models for Indigenous Child Protection at page 5

[122] See for example the Adoption Promotion and Stability Act 1996 discussed in 'Why Title III of H.R. 3286 is Bad for Indian Children', http://thomas.loc.gov/cgi-bin/query/F?r104:1:./temp/. Title III would have eliminated Tribal Court jurisdiction in off-reservation adoption or foster care cases unless the parent was a member of the tribe and could prove significant social, cultural or political affiliation with the tribe.

[123] 424 U.S. 382 (1976)

participate fully in the court proceedings) but so also can any Indian custodian and the child's Indian tribe intervene at any point in the proceeding.[124]

State courts are bound by the equivalent of the Aboriginal Child Placement Principle. That placement principle applies whether the placement is voluntary or involuntary and whether done through a public or private agency. Additionally, a person seeking a foster care placement or 'termination of parental rights' in a State court has to show they have made positive efforts to help prevent the breakdown of the relationship which led to the removal action being taken:

Any party seeking to effect a foster care placement of… an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.[125]

Furthermore, the onus of proving that an Indian child should be placed outside the Indian family is on the party asserting it:

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[126]

Many of the phrases in this part of the legislation have been litigated including "active efforts", "clear and convincing evidence", "qualified expert witnesses", "continued custody" and "serious" damage to the child.

Meaning of "active efforts"

The Indian Child Welfare Act does not define "active efforts" and the meanings given to the term have varied widely. In the absence of any cases on the issue decided by the United States Supreme Court, the decisions of the various State courts have governed how the law is applied. There is little consistency between the State courts about how the term should be interpreted.

In some cases, 'active efforts' has been interpreted to impose no higher responsibility than 'reasonable efforts' as used in the general child welfare law.[127] This seems to ignore the purpose of the Indian Child Welfare Act, which is to redress the unacceptable rate of disruption of Indian families.

Some United States courts have held that the standard to be reached in establishing that active efforts had been made to prevent the breakup of an Indian family was "beyond reasonable doubt", the standard applicable to criminal conduct.

Meaning of "clear and convincing evidence" - Standard of proof

In Australia, the standard of proof in civil cases is "on the balance of probabilities" whereas, in view of the greater consequences involved, the standard in criminal cases is "beyond reasonable doubt." Accordingly, the decision-maker needs to be convinced to a higher

[124] Title 25, Chapter 21, section 1911 (c)
[125] Title 25 Chapter 21 Subchapter 1 section 1912 (d)
[126] Same at section 1912 (e)
[127] In re Adoption of Hannah S., 48 Cal. Rptr. 3d 605

standard in a criminal case than in a civil case. This is why a person can be acquitted of a crime but be found liable to pay damages in a civil case based on the same facts.

Meaning of "good cause to the contrary"

The "good cause to the contrary" exception has also resulted in much litigation, often with quite contradictory results.

In an Alaskan case, the appeal court agreed that "good cause to the contrary" was shown by the mother's preference, the bond between the child and the adoptive parents, and the uncertainty of the child's future if not adopted.[128] On the other hand, the case of *Alicia*[129] observed the Indian Child Welfare Act requires no preliminary finding that a child must have a particular kind of relationship with an Indian tribe and there is no justification for a court to go behind the plain words of the Act itself. In that case, the appeal court of California followed observations in the US Supreme Court case of Holyfield that use of the existing Indian family doctrine returned custody proceedings to a time when Indian children were removed from their families "by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing."[130]

'Existing Indian family' doctrine

Another area of litigation about the USA Indian Child Welfare Act has been the notion applied by some courts that the Act applies only when they find that an "Indian family" exists. Some courts have found a child of Indian heritage does not belong to an "existing Indian family" and so the provisions of the Indian Child Welfare Act do not apply.

The USA legislation defines an "Indian child" as an unmarried person under age eighteen who is either a member of an Indian tribe or who is eligible for membership of an Indian tribe and is the biological child of a member of an Indian tribe. Not all tribes are recognised by the federal government and not all tribes are recognised by the various States. Although membership of tribes is based largely on ancestry, it is possible to be a member of a tribe without having any Indian ancestry.

In a case in the Supreme Court of Kansas[131] a child of an unmarried non-Indian mother and an Indian father was adopted out at birth to a specific non-Indian couple and the father and his tribe tried to reverse that placement relying on the Indian Child Welfare Act. The Kansas Supreme Court found there was no existing Indian family and so the Act did not apply:

> "...the overriding concern of Congress...was the maintenance of the family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment. It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother."[132]

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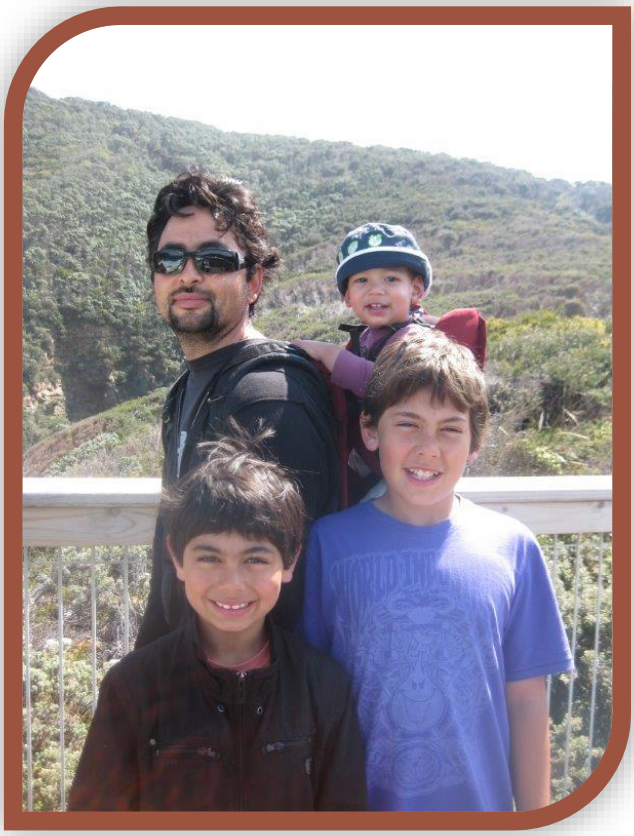
[128] Matter of Adoption of F. H. Alaska (1993) 851 P.2d 1361

[129] In re Alicia

[130] In re Alicia at page 15 citing Holyfield at pages 34-35

[131] In the Matter of Adoption of Baby Boy L Kan. 1982 643 P.2d 168

[132] Same at page 175



Other State courts have made similar findings whereas yet others have found no justification in the words of the Indian Child Welfare Act for the court to find that an Indian child is not a part of an Indian family.[133]

A Californian Court of Appeal overturned a trial judge's decision that an Indian child had not 'developed an identification as an Indian'[134] finding no justification for such a requirement in the words of the Act. They also found that the Act required notification of custody proceedings to an Indian father's tribe even though the father had had little contact with his three year old child.[135]

Other cases even in the same States have reached a different conclusion, approving the existing Indian family doctrine. A Californian Court of Appeal found the purpose of the Indian Child Welfare Act was not served:

> by an application of the Act where the child may be of Indian descent, but where neither the child nor either parent maintains any significant social, cultural or political relationship with Indian life.[136]

In that case, newborn twins were relinquished for adoption by non-Indians but a year later the father claimed Indian heritage and tried to have the children placed instead with his extended family. In rejecting the father's claims, the court gave priority to the children's right to a stable and permanent home.

Some of the cases that have found an existing Indian family doctrine to apply to the Indian Child Welfare Act have based their decision on a perceived need to avoid "serious constitutional flaws" with the legislation. This is reminiscent of speeches in the Tasmanian parliament where members have sought to find reasons to oppose measures such as Aboriginal Land Rights or marriage equality.

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[133] *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989)
[134] In re Junious M. (1983) 144 Cal.App.3d 786
[135] In the Matter of Adoption of Lindsay C. (1991) 229 Cal.App.3d 404
[136] In re Bridget R. (1996) 41 Cal.App.4th 1483 at p.1512

Californian courts have described in detail the factors they consider necessary for parents to qualify as being an Indian family. In the case of In re Bridget R.[137] the factors the court considered should be taken into account included:

- The parents' ties to the tribe rather than other extended family members ties;
- The parents' ties at the time they relinquished parental rights, not later;
- The parents' private identification of themselves as Indians;
- The parents' private following of tribal customs;

The parents' participation in tribal communal affairs including voting in tribal elections, subscribing to tribal newsletters and publications, participation in Indian religious, social, cultural or political events, or maintenance of social contacts with other members of the tribe.

Other courts have observed that this detailed examination by State courts in the USA is exactly what the federal Indian Child Welfare Act was designed to avoid as it had resulted in so many removals of Indian children in the past.

The Californian Court of Appeal in its 1998 decision in In re Alicia S.[138] did not follow the existing Indian family doctrine but did observe that a child's interest in permanence and stability might outweigh the competing interests of the parents and the tribe, noting that cases such as Bridget and Alexandria would otherwise have resulted in a child being removed from a non-Indian environment where the child had spent all its life. In that possibility, the court found "good cause" to depart from the usual preference for an Indian placement.

These disagreements about the meaning of the Indian Child Welfare Act have not been considered until very recently by the highest court in the USA, the United States Supreme Court. Until then, only one case had reached that court about the meaning of the Act. That case concerned the meaning of "domicile" when a child's parents had deliberately left a reservation to give birth to the child and have it adopted by a specified non-Indian family. The Court found they were nevertheless "domiciled" on the reservation and so the child was subject to the adoption provisions of the Indian Child Welfare Act and specifically that the tribal court had exclusive jurisdiction over the custody proceedings.

In that case of *Holyfield*, the Supreme Court made important observations about the Indian Child Welfare Act, noting a purpose of the Act was to correct decisions made at State level and to ensure national uniformity. The Court also agreed with a Utah decision about the importance of Indian communities and tribes, not merely of individuals and their families:

> "The protection of this tribal interest is at the core of the ICWA which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents."[139]

The Court also observed that Indian children have an interest in keeping a relationship with their tribes regardless of what their parents do because of the available evidence about the detrimental effect on the children of being placed outside their culture.

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[137] Same at pp. 1514-1515
[138] Super. Ct. No. 77361
[139] Holyfield, above at page 52

Most recently the United States Supreme Court decided by the smallest possible majority of 5 to 4 that section 1912 of the Act does not apply to a biological father who has never had custody of his child.[140] Therefore the higher standard of requiring it to be shown that serious harm to the child is likely to result from the Indian parent's continued custody did not apply and there was no requirement for remedial efforts to be made before an adoption could occur.

Other provisions of the United States legislation worthy of note because of the ways they differ from legislation in Australia include:

- those which require written records to be kept of the efforts made by the State to comply with the Aboriginal child placement principles with those records;
- an agency or court considering a foster or adoptive placement must follow the decision of the child's tribe to make a placement outside of the principles and the views of the child or Indian parent are to be "considered"[141];
- a parent or Indian custodian can withdraw consent to a foster care placement under State law at any time and the relevant child is then to be returned to the parent or Indian custodian.[142]

Tribal government and courts

The Constitutions of most of the Indian nations and the agreements made between the States and the Tribes under the Indian Child Welfare Act are nearly always heavily influenced by mainstream United States agencies rather than being governed by traditional (or even contemporary) Indian laws.

It is instructive to examine in greater detail one of the Indian child welfare laws which is firmly grounded in current practice but pays particular regard to the historical circumstance of indigenous child removals. The Indian Child Welfare Ordinance of The Confederated Tribes of the Grand Ronde Community of Oregon[143] has as its underlying purpose,

> …to assure the future of the Confederated Tribes of the Grand Ronde Community of Oregon by establishing procedures to protect the best interests of Grand Ronde children and of the Tribe and its customs and culture…Recognizing that Indian children are a tribe's most important resource and vital to the Tribe's continuing existence, the Confederated Tribes of the Grand Ronde Community of Oregon established this code as a means of protecting the health, welfare, language, customs and traditions for all future generations

Further details of how the Child Welfare Ordinance aims to achieve that objective is set out in Appendix 5. Legislative models such as this demonstrate the comparative ease of devising child welfare codes which adapt mainstream forms to the specifics of indigenous communities.

Effectiveness of the Indian Child Welfare Act

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[140] Adoptive Couple v Baby Girl, 398 S. C. 625 (2013). www.supremecourt.gov/opinions/12pdf/12-399_q86b.pdf

[141] Indian Child Welfare Act section 1915 (c)

[142] Same at section 1913 (b); however, consent to adoption cannot be withdrawn after 2 years even if obtained through fraud or duress unless State law provides otherwise: paragraph 1913 (d)

[143] www.grandronde.org/Legal/Docs/IndianChildWelfare

Almost twenty five years after the introduction of the Indian Child Welfare Act there was little information assembled on which to assess the success or otherwise of the Act. In the year 2000 a study of the compliance of State authorities with the Act was still a "pilot study".[144]

Grave difficulties remain in having the State authorities comply with the provisions of the national legislation. Some of the reasons given[145] for ignoring the legislative safeguards include:

- the authorities did not know the child was an Indian because the child did not "look Indian" and was not asked;
- they tried to contact the Tribe but without success;
- they did not know the Act existed;
- they did not enquire of the Tribal Court as to whether or not an Indian child living off the reserve had previously been made a ward of the Tribal Court and so was outside State jurisdiction;
- legislative foster care preferences were not followed;
- more financial resources went to an Indian child who was fostered under the State system than to a child receiving family preservation services on the reservation.

The Indian Child Welfare Act arrangements have come under attack particularly in Alaska for being a major hurdle to native self-determination and sovereignty. The Alaska Inter-Tribal Council asserts that funding arrangements under the Act are one example of how new structures created by governments remove power and funding from villages and tribes. Alaskan Native Claims Settlement Act Corporations were established by legislation in 1971as part of the negotiations to settle land claims. Funding and authority was removed from villages and tribes to the corporations at the regional level and those corporations in turn operate under state law rather than sovereign tradition and culture. The Alaska Inter-Tribal Council calls this political ethnic cleansing designed to eliminate the viability of tribal councils by starving them of funds.[146]

Despite its drawbacks, the United States legislation provides better protection for indigenous children and families than does Australian law. Compare Australian legislation to this description of the United States Indian Child Welfare Act:

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[144] Jones B, Jodi Gillette, Deborah Painte & Susan Paulson 2000. Indian Child Welfare Act: A Pilot Study of Compliance in North Dakota. See also Texas Department of Family and Protective Services (2005) 'Plan for Compliance with the Indian Child Welfare Act 2005-2009', www.dfps.state.tx.us/About/State_Plan/2005-2009_Plan/15.asp which contains this account of how the state and tribal systems 'work' together:
In September 2000, the Kickapoo Tribe indicated that they had received a federal grant, hired investigators and law enforcement officers and began working to develop their own tribal court system. It is believed that the Tribe is now conducting its own child abuse investigations on the reservation. CPS has had limited involvement with children living on the reservation as very few reports have been received over the last several years

[145] Same for example

[146] Alaska Inter-Tribal Council Website, 'Political Ethnic Cleansing', www.aitc.org.advocacy.htm

When the petitioning party's objective is the termination of parental rights to an Indian child, the party has the burden of demonstrating beyond a reasonable doubt that serious emotional or physical harm will befall the child if parental rights are not terminated, and that active efforts to provide remedial and rehabilitative services have been unsuccessful. Again, the findings must be supported by the testimony of a qualified expert witness, one who is versed in the ways of traditional Indian child-rearing practices.[147]

[147] Same at page 4

Canada[148]

The treaty rights of the Indian tribes recognised by the USA Supreme Court were similarly recognised by Canadian courts. Like the United States and Australia, Canada also has political and legislative responsibilities divided between the national government and the States (called 'Provinces' in Canada) and Territories. The national government has responsibilities for 'status Indians' only, whereas the provinces are responsible for child welfare including for non-status Indians and native peoples living off reserves. Except for the province of Quebec which derives its legal system from France, Canada's legal system is based on English common law in the same way as Australia's legal system.

There are also many differences in the legal position of Aboriginal peoples in Australia and Canada. Unlike Australia, Canada created a legal entity of 'status Indian' so Canadian law distinguishes between status Indian, non-status Indians and people of mixed ancestry (Metis).[149] Canada has treaties with various Indian nations, has land claims settlement agreements with Inuit and First Nations peoples, has a federal Indian Act, and constitutional recognition of Aboriginal rights since the Constitution Act 1982.[150] Under that Act, jurisdiction for child and family services rests with the Provinces rather than the federal government, but it also provides for federal responsibility for First Nations peoples in areas such as child and family services. The federal government has not acted on that power to pass federal legislation for First Nations child welfare leaving it to the provinces.[151] The federal government has,

[148] Unless otherwise stated, this Part is taken from Department of Human Resources and Social Development Canada 2002, *Child Welfare in Canada 2000*. Government of Canada. www.hrsdc.gc.ca/cgi-bin/hrsdc-rhdsc/print

[149] University of British Columbia, Indigenous Foundations. Available at http://indigenousfoundations.arts.ubc.ca

[150] Peter Jull 2001. *'Nations with Whom We Are Connected' – Indigenous Peoples and Canada's Political System*, [2001] AILR 12. Jull also traces the development and varying fortunes of the various Aboriginal movements in Canada in the modern era, including the work of the influential Berger Commission of the 1970s.

[151] Department of Human Resources and Social Development Canada. Child Welfare in Canada 2000.

however, funded such services for Aboriginal peoples with status under the Indian Act, Canada.

In Canada the system of residential schools, whose harsh regimes were aimed at turning Indians into white Canadians, was similar to the residential schools of the United States and the religious 'orphanages' and homes in many parts of Australia. However, it was after the overtly assimilationist measure of residential schools had ended in Canada that the harshest cultural deprivations were practised.

Integration Policy

From the 1960s onwards there was a huge increase in the number of indigenous children removed from their families in Canada for "protective" reasons under the government policy of integration which purported to treat Aboriginal children in the same way as white children. The result has been described as cultural genocide:

Children were removed without consideration of cultural difference, according to the ethnocentric assumptions of social workers, regarding matters of perceived health, housing, diet etc. These children were more culturally isolated than those earlier sent to residential schools, due to the absence of their peers in the placement. This isolation engendered a greater degree of assimilation than under the previous overtly assimilationist policy.[152]

It is now estimated that modern child protection measures resulted in three times as many Indian children being removed from their families and communities as under the residential school policies of the past.

Self management

During the 1970s and 1980s, measures aimed at restoring Indian band control over child welfare services were funded under tripartite agreements with the federal and provincial authorities. Rather than enacting federal legislation about First Nations child welfare, the national government with its responsibility for status Indians entered into agreements with various First Nations.

The federal government was involved in the agreements through its Department of Indian Affairs and Northern Development (DIAND) and the First Nations peoples through their Band organisations. Many First Nations Child and Family Services (FNCFS) agencies were formed in Canada throughout the 1980s under a variety of agreements with the provinces, the national government or both.

There was an increase in the number of Indian children going into care under these arrangements. Some considered this increase to be due to higher rates of reporting to Indian-run services.

A three year moratorium on the creation of new First Nations Child and Family Service agencies was imposed in 1986 by the DIAND. The agencies had been found to be costing governments much more than anticipated. A Federal Directive in 1991 put the agencies under greater control both operationally and financially. They were required to provide child

[152] Andrew Armitage 1993. 'Family and Child Welfare in First Nation Communities' in Brian Wharf (ed). *Rethinking Child Welfare in Canada*, McClelland & Stewart, Toronto at pages 131 - 171

protection services according to the legislation of the province in which they operated and under delegation from the relevant province. Other restrictions included:

- minimum of 1000 children to be covered by the service
- exclusion of child-care services
- government legislation and standards to be followed
- new agreements to be entered into only as resources become available.

Self government

Following a 1999 national policy review of the 1991 federal directive described above, Aboriginal self-government became another option for Aboriginal child welfare authorities. "Self-government agreements" between First Nations and the provincial and federal governments were negotiated under which the governments allow the First Nations the power to legislate and deliver a range of services including culturally appropriate child welfare services. Such regulation and services must be compatible with the legislation of the particular province. The agencies may be delegated to provide all child welfare services including child protection whereas other agencies may provide only support services such as foster care, preventive and voluntary services.

Provincial systems

The provincial and territory government departments set standards and requirements for organisations which provide child welfare services and oversee and monitor the support services provided to families and children as well as providing preventive and intervention services to children at risk of abuse and neglect.

In many Canadian provinces, Indian agencies operate child welfare services through delegation from government with the practice being in advance of the legislation. However, the service models are based squarely on the legislative schemes and mainstream services and the agencies are generally under-funded.

The administration of child welfare services differs between the provinces. In Ontario, private non-profit agencies (Children's Aid Societies) provide the services under contract to the government whilst in Nova Scotia and Manitoba service providers are both non-government and government agencies. First Nations Child and Family Services agencies provide the services directly even in some provinces where only government agencies deal with the rest of the population. In some jurisdictions, the primary method of delivering child welfare and adoption services is community-based non-profit agencies operating under boards of directors. Most jurisdictions have informal child abuse teams or committees made up of professionals from health, education, legal and social services for a variety of purposes including public education, advocacy, protocol development and advice on individual child protection cases.

In Ontario, the Children's Aid Societies are governed by a Board of Directors with an Executive Director in charge of management. The Board sets the internal policy and strategic directions, approves the service plan and budget submission and hires the Executive Director. Every Children's Aid Society is required to have a review team whose function is to provide professional advice or protection recommendations on child abuse cases. The teams include people professionally qualified in medical, psychological, developmental, educational or social

assessments and must include a medical practitioner. The review teams operate as a panel of at least three members and makes recommendations to the Society about how a referred child should be protected.

Manitoba was the first Canadian Province to enter into an agreement with an Indian band and the Canadian government. The governments saw this as an 'evolutionary' process in the 1980s:

Aboriginal child welfare services then entered into a second phase of evolution whereby the capacity to deliver child welfare services was developed by the First Nations communities in partnership with the provinces and the federal government.[153].

In 2000 in the province of Ontario there were five First Nations child welfare agencies designated to provide child welfare services. The *Child and Family Services Act* of Ontario enables the Minister to designate native communities and enter into agreements for the purposes of the Act. The community can then designate a service delivery body as a child and family service authority and obtain the Minister's consent to function as a Children's Aid Society with full or partial delegation of authority under the Act.

Manitoba, like other Canadian provinces, had divided jurisdiction with First Nations agencies having responsibility only for people living on reserves and those responsibilities could be exercised only through models of delegation from the State requiring compliance with the legislation and standards of the Provinces.[154] Through complex negotiated agreements involving protracted studies, First Nations agencies acquired responsibility for child welfare services off reservations under arrangements which, despite the preparations, changed over time in response to unforeseen circumstances.

The multiplicity of agencies delivering child welfare services in Winnipeg in particular has given rise to problems arising from their concurrent jurisdiction. Cultural appropriateness of service delivery was designed to be achieved through service recipients identifying their service deliverer of choice. Hence, many agencies covered the same geographical area catering for different communities of people but causing confusion about where people should go for assistance.[155]

[153] Child Welfare Canada 2000

[154] Pete Hudson and Brad McKenzie, 2003. Extending Aboriginal Control Over Child Welfare Services: The Manitoba Child Welfare initiative. *Canadian Review of Social Policy*, 51, page.49

[155] Kate Rosier, 2010. Indigenous led approaches to Indigenous child abuse and neglect: An exploration of implementing Indigenous led approaches in Canada, with potential lessons for Australia. National Child Protection Clearinghouse.

The nature of Aboriginal decision-making as delegated decision-making from the Provincial legislation puts it well outside the realm of being an exercise of Aboriginal law and even puts in doubt any claims for a distinctly Aboriginal form of child welfare. As explained by a recent legal study of Aboriginal law making:

Clearly, the delegation of authority under the provincial child protection legislation does not grant any 'sphere of authority' for Aboriginal customary law. It improves the sensitivity of service provision, and agencies can and do provide additional services not required under the legislation, but it absolutely does not recognize Aboriginal jurisdiction, or Aboriginal rights, or a qualitatively distinct Aboriginal society which has a fundamentally different orientation to the care and well-being of children. ...Aboriginal people can participate in the jurisdiction which has authority for the care and well-being of their children only if they agree to accept the dominant framework of Eurocentric values and law, and exercise no independent authority. The delegation process is structured to ensure that there will be no elements of "Indianness" in the delivery of services to Aboriginal children and families.[156]

Nearly all Canadian jurisdictions have mandatory reporting laws although reports may be made to the police as well as child protection authorities in some jurisdictions. Protective authorities use screening and risk assessment tools based on the New York Risk Assessment Model or similar models tailored to the specific legislation of the relevant province including British Columbia, Manitoba and Ontario.[157] The provincial legislation also has versions of the Aboriginal child placement principle for First Nations children removed from their families.

The strict regulation of agencies in Manitoba differs from the greater uniformity that occurs in British Columbia. The largest urban Aboriginal child welfare agency in the country which provides child protection services as well as all other child welfare services is the Vancouver Aboriginal Child and Family Services Society (VACFSS). Other British Columbian Aboriginal agencies exclude child protection functions that could involve the involuntary removal of children from their families but retain advisory involvement in such matters with the statutory government authority. All the agencies are considered to be providing the services and approaches pre-determined by the Provinces rather than Indigenous devised solutions.[158]

Some commentators consider the most effective work is done by Aboriginal agencies, such as those in Manitoba, that are not part of the government regulated 'Authorities' system that operate under statutory responsibilities. Those bodies have more freedom to devise creative solutions at both preventative and tertiary levels.[159]

The delegation agreements with Aboriginal agencies and their employees under the *Child, Family and Community Service Act* of British Columbia vary in the extent of the responsibilities they confer on community agencies that represent the nearly 200 First Nations bands in British

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[156] Vicki Trerise, 2011. Aboriginal Children and the Dishonour of the Crown: Human Rights, 'Bests Interests' and Customary Adoption. University of British Columbia page 210. Available at www.circle.ubc.ca/bitstream/handle.../ubc_2011_fall_trerise_vicki.pdf?, pages 226-227

[157] Although they are more likely to be based on United States models such as the New York Risk Assessment Model. Note also that Quebec has optional rather than mandatory risk assessment tools.

[158] Kate Rosier, 2010, above

[159] Kate Rosier, 2010, same

Columbia.[160] The government department which negotiates the agreements has annual service plans which specify goals, objectives, strategies and performance measures against which the Department is required to report. The performance indicators for the First Nations agencies appear to be the subject of continuing negotiations.

In Canada, the experience of First Nations in operating their own child and family services has encouraged the development of local models of family decision-making. For one Province, these have been described extensively by the Law Foundation of British Columbia which granted over $3million to projects which expanded the use of alternative dispute resolution processes in child protection law. The evaluation of the program describes the agency models for collaborative decision-making, a term encompassing family group conferencing, traditional decision-making and hybrid models of decision-making which meld processes from many Aboriginal nations with family group conference elements.[161]

The common values of the projects included respect; being thankful for existence as humans; connection to spirit; cycles within nature; interconnectedness between all living forms; collective responsibility; and the importance of consensus decision-making. The Circle discussion format guided by a feather or talking stick was a common format and the presence

[160] British Columbia Ministry of Children and Family Development, 'Delegated Child and Family Service Agencies. Available at www.mcf.gov.bc.ca/about_us/aboriginal/delegated/index.htm. The performance targets include, for example, an increase from 54% to 56% of children in out of home care for at least two years who had no change in placement; an increase from 53.2% to 59.5% in Aboriginal children removed from their families who are cared for through Aboriginal communities and providers.

[161] Law Foundation of British Columbia 2009. Report of Aboriginal Child Welfare Collaborative Decision-Making Models. Available at www.lawfoundationbc.org/wp-content and see www.mcf.gov.bc.ca/child_protection/mediation.htm

of Elders was a common feature. The Circle meetings usually last around 7 to 8 hours but may last only ninety minutes or as long as several days. A common theme was for service delivery to continue or re-introduce local Aboriginal ways and practices of responding to child protection with a concentration on history, culture and identity through group work and ceremony. The processes used by the different agencies are described in detail by the Law Foundation.

Nunavut

The Territory of Nunavut was created by the division of the Canadian Northwest Territory in 1999 following the settlement of an Inuit land claim in the Nunavut Land Claim Agreement. The new Territory has a majority of Indigenous people (Inuit, Dene and Metis) and the Territorial government rules for all people in the Territory.

In the Inuit Territory of Nunavut the relevant legislation is that adopted from the Northwest Territories. The *Child and Family Services Act* of Nunavut enables the Minister to establish Community Agreements to delegate authority to persons and groups outside the Department of Health and Social Services. The Act sets out the framework and process by which a Community Agreement may be entered into with a corporate body. The Agreement must specify the matter for which authority and responsibility is delegated, specify the community and Aboriginal children for whom the corporate body may act, establish a Child and Family Services Committee and define its role and establish terms of office and procedures by which the Committee exercises its powers and duties under the Act.

The Child and Family Services Committee is to be a committee of the Board of Directors of the Aboriginal organisation, with members appointed by the Board in accordance with the terms set out in the Community Agreement. The Director of Child and Family Services may authorise the delegation of powers and duties under the Act to the Chairperson of the Child and Family Services Committee and that Chairperson is subject to the direction of the Director of Child and Family Services. The Community Agreement enables the corporate body to establish standards for its community to determine the level of care required to meet the child's needs and whether or not the child requires protection. The legislation requires Aboriginal organisations to be informed when an Aboriginal person is a party to a child protection court case.

Several fact-finding visits have been made by Aboriginal groups from Australia to Canada in recent years, particularly to examine their models of Indigenous child welfare, but details of their findings are sparse.[162]

New Zealand

The Tasmanian child protection and youth justice legislation is firmly based on the New Zealand *Children Young Persons and Their Families Act* 1989. Central to their structures is the stated principle of involving the families in decision-making through family group conferencing.

[162] See for example, 'SNAICC visits Canada and New Zealand', SNAICC News December 2005-January 2006.

Family group conferencing in child protection cases is described as "a means of balancing children's need and right to be safe, with their need and right to be in a family."[163] In Tasmania, as in most other parts of the world where family group conferencing has been introduced by legislation, there has been a failure to recognise that what is culturally appropriate in one context cannot be transported to a different cultural context, not only without 'adjustment' but without the consent and invitation of those who are subject to the new regime. Family group conferencing has been criticised for precisely that reason[164]although it appears to have been well received in Scandanavia and elsewhere.[165]

The New Zealand model has been criticised for not providing sufficient resources to address the underlying problems within families and communities and because it privatises child protection issues within a family conference forum.[166] As well, the legislation has the potential to make the principles of the maintenance of the indigenous family and the interests of the individual child subject to each other.[167] In New Zealand as in Australia the "best interests of the child" has been interpreted in such a way as to override the interests of the family and community rather than the duality of the concepts being recognised by decision-makers. Indeed, the New Zealand legislation has been described in scathing terms:

Where legislation implements processes of self-determination, it is important that the structural framework, and preferably legislative framework, within which new forms of decision-making for vulnerable people are implemented are clear, well resourced and well defined. The potential for open ended undefined processes for child protection to serve neither processes of self-determination nor protection of vulnerable parties needs is evident in the criticism which the NZ legislation has given rise to.[168]

The problems identified with the family group conferencing model are worth identifying both because similar concerns have arisen with family group conferencing in Tasmania and because a possible alternative system including community panels would need to take identified problems into account.

In New Zealand a Social Policy Agency Study in 1995[169] identified the problems to include:

- inadequate information about the situation giving rise to care and protection concerns and the family group conferencing process
- the need to wait for the family group conferencing process to commence before receiving help
- difficulties regarding the process for inviting participants

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[163] Department of Child, Youth and Family Services of New Zealand in 'New Zealand Government Online', www.cyf.govt.nz/text/1254.htm

[164] Juan Marcellus Tauri, 'Family Group Conferencing: The Myth of Indigenous Empowerment in New Zealand' in *Justice as Healing* History of child protection services, Resource Sheet, National Child Protection Clearinghouse

[165] See for example Liv Schjelderup and Cecilie More 'Family Group Conferencing in Norway: Development and Status' in *Restorative Justice News Online.* Available at www.restorativejustice.org/editions/2005/june

[166] Chris Cuneen and Terri Liebesman, above, Part One page 9

[167] Same

[168] Same at page 10

[169] Terri Libesman 2004. Child Welfare Approaches for Indigenous Communities: International Perspectives. *Child Abuse Prevention* Issues No. 20. Australian Institute of Family Studies page 10

- inadequate management of relationships between participants at family group conferences
- undue influence of officials and some family members in the decision-making process
- failure to ensure decisions meet the needs of the child and address the underlying issues
- resourcing of family group decisions
- unequal participation of attendees
- lack of effective monitoring of implementation and failure to address non implementation.

All of these problems have been encountered by Aboriginal participants in the Tasmanian family group conferencing process.

Some commentators have seen these problems as indicating tensions between the dual goals of strengthening families and protecting children.[170] This report suggests it is the legislative framework itself which has created those tensions.

On the positive side for the participants, and the reasons why some social workers do not favour the process, the method is intended to change the traditional role of the child welfare expert, including relinquishing responsibility for what happens with the children.[171]

Many of the arguments for and against the family group conferencing model ignore its beginnings as a purported adaptation of Maori methods of dispute resolution. The method is seen as empowering for indigenous peoples as well as showing the ability of the dominant system to make itself culturally responsive and incorporate Aboriginal philosophies and practices.[172] In reality, the method as incorporated in the Children Young Persons and Their Families Act "underlines the willingness of the State to disempower Maori by employing their justice processes while denying them a significant measure of jurisdictional autonomy."[173] On this analysis, the use of family group conferencing, especially in youth justice matters, has the same tokenistic quality as using Aboriginal words to name buildings, flying the Aboriginal flag over institutions which otherwise ignore the presence of Aborigines, and paying lip service to the traditional owners in welcome to country ceremonies.

Chapter Six: SOME MAJOR ISSUES IN ABORIGINAL CHILD PROTECTION

Preferred Models of Child Protection

The Australian system of child protection is in transition from an approach based on legal intervention (called the legalistic or forensic approach in the literature) to a public health model. The legalistic approach works to develop a legal response to allegations of child abuse based on determining if the allegations, if true, warrant intervention by the State. This

[170] Same note 72 at page 11
[171] Liv Schjelderup and Cecilie More above
[172] Tauri above
[173] Same at page 2

approach has involved the professionalisation of the child protection sector with the development of decision-making aids, guides and check lists to assist professional decision-making. In turn, this has meant child protection workers spending a lot of their time on investigative and administrative (including court) functions with fewer financial and human resources devoted to supporting families in trouble. The result has been the impossibility of child protection services keeping up with demand.[174]

The emerging model of child welfare and protection is the public health model, also described as the 'ecological framework' of child abuse. These terms refer to the connection between child neglect and the social disadvantage that arises from factors such as racism, unemployment and poverty both of families and neighbourhoods or communities.[175] These systemic issues are approached through a public health model which recognises that attempts to change parental behaviour will always have limited results as it leaves untouched the societal and systemic factors that cause the existence of the 'haves' and the 'have nots'. In the case of Aborigines, this social and economic disparity is exacerbated by dispossession, powerlessness, discrimination and racism.

The public health model of child protection requires the availability of services at all levels from universal services available to all, through secondary services to support those at risk, to the tertiary end point of child protection intervention. It requires system reforms so that families can access the services they need easily and early with a resulting decrease in the

[174] Alister Lamont & Leah Bromfield 2010. History of child protection services, Resource Sheet, National Child Protection Clearinghouse

[175] See, for example, the studies cited in Ruth Lawrence and Penelope Irvine 2004. 'Redefining fatal child neglect' in *Child Abuse Prevention Issues* No 21, Australian Institute of Family Studies, especially at page 9

need for State intervention in child protection.[176] This contrasts with child protection being the first point of contact for families requiring them to have a preventive function which they are ill-equipped to provide.

Recent years have seen government recognition of the importance of the early years of childhood to the long term health and well-being of the population. Tasmania has seen an Our Kids Bureau, the Early Years Foundation, and the Department's 'Kids Come First' reports since 2009 giving statistical data on changes in child and youth health and well-being – all designed to implement a holistic approach to children and young people.

Throughout Australia, new programs have emerged to provide early supports for Aboriginal families in order to avoid child protection interventions. In Victoria there is an Aboriginal Best Start program which helps local services work together to support families with young children with issues such as increasing participation in kindergarten; Tasmania has Aboriginal parenting projects; South Australia's Port Augusta Aboriginal Families Project was designed for families with multiple problem issues who were receiving services from a variety of agencies and with whom new tools such as the Life Wheel and the Financial Wheel were showing benefits.[177] There are very many more examples of support programs, mostly funded on a trial basis, in both mainstream and Aboriginal services.[178]

The Tasmanian system of Gateway services is part of the new system design for early intervention services. However, there is currently no provision for specifically Aboriginal preventive and early intervention services.

Typical evaluations of the effectiveness of child maltreatment prevention programs measure short-term changes in participants rather than changes in the incidence of child abuse. The short-term changes studied are those thought to work against child maltreatment such as social inclusion and knowledge of child development. Those matters are believed to be relevant because some studies have found abusive parents to be socially isolated and to lack knowledge of child development. Other studies have attempted to demonstrate the effect particular programs have on the actual incidence of child maltreatment but with variable results.[179]

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[176] Leah Bromfield and Prue Holzer 2008. Protecting Australian children: Analysis of challenges and strategic directions, Community and Disability Services Ministers' Conference, Australian Institute of Family Studies

[177] Sharon McCallum, Port August Aboriginal Families Project Review, August 2001, www.health.sa.gov.au/LinkCI/pt-aug-aboriginalfamilies-2001

[178] See for example, Telstra Foundation, Early Learnings Research Report Vol 1, 2004; Telstra Foundation, Early Learnings– Indigenous Community Development Projects Research Report Vol 2, 2005, SNAICC, Early Childhood Case Studies; SNAICC, Footprints To Where We Are: A Resource Manual for Aboriginal and Torres Strait Islander Children's Services, 2005;SNAICC, Indigenous Parenting Project, July 2004; Section 3 of Child Death Inquiries Unit DHS (Vic), Child Death Analysis Report – Protective Issues for Newborn Siblings of Children Previously Taken Into Care; Durst Douglas, It's not what but how! Social Service Issues Affecting Aboriginal Peoples: A Review of Projects, Human Resources Development Canada, 2000; National Child Abuse Prevention Awards as reported in National Child Protection Clearinghouse Child Abuse Prevention Newsletters, Australian Institute of Family Studies

[179] Oates (1979) Dubowitz (1986) and other studies cited in Robert Caldwell 1992

The financial benefits of a prevention as against an intervention and rescue approach have been advocated as a powerful reason in favour of universal family support services. One United States study calculated this to be a 19 to 1 cost advantage to prevention.[180]

The Michigan cost benefit analysis contemplated a prevention program which started before birth and worked intensively with the parents during the child's first year of life. Hence the types of costs considered to be prevented included those associated with low birthweight, infant mortality, medical treatment, child protective services, foster care, special education, juvenile justice involvement, adult criminality, psychological problems. The type of prevention programs studied in that analysis were family home visitor programs, parent education programs and interventions designed to make children less vulnerable to abuse such as children's protective behaviours programs for sexual abuse prevention

The provision of such services outside the government sector requires a guaranteed financial allocation for effectiveness. Inadequate funding of Aboriginal prevention and early intervention services has been widely condemned. In the context of the need for national policy initiatives, the then Executive Director of SNAICC, Julian Pocock, said:

The contrast is stark: when the policy objective was to eliminate Aboriginal culture no stone was left unturned – when the policy need is to preserve Aboriginal culture and re build families we barely lift a finger. The history of Aboriginal communities in the Northern Territory shows that the child welfare system can change society. However, the question now is can it change society for the better as judged by Aboriginal and Torres Strait Islander people?[181]

Pocock warns however that theories of social isolation and building social capital through increased connectedness and interaction is not always positive and that people can be so overwhelmed by poverty, violence and abuse that they are unable to move beyond that situation: "In such circumstances increased social connectedness may simply reinforce the difficulty people face in overcoming the disadvantages that confront them."[182]

Pocock also recommended that child neglect be treated separately from child abuse and that welfare and support interventions be developed rather than investigating cases to establish blame as occurs in cases of physical and sexual abuse. Funding priority should be changed from investigating specific instances of maltreatment and alternative care to "Indigenous family support services and programs which are universally accessible and focused on primary prevention of family conflict, breakdown, family violence, child abuse and child neglect."[183]

Australia has adopted a national public health approach to child welfare through its National Framework for Protecting Australia's Children 2009-2020.[184] This approach relies on a collaborative effort between the Commonwealth government, all State and Territory governments, and non-government agencies working in the area of child welfare. The

[180] Caldwell, Robert 1992. The Costs of Child Abuse vs Child Abuse Prevention: Michigan's Experience. Michigan Children's Trust Fund. Available at www.msu.edu/user/bob/cost.html
[181] Julian Pocock, above at page 57
[182] Same
[183] Same at page 65
[184] Council of Australian Governments 2009. Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009-2020, COAG, Canberra

emphasis is on promoting the safety, health and wellbeing of children and families in an integrated way as part of a national reform agenda for child welfare.

Under the public health model, issues about inadequate supervision of young children which the forensic model would treat as child neglect, would be dealt with at a whole of population level through measures to reduce road accidents, drowning, poisoning, accidental burns, and inadequate nutrition. Those measures would include media campaigns about injuries in the home, health promotion messages, and legislative regulation of behaviour such as use of car restraints and tamper-proof containers. It has been suggested that formal and informal regulation of alcohol consumption by care-givers through social marketing strategies should be the next step in child abuse prevention given the strong association between alcohol use and child abuse and neglect.[185]

The National Framework aims for six major outcomes each adopting a range of strategies for achieving those outcomes and each with indicators to enable assessment of progress towards achieving those outcomes. Those initiatives are shown in the table below.

Table 6: Outcomes, Strategies & Indicators for Australian Child Welfare[186]

Outcome 1. Children live in safe & supportive families & communities	
Strategy	Strengthen the capacity of families to support children
	Educate & engage the community about child abuse & neglect & strategies for protecting children
	Develop & implement effective mechanisms for involving children & young people in decisions that affect their lives
Indicator	1. Community attitudes towards & value of children 2. Children's perception of their value within the community 3. Child homicides 4. Rate of hospitalisation for injury & poisoning for children aged 0 to 4 years 5. Deaths of children known to child protection

[185] Dorothy Scott, above at page 69

[186] Australian Government, National Framework for Australia's Children

Outcome 2. Children & families access adequate support to promote safety & early intervention	
Strategy	Implement an integrated approach to service design, planning & delivery across the life cycle & spectrum of need
	Develop new information sharing provisions between Commonwealth, state& territory agencies, and non government agencies dealing with vulnerable families
	Ensure consistency of support & services
	Enhance services & support to target the most vulnerable & protect at risk children
	Provide priority access to services for children who are at serious risk of abuse and neglect
Indicator	6. Rate per 100,000 babies born with low birth weight 7. Rate of child protection notifications 8. Number of at risk children & families accessing support services 9. Proportion of pregnant women who receive perinatal care 10. Proportion of communities with improved measures against the Australian Early Development Index (AEDI) 11. Proportion of disadvantaged 3 year olds in high quality child care 12. Proportion of 3 to 4 year olds participating in quality early childhood education, development & child care services 13. Proportion of children aged 4 to 14 years with mental health problems
Outcome 3. Risk factors for child abuse & neglect are addressed	
Strategy	Enhance alcohol & substance abuse initiatives to provide additional support to families
	Enhance programs that reduce family violence
	Increase services & support for people with mental illness
	Enhance housing & homelessness services for families & children at risk
	Increase capacity & capability of:
Indicator	14. Rate per one thousand children accessing assistance through homelessness services 15. Rate per one thousand children living in households where there is adult abuse of alcohol and/or other drugs 16. Rate per one thousand children living in households where family violence occurs 17. Proportion of children with a mental illness who are accessing mental health services 18. Number of children living in jobless families

Outcome 4. Children who have been abused or neglected receive the support & care they need for their safety and wellbeing	
Strategy	Improve access to appropriate support services for recovery where abuse or neglect has occurred
	Support grandparent, foster & kinship carers to provide safe & stable care
	Improve support for young people leaving care
	Support improved national consistency & improved continuous improvement in child protection services
Indicator	19. Number of out of home carers by type of carers 20. 20. Retention rate of foster carers & child protection workers 21. Proportion of investigations finalised by time taken to complete investigations 22. School retention rates (Years 10 & 12) of young people in out of home care or under guardianship 23. Proportion of children on guardianship or custody orders achieving national literacy & numeracy benchmarks
Outcome 5. Indigenous children are safe & supported in their families & communities	
Strategy	Expand access to Indigenous & mainstream services for families & children
	Promote the development of safe & strong Indigenous communities
	Ensure Indigenous children receive culturally appropriate protection services & care
	Raise awareness of child sexual exploitation & abuse, including online exploitation
Indicator	24. Rate per one thousand Indigenous children with substantiated cases compared to other children 25. Rate per one thousand Indigenous children in out of home care compared with other children 26. Proportion of Indigenous children placed in accordance with the Indigenous Child Placement Principle 27. Rate of Indigenous out of home care placement through mainstream or Indigenous services
	- adult-focused services to identify & respond to the needs of children at risk - child-focused services to identify & respond to the needs of vulnerable families - the broader system to identify children at risk
Outcome 6. Child sexual abuse & exploitation is prevented & survivors receive adequate support	
Strategy	Enhance prevention strategies for child sexual abuse
	Strengthen law enforcement & judicial processes in response to child sexual abuse & exploitation
	Ensure survivors of sexual abuse have access to effective treatment & appropriate support
Indicator	28. Number & rate of children in substantiations, by abuse type

The annual reports on progress towards the desired outcomes reveal the difficulty of reporting on progress towards the progress indicators and reveal the ongoing difficulties of achieving national goals when legislation and practice remains with the states and territories.

The level of evaluation and oversight required to assess performance under the National Framework gives rise to interesting issues about formal and informal regulation of families. It has been observed that as formal State regulation increases, there may be a corresponding decrease in informal family and peer regulation which has been effective in protecting children within families in the past:

> ...I suspect we may be witnessing an increasing reluctance of kith and kin to perform their traditional function of "informal regulation" in relation to childrearing. The fact that relatives of a child are frequently the notifiers to child protection services and that some family members have been awarded compensation by the state in the wake of child abuse related deaths in cases previously known to child protection authorities may be indications of a shift in this function from the family to the state.[187]

A new regime of 'responsive regulation' would require acceptance of the fact that no child protection system can prevent all child abuse deaths and increasingly removing large numbers of children from their families because they MAY be at risk of harm can cause actual and significant harm to children and their families[188] It also raises ethical and political considerations of the degree to which families will tolerate State intervention and the high likelihood of unintended consequences if the goals of State regulation are not shared. Unintended and punitive consequences may include even greater social isolation of parents, family shame, loss of public housing making family restoration even harder, grief of children for lost attachments and concern about siblings left at home. Such concerns highlight the need for clarity and hopefully consensus about the aim of State child protection interventions starting with consideration of whether the aim is to prevent harm to the child or to provide a child with better opportunities for development. To allow for both possibilities would require a different framework of regulation, one that would not automatically assume the State can be a more effective long-term guardian than parents nor that it should decide, for example, that emotional abuse suffered through removal from a family is outweighed by the risk of emotional abuse within the family:

> As the state assumes greater responsibility for providing opportunities for the child, either by imposed direction on parents or taking matters into their own hands, it must increasingly shoulder the burden of developing a whole-of-childcare plan. The power balance shifts with risk for government. Individuals and communities that respond to government intrusiveness with grievance and a sense of powerlessness are likely to distance themselves from child protection agencies (Scott, 1996) leaving the state to manage their newly acquired responsibilities with little family cooperation...Current failings by child protection agencies call into question

[187] Dorothy Scott 2009. Regulatory Principles and Reforming Possibilities in Child Protection: What Might be in the Best Interests of Children? *Communities, Children and Families Australia* page 66

[188] Same at page 66-67

> the capacity of the current regulatory framework of the state to deliver on the responsibilities they have assumed.[189]

The 'best interests' of the Aboriginal Child

The concept of the 'best interests' of the child is fundamental to child welfare, adoption, and family law in Australia. It is only in recent years, however, that the Aboriginality of children has been considered relevant to determining best interests, and that recognition is still not given the weight many consider necessary.

Commentators have observed that the concepts of the best interests of the Aboriginal community and the best interests of the Aboriginal child are interrelated and interdependent:[190]

> … the 'best interests of the Indigenous child's community' must inform the best interests of that child and any associated placement or custody decisions. Recognition must be afforded to the fact that 'the best interests of the child and the community are profoundly intertwined and inseparable.[191]

That same conclusion was reached in Canada by the Native Child and Family Services of Toronto when advocating for funds to be diverted from court cases about fostering in individual cases to research into the effects of cross-cultural adoption. The agency argued from its long involvement with Aboriginal peoples that the best interests of the Aboriginal child "are inexorably linked to the best interests of the community and vice versa":

For the child, the collective approach not only nurtures but also provides a clear identity and a sense of belonging. This is a critical indicator of successful adjustment in adult life. Anglo European ideology, on the other hand, may consider culture and community as a factor but its fundamental linkages to the child's best interests are often superseded by considerations more compatible with their world views. Here "objective" reality prevails although that reality is colored significantly by the culture through which it is interpreted. Child development psychology, as written primarily by those with an individualist orientation and tests with non-Aboriginal children, is given credence over non-scientific beliefs about a child's best interests and beliefs based on practical experience over time and through multiple generations within the tribal context.[192]

Furthermore, the process of acculturation cannot take place through occasional visits to family and community even when the white custodians recognise the importance of continuing the child's cultural connections:

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[189] Valerie Braithwaite, Nathan Harris and Mary Ivec 2009. Seeking to Clarify Child Protection's Regulatory Principles. *Children and Families Australia* page 12

[190] See for example Philip Lynch 2001. 'Keeping Them Home: The Best Interests of Indigenous Children and Communities in Canada and Australia', *The Sydney Law Review* Vol 23 No 4.

[191] Philip Lynch 2001. Keeping Them Home … citing Beamish C (1993) 'Parenting Disputes: Across Cultural Lines', Special Lecture Law Society of Upper Canada

[192] Richard Kenn 'A Commentary Against Aboriginal to non-Aboriginal Adoption', *First Peoples Child & Family* Review Vol 1 No 1 September 2004, First Nations Child & Family Caring Society of Canada, www.fncfcs.com/pubs/onlineJournal.html

> Culture is complex but its transmission is simple. Put a child within a certain cultural milieu and an organic process of acculturation occurs. It is through everyday living that the values, beliefs and culturally prescribed behaviors are learned. This immersion in culture is the vehicle of acculturation.[193]

In Australia, the Aboriginal culture of a child was not considered relevant until the Full Court of the Family Court decision in 'In the Marriage of B and R' in 1995.[194] The Court disapproved of the trial judge in a custody contest between an Aboriginal and a non-Aboriginal parent who had remarked that it was a "normal custody case between two parents, both of whom are Australian citizens…There is nothing special about it."[195]

The appeal judges in this case considered that many relevant aspects of Aboriginal life in Australia were so well known and understood that a court should take judicial notice of them (that is, not require their existence to be proven in court). Those factors included racism being prevalent in Australian society and the devastating impact on the self esteem and identity of an Aboriginal child of being removed to a white environment. The Court therefore concluded that in every such case a separate representative should be appointed for an Aboriginal child. However, the Court did not agree that there is a presumption that an Aboriginal child should be placed with an Aboriginal parent, all other things being equal.[196]

In the absence of such a legal presumption, evidence needs to be given of the importance and relevance of Aboriginality in each particular case. This is precisely what the Bringing Them Home Report argued against. They pointed to the problems bound to arise from the continuing need in each case for evidence to be put before the court about the need of each particular child for continuing connection with Aboriginal culture.[197] The Family Court had said that should be done by the appointment of a separate representative for Aboriginal children involved in a parenting dispute. The Court then provided rules and guidelines for how that separate representative should undertake the task of providing the court with reliable information about the best interests of the Aboriginal child.[198]

The Human Rights and Equal Opportunity Commission considered the relevance of the Aboriginal Child Placement Principle in family law proceedings in Australian courts[199] and expressed the view that the Aboriginal Child Placement Principle should be included in child adoption legislation.[200]

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[193] Same
[194] 19 Family Law Reports page 594
[195] *In the Marriage of B and R* (1995) 19 Fam LR 594 at page 615
[196] Same at paragraph [150]
[197] Bringing Them Home Report, page 485
[198] Family Court of Australia, Guidelines for Child Representatives 2004
[199] See especially chapter 23, Bringing Them Home Report, page 481 - 488
[200] Bringing Them Home Report, page 475

At that time, section 68F of the Family Law Act 1975 listed the factors to be taken into account when a judge or magistrate was deciding what was in a child's best interests. One of those factors was:

> the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;[201]

One of the questions to which this description gave rise was whether it directed the court to recognise an Aboriginal child's need to maintain a connection with his or her culture or whether it was simply an invitation to the judge to decide whether the particular child had that need: it was one of the many factors in the checklist to be looked at but with no weight attached to any particular factors. With this wording, it will almost inevitably be white people who decide if an Aboriginal child has "any need" to maintain cultural connections with the Aboriginal community. For this reason the Human Rights and Equal Opportunity Commission recommended that the term "any need" by replaced by "the need of every" Aboriginal child to maintain a connection with Aboriginal lifestyle, culture and traditions.[202]

United Nations Convention on the Rights of the Child

At that time, the wording in the Family Law Act did not accord with the human rights recognised by international law. The United Nations Convention on the Rights of the Child guarantees the right of Aboriginal children as a group to the enjoyment of their own culture, religion and language:

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[201] Family Law Act 1975 section 68F (2) (f)
[202] Bringing Them Home Report, recommendation 54

> In any State in which there exists, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.[203]

As the Human Rights Commission observed, this omission from the *Family Law Act* was strange because amendments to the Act in 1996 were said to have arisen from the desire to make the Family Law Act more closely reflect the Convention on the Rights of the Child.[204]

Those changes were adopted in the amendments which now form section 60CC of the *Family Law Act*. That section guides the Court in determining the best interests of an Aboriginal child. It specifies the primary considerations in determining the best interests of all children to be:

- the benefit of meaningful relationships with both parents; and
- the need to protect children from harm.

The legislation then lists "additional considerations" to be taken into account in determining the best interests of the child. That long list includes Aboriginal cultural factors. Paragraph 60CC 3 (h) stipulates that in determining a child's best interests:

> 3 (h) if the child is an Aboriginal child or a Torres Strait Islander child:
>
> i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and
>
> (ii) the likely impact any proposed parenting order under this Part will have on that right.

Sub-section 60CC (6) expands on the right to cultural enjoyment:

> (6) For the purposes of paragraph(3)(h), an Aboriginal child's or a Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:
>
> (a) to maintain a connection with that culture; and
>
> (b) to have the support, opportunity and encouragement necessary:
>
> (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
>
> (ii) to develop a positive appreciation of that culture.

Another alternative would be for the law to include a presumption that an Aboriginal child's best interests are served by living with an Aboriginal parent or other relative. Being a presumption only, it would be open to the other party to show by evidence to the court that being within the Aboriginal community would not be in the child's best interests. This option was specifically rejected by the Full Court of the Family Court in the case discussed above. This outcome is considered by many to be symptomatic of the bias of the Australian legal system against Aborigines. It is illustrated also by section 61C of the Family Law Act 1975 which recognises the parenting responsibility of the biological or adoptive parents of a child, but not the parenting role of the extended Aboriginal family. The same bias occurs in the family law

[203] Article 30, Convention on the Rights of the Child.
[204] Bringing Them Home Report, page 483

notion of preferring stability of residence which disadvantages the practice of many Aborigines of having their children move between family households.[205]

Child protection systems and legislation need to be assessed for conformity with the internationally-agreed principles established in the United Nations Convention on the Rights of the Child, and for Aboriginal children guidance should also be drawn from the International Declaration on the Rights of Indigenous Peoples.

It is to be noted that, unlike the Tasmanian legislation, the *United Nations Convention on the Rights of the Child* stipulates "the best interests of the child" as a paramount consideration and not "the" paramount consideration.

The United Nations Committee on the Rights of the Child has shed light on how "the best interests of the child" should be interpreted in relation to Aboriginal children. The United Nations Committee's *General Comment No. 11* on the application of the *Convention on the Rights of the Child* to Indigenous children throughout the world states in part 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;[206]

and:

> Maintaining the best interests of the child and the integrity of indigenous families and communities should be primary consideration in ...social services...affecting indigenous children[207]

and further:

> "In States parties [countries] where indigenous children are overrepresented among children separated from their family environment, specially targeted policy measures should be developed...to reduce the number of indigenous children in alternative care and prevent the loss of their cultural identity"[208]

This commentary indicates that it is not States that are the guardians of the best interests of Aboriginal children; rather, it is States which present the biggest threats to the rights of Aboriginal children and it is States that are obliged to take measures to protect those rights.[209]

The Guidelines for Independent Children's Lawyers incorporates Article 30 of the United Nations Convention on the Rights of the Child which refers to an indigenous child maintaining the right "in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language".

Section 9 of the Guidelines states in part:

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[205] As recognised in the Bringing Them Home Report, page 486

[206] United Nations Committee on the Rights of the Child, *General Comment No. 11 (2009) Indigenous children and their rights under the Convention*. 50th Session, Geneva, para.30

[207] Same, para. 47

[208] Same, para 48

[209] Vicki Trerise 2011 page 235

> ...the ICL should liaise with an agency to which they are referred by the Family Consultant, and as appropriate, facilitate liaison between the Consultant or agency with any single expert, family report writer or other relevant expert retained in the case. This liaison is for the purpose of assisting the ICL to consider the need of the child to maintain "a connection to culture" and how this can most effectively be achieved in considering the case before the court.

The ICL also needs to consider the broader community and extended family support available to the child in recognition of the important role played by extended family members in the raising of indigenous children. That is, the Child's Representative needs to be aware of the capacity of the extended family and community network to promote the best interests of the child. This is likely to entail consultation with extended family members and significant others from within the child's broader family and cultural group.

These provisions are in support of the Family Law Act itself which requires the Court, when considering the best interests of the child, to consider the child's right to enjoy his or her Aboriginal culture and the likely impact any proposed parenting order would have on that right.[210]

Article 12 of the Convention on the Rights of the Child guarantees children the right to be heard and to have their views taken into account in decisions which affect them.[211] The Full Court of the Family Court of Australia,[212] and the past Chief Justice of the Family Court, Alastair Nicholson in particular, have canvassed the need for children's views to be heard more directly in family law matters.[213]

It was only in 2004, for example, that minimum standards were developed for the legal representatives appointed in Family Court proceedings as "separate representatives" for children[214] and it seems the impetus for the guidelines was the unsatisfactory nature of the work of the lawyers appointed for that purpose.[215]

Bonding, Attachment and Continuity of Care

These concepts have become the modern embodiment of the cultural blindness of the 'experts'. Continuity of care has been interpreted, like the best interests of the child, in individualist terms inconsistent with an Aboriginal world view.

Feeling part of a family is no doubt a "good thing" for all children, but psychological notions such as bonding and attachment have been misused to keep Aboriginal children away from their families. It is a major reason why Aborigines fear that short term removal of their children

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[210] Family Law Act 1975 section 60CC (3) (h)

[211] See Appendix 4 for the full text of selected Articles of the United Nations Convention on the Rights of the Child

[212] See, for example, the decision of Re K [1994] FLC 92

[213] See, for example The Hon Alastair Nicholson 2003. Children and Children's Rights in The Context of Family Law

[214] Family Court of Australia Guidelines for Child Representatives 2004, replaced in December 2007 by the National Legal Aid Commission's Guidelines for Independent Children's Lawyers

[215] Nicholson, above, at page 5

will inevitably turn into long term removal. The argument becomes that the foster parents, originally intended as short term carers, have become the main source of bonding and attachment for the Aboriginal child and hence it would be psychologically destructive to return the child to their family.

The psychologist John Bowlby developed attachment theory in the twentieth century and its many followers purport to explain child and adult behaviour based on early mother and child interaction styles. Some of the most potent criticism derive from the fact that it is a theory developed in western nations and does not account for the multiple attachments that develop when a child is raised in a broader group than the nuclear family.

Attachment theory also forms the basis of the current prominence given to permanency planning for children in foster care. It is ironic that delays in decision-making about removed children caused by controllable factors such as preparation for court appearances are considered mere annoyances while the removed child is forming bonds with foster carers who then claim the need for stability and permanency for the removed child.

Permanency planning was one of the western principles of child protection considered inappropriate for Aboriginal families in a pilot project that enabled Aboriginal social work principles and practices in Yukon Territory before the stricter delegation regime was introduced in parts of Canada. The Aboriginal approach used has been described as:

> ...intermittent flowing care pattern in which children can move from parents to relatives to [native] foster home and back again.[216]

This system of substitute care accepts the necessity for children to be in 'out-of-home-care' at particular times and needs to be regarded as part of the continuum of care rather than a situation to be strenuously avoided. This approach requires that:

> ...service boundaries are permeable so that families can easily enter, leave and re-enter. The emphasis of the service program is on "being there", providing continuity and services as a resource to the family rather than providing a time limited, goal oriented service and closing the case.[217]

In the social sciences studies of acculturation, the theory of cultural attachment to groups[218] has arisen to challenge the primary care-giver attachment theory of Bowlby. Based on studying the experiences of mainly Chinese in the United States of America, academics have postulated the extent of one's cultural attachment may explain the mental health of immigrants and those with bicultural attachments. The regard in which a person's cultural group is held by the dominant society is shown to be a major contributor to the health of the individual.

The development of theory and practice surrounding cultural competence and cultural safety is designed to counter the western bias of the theories of child development and assessment tools of practitioners such as Bowlby.

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[216] University of Victoria, British Columbia, evaluation as described in Trerise, above, page 227

[217] Vicki Trerise 2011 above citing a study by Jones, Mary Anne, 1985

[218] Hong,Ying-yi, Roisman, Glenn and Chen, Jing, 2006. A Model of Cultural Attachment: A New Approach for Studying Bicultural Experience. Available at www.ntu.edu.sg/home/YYHong/papers

Cultural Competence

This term seems to encapsulate the reason that so many Aboriginal peoples around the world prefer to work within and to use Aboriginal services. It has been defined as, "a set of congruent behaviours, attitudes and policies that come together in a system, agency, or among professionals that enable them to work effectively in cross-cultural situations."[219]

Increased understanding of the importance of cultural competence and enhanced abilities to dissect and explain the elements which make up cultural competence and cultural safety have resulted in the concept being included in codes of professional practice[220] and being the subject of academic study. There is, for example, a National Centre for Cultural Competence at Georgetown University Centre for Child and Human Development in Washington DC in the United States which produces online training materials[221] , followed shortly after by a Centre for Cultural Competence Australia also selling competence based courses. Many other organisations, both Aboriginal and otherwise, as well as private practices have also entered the field of cultural competence training.

It is from within the framework of cultural competence that social work theory and practice, particularly as they relate to indigenous child welfare, have been strongly criticised. Social work has been seen as intellectual colonialism, as imposing alien cultural values of individualism, materialism and empiricism, as paternalism in its reliance on the one objective truth or reality to any given situation best understood by 'the expert'.

[219] Tong C and Cross T 1991. Cross Cultural Partnerships for Child Abuse Prevention with Native American Communities, Portland Oregon, Northwest Indian Child Welfare Institute quoted in Cuneen and Liebesman.
[220] For example, section 1.05 of the Code of Ethics of the National Association of Social Workers of the United States, www.socialworkers.org/pubs/code/code.asp; Australian College of Physicians (RACP) 2004, An Introduction to Cultural Competency, www.racp.edu.au/page/policy-and-advocacy-unit
[221] See http://gucchd.georgetown.edu.ncc/framework.html

Cultural attachment has been considered in the child welfare practice of Aboriginal communities in Canada. Cultural restoration has become the major practice philosophy of the long-standing child welfare group in Ontario in Canada, Weechi-it-te-win Family Services. The organisation became an 'Aboriginal Children's Aid Society' in 1987 under Ontario's *Child and Family Services Act*, providing child and family services to ten First Nations communities. They developed an Aboriginal model of child welfare under the guidance of the ancestors and the chiefs known as the Rainy Lake Community Care program.[222] The agency is committed to creating an Indian (Anishinaabe) alternative to mainstream child welfare practice and to create culturally appropriate changes in service delivery to Anishinaabe children and families although its practice is claimed to be bi-cultural. The organisation has devolved child welfare responsibilities to each of the ten communities within its jurisdiction.

Weechi-it-te-win Family Services conducted a research project to document how their twenty years of service practice fulfilled the theory of culturally restorative child welfare and to demonstrate how that culturally competent standard of care could be followed by mainstream social workers working with Aboriginal children.[223] A foundational precept is described as follows:

> ...as First Nation people we are cautioned by our elders to not stay in the pain of history too long. They teach us to look at the internal strengths of our Nations, as it is the cultural laws that have guided how First Nation people govern themselves, their families, and their communities prior [to] the beginning of colonization...[T]here exists the need to capture the essence of First Nation history and the resurgence of culture and teachings. It is the teachings, the language, and the cultural ceremonies that have been passed down from generation to generation, from elder to elder, from parent to child. Seeking this knowledge and applying it to current realities is an important aspect of culturally restorative child welfare practice.[224]

Cultural competence has acquired its own performance measures and quality assurance mechanisms to assess the following domains:

- needs assessment – service providers need information on the possibly diverse cultural groups in the service area;
- information exchange – a process by which community groups can inform service providers of their concerns and receive information which facilitates access to services;
- services – consumers and family members need to be involved in service development and barriers to access need to be identified and removed;
- human resources – employees need to be trained in cultural competence using locally produced materials;

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[222] Estelle Simard 2009. Culturally Restorative Child Welfare Practice – A Special Emphasis on Cultural Attachment Theory. *First Peoples Child and Family Review* Vol. 4 No. 2, page 44

[223] Same at page 45

[224] Same

- policies and procedures – cultural competence plans should be formulated and disseminated with adjustments to management information systems as required
- outcomes – desirable outcomes for individuals are shown by clinical change, improved social functioning, recovery and self-empowerment with high drop out or no show rates indicating possible cultural competence problems.[225]

The six underlying principles of the organisation which they consider consistent with community cu... y oriented ... e analy... e ide... g de... e fa...

M...

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A ... e all... of ma... al ch...

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Chapter Seven: SUGGESTIONS FOR REFORM OF ABORIGINAL CHILD PROTECTION

Evidence to the Inquiry and substantial research findings establish conclusively the need for a fundamentally different approach if the objective of eliminating unjustified and unnecessary removal of Indigenous children from their families and communities is to be achieved.[229]

This chapter looks at some of the options for a different legal framework for Aboriginal child protection in Tasmania.

Autonomous Jurisdiction

The Royal Commission into Aboriginal Deaths in Custody and the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families produced the major reports into Aboriginal affairs in Australia in recent years.[230] Both national reports left no doubt that Aborigines must resume the central role in all matters of importance to Aboriginal individuals and communities.

The 1991 report of the Royal Commission into Aboriginal Deaths in Custody brought the separation of Aboriginal children from their families to public attention. It found that almost half of those whose deaths it investigated had been separated from their families. The Royal Commission made recommendations aimed at dealing with the consequences of those removals including the need for legislative recognition of the Aboriginal Child Placement Principle and the essential role of Aboriginal Child Care Agencies, funding of Link-Up organisations to assist the re-establishment of connections with families and communities, and measures to facilitate access to government records for Aborigines removed from their families and communities as a result of government policies.[231]

Of particular relevance to this report are recommendations 43 to 52 of the *Bringing Them Home Report*.[232] The Inquiry recommended the negotiation of national framework and standards legislation to enable Aboriginal communities who wished to do so to have responsibility for their own children and young people. The matters contemplated for a negotiated transfer of responsibility include:

- legal jurisdiction for children's welfare, care and protection, adoption and juvenile justice
- transfer of police, judicial and departmental functions
- sharing of jurisdiction where desired

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[229] Bringing Them Home Report, page 561

[230] Many other major reports have been produced but have focussed on specific issues such as domestic violence or alcohol and drug use or on administrative structures such as a model for the replacement of the National Aboriginal Conference, the deficiencies of ATSIC or a service model for improving the delivery of services

[231] *Bringing Them Home Report*, Recommendations 54, 52 & 53 respectively

[232] Recommendations 43 to 52 are reproduced in full at Appendix 7

- funding and other resourcing of programs and strategies for children, young people and families.[233]

It is instructive to note that none of the submissions from Aboriginal organisations to the Human Rights and Equal Opportunity Inquiry into the Separation of Aboriginal Children from Their Family regarded intervention by welfare departments as an effective way of dealing with Aboriginal child protection needs and it was accepted that the employment of Aboriginal staff in those departments had not improved the situation.[234]

The Human Rights and Equal Opportunity Commission (HREOC) is not alone in arguing for Aboriginal jurisdiction. In the USA, the Harvard Project on American Indian Economic Development has put forward extensive arguments to show that Indian decision-making makes a real difference to the daily life of Indigenous peoples.[235] Stephen Cornell puts the argument for Aboriginal jurisdiction on three bases:

- moral, in that historical events have created an obligation on those who have benefited from colonial dispossession to "allow the dispossessed a major voice in what happens to them and in their affairs";
- human rights, the national and international right of a people to self-determination and self government;
- practical, in that the evidence shows it works to improve life for Aboriginal people.[236]

Cornell identified three major outcomes from Aboriginal decision-making: Aboriginal priorities replace bureaucratic priorities, decisions reflect local knowledge and concerns, and decisions are linked to consequences so Aboriginal people learn from the mistakes they make in decisions affecting their communities and get the rewards of good decisions hence improving the quality of decision-making and accountability.

These outcomes are those advocated by HREOC in its *Bringing Them Home Report* and are similar to the need recognised in the National Framework for Protecting Australia's Children for Aboriginal led and managed solutions.[237]

Sentiments expressed during this consultation reflect what was said by the Human Rights Commission:

> For many Indigenous communities the welfare of children is inextricably tied to the well-being of the community and its control of its destiny. Their experience of 'The Welfare' has been overwhelmingly one of cultural domination and inappropriate and ineffective servicing, despite attempts by departments to provide accessible services. Past and current legislative and

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[233] Recommendation 43c

[234] Bringing Them Home Report, page 454

[235] Stephen Cornell and Joseph Kalt 2003. *Reloading the Dice: Improving The Chances for Economic Development on American Indian Reservations*. Native Nations Institute and The Harvard Project on American Indian Economic Development.

[236] Stephen Cornell 2004. Indigenous Jurisdiction and Daily Life: Evidence from North America. Remarks presented at the National Forum on "Indigenous Health and the Treaty Debate: Rights, Governance and Responsibility."

[237] Council of Australian Governments 2009. Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009-2020, page 28

> administrative policies together with bureaucratic structures and mainstream cultural presumptions create a matrix of 'Welfare' which cannot be reformed by means of departmental policy alone. If welfare services are to address Indigenous children's needs they need to be completely overhauled. Welfare services must be provided in a manner which is accepted by communities.[238]

The practical difficulty, of course, is that what the Human Rights Commission considered "must" happen, when its 1997 report was published, has still not happened. Aboriginal communities have no choice about what type of welfare services they will receive.

There are precedents for the establishment of an autonomous jurisdiction for Aborigines in Australia, even if the prospect of full independence in international law seems remote. In Quebec and Greenland, for example, separate parliaments and legal systems exist within the larger political entities of Canada and Denmark respectively.[239]

These entities, although having law-making capacity and state-like authority, do not challenge the sovereignty of the majority nation and do not constitute the formal independence sought by some Aboriginal leaders. Within a framework of legal pluralism, an Aboriginal jurisdiction can easily sit together with a majority legal jurisdiction as occurs in nations within the English common law tradition such as Nigeria[240] and New Guinea.

[238] Bringing Them Home Report, page 459

[239] See for a full explanation and analysis, Peter Jull 2001. 'Nations with Whom We Are Connected' – Indigenous Peoples and Canada's Political System Part 2, [2001] AILR 26.

[240] Vicki Trerise 2011. Aboriginal Children and the Dishonour of the Crown: Human Rights, 'Bests Interests' and Customary Adoption. Ph. D. thesis University of British Columbia page 210.
+ Available at www.circle.ubc.ca/bitstream/handle.../ubc_2011_fall_trerise_vicki.pdf?

Reform of Court Processes

Reforms to the court process used in child protection cases would go some way to improving the experience for Aboriginal parents and particularly to getting more appropriate outcomes for Aboriginal children.

Innovation in the Family Court of Australia has shown that changes to court process can make significant improvements in child custody disputes, even in the absence of legislation. In the Family Court a new 'Children's Cases Program'[241] was introduced into two New South Wales registries in 2004 following a two-year study into alternative models for reducing the adversarial nature of children's cases. Adapted from European models, the new approach gives the judge in charge of the case a more active role in deciding what material should be put in evidence to assist the judge determine the best outcome for the children involved rather than leaving it to the disputing parents to show each other's bad behaviours in the past. The judge also attempts to assist the parties reach their own solution in their children's best interests. This process is followed even after the parties have tried mediation and other pre-trial processes of the court. The advantages of the process are said to be shorter, earlier and cheaper court hearings as well as simplicity and flexibility for the parties. The consent of both parties is required before this process can be used in a case.

Sentencing Circles and Koori Courts

An alternative dispute resolution process is used in the sentencing circles for Aboriginal juveniles and adult offenders in New South Wales and Victoria. These models required legislative adjustment to the laws establishing the magistrates' courts but despite their names they are not Aboriginal Courts.

In Victoria, for example, the Magistrates' Court (Koori Court) Act 2002 created a Koori Court Division of the existing Magistrates' Court to increase Aboriginal participation in the sentencing of Aboriginal offenders through conferring an advisory sentencing role on 'Aboriginal Elders and Respected Persons'. The courts can deal only with pleas of guilty and less serious offences and have a lesser jurisdiction than the usual Magistrate's Court with sexual offences and breaches of family violence orders being excluded. Their main business has been traffic matters and theft. Defendants must consent to their matter being dealt with in the Koori Court. The advantages are said to be the informality and decreased reliance on the technicalities and other trappings which often make the court process incomprehensible to Aborigines. A Magistrate passes sentence on offenders but in determining sentence the Magistrate is required to consider the statements made by Aboriginal Elders and others involved in the sentencing process.

An evaluation of the first two Victorian Koori Courts[242] found that the model had been a resounding success in meeting its objectives including reducing the recidivism rate by half,[243]

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[241] As described in The Hon. Diana Bryant, 2004, and at the Family Court of Australia website, www.familycourt.gov.au and follow the prompts to 'children's cases program'

[242] Mark Harris 2006."A Sentencing Conversation": Evaluation of the Koori Courts Pilot Program October 2002 – October 2004

[243] From around 30% to 15% and less

and showing recognition and respect to Aboriginal cultural considerations within the white legal system.

In New South Wales similarly, the sentencing circle model with its origins in Navajo law via Canadian criminal law and New Zealand restorative justice models, has its champions thanks to the reduced recidivism claimed for it.

There are some interesting differences between the New South Wales and Victorian structures.[244] In New South Wales an Aboriginal panel has to agree to accept an offender into the sentencing circle court and offenders who are found guilty, as well as those who plead guilty, are eligible to apply.[245] Offences eligible to be dealt with by a sentencing circle are those that can be dealt with in a Local Court, have a potential term of imprisonment and are judged by the magistrate as likely to have a term of imprisonment attached.

There are important roles for an Aboriginal Community Justice Group established for each area in which the court sits and for the Aboriginal Project Officer based at the court and employed by the Aboriginal Justice Advisory Committee to assist the Justice Group. For an offender to reach a circle sentencing court there has to be approval by the court that the matter is suitable to be dealt with by circle sentencing and there also needs to be approval by the Aboriginal Community Justice Group that the offender is acceptable for circle sentencing. One of the criteria for deciding acceptability is whether the offender is part of the community or has strong links with the community in the trial location. The Community Justice Group makes a recommendation to the magistrate giving reasons for their decision.[246]

Sentencing circles and similar courts have a superficial attraction for child welfare matters as the strict rules of evidence and adversarial system that apply in standard

[244] The sentencing circles in South Australia and Western Australia are outside the scope of this study.

[245] This description is taken from Ivan Potas, Jane Smart, Georgia Brignell, Brian Thomas and Rowena Lawrie 2003. 'Circle Sentencing in New South Wales: A review and evaluation', Judicial Commission of New South Wales, Sydney

[246] Same at pages 5-6

courts applying English law are usually unfamiliar and daunting for Aborigines. On the other hand, the drastic consequences of child welfare proceedings which have the potential to remove Aboriginal children from their families can be argued to require the very highest standard of technical protection that English law can apply. There are risks in conferring functions on magistrates for which they have not been trained and requiring judicial methods of European rather than English law in contrast to all other areas of law applied by magistrates. These unfamiliar methods may pose greater risks than the claimed benefits are likely to confer. At present (and guided by legislation which requires the application of the rules of evidence unless the best interests of the child requires otherwise) magistrates in Tasmania are able to play an active role in protecting children whilst having regard to the legal rights of parents confronted by the otherwise-untrammelled power of the State.[247]

It has been cogently argued that the rules of natural justice and procedural fairness need to be made apply more often to the administrative decisions made by child protection workers.[248] It is the first decisions of these workers to remove children from their families which can have such disastrous consequences and which, through the mere passage of time and departmental delays in the court process, can become irreversible.

Aboriginal Oversight Authorities

A Canadian suggestion is for the establishment of independent Aboriginal monitoring bodies to oversee State policies for Aboriginal children in State care to ensure equitable, culturally based and effective care for Aboriginal children and their families and with power to require States to implement progressive policy and practice solutions at the systems and individual case levels. Combined with these new oversight monitoring bodies, they suggest an enhanced role for UNICEF (United Nations International Children's Economic Fund) in monitoring systems for the care of removed Aboriginal children in developed countries such as Australia and Canada.[249]

This model has many attractions. It allows for Aboriginal decision-making without requiring the direct interventions into Aboriginal family life that concerns many Aboriginal community people. It would reduce the burden of work involved and consequently also reduce the cost of the scheme.

On the other hand, it would maintain the presence and intervention of State welfare agencies and so not be any kind of solution to the current problems until 'after the event' when the monitoring exercise might identify bad practices. In the meantime, it would be Aboriginal children, families and community who would suffer.

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[247] Deputy Chief Magistrate M Daly, *D and Others (Children)* [2013] TASMC 34

[248] Tamara Walsh and Heather Douglas 2012. Lawyers' Views of Decision-Making in Child Protection Matters: The Tension Between Adversarialism and Collaborative Approaches. *Monash University Law Review* Vol 38 No. 2 page181

[249] First Nations Child and Family Caring Society of Canada 2005. The Chance to Make a Difference for this Generation of Indigenous Children: Learning from the Lived Experience of First Nations Children in the Child Welfare System in Canada, submission to the UNCRC Day of General Discussion: *Children without Parental Care*, Ottawa, Canada

It is entirely possible that this could be a fall-back position if the resourcing required for an Aboriginal community protection scheme proves impossible.

Aboriginal Customary Law

The Aboriginal Child Placement Principle now enshrined in Australian law is the area of Aboriginal customary law most relevant to this report. Essentially the Principle recognises that Aboriginal children are best off within their own family group and community and should remain or be placed there whenever possible.[250] However, this is just one small facet of Aboriginal law that has become codified in Australian law, while the underlying principle of enabling a return to Aboriginal jurisdiction remains a pipe dream in a country without treaties or compensation for vast losses.

There have been major enquiries into the recognition of Aboriginal customary law in at least three Australian jurisdictions. The Australian Law Reform Commission's ten year enquiry[251] was the first and most extensive of the enquiries. Its recommendations were not taken up by the Australian Government when its report was published in 1986. The Northern Territory Law Reform Commission had only eight months to make its findings from late 2002.[252]

In Western Australia the Law Reform Commission enquiry commissioned in 2000 published its Discussion Paper in December 2005 and Final Report in 2006.[253]. It recommended that customary law not be given constitutional recognition as a source of law of that State[254] nor that the prior occupation of Aborigines be recognised in a preamble to the Constitution.[255] They did recommend, however, that Aboriginal peoples be recognised in a "foundation section" of the Constitution (section 1 of the Act) following the Victorian model.[256]

Australian courts in various jurisdictions have taken Aboriginal customary law into account when considering the custody of Aboriginal children. However, as there is no legislative direction to do so it has been argued that its relevance is often overlooked because of the lack of knowledge of lawyers, or magistrates. Other reasons include claims that the rules of evidence prohibit its introduction, or that there was no reliable or adequate source of evidence available about the content of the relevant customary law.[257] The Western Australia Law Reform Commission therefore recommended recognition of customary law for particular

[250] For a detailed study of the evolution of the principle see Lock J 1997. *The Aboriginal Child Placement Principle*, Research Report no 7, New South Wales Law Reform Commission, Sydney; SNAICC 2013 above.

[251] Australian Law Reform Commission 1986. The Recognition of Aboriginal Customary Law

[252] Northern Territory Law Reform Commission 2003. Report of the Committee of Inquiry into Aboriginal Customary Law.

[253] Law Reform Commission of Western Australia 2005. Aboriginal Customary Laws Discussion Paper and Final Report 2006, Project 94, with 131 recommendations.

[254] As recommended by the Northern Territory Law Reform Commission, above, recommendation 11

[255] As proposed for the Australian Constitution in the national referendum in November 1999

[256] Constitution (Recognition of Aboriginal People) Act 1994 (Vic) section 1A

[257] Williams Victoria 2003. 'The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law' Law Reform Commission of Western Australia, Project No. 94, Background Paper No 1

purposes in defined areas of law following the 'functional recognition' approach espoused by the Australian Law Reform Commission in the 1980s.[258]

Since the Australian Law Reform Commission Inquiry into Aboriginal Customary Law in the 1980s, and despite the other State Law Reform Commission enquiries on the matter, the

debate has progressed and it is now more appropriate to investigate the state of the international law right of self-determination in relation to Aboriginal rights.

[258] Law Reform Commission of Western Australia 2005 above at page 64

Aboriginal Self-Determination

The recognition of Aboriginal rights in international law involves self-governing and law-making powers. "The limits set on those law-making powers would derive from the negotiated relationship between the relevant non-indigenous political authority and the Indigenous political entity, as well as from the need to comply with internationally recognised human rights standards."[259] The issue is not about legal pluralism but about Aboriginal sovereignty, the recognition of the right of Aborigines to make law.

Aboriginal self-determination is now a principle of international law. The *International Covenant on Civil and Political Rights* (ICCPR) guarantees the right of self-determination to "all peoples" and it is accepted that Aborigines around the world are "peoples" to whom the right applies. Article 1 of the ICCPR[260] stipulates the content of the right to self-determination:

ICCPR Article 1
All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The right of Aboriginal peoples to self-determination is spelt out specifically in the *International Declaration on the Rights of Indigenous Peoples*, Article 3 of which is identical to Article 1 of the ICCPR with the exception that it is stated to apply to "Indigenous peoples". The Declaration was developed over twenty years within the United Nations system and continued to be opposed by Australia, Canada, New Zealand and the USA for five years after its acceptance by the other nations of the United Nations General Assembly. Australia finally signed the Declaration but has not implemented it in Australian legislation.

Despite the broad words of Article 3 of the International Declaration of the Rights of Indigenous Peoples, other Articles may be interpreted to detract from the general right of all peoples to self-determination. Article 7 (2) elaborates on how the right to self-determination may be exercised, but the scope of the right is left broad enough to include a regulation of community affairs including child welfare.

IDRIP Article 7 (2)
Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs as well as ways and means for financing these autonomous functions.

An earlier draft of the Declaration in the equivalent draft Article 31 elaborated on "internal and local affairs" to include culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members. Most of those topics are now dealt with in other Articles of the final Declaration.

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[259] Cunneen Chris and Schwartz Melanie (2005) 'Customary law, human rights and international law: some conceptual issues' Background Paper 11, Project 94, *Aboriginal Customary Laws*, Law Reform Commission of Western Australia

[260] International Covenant on Civil and Political Rights 1966 entered into force generally in March 1976 but not until 1980 for Australia and 1993 for Article 41 by which States may recognise the jurisdiction of the Human Rights Committee to examine State action.

The Declaration is broad enough to encompass rights to make laws and establish judicial systems as well as to negotiate a new form of political relationship with the colonial state:

Article 34
Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards

Aboriginal self-determination has often been discussed as self-governance or self-management. Community justice mechanisms, as a way of returning control and decision-making processes to Aboriginal communities, have been advocated by the Aboriginal and Torres Strait Islander Social Justice Commissioner,[261] supported by the Law Reform Commissions of various Australian jurisdictions as well as academics and social commentators, and are similar to the approach of the 'Self-Determination' recommendations of the Royal Commission into Aboriginal Deaths in Custody.[262]

The Law Reform Commission of Western Australia recommended the establishment of community justice groups at the local level to have a direct role in the formal criminal justice system. This would represent a new incarnation of the structures now known as community justice panels, Aboriginal courts, koori courts, nunga courts, sentencing circles. None of them have the judicial powers of Western courts and none of them administer Aboriginal laws. They have been regarded as a way of avoiding Aboriginal self-determination rather than being an expression of it.

The Australian Law Reform Commission examined the desirability of Aboriginal courts being established in Australia. They recommended against the adoption of a variation on the Village Court system of Papua New Guinea and saw the Indian tribal court system and other 'Aboriginal courts' then operating in Queensland and Western Australia as the "enforcement of local by-laws by courts staffed by persons appointed from (though not always by) the local community" and being "modelled on the common law system at its lowest level of the magistrate's or justices court."[263]

It seems settled law in Australia that there is no room for Aboriginal law to operate alongside the Australian legal system and hence more limited forms of recognition have been canvassed by enquiries such as the Australian Law Reform Commission.[264] Some means of achieving that might be through formal legislative recognition, codification or regulation of the interaction between Aboriginal laws and Australian law; one-off consideration of customary law issues as a mitigating factor in sentencing in criminal cases; to a very informal process of influencing how decision makers exercise their discretion in areas where customary law might be a contributing factor.[265] Perhaps the most interesting of the propositions put forward in the debate is consideration of the question:

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[261] William (Bill) Jonas 2002. 'Community Justice, Law and Governance: A rights perspective' at pages 2-3
[262] RCIADC 1997. 'The Path to Self Determination'. National Report Volume 5, recommendations 188 to 204
[263] Australian Law Reform Commission 1986. The Recognition of Aboriginal Customary Laws, Report No 31 para 812
[264] Same; they called this "functional recognition"
[265] Human Rights and Equal Opportunity Commission President, The Hon. John von Doussa 2003. Recognising Aboriginal and Torres Strait Islander Customary Law – International and Domestic law Implications

> Are there justifications for legal pluralism by recognising a source of law-making that does not fit within the three arms of government – the Judiciary, the Executive and the Parliament – that are the usual sources of law within our legal system?[266]

It now seems incontrovertible that adopting measures which restore Aboriginal self-determination will improve social and economic indicators in the Aboriginal community. There is a demonstrated link between mortality and the social factors of poverty, low education and negative social interactions like discrimination. That effect is thought to arise from adverse effects on mental and physical health and decreased access to resources.[267] A 2011 study in the USA found there were more deaths attributable to low education than to acute myocardial infarction (heart attack) and more deaths attributable to racial segregation than to cerebrovascular disease (stroke).[268] This study was carried out by academics at the Department of Epidemiology at the University of Michigan and published in the prestigious *American Journal of Public Health* in 2011 who analysed 120 studies conducted in the USA. There is no reason to believe Australia is doing any better.

[266] Same at page18

[267] Sandro Galea, Melissa Tracy, Katherine Hoggatt, Charles DiMaggio and Adam Karpati. 2011. Estimated Deaths Attributable to Social Factors in the United States. *American Journal of Public Health* Vol. 101, No. 8, page 1456

[268] Same at page 1462

CONCLUSION & RECOMMENDATIONS

Aboriginal jurisdiction

The practice in other Australian jurisdictions, and the law and practice in international jurisdictions, support the views expressed by the Aboriginal community in this consultation that State child protection intervention has been damaging to the Aboriginal community. The workshops demonstrated a high degree of awareness of the possible pitfalls of Aboriginal community control of a child protection system, giving greater assurance that an improved system can be devised in the interests of both the Aboriginal child and the Aboriginal community. The transfer of jurisdiction was also a recommendation of the *Bringing Them Home Report*. The experiences of other jurisdictions as indicated in this report give added assurance that the perceptions of the community participants in the workshops can be accommodated in a new and more effective regime for Aboriginal child protection in Tasmania.

Recommendation 1

That the Tasmanian Government accept the wish of the Aboriginal community in Tasmania for the transfer of jurisdiction over child welfare and child protection to the Aboriginal community.

State legislation

Chapter 7 considered some ways in which Aborigines might have a greater say in Aboriginal child protection and elaborated on the ideas expressed during the community consultations. The problems and inequities in the current system identified in the community workshops make it clear that many in the Aboriginal community would prefer to have their child protection issues dealt with by an Aboriginal rather than a departmental system. The child protection statistics for Tasmania and the experience of Aboriginal families as documented in this report demonstrate that an alternative system is required.

Recommendation 2

That the Tasmanian Government amend the *Children, Young People and Their Families Act* 1997 to enable Aborigines to opt to have their child protection matters dealt with under Aboriginal jurisdiction rather than under the State system.

Funding

Experience in other Australian States and Territories as well as in Canada in particular demonstrate that Aboriginal systems of child welfare can succeed only if adequately funded. This truism has been ignored in Tasmania where Aboriginal child welfare programs have been hugely under-funded in comparison to the Gateway Services established in recent years. The returns would be shown in a lower number of Aboriginal children being removed from their families and community, with a consequent reduction in State expenditure and an increased investment in healthy and well-adjusted children.

Recommendation 3

That the Tasmanian Government fund the exercise of Aboriginal jurisdiction in forms to be negotiated and to at least the same rate as that funded for non Aboriginal children.

Redefinition of 'Best Interests' of Aboriginal children

The child welfare experiences of Aboriginal groups in Canada and the USA, as well as the outcomes of major Australian reviews, have demonstrated that the Western interpretation of 'best interests' for Aboriginal children has too often resulted in disastrous consequences for Aboriginal adults removed from their families as children. International experience in legislating for improved outcomes provides good guidance for how better outcomes might be achieved in Australia.

Recommendation 4.

That the form in which Aboriginal jurisdiction is transferred also recognise a rebuttable presumption that the best interests of the Aboriginal child is inextricably linked to the best interests of the Aboriginal community, and the best interest of both lies in keeping Aboriginal children within that community.

Standard of Proof

The legislative schemes for child protection in Australia, in Canada and the USA, have all aimed to redress the removal of Aboriginal children from their families and communities, recognising the impacts of stolen generations on the continuing cultures of Aboriginal peoples arising from governmental attempts at assimilation into the dominant society. This report looks at some of the schemes designed to reverse this trend and the manner in which legislative schemes have been interpreted by the courts of other countries. It is apparent that legislation in Australia can and should go further in requiring greater scrutiny of administrative and legal decisions that remove Aboriginal children from their families and community at the time of first intervention.

Recommendation 5.

That in both Tasmanian and Aboriginal jurisdictions, there be recognition that the initial decision to remove a child from his or her family and community is the decision of greatest consequence and should require the decision maker to be satisfied beyond reasonable doubt that the safety and well being of the child requires it.

Out of Home Care

Participants in this consultation noted that what is intended as an Aboriginal child's short time away from Aboriginal families to enable assessment of the child's safety too often results in permanent orders, and noted the inequities that occur in the services provided to Aboriginal children in out of home care. The high turn-over of departmental staff, the changed practices and guidelines for overseeing the welfare of children in out of home care situations, and the almost inevitable circumstance that departmental workers will be unknown to the children they are working with, all lead to the conclusion that major change is needed.

Many other Australian jurisdictions have started increased involvement of Aboriginal people in the child protection system through greater involvement at the end point of the system, the out of home care arrangements. This has required considerable dedication of resources to this end of the system and has resulted in many more placements being in accordance with the Aboriginal Child Placement Principles, except in Tasmania.

Recommendation 6

That upon the Government's acceptance of this report, they require the Department to enter into immediate negotiations with the Tasmanian Aboriginal Centre for the transfer of responsibility for out of home care for Aboriginal children to the TAC with an accompanying transfer of finances currently available for those children.

Recognised entity in Tasmanian legislation

The legislative recognition of Aboriginal organisations as recognised entities of some form has been the model followed in other Australian jurisdictions as outlined in chapter four. One of the drawbacks of those models is that their operations are so closely defined in the legislation that they are denied the opportunity to implement Aboriginal solutions to Aboriginal problems. The Tasmanian Aboriginal Centre has been operating as a de facto recognised entity throughout the State for many years, with varying degrees of difficulty in having its voice heard.

This model of increased Aboriginal involvement in Aboriginal child protection would not challenge the underlying problem of cultural insensitivity, of cultural domination, and of wasted resources spent on educating non Aboriginal staff and agencies of matters well within the knowledge of the community whose children are being removed in disproportionate numbers. However, it is hoped that the alternative of greater integration into the State system might result in an improved acceptance by State authorities of the notion that the Aboriginal community is indeed able to find its own solutions.

Recommendation 7

That pending implementation of the measures specified above, the Minister declare the Tasmanian Aboriginal Centre as a 'recognised Aboriginal organisation' in order to reduce the delays and technicalities currently experienced in trying to make Aboriginal voices heard in the Tasmanian child protection system.

Aboriginal Children's Commissioner

As demonstrated in chapter 7, there are a number of ways in which Aboriginal involvement in Aboriginal child protection decisions may be increased. The need for increased involvement has been acknowledged in the major inquiries into Aboriginal disadvantage in Australian and related overseas jurisdictions, in the major inquiries into child protection systems, and in international instruments including Rights of the Child and Rights of Indigenous Peoples.

Some recent Australian models have placed emphasis on Aboriginal involvement in supporting better out of home care placements including the recruitment and training of foster carers. This has included significant funding to peak bodies for cultural competency standard setting

and training, although there is little evidence of improved outcomes for Aboriginal children. There appears to be an emerging trend to national and international oversight of State efforts even where decision-making about child removals has been denied to Aboriginal communities.

Recommendation 8.

That the Government investigate the model adopted in Victoria of creating a statutory office for an appropriately experienced Aboriginal person of an Aboriginal Children's Commissioner to oversee the implementation of child welfare and child protection services for Aboriginal children in Tasmania.

Family Violence

Emotional abuse has become the most likely cause of substantiated reports of child abuse for children in Tasmania. Since the passage of the *Family Violence Act* in 2004, any concern for the welfare of a child in situations of apprehended violence between spouses or partners is sufficient to warrant state intervention. A parent protecting children from physical abuse from a partner may nevertheless be reported to child protection by Police, and a child present in a house where verbal abuse between partners is occurring may similarly become subject to removal from the family. Family violence has become a very common cause of Aboriginal child removals.

The commendable social concerns that led to the Safe at Home legislation have had unintended consequences particularly for children and for the partners who are subject to domestic violence. Whilst recognising that children exposed to domestic violence may experience at least some degree of trauma, it is far from clear that such exposure warrants removal from the family in the numbers that are now occurring. The extent to which the

current system discriminates on the basis of race, gender and class may be presumed, although not studied. Social responses to domestic violence centred on public education present more viable options.

Recommendation 9.

That the *Family Violence Act* 2004 be amended to require some degree of actual danger to the physical safety of a child for that child to be considered an 'affected child' rather than the mere requirement of a child being a person whose psychological wellbeing or interests may be affected by violence (as defined) between partners.

Mandatory reporting & public health

There is an increasing body of literature that exposes the waste of resources involved in the current mandatory child abuse notification system, without concurrent benefits to children at risk of harm. At the same time, the misdirection of public resources which public health models of child welfare seek to rectify, has been recognised in the National Framework for Protecting Australia's Children which provides detailed guidance for systems improvement. This is the same model of child welfare discussed in the local consultations for this project, as well as the model advanced in many of the Canadian jurisdictions examined in this report.

Recent changes in other jurisdictions may provide guidance on the impacts of such a change in the Tasmanian system. Although not abolishing mandatory reporting, New South Wales legislation requires "significant" risks to children as the threshold test for reporting and experiences under that changed regime are currently under investigation. Western Australia has not had the same mandatory reporting regime as other Australian jurisdictions and the effects of that system on the wellbeing of children in Western Australia warrants further attention.

Recommendation 10

That the Tasmanian Government take the Australian lead in reducing the administrative and operational costs involved in recording, investigating and reporting on child concerns that fail to meet threshold tests for State intervention, by abandoning mandatory notification in favour of investment in the public health model of child protection.

Appendices

Appendix 1 Project Terms of Reference

Background:

The *Children, Young Person's and Their Families Act 1997* contemplated the official government appointment of 'recognised Aboriginal organisations' to work in consultation with the Department within the general legal framework for the care and protection of Aboriginal children. The idea was that the involvement of Aboriginal organisations would make the work of the Department, and the Courts where necessary, more sensitive to the needs of the Aboriginal community and ensure the best possible protection of Aboriginal children at risk.

Since early 2000, the TAC has been seeking to obtain agreement that its involvement in the process be conditional upon ministerial endorsement of a move towards returning responsibility for Aboriginal children to the Aboriginal community. The project aims to examine ways in which that responsibility may be best implemented.

The Project

Engage a consultant for up to 6 months to:

- Consult with Aboriginal workers, organisations and community about their aspirations for their involvement in decision-making affecting the protection, placement and care of Aboriginal children;
- Identify any shortfalls in the capacity of the Aboriginal community to provide protection, placement and care of Aboriginal children in the community and ways in which any deficiencies may be overcome
- Analyse and document any legal impediments to Aborigines being afforded greater decision-making power for the better protection of Aboriginal children and options for overcoming any impediments;
- Propose a legal framework within which Aboriginal people might exercise formal responsibility, including decision-making, for the protection, placement and care of Aboriginal children taking account of Aboriginal values and aspirations.
- The consultancy will be managed by the TAC and completed within six months from commencement of the consultancy.
- Simultaneously the TAC will analyse and document its own abilities and any deficiencies in its practice towards the protection of Aboriginal children.

Outcomes

The department will obtain from the relevant Minister and the Government a commitment to implement the principle of Aboriginal self-determination which may mean, depending on the recommendations of the project report, changes to the current legislative framework for the protection, placement and care of Aboriginal children.

A report will be produced to form the basis of discussions between the TAC and the government about practical ways of implementing reforms to the current system of Aboriginal child protection.

Appendix 2 Aboriginal Child Protection Project - Information Sheet 1

Background to the Aboriginal Child Protection Project

Aboriginal children have been removed from their families by white people ever since the English invaded the country and set themselves up at Risdon Cove in 1803. At that time, they killed the parents and stole the child. Later they put the parents in prison and stole the child. Later still they said the parents could not look after the child, or had harmed the child, and so took the child away. In most cases the child was sent to live with white people to have a "better life".

In this way, the ability of the Aboriginal community to keep itself alive and healthy has been reduced and all those Aborigines involved have been hurt. A community cannot survive without its children.

At the same time, every Aboriginal child has the right to be safe from harm at home as well as elsewhere. The Aboriginal community should not hide its eyes when it knows Aboriginal parents are not treating their children properly. If the Aboriginal community cannot or will not keep the children safe, then white people should not be blamed for stepping in.

Of course it's more difficult than that. There are many reasons why Aborigines do not act to protect children who may be at risk of harm in Aboriginal families.

One thing is sure; there are too many Aboriginal children still being removed from their families and communities. It's time we did something about it.

Is it possible to make sure Aboriginal children are protected from harm and have the best possible opportunity to develop into fully functioning Aboriginal adults and at the same time protect the Aboriginal community interest in determining its own future and making its own decisions?

The aim of this project is to work out what part the Aboriginal community wants to play in protecting Aboriginal children from harm, to figure out how that can be done, and then convince the government to follow the wishes of the Aboriginal community.

The government has said it is committed to the principle of Aboriginal self-determination and will consider the results of this project in light of the principle of Aboriginal self-determination.

Appendix 2 continued Aboriginal Child Protection Project - Information Sheet 2

What is possible under Tasmanian law as it is now?

Current Tasmanian law, as stated in the *Children, Young Persons and Their Families Act 1997*, gives a role to Aborigines. A question for the Aboriginal community to decide is:

do we want to be part of the system that the government has given us in the current laws; or

do we want some other function under those laws; or

do we want to keep out of the 'child rescue' part of child protection and stick to supporting families stay together and help look after Aboriginal children who have been removed from their families by state government bodies?

The Tasmanian law allows for the government to declare an Aboriginal organisation to be a "recognised Aboriginal organisation",

It also defines "extended family" for Aborigines to mean "if a child is an Aboriginal child who has traditional Aboriginal kinship ties, those persons held to be related to the child according to Aboriginal kinship rules".

The law states that in exercising powers under this Act the main consideration must be "the best interests of the child" and there are a list of factors that have to be given "serious consideration". One of those factors is "preserving and enhancing the child's sense of ethnic, religious or cultural identity, and making decisions and orders that are consistent with ethnic traditions or religious or cultural values". The law also says when a court is considering what is in the best interests of an Aboriginal child it must consider "any need to maintain a connection with the lifestyle, culture and traditions of the Aboriginal community".

There is a separate section in the Act entitled "Principles relating to dealing with Aboriginal children". It states that:

A decision or order as to where or with whom an Aboriginal child will reside may not be made under this Act except where a recognised Aboriginal organisation has first been consulted.

That section goes on to say that a decision or order must comply with the general principles including the best interests of the child being the first consideration but must also take into account any submissions made by a recognised Aboriginal organisation, or have regard to Aboriginal traditions and cultural values, and must consider the principle that an Aboriginal child should remain within the Aboriginal community.

When the department convenes a family group conference to try to sort out matters without further court orders they must consult with "an appropriate recognised Aboriginal organisation" (as well as others) about who should be invited to attend the family group conference and the conference convenor may invite a person nominated by a recognised Aboriginal organisation to attend the group conference.

A recognised Aboriginal organisation is not named amongst those to whom custody may be granted when the court makes a care and protection order for 12 months, but custody may

be granted to “the chief executive officer of a non-Government organisation that provides facilities for the residential care of children”

When the court is considering making a care and protection order for an Aboriginal child, a recognised Aboriginal organisation may apply to the court to make submissions and give evidence although they are not a party to the proceedings.

No organisation has become a ‘recognised Aboriginal organisation’ under this Act although TAC staff have been involved as advocates for a parent or a child in family group conferences. The TAC has also given legal aid for Aboriginal parents to be represented in court proceedings under the Act.

Appendix 2 continued Aboriginal Child Protection Project - Child Protection Options

Should there be Aboriginal involvement (TAC and/or different structure) in:

Helping Aboriginal women be healthy so they give their baby the best possible start in life, from before the baby is born onwards

Running home visiting and other programs to help mothers of all Aboriginal babies take the best possible care of their babies and children

Operating Aboriginal childcare centres throughout the State so parents get a break and children get an early start in their development in an Aboriginal environment

Running domestic violence, substance abuse and similar programs aimed at improving the quality of life in Aboriginal families

Offering school-based and Aboriginal community programs so Aboriginal children in white schools are able to keep in touch with their culture and heritage

Getting involved intensively to help Aboriginal families who seem not to be taking good care of their children

Setting up respite care programs to help families and children having problems at home and which might result in the children being removed from their parents

Taking over from Child Protection and Police by receiving and investigating complaints of child abuse for Aboriginal children

Making the decisions now made by the Department about when it is unsafe for an Aboriginal child to remain living with its parents

Making the decisions now made by the Courts about whether or not an Aboriginal child should remain living away from its parents

Selecting and supporting foster parents for Aboriginal children who cannot remain living at home

Providing and/or co-ordinating services for Aboriginal children in foster care

Appendix 3 Seminar Participants and Interviewees

Adam Urmston
Allison Cann
Alison Overeem
Ambrose McDonald
Annette Apted
Annette Peardon
Anthony Dillon
Arthur McCallum
Audrey Beeton
Audrey Frost
Belinda Farley-Wills
Beulah Maynard
Bev McDonald
Brendan Coad
Brendan Murray
Brendon Maroney
Bruce Boyer
Carla Jennings
Chantelle Pitchford
Cheryl Mansell
Christine Wright
Daisy Maluga
Danielle Bowden
Darlene Mansell
David Green
Dawn Blazeley
Dean Newall
Dee West
Delia Summers
Della Jenkins
Denise Gardner
Devaya Jones
Di Spotswood
Diane Anderson
Donna Picken
Douglas Greaves
Dyan Summers
Dwayne Everett-Smith
Eddie Thomas
Ellen Hemming
Elvie Greaves
Emmerenna Burgess
Fiona Eiszele
Fiona Hughes
Fiona Maher
Gail Robertson
Gail Wright
Gaylene Dale
Gloria Templar
Graeme Gardner
Heather Brown
Janelle Snooks
Janice Ross
Jason Mansell
Jay McDonald
Jeanette Battese
Jim Everett
Joan Wright
Joanne Rudd
Jodi Jenkins
Jodie Mansell
John Anderson
John Wright
Joshua Jennings
Jual Purton
Julie Cann
Julie Spotswood
June Sculthorpe
Kade Greaves
Kailah Maynard
Karen Burgess
Karen Smart
Karen West
Kathy Brown
Kellie Arnott
Kerry Stone
Kevin McDonald
Kim Harris
Kristine Wright
Kylie Thomas
Laura Kearnes
Laura (Maluga) Burgess
Lauritia Thomas
Laurette Thorp
Leanne Wells
Leigh Maynard
Lillian Maynard
Lisa Coulson
Liz Gilbert
Louise Adams
Louise Beeton
Loreena Brown
Lucy Williams
Lutana Spotswood
Lyndy Bowden
Lynne Spotswood
Malcolm Cunningham
Margaret Mansell
Mark Banovic
Mark West
Marie Stannus
Marilyn Snooks
Marita Young
Maree Maynard
Mary-Jean Wilson
Melissa Jones
Melissa West
Michael Beeton
Michael Mansell
Mona Hart
Murray Everett
Myrtle Maynard
Nala Mansell
Nan Mabb
Nathan Cann
Nikki Randriamahefa
Nola Hooper
Pat Binns
Pat Green
Penny Gardner
Rachel (Lawrie) Maynard
Rachel Maynard
Rachel Quillerat
Raylene Foster
Rex Burgess
Ricky Maynard
Robert Harris
Robert Hughes
Robyn Brown
Robyn Jeffes
Rosalind Langford
Ruth Jackson
Sally West
Sara Maynard
Shane Marshall
Sharnie Everett
Sheralee Armstrong
Sheree Marshall
Sonia Smith
Sonya Maher
Stephanie Allen
Suzie Smith
Tammy Burgess
Tammy Evans
Tanya Harper
Tara Donald
Tarni Matson-Green
Terrence Maynard
Terry Maynard
Tina Goodwin
Tony Brown
Tracey Turnbull
Trudy Maluga
Vicki Matson-Green
Yvonne Smith
Wendy Pitchford

Appendix 4 United Nations Convention on the Rights of the Child - Selected Articles

Article 3

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

State Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

State Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 12

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Appendix 5 United States Code 25 - Indians

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds

that [through] article 1 of the United States Constitution…and other constitutional authority, Congress has plenary power over Indian affairs;

that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

Appendix 6 Indian Child Welfare Ordinance of The Confederated Tribes of the Grand Ronde, Community of Oregon - Preamble

The policy platforms for child welfare include:

(A) Protect the best interests of Grand Ronde children by:

(i) Preventing the unwarranted breakup of Grand Ronde families

(ii) Maintaining the connection of Grand Ronde children to their families, the Tribe, and the Tribal Community, when appropriate, and

(iii) Promoting the stability and security of the Tribe by establishing Tribal standards for appropriately handling situations involving youth-in-need-of-care and other proceedings involving Grand Ronde children.

(B) Preserve the opportunity for Grand Ronde children to learn about their distinct and unique culture and heritage, and to become productive adult members of the Grand Ronde Tribal community, by insuring that Grand Ronde children have a meaningful opportunity to experience their culture on a permanent basis.

(C) Encourage, guide, assist, and compel if necessary, the parent, guardian, or custodian of a Grand Ronde child to provide a safe and nurturing environment for the child;

(D) Establish a judicial process whereby the Tribe is able to protect the health, welfare, and safety of Grand Ronde children, and other children within its jurisdiction, which process may include the provision of substitute care and supervision for children who are in need of such are, and provision of services to parents seeking return of their children from substitute care;

(E) Ensure Grand Ronde children reside in an adequate physical and emotional environment that will protect and promote the health, safety, and development of all Grand Ronde children;

(F)Provide child welfare services, in accordance with the traditions, laws and cultural values of the Tribe, to Grand Ronde children and their families

(G) Utilize, as applicable, the Tribe's Family Unity Model approach in efforts to prevent the unwarranted break-up of Indian families, or to reunify and otherwise assist Grand Ronde families in strengthening and preserving cultural and tribal identity.

Appendix 7 Human Rights and Equal Opportunity Commission Bringing Them Home Report: Recommendations 43a - 54

Self-determination

43a. That the Council of Australian Governments negotiate with the Aboriginal and Torres Strait Islander Commission, the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Secretariat of National Aboriginal and Islander Child Care and the National Aboriginal and Islander Legal Services Secretariat national legislation establishing a framework for negotiations at community and regional levels for the implementation of self-determination in relation to the well-being of Indigenous children and young people (national framework legislation).

43b. That the national framework legislation adopt the following principles:

1. that the Act binds the Commonwealth and every state and territory government;

2. that within the parameters of the Act Indigenous communities are free to formulate and negotiate an agreement on measures best suited to their individual needs concerning children, young people and families;

3. that negotiated agreements will be open to revision by negotiation;

4. that every Indigenous community is entitled to adequate funding and other resources to enable it to support and provide for families and children and to ensure that the removal of children is the option of last resort; and

5. that the human rights of Indigenous children will be ensured.

43c. That the national framework legislation authorise negotiations with Indigenous communities that so desire on any or all of the following matters:

1. the transfer of legal jurisdiction in relation to children's welfare, care and protection, adoption and/or juvenile justice to an Indigenous community, region or representative organisation;

2. the transfer of police, judicial and/or departmental functions to an Indigenous community, region or representative organisation;

3. the relationship between the community, region or representative organisation and the police, court system and/or administration of the state or territory on matters relating to children, young people and families including, where desired by the Indigenous community, region or representative organisation, policy and program development and the sharing of jurisdiction; and/or

4. the funding and other resourcing of programs and strategies developed or agreed to by the community, region or representative organisation in relation to children, young people and families.

National standards for Indigenous children

44. That the Council of Australian Governments negotiate with the Aboriginal and Torres Strait Islander Commission, the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Secretariat of National Aboriginal and Islander Child Care and the National

Aboriginal and Islander Legal Services Secretariat, national legislation binding on all levels of government and on Indigenous communities, regions or representative organisations which take legal jurisdiction for Indigenous children establishing minimum standards of treatment for all Indigenous children (national standards legislation).

National standards for Indigenous children under state, territory or shared jurisdiction

45a. That the national standards legislation include the standards recommended below for Indigenous children under state or territory jurisdiction or shared jurisdiction.

45b. That the negotiations for national standards legislation develop a framework for the accreditation of Indigenous organisations for the purpose of performing functions prescribed by the standards:

Standard 1: Best interests of the child factors

46a. That the national standards legislation provide that the initial presumption is that the best interest of the child is to remain within his or her Indigenous family, community and culture.

47. That the national standards legislation provide that in any judicial or administrative decision affecting the care and protection, adoption or residence of an Indigenous child the best interest of the child is the paramount consideration.

Standard 3: When other factors apply

48. That the national standards legislation provide that the removal of Indigenous children from their families and communities by the juvenile justice system, including for the purposes of arrest, remand in custody or sentence, is to be a last resort. An Indigenous child is not to be removed from his or her family and community unless the danger to the community as a whole outweighs the desirability of retaining the child in his or her family and community.

Standard 4: Involvement of accredited Indigenous organisations

49. That the national standards legislation provide that in any matter concerning a child the decision-maker must ascertain whether the child is an Indigenous child and in every matter concerning an Indigenous child ensure that the appropriate accredited Indigenous organisation is consulted thoroughly and in good faith. In care and protection matters that organisation must be involved in all decision-making from the point of notification and at each stage of decision-making thereafter including whether and if so on what grounds to seek a court order. In juvenile justice matters that organisation must be involved in all decisions at every stage including decisions about pre-trial diversion, admission to bail and conditions of bail.

Standard 5: Judicial decision-making

50. That the national standards legislation provide that in any matter concerning a child the court must ascertain whether the child is an Indigenous child and, in every case involving an Indigenous child, ensure that the child is separately represented by a representative of the child's choosing or, where the child is incapable of choosing a representative, by the appropriate accredited Indigenous organisation.

Standard 6: Indigenous Child Placement Principle

51a. That the national standards legislation provide that, when an Indigenous child must be removed from his or her family, including for the purpose of adoption, the placement of the child, whether temporary or permanent, is to be made in accordance with the Indigenous Child Placement Principle.

51b. Placement is to be made according to the following order of preference:

1. placement with a member of the child's family (as defined by local custom and practice) in the correct relationship to the child in accordance with Aboriginal or Torres Strait Islander law;

2. placement with a member of the child's community in a relationship of responsibility for the child according to local custom and practice;

3. placement with another member of the child's community;

4. placement with another Indigenous carer.

51c. The preferred placement may be displaced where:

1. that placement would be detrimental to the child's best interests;

2. the child objects to that placement; or

3. no carer in the preferred category is available.

51d. Where placement is with a non-Indigenous carer the following principles must determine the choice of carer:

1. family reunion is a primary objective;

2. continuing contact with the child's Indigenous family, community and culture must be ensured; and

3. the carer must live in proximity to the child's Indigenous family and community.

51e. No placement of an Indigenous child is to be made except on the advice and with the recommendation of the appropriate accredited Indigenous organisation. Where the parents or the child disagree with the recommendation of the appropriate accredited Indigenous organisation, the court must determine the best interests of the child.

Standard 7: Adoption a last resort

52. That the national standards legislation provide that an order for adoption of an Indigenous child is not to be made unless adoption is in the best interests of the child and that adoption of an Indigenous child be an open adoption unless the court or other decision-maker is satisfied that an open adoption would not be in the best interests of the child. The terms of an open adoption order should remain reviewable at any time at the instance of any party.

Family law

54. That the Family Law Act 1975 (Cth) be amended by:

1. including in section 60B(2) a new paragraph (ba) children of Indigenous origins have a right, in community with the other members of their group, to enjoy their own culture, profess and practice their own religion, and use their own language; and

2. replacing in section 68F(2)(f) the phrase `any need' with the phrase `the need of every Aboriginal and Torres Strait Islander child'.

Appendix 8 Recent Australian Child Protection Inquiries[269]

1999:

Commission of Inquiry into Abuse of Children in Queensland, *Report of the Commission of Inquiry into the Abuse of Children in Queensland Institutions* (Forde Inquiry)

2000:

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Government of Western Australia, *Putting the picture together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (Gordon Enquiry)

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[269] Based on Child Protection Australia 2011-12, page 136

Commissioner for Public Administration, ACT, *The Territory's Children: Ensuring Safety and Quality Care for Children and Young People*. Report on the Audit and Case Review (Gwenn Murray)

Ombudsman Tasmania, *Listen To The Children: Review of Claims of Abuse from Adults in State Care as Children*

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2007:

Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle "Little Children are Sacred"* (Anderson & Wilde report)

Government of Western Australia, *Review of the Department for Community Development* (Prudence Ford)

2008:

Government of South Australia, *Children on Anangu Pitjantjatjara Yankunytjatjara (APY) lands: Commission of Inquiry* (Mullighan Enquiry)

Government of South Australia, *Children in State Care: Commission of Inquiry* (Mullighan Enquiry)

Government of New South Wales, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (Wood report)

2010:

Northern Territory Government, *Growing them strong, together: promoting the safety and wellbeing of the Northern Territory's children.* Report of the Board of Inquiry into the child protection system in the Northern Territory (Bamblett, Bath & Roseby)

Tasmanian Commissioner for Children, *Inquiry into the Circumstances of a 12 year old child under Guardianship of the Secretary*

2011:

ACT Public Advocate, *Report of the Review of the Emergency Response Strategy for Children in Crisis in the ACT* (Phillips report)

New South Wales Ombudsman, *Keep Them Safe?* A Special Report to Parliament

Parliament of Tasmania, *Select Committee on Child Protection Final Report*

2012:

State Government of Victoria, *Protecting Victoria's Vulnerable Children Inquiry* (Cummins, Scott & Scales in 3 volumes)

2013:

Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Road Map for Queensland Child Protection* (Carmody Inquiry)

Appendix 9 - Table

Table 1: Total number of notifications, investigations and substantiations across Australia from 2000-01 to 2009-10, and total number of children on orders and in out-of-home care at 30 June 2000 to 2010[270]

Year	Total notifications	Total finalised investigations	Total substantiations	Children on orders	Children in OOHC
2000-01	115,471	66,265	27,367	19,917	18,241
2001-02	137,938	80,371	30,473	20,557	18,880
2002-03	198,355	95,382	40,416	22,130	20,297
2003-04	219,384	(a)	(a)	(a)	21,795
2004-05	252,831	121,292	46,154	24,075(c)	23,695
2005-06	266,745	137,829	55,921	26,215(c)	25,454
2006-07	309,448	(b)	60,230	28,854(c)	28,379
2007-08	317,526	148,824	55,120	32,642(c)	31,166
2008-09	339,454	162,259	54,621	35,409(c)	34,069
2009-10	286,437	131,689	46,187	37,730(c)	35,895
2010-11	237,273	99,649	40,466	39,058	37,648

Note: a. and b. - Some numbers are missing for 2003-04 and 2006-07 because NSW and Queensland respectively were implementing new information management systems and so could not provide data. For items noted (c), the figures may not be matched to previous data as Victorian data was updated in 2009.

[270] Australian Institute of Health and Welfare, Child Protection Australian Annual Series.

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